

HONG KONG / JUDGMENT

CM v. XDY

[2019] HKFC 90

COURT

Family Court

DECIDED

4 April 2019

CASE / FILE NUMBER

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FCMP 154 / 2018

[2019] HKFC 90

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MISCELLANEOUS PROCEEDINGS

NUMBER 154 OF 2018

IN THE MATTER of an Application by CM under sections 29AC of the Matrimonial Proceedings
and Property Ordinance (Cap 192)

BETWEEN

CM

Applicant

and

XDY

Respondent

Coram: Deputy Judge J. Chow in Chambers (Not Open to Public)

Date of Hearing: 10 October 2018 & 15 February 2019

Date of Judgment: 4 April 2019

JUDGMENT

(For leave to make an application for an order of financial relief
under section 29AG of the Cap 192)

Introduction

The applicant issued an originating summons on 30 July 2018 for leave to make an application for an order for financial relief under section 29AG of the Matrimonial Proceedings and Property Ordinance, Cap 192 (“the MPPO”).

Background

The applicant and the respondent were married in the mainland on 11 March 1997. They have one daughter and one son who are now 20 and 13 years of age.

In 2014, the respondent commenced divorce proceedings in the mainland, the People’s Court of Yinzhou Zone (“ the Yinzhou Court”). On 11 July 2017, the Yinzhou Court granted a divorce order (“the divorce order”) with regard to custody and ancillary relief. The divorce order embraced all family assets except (i) shares in a PRC Garment Company and a residential property in Shatin, Hong Kong where the respondent is the registered owner (the “Property”).

The reason for the exclusion of the Property in the divorce order was that both the Yinzhou Court and the respondent refused to deal with the Property in the belief that it being a landed property in Hong Kong. The disposal of the Property should be dealt with by a court in Hong Kong. It resulted the applicant to apply for leave to make such application.

Legal principles

By virtue of section 29AB of the MPPO, either party to a marriage may apply to the court for an order for financial relief if the marriage has been dissolved by judicial proceedings in a place outside Hong Kong and such divorce is recognized as valid by the law of Hong Kong. Section 29AG of the MPPO expressly states, upon such application, the court may make any order that it could make under section 4, 5 or 6 of the MPPO as if a decree of divorce had been granted in Hong Kong. However, pursuant to section 29AC of the MPPO, leave must first be obtained from the court before such application may be brought.

At the stage of leave application, it is incumbent for the Court to determine on jurisdiction. Pursuant to section 29AE of the MPPO, the court only has jurisdiction to entertain an application for an order for financial relief under the section 29AG of the MPPO if either of the parties:-

was domiciled in Hong Kong on the date of the application for leave under section 29AC or on the date on which the divorce obtained outside Hong Kong took effect in that place;

was habitually resident in Hong Kong throughout the period of 3 years immediately before the date of the application for leave under section 29AC or the date on which the divorce obtained outside Hong Kong took effect in that place; or

had a substantial connection with Hong Kong on the date of the application for leave under section 29AC or on the date on which the divorce obtained outside Hong Kong took effect in that place.

Section 29AF of the MPPO requires the court to consider whether Hong Kong is the appropriate venue for the application with a list of factors to be considered.

In *C v H* [2012] HKFLR 199, the landmark decision on ex parte applications for leave, Poon J (as he then was) applied the approach laid down in *Agbaje v Agbaje* [2010] 1 AC 628 where Part III of the English Matrimonial and Family Proceedings Act 1984 (Part IIA of the MPPO) was modelled. Poon J held an applicant must satisfy the court that there is “substantial ground” for the making the application, which means the “threshold is not high, but is higher than ‘serious issue to be tried’ or ‘good arguable case’ found in other contexts. It is perhaps best expressed by saying that in this context ‘substantial’ means ‘solid’.”

Poon J (as he then was) further laid down guidance on how to consider whether an applicant has discharged the burden of meeting this threshold, namely:-

First, an applicant must satisfy one of the three formal jurisdictional requirements in section 29AE.

Secondly, an applicant must satisfy the court provisionally it would be appropriate for the order to be made by a court in Hong Kong under section 29AF having regard to the factors listed in section 29AF(2), but the exercise is not to determine whether Hong Kong is the more appropriate forum under the forum non conveniens principles.

Thirdly, an applicant does not have to prove hardship, injustice or exceptionality although these factors, if these factors were present, they are cogently relevant to the court’s consideration for granting leave.

The Court of Appeal revisited the definition of “substantive connection” in *WSJ* (minor), by his mother and next friend *HC v. WZC* (CACV 10 of 2016 / [2019] HKCA 89), In this case, the dispute arose from the Parent and Child Ordinance, Cap 429 in determining the same with regard to children. The Court of Appeal expressly stated the test is no different from in the context of other matrimonial disputes. The relevant paragraphs are as follows:

35. Apart from the PCO, there are other family legislations with similar jurisdictional requirements such as the MCO and the MPPO, both of which were introduced as part of the family law reform in the 1970’s.

36. Under section 3 of the MCO, in respect of proceedings for divorce, the jurisdictional requirements are similarly stated to be domiciled in Hong Kong, habitual residence in Hong Kong or substantial connection with Hong Kong. Section 29AE of the MPPO also sets out three similar jurisdictional alternative requirements for the granting of financial relief.
37. In *ZC v CN*, supra, this Court reviewed previous cases decided under the MCO on the meaning of substantial connection. Such cases include the first Hong Kong decision which interpreted this phrase, namely, *Jean Michel Savournin v Lau Yat Fung* [1971] HKLR 180. We held in *ZC* that :
- “9.4 Whether a person has a substantial connection with Hong Kong is clearly a question of fact. No definition for this term will be succinct or comprehensive enough. What one may do is to look at the surrounding factors to see whether that person is substantially connected with Hong Kong at the time of the petition. As a starting point, one begins to see if that person has connection here and then decide whether that connection is a substantial one, see S v S [2006] 3 HKLRD 751, [15]. In terms of connection, there must be physical presence in Hong Kong, this must be the ground rock of invoking the divorce jurisdiction. But because of the requirement of “substantial”, the presence cannot be of a transitory nature otherwise this will encourage “fly in” and “fly out” divorces, a theme that the Court has consistently emphasised, see, for example, Griggs (née Sharp) v Griggs [1971] HKLR 299, Ta Tran Thi Thanh v Ta Van Hung [1981] HKDCLR 37 and more recently S v S, B v A [2008] 1 HKLRD 43.’*
38. We noted in *ZC* the case of *CMU v WPM (Part IIA Application)* [2012] HKFLR 245 which applied the same interpretation of the phrase ‘substantial connection’ under the MPPO.”

The jurisdiction of this court

Mr Ho, counsel for the applicant submitted he relies on the ground of substantive connection with Hong Kong on both the date of divorce (11 July 2007) and the date of this ex parte application (30 July 2018). The relevant factors that tend to show that the applicant and/or the respondent had a substantial connection with Hong Kong on either of those dates:

The Property was purchased by the respondent in June 2010 by means of family assets for the purpose of the respondent’s application as a resident in Hong Kong via the Capital Investment Entrant Scheme (“CIES”);

The respondent was granted resident status in Hong Kong under the CIES in 2011;

The applicant and their 2 children were granted dependent visas to stay in Hong Kong shortly thereafter in 2011;

The applicant had resided at the Property in Hong Kong since 2011 and the respondent and the children would come to Hong Kong occasionally;

From 2013 to 2015, the applicant worked as an insurance agent in Hong Kong and had paid salaries tax for her income in 2015;

The applicant's dependent visa was not renewed in 2015 because the respondent ceased to support her application after he commenced divorce proceedings in the mainland in 2014. Yet, the applicant continued to enter into Hong Kong by two-way permits and resided at the Property until October 2016 when she went to the mainland to handle the divorce proceedings. After she returned to Hong Kong, she found that the respondent has changed the door lock of the Property and she could no longer reside in Hong Kong;

The applicant has since 2010 maintained a bank account with HSBC in Hong Kong;

The respondent has also maintained a bank account with HSBC in Hong Kong since 2012 although the applicant has no knowledge of the current status of that account;

The respondent was the sole shareholder and director of a limited company incorporated in Hong Kong, namely "JXXX PXXXXX Int'l (Hong Kong) Limited. However, the company was deregistered in September 2015.

It is vital for the applicant to establish she or the respondent has substantive connection with Hong Kong. Mr Ho cited *YS v TTWD* [2012] HKFLR129, the wife, despite being employed by a Hong Kong employer, was living in Beijing when she commenced petition for divorce proceedings. The marriage only lasted for around 8 months and the couple had only stayed in Hong Kong during part of that period. Shortly after the wife gave birth to their son, they separated and the wife returned to Beijing with her son. It was held that the wife was able to show her substantial connection with Hong Kong with her previous history of connection with Hong Kong and that it would not be surprising that she went back to Beijing under those circumstances.

Mr Ho has fairly submitted there are situations where the Court has refused to grant leave. In *CMU v WPM* [2012] HKFLR 245, the applicant wife had worked for the husband's business in Hong Kong but the couple moved to settle in Macau thereafter. Seemingly contrary to the decision in *YS v TTWD*, Deputy District Judge G. Own (as he then was) held that a person previously job in Hong Kong is historic, but he further held that even a person who does not have the legal right to live and work in Hong Kong but nevertheless having investments and business here and paying profit taxes may be considered to have had substantial connection. In that case, the applicant wife could not provide any information of whether she had paid any tax or had any investment in Hong Kong and the application was refused.

In *ZC v CN* [2014] 5 HKLRD 43, the husband was born in the mainland and had moved to Hong Kong since teenage and had become a permanent resident. He had lived in Shenzhen since 1982. The husband met his wife in 1995 and had married her in 2005. The matrimonial home was in Shenzhen. They have properties in Hong Kong. The wife travelled on the strength of a two way permit to Hong Kong. In 2010, the wife was granted with a one – way permit. She was not a permanent resident. In 2012, the wife petitioned for divorce in Hong Kong claiming she and her husband has substantive connection in Hong Kong. HH Judge Melloy decided both the husband and wife were not domiciled in Hong Kong but were substantially connected with the jurisdiction. The Court of Appeal overturned the decision that neither the husband and the wife

were substantially connected with Hong Kong.

Discussion

Having considered the affirmations, I am not satisfied the applicant could establish she or the respondent has substantive connections in Hong Kong for the following reasons.

Both the applicant and the respondent were not living in Hong Kong. The applicant was living in the mainland with her two children, she agreed the respondent was not in town as well at time of this application (or at time when the divorce order was granted by the Yinzhou Court). The applicant failed to satisfy the requirement of physical presence. The application (See ZC v CN, para 9.4)

The applicant argued she was forced to leave Hong Kong in October 2016 after the divorce proceedings. She had been residing in the Property but the respondent has changed the door lock and she unable to return to stay in the Property. She has no place to live here and has chosen to return to live in the mainland. The applicant did not explain why she could have looked for alternative accommodation in Hong Kong. As I see she has ceased to work after 2015, both her children were not living in Hong Kong, it is logical that she has chosen to return to the mainland. I do not see this fact could assist the applicant.

The other facts and surrounding factors did not support the applicant or the respondent to have been substantially connected with Hong Kong. The presence of the Property could not have been a pointer in establishing substantive connection without physical presence. Albeit the respondent has obtained residency in Hong Kong via the CIES, his whereabouts were unknown in accordance with the applicant's saying.

In terms of employment or business, the applicant ceased to work in 2015. The respondent's limited company was deregistered in 2015 as well. The evidence shows both of them had intended to withdraw from Hong Kong in or about that time.

Both the applicant and the respondent have maintained a bank account in Hong Kong is a weak argument.

The applicant is frank in disclosing her reason to have applied for leave was because the Yinzhou Court has refused to deal with the Property in their divorce suit. The applicant then attempted to seek leave to apply for financial relief here. This is a non-starter. The decision of the Yinzhou Court should not have a bearing in this application.

Premised on the above reasons, the applicant had failed to establish she or the respondent has substantive connection with Hong Kong at time of filing the originating summons for leave to make the application pursuant to section 29AC of MPPO (30 July 2018) or on the date of the divorce order was granted by the Yinzhou Court (11 July 2017).

The application for leave to make an application for an order for financial relief under section 29AG shall be refused.

Whether Hong Kong is the appropriate venue in the present case

Notwithstanding the above conclusion and for completeness sake, I shall decide on the other factors the court should consider in making an order of financial relief as stated in section 29AF of MPPO. If the court is not satisfied that it would be appropriate, the court must dismiss the application.

Section 29AF(2)(a) – connection with Hong Kong

I do not intend to reproduce the requirements of “connection with Hong Kong” which has been thoroughly considered in the above. I have concluded neither party has connection with Hong Kong.

Section 29AF(2)(b) – connection with the mainland

I accept both the applicant and the respondent have connections with the mainland.

Section 29AF(2)(c) – connection with other place

There is no evidence that either party has connection with other place.

Section 29AF(2)(d) – any financial benefit obtained or obtainable outside Hong Kong; section 29AF(2)(e) – an order by a foreign country; section 29AF(2)(f) – any right to apply for financial relief outside Hong Kong

The Yinzhou Court has only decided on properties in the mainland and has ordered a lump sum payment of RMB 9.30 million to be paid by the respondent to the applicant. Inasmuch in that the order relating to their divorce did not cover the Property. There is no order made on any foreign authority.

Section 29AF(2)(g) – availability of property in Hong Kong

Yes, the subject matter is the Property.

Section 29AF(2)(h) – enforceability of any financial order

The applicant intends to seek an order of financial relief in respect of the Property without enforcement of any other order made.

Section 29AF(2)(i) – lapse of time since divorce

The application filed her originating summons on 30 July 2018, which is around one year after the date of the divorce order made by the Yinzhou Court. I accept the lapse of time was not unreasonable as she might have to spend some time to seek legal advice or to give instructions to her legal representatives.

Conclusion

I therefore give the following orders:

The originating summons filed on 30 July 2018 be dismissed.

There be no order as to costs of the originating summons filed on 30 July 2018.

(J. Chow)

Deputy District Judge

Mr Duncan Ho instructed by Khoo & Co for the Applicant

The respondent did not appear

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