

HONG KONG / JUDGMENT

CCMJ v. SSM (formerly known as SKL)

COURT

Court of First Instance

DECIDED

7 December 2015

CASE / FILE NUMBER

HCMP2059/2015

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bjbj HCMP 2059/2015 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL MISCELLANEOUS PROCEEDINGS NO 2059 OF 2015 (ON INTENDED APPEAL FROM FCMP 67 OF 2010)

IN THE MATTER OF xxxx, female, a child on xxxx 2008 in Hong Kong and IN THE MATTER OF Sections 3(1c)(ii), 3(1)(d) and 10(1) of Guardianship of Minors Ordinance (Cap 13, Laws of Hong Kong) and IN THE MATTER OF Order 90, rule 1 of the Rules of the District Court (Cap 336H, Laws of Hong Kong)

BETWEEN CCMJ Applicant and SSM (formerly known as SKL) Respondent

Before : Hon Lam VP and Hon Poon JA in Court Date of Hearing : 2 December 2015 Date of Judgment : 2 December 2015 Date of Reasons for Judgment : 7 December 2015 R E A S O N S F O R J U D G M E N T Hon Poon JA (giving the Reasons for Judgment of the Court) : AUTONUMOUT On 2 December 2015, we dismissed the Father s application for leave to appeal against the order of financial provisions made by Deputy Judge Own on 5 June 2015 with costs, leaving the quantum to be assessed. We have indicated that we would hand down the reasons for our judgment, which we now do. We would also assess the quantum of the Mother s costs.

Background

AUTONUMOUT By his order date 5 June 2015, Deputy Judge George Own ordered, inter alia : the One Silver Sea Property under the sole name of the Father be settled on trust for the use of the Child and her primary carer, the Mother, at nil consideration until the Child reaches the age of 18 or ceases full time education, whichever is later, with reversion to the Father thereafter (the Settlement Order); subject to full reimbursements by the Father to the Mother as per the Undertakings dated 12 June 2014, the Father do pay to the Mother the sum of HK\$140,140.61 as reimbursement of expenses incurred for the Child for the period from May 2009 to June 2014

within 14 days from the date of judgment; subject to any payments already made under the Interim Maintenance Order dated 7 November 2013, the Father do pay to the Mother periodical payments for the maintenance of the Child at the rate of HK\$13,726.00 per month commencing from 1 July 2014 and thereafter on or before the 1st day of each succeeding month until the Child reaches the age of 18 or ceases full time education, whichever is later; and the Father do pay to the Mother carer's allowance at the rate of HK\$10,000.00 per month commencing from 25 October 2013 until further order. AUTONUMOUT The learned Judge gave his reasons for the order in his judgment handed down on the same date (the Main Judgment AUTONUMOUT By a summons dated 3 July 2015, the Father applied to the Judge for leave to appeal against his order. The Draft Grounds of Appeal attached to the summons contained four headings with four Grounds, which further contained 9 sub-grounds for Ground 1, 3 lied to amend the Draft Notice of Appeal. The amendment sought to be introduced concerned the stamp duty said to be chargeable as a result of the Settlement Order. This was a completely new point, which was not even raised before the Judge at the substantive hearing. The Notice of Appeal is objectionable AUTONUMOUT The Draft Notice of Appeal, whether in its original form or the amended form, is objectionable for two reasons. First, although it purports to be a notice of appeal, it is in substance a repetition of the closing submissions for the purpose of the substantive hearing below (save and except the stamp duty ground). It goes well beyond the permissible scope of an appeal against findings of facts and of what is required for a properly drafted notice of appeal. We would repeat our advice to the profession recently given in *China Gold Finance Limited v CIL Holdings Ltd*, CACV 11/2015, unreported, 27 November 2015 : The proper scope of an appeal against findings of fact and the proper drafting of notice of appeal

11. It is well settled that in respect of findings of fact, this court can only intervene when we are satisfied that the findings by the primary judge is plainly wrong: *Ting Kwok Keung v Tam Dick Yuen* (2002) 5 HKCFAR 336 is often cited and applied in this court.
12. Regrettably, there are still cases coming before us in which counsel (including experienced and senior counsel) apparently failed to have regard to the proper role of the Court of Appeal in an appeal of this nature. Thus, from time to time, we can find judgments from this court reiterating the fundamental principles in this respect: *Chinachem Charitable Foundation Ltd v Chan Chun Chuen* CACV 101 of 2010, 14 February 2011 para 26; *Welltus Ltd v Fornton Knitting Co Ltd* [2013] 5 HKC 106; *Bank of China (Hong Kong) Ltd v Tsang Sheung Bun* [2013] 5 HKLRD 62; *Pang Ketian Sally v Tam Yuk Hung Annie* CACV 147 of 2013, 25 April 2014; *To Pui Kui v Ng Kwok Piu* CACV 281 of 2012, 21 August 2014; *Ageas Insurance Co Ltd v Lam Hau Wah Inneo* CACV 65 of 2014, 9 January 2015 are some recent examples.
13. Mr Lam also referred us to the recent judgment of the United Kingdom Supreme Court on the same topic: *Carlyle v Royal Bank of Scotland* [2015] UKSC 13 in which references were made to *McGraddie v McGraddie* [2014] UKSC 12; *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600 and the judgment of the Privy Council in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21.

14. These authorities explained the limits of an appellate court in reversing the findings of fact of the primary judge. We used the expression primary judge because it emphasizes the primary role of the first instance judge in the assessment of evidence and making of relevant findings of fact. In our judicial system, the appellate process is not designed to give a litigant (or his counsel) a platform for regurgitating his closing submissions on the evidence and factual aspects of the case again with the hope that the appellate judges may come to a different view to that of the primary judge. It is thus, as we said above, a misuse of the appellate process to place before this court submissions which, in substance, are (or should be) submissions advanced by way of closing submissions at the trial after the judge has heard all the evidence.
15. In an appeal, the court of appeal should focus on the question whether the primary judge has fallen in palpable errors which could give rise to grounds for intervention by the appellate court. As explained in the cases, it is not germane that judges in this court may reach a different conclusion from that of the judge. There are many areas, particularly those in relation to findings of fact, where judges can reasonably reach different conclusions from each other. That would not be a ground for intervention.
16. Thus, in an appeal, it is not helpful if counsel and litigant (acted in person) only repeat submissions already advanced and considered by the primary judge at the trial. The starting point should be the judgment of the primary judge and the identification of palpable errors (which must be errors of such nature which warrants intervention from this court) in the judgment. The mere assertion that the finding of the judge is against the weight of the evidence or that the judge should have reached another conclusion because of points advanced in the closing submissions below are not errors coming within that category.
17. We respectfully agree with the judgment of the Privy Council in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd*, supra, where Lord Hodge explained at paragraph 12 the phrase plainly wrong in the context of an appeal against a finding of fact: This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts. Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions.
18. Similar statement was made by Lord Reed in *Henderson v Foxworth Investments Ltd*, supra at paragraph 62.

19. The kinds of mistake which could engage an appellate court's power of intervention were recently explained by Lord Neuberger in *In re B (A Child)* [2013] 1 WLR 1911, at paragraph 53: where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it.
20. In addition to the traditional explanation for such a limitation on appellate intervention by reference to the trial judge's advantage in assessment of witnesses after hearing their evidence, Lord Neuberger also provided further explanations in light of modern litigation ethos: This can also be justified on grounds of policy (party should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first).
21. To the same effect, Lord Hodge said in *Carlyle v Royal Bank of Scotland*, *supra*, paragraph 22: The rationale of the legal requirement of appellate restraint on issues of fact is not just the advantages which the first instance judge has in assessing the credibility of witnesses. It is the first instance judge who is assigned the task of determining the fact, not the appeal court. The re-opening of all questions of fact for redetermination on appeal would expose parties to great cost and divert judicial resources for what would often be negligible benefit in terms of factual accuracy. It is likely that the judge who has heard the evidence over an extended period will have a greater familiarity with the evidence and a deeper insight in reaching conclusions of fact than an appeal court whose perception may be narrowed or even distorted by the focused challenge to particular parts of the evidence.
22. With the recognition of the rationale for appellate restraint in this light, there is also a greater appreciation of the need to exercise restraint in respect of findings of secondary facts based on inference drawn from findings of primary fact, see *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd*, *supra*, paragraph 17; *Pang Ketian Sally v Tam Yuk Hung Annie*, *supra*, paragraphs 26 to 32; *Ageas Insurance Co Ltd v Lam Hau Wah Inneo*, *supra*, paragraphs 29 to 30.
23. See also the well known statement of Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372 on the findings of fact by a judge as inherently incomplete statement of the impression upon him or her and the judgment of Bokhary PJ in *Ting Kwok Keung v Tam Dick Yuen*, *supra*.
24. In *To Pui Kui v Ng Kwok Piu*, *supra*, after referring to *McGraddie v McGraddie*, *supra*, this court also explained at paragraphs 12 to 16 why institutionally it is not appropriate for our Court of Appeal to take over the role of the trial judge as the primary assessor of the evidence.

25. A notice of appeal should set out the grounds of appeal by identifying errors are of a nature which truly entitled the court of appeal to intervene with a finding of fact. We regret to say that in many cases we have seen numerous paragraphs which are in substance closing submissions made at the trial and references to evidence. We are firmly of the view that statements of such nature have no place in a proper notice of appeal.
26. The Notice of Appeal in the present appeal was settled by senior counsel. It is 48-page long with a 10-page schedule. We do not know how much costs were incurred in the preparation of this document (including the costs of explaining it to the clients) and how much costs were incurred by Mr s team in digesting the same. In any event, with respect, we do not find the document helpful in the proper resolution of the appeal.
27. We implore counsel (or whoever drafts a notice of appeal) to exercise discipline, proper care and professional judgment in the preparation of a notice of appeal. It should be a concise document setting out clearly and succinctly why the Court of Appeal should intervene with the judgment of the judge. In relation to findings of fact, the grounds of appeal must pinpoint the palpable errors of the primary judge. It is an abuse to canvass submissions at length in a notice of appeal. Such a practice proliferates unhelpful arguments and escalates the costs of the process. It also causes wastage in judicial resources which should be more fruitfully utilised for other purposes.
28. Lawyers and litigants are required by Order 1A Rule 3 of The Rules of the High Court to assist the court in the furtherance of the underlying objectives in Order 1A Rule 1. A notice of appeal which is prolix and unfocused containing statements in the nature of submissions or evidence goes against each and every objective set out in Rule 1. It is the duty of the court to discourage such practice. And it is the duty of the litigants and the professional duty of their lawyers to refrain from engaging in such practice. AUTONUMOUT We would add that in the future, if lawyers representing an applicant do not heed our advice, we would seriously consider disallowing their costs for the preparation of and/or any costs arising from the notice of appeal. AUTONUMOUT The second objection to the Draft Notice of Appeal is this. It contains new grounds of appeal not previously canvassed before the Judge at the leave application. Time and again, this Court has said that save in very exceptional circumstances on a renewed application for leave to appeal (which by definition should be extremely rare), the Court of Appeal will not entertain new grounds of appeal not previously raised before the court below. It is up to the applicant to go back to the court below to apply for leave on them. This objection applies even with greater force when the new point, such as the stamp duty ground in the present case, was not even raised before the judge at the substantive hearing. AUTONUMOUT The stamp duty ground complained that the Judge erred in making the financial provisions without considering and addressing implications of the stamp duty (which is sizable and costly) brought about by the Settlement Order on the Father s means to pay (which is limited). The error was said to be material in view of the sizable stamp duty payable upon the two stages of conveyancing, namely, settlement on trust and reversion; and the limited means of the parties. As to why it was not raised at the

substantive hearing or the leave application below, the Father explained that the legal team then representing him was not familiar with conveyancing. It was only after the Settlement Order had been made that legal advice from another firm of solicitors doing conveyancing work was obtained. And that firm of solicitors advised that stamp duty was chargeable on both the settlement and reversion at a sizable sum. So the point only became apparent to the Father there and then. We do not regard this as reasonable explanation. There was no reason why the original team of lawyers did not consider the stamp duty implications and if they failed in their duties towards the Father in that regard, it would not be fair to grant leave to appeal on such a ground. The proper course, as explained below, is to go back to the Judge. AUTONUMOUT The financial implications arising from the stamp duty are matters to be weighed in the overall scale by the court in deciding how to order the Father to provide for the accommodation needs of the Child. It is eminently a matter for the first instance court, and not the Court of Appeal. The primary role of the Court of Appeal is to review the exercise of the discretion by the first instance court. Only when it is demonstrated that the exercise of the discretion by the lower court can be interfered with on well established grounds will the Court of Appeal exercise that discretion afresh. If we were to entertain the stamp duty ground and to give leave to appeal, we would be departing from the well established principles upon which this Court approaches appeals concerning exercise of discretion. It would be asking us to perform the task of the Judge as the first instance court. We fail to see any exceptional circumstances which would justify such departure, especially when the point was never raised before the Judge. AUTONUMOUT It is up to the Father to apply before the Judge for leave to appeal on the stamp duty ground. And it is up to the Judge to decide if he would accede to the application. If yes, he would indicate how he would have evaluated the financial implications arising from the stamp duty in the exercise of his discretion over the Child's accommodation needs. This Court will then have the benefit of his reasoned decision on the matter when hearing the substantive appeal. If the Judge refuses to give leave to appeal, he would explain why the stamp duty point would not have affected how he exercised his discretion in making the Settlement Order. If and when the Father renews his application for leave to appeal before this Co for the Father, during the course of the hearing that he was trying his best not to provide accommodation to the Child in the One Silver Sea Property, despite the Settlement Order. That attempt must be nipped in the bud. It is the Judge's clear finding on the evidence before him that the only option open for consideration by the court on the Child's accommodation needs was the One Silver Sea Property : see [54] of the Main Judgment. It was upon that basis that he made the Settlement Order. The Father is bound by the Judge's finding. He must provide for the Child's accommodation needs in the Property. It is also the duty of his legal representatives to advise him that like it or not, he must act according to the Judge's finding. Without expressing any view on the merits of the stamp duty ground, we indicated that to alleviate the financial burden on the Father arising from the stamp duty as a result of the Settlement Order, if genuine, an undertaking by him to allow the Child and the Mother to occupy and live at the One Silver Sea Property rent free until the Child reaches 18 would be an option worth exploring. That, we note, was accepted by Ms Por, solicitor for the Mother, to be

reasonable. We would leave it to the parties to see if anything can be made out of our indication. AUTONUMOUT Faced with these objections, it was open to us to direct the Father to redraft the Draft Notice of Appeal to satisfy the proper requirements before proceeding any further. However, that would only mean an adjournment with resultant wastage of costs and judicial resources. That might be justified if the Father were able to convince us that he might have a reasonably arguable ground of appeal which might allow us to grant him indulgence to put his house in order. But since, as we will demonstrate shortly, there was none, there was no point in adjourning the matter any further. We proceeded to hear the application but disallowing Ms Wong to rely on any of the new grounds of appeal not previously argued before the Judge. The Application is wholly unmeritorious AUTONUMOUT We re-iterate two guiding principles in dealing with an appeal of this nature. AUTONUMOUT First, to successfully challenge any finding of fact, the burden is firmly on the applicant to demonstrate that the finding is plainly wrong : see *Ting Kwok Keung v Tam Dick Yuen* [2002] 3 HKLRD 1, at [42]. The applicant has to show that the trial judge misunderstood the evidence, or overlooked important evidence or in some way came to the conclusions of fact that, in the overall context of the evidence as a whole, were plainly illogical or in some other way plainly wrong : *KNW v HTF*, HCMP 288/2011, 7 September 2011, unreported, at [2] and [3]. AUTONUMOUT Second, maintenance provisions granted under the Guardianship of Minors Ordinance, Cap 13 involve the trial judge's exercise of discretion. The appellate court will not interfere with the judge's exercise of discretion lightly. It will do so only if the judge erred as a matter of law, misunderstood the evidence, took into account irrelevant factors, failed to take into account relevant factors or had acted blatantly outside the scope of the discretion that no reasonable tribunal would have done. See *Hadmor Productions v Hamilton* [1983] 1 AC 191, at p 220B-F; *SPH v SA* [2014] 3 HKLRD 497. It is not a sufficient basis to intervene merely because the appellate court might have exercised the discretion differently. AUTONUMOUT We have read the Main Judgment with care. In our view, the findings made by the Judge were all supported by the evidence before him. There is no basis to disturb his findings. And he was entirely correct in exercising his discretion over maintenance as he did. There is no basis to intervene either. We have carefully considered the grounds of appeal with the benefit of Ms Wong's submissions, both written and oral. Presented before us was no more than a third attempt to argue the matters in question all over again with a view to persuading this Court to accept the Father's case, as if we were the first instance court. That was not the proper way to conduct an application for leave. Ms Wong had singularly failed to satisfy us that the Judge had made any palpable error in his factual findings or his exercise of discretion could be impeached on well established grounds, thus entitling this Court to intervene. AUTONUMOUT The Father had not showed any reasonable prospect of success in any of the grounds of appeal. We dismissed his application without any hesitation. Costs AUTONUMOUT Costs should follow the event. We order him to pay the Mother indemnity costs summarily assessed at HK\$100,000.00. The Mother's own costs are to be taxed in accordance with legal aid regulations. Hearing bundles AUTONUMOUT Before we leave this case, we must say something about the hearing bundles prepared by the Father for his application. AUTONUMOUT The Father has put in one bundle

on pleadings (Bundle A), three exhibit bundles, two correspondence bundles and two transcript bundles. The documents filed in the court below that are essential for the disposal of the application for leave to appeal. Ms Wong has failed to give us a credible explanation as to why there was such a failure on the part of her instructing solicitors in preparing the hearing bundle. AUTONUMOUT Bundle A is a so-called running bundle. It contains documents filed with the court including affirmations, Form Es, answers to questionnaires and court orders and decisions. Irrespective of their nature, they are simply arranged in chronological sequence according to the time when the specific document came into being. It is just an indiscriminate compilation of documents without due regard to the proper scope and nature of the leave application. It fails to identify and focus on the essential documents pertinent to the leave application and the issues involved. It does not contain the most essential documents, namely, the Draft Notice of Appeal, the summons dated 8 October 2015 and the amended Draft Notice of Appeal attached to it, and the Leave Judgment. It unduly overburdens the Court in its reading of the papers and preparation of the hearing. It escalates the costs of the application unjustifiably. AUTONUMOUT As to the other bundles, we fail to see why it is necessary to put before us all the exhibits to the affirmations or the full transcripts of the substantive hearing. In particular, we fail to see why we should be burdened with the solicitors correspondence at all. The same objections to Bundle A also apply to them with full force. AUTONUMOUT The hearing bundles before us follow the practice of many practitioners engaged in matrimonial litigation in the Family Court. But this is not the practice of the Court of Appeal. Practitioners should consult and faithfully follow the practice and requirements for documentation as set out in Section E of Practice Direction 4.1. AUTONUMOUT In particular, the applicant should only include essential documents (namely, those relating directly to the issues raised in the draft grounds of appeal) in the application bundle. Indiscriminate inclusion of materials in the application bundle or reproduction of bundles previously used in the court below as application bundles is not acceptable. When there was a decision by the court below in refusing leave or extension of time, the party applying to the Court of Appeal for leave or extension of time must include in the documents submitted to the court a copy of the reasons for refusal given by the court below. If the court below did not give any written reason, the applicant should obtain a transcript of that hearing and include the same in the bundles placed before the Court of Appeal. Counsel or solicitor making the application for leave to appeal at the court below should invite the judge to give brief oral reasons for his refusal and it is their duty to make a record of such oral reasons and to make them available to the Court of Appeal in the renewed application for leave when requested by the court. AUTONUMOUT hO W h d w r h O W g d d w r g d d w r g d d w r g d d w r h v s 4 h 8 o h v s 4 h O W h f : V g d 8 o g d 8 o g d 8 o g d 8 o g d 8 o i b T G h Z \# h O W h O W h 8 o h 8 o y t Y P g d d w r g d d w r h Z \# h Z \# h = 7 3 h 5 * o h W S h O W g d Y P g d Y P g d 4 B g d W S g d Y P g d Y P g d Y P g d Y P g d Y P h W S h W S h W S h W S h W S h W S g d y B g d Y P g d & v h S 6 < In the future, if the hearing bundles for leave application before the Court of Appeal do not satisfy the requirements in Practice Direction 4.1, this Court will simply return them without reading and direct the responsible party to prepare them in accordance with Practice Direction 4.1. The Court may also visit the responsible party and his solicitors

with costs sanctions. (Johnson Lam) (Jeremy Poon) Vice President Justice of Appeal Ms Athena Wong, instructed by Payne Clermont, for the applicant Ms Catherine Por, Solicitor Advocate of Stevenson, Wong & Co, for the respondent PAGE - 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 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 }jfbXRXR hdwr &`#\$ gd&v &`#\$ gd&v :pdwr ytYP B* ph phf3f [Content_Types].xml Iw}, \$yi} _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v)I`n 3Vq%`#q x}r :TZaG I u3 L+M2 e\O* \$*c?)6-r IqbJ#x ,AGm T[XF64 E)`# R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?><a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/>ZHP7 QU?b 6a\B ;!m(PS@Q ;!m(VIFil PS@Q b8~n CACV Jeannie MY MokSo ABC.dot Judiciary Microsoft Office Word Judiciary CACV Title <b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?><ds:datastoreItem ds:itemID="{946ABBCC-04DD-48AC-8724-9A13F17F832D}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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