

HONG KONG / JUDGMENT

CMU v. WPM

COURT

Family Court

DECIDED

25 June 2012

CASE / FILE NUMBER

FCMP59/2012

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bjbj FCMP 59 / 2012 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MISCELLANEOUS PROCEEDINGS NO. 59 OF 2012

In the Matter of an application by CMU and In the Matter of Section 29AC of the Matrimonial Proceedings and Property Ordinance, Cap.192

BETWEEN CMU Applicant and WPM Respondent

Coram: Before Deputy District Judge G. Own (in Chambers) Date of Hearing: 25 May 2012 Date of Decision: 25 June 2012

REASONS FOR DECISION

Introduction

AUTONUMOUT This is the Applicant Wife Wife) ex parte summons seeking leave under the newly enacted Part IIA of the Matrimonial Proceedings and Property Ordinance, Cap.192 (MPPO) to issue proceedings for financial reliefs subsequent to a divorce proceedings having been finalized in Macau on 28 October 2011 (the Macau divorce suit). The Wife filed her Affirmation in support dated 15 March 2012 (Wife s Affirmation). AUTONUMOUT On 10 May 2012, which is 2 weeks before this hearing, Mr. Justice Poon in the case of C v. H, HCMC No.3 of 2011, delivered the first Decision on this area where his Lordship laid down the proper approach to be adopted by the courts when considering Part IIA applications.

Background

AUTONUMOUT The parties married in Hong Kong in 1997. Both parties are permanent residents of Hong Kong. There is a child born out of the marriage in Macau who is now 9 years old.

AUTONUMOUT In the Wife's Affirmation, she deposed that between 1996 and 2000, the Respondent (Husband) worked in his own dental laboratories in Hong Kong and in Macau. The parties travelled frequently between Hong Kong and Macau. The Wife assisted the Husband in the management of the laboratories business. The parties later decided to settle in Macau as the base and re-focused the dental clinic business in Macau. The parties then lived in Macau ever since but would often come to Hong Kong for visits. AUTONUMOUT The marriage broke down because of loss of affection from the Husband. Since 2006, the Wife discovered the Husband has a girlfriend. In 2007, she commenced the Macau divorce suit. The Macau divorce suit AUTONUMOUT The Wife had once applied in the Macau divorce suit for injunctions against the Husband over his properties in Macau. There are 5 relevant properties which the Wife said to be part of the matrimonial assets. Such application was, however, refused by the Macau courts on 18 November 2010. The Wife then appealed to the Court of Appeal in Macau which appeal was unsuccessful. AUTONUMOUT By a Judgment dated 28 October 2011, the Court of First Instance in Macau dissolved the marriage between the parties and also decided against the Wife on her financial claims against the Husband. The statutory provisions under Part IIA AUTONUMOUT Section 29AB(1) empowers the court to grant financial reliefs after a marriage had been dissolved or annulled by a foreign court and such divorce or annulment is recognized as valid by the laws of Hong Kong. However, such jurisdictional powers can only be invoked when one or more of the requirements under Section 29AE(a) to (c) are satisfied. AUTONUMOUT Section 29AE provides, inter alia, that

- (a) either of the parties to the marriage was domiciled in Hong Kong on the date of the application for leave under section 29AC; or on the date on which the divorce, annulment or legal separation obtained in the place outside Hong Kong took effect in that place; (b) either of the parties to the marriage was habitually resident in Hong Kong
- (i) throughout the period of 3 years immediately before the date of the application for leave under section 29AC; or (ii) throughout the period of 3 years immediately before the date on which the divorce, annulment or legal separation obtained in the place outside Hong Kong took effect in that place; or
- (c) either of the parties to the marriage 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, annulment or legal separation obtained in the place outside Hong Kong took effect in that place. AUTONUMOUT Mr. Clough, Counsel for the Wife, confirmed that the jurisdictional requirement relied upon for the present application is the substantial connection ground (i.e. section 29AE (c)) of the provisions. The Wife is not relying on the domicile or the habitual residence grounds (i.e. sections 29AE (a) and (b) respectively). AUTONUMOUT Section 29AC provides a filter mechanism for Part IIA applications as follows :

- (1) No application for an order for financial relief may be made unless the leave of the court has been obtained in accordance with rules of court.
- (2) The court must not grant leave unless it considers that there is substantial ground for the making of an application for an order for financial relief.
- (3) The court may grant leave under this section despite the fact that an order has been made by a competent authority outside Hong Kong requiring the other party to the marriage to make any payment or transfer any property to, or for the benefit of, the applicant or a child of the family.
- (4) Leave under this section may be granted subject to any conditions the court thinks fit. The C v. H case AUTONUMOUT In the C v. H case, his Lordship held that to obtain leave under section 29AC(2), the Applicant has to pass the threshold of satisfying the court that there is substantial ground for the making of the substantive application. The threshold explained by Lord Collins in Agbaje v. Agbaje [2010] 1 AC 628 was held by his Lordship to be the same threshold in section 29AC of Part IIA (see paragraph 28 of the Reasons). AUTONUMOUT His Lordship then went on to say :-
 30. First, the applicant must satisfy one of the three formal jurisdictional requirements in section 29AE. This is obvious. If none of those formal requirements is satisfied, the court simply does not have jurisdiction to entertain the substantive application for financial relief. It would be clearly wrong for the court to grant leave.
 31. Second, the applicant must also satisfy the court that provisionally it would be appropriate for the order to be made by a court in Hong Kong under section 29AF. This point needs further explanation.
 32. Under section 29AF(1), the court is under a duty to consider at the substantive hearing whether Hong Kong is the appropriate venue for the application for financial relief. The English courts have consistently taken into account the criteria set out in section 16 of the 1984 Act (the English equivalent of section 29AF of Part IIA) and the relevant circumstances in considering leave. As explained in Rayden and Jackson on Divorce and Family Matters, 18th Edition, para 26.10 : The duty imposed under the MFPA 1984, s 16 to consider at the substantive hearing whether England and Wales is the appropriate venue for an application for financial relief is a matter for consideration at the leave stage. If on the application for leave to apply it is clear that if leave were given the application must founder at the first hurdle of s 16(1), then it would clearly be wrong for the court to grant leave to apply in the first instance.
 33. At the leave stage, the court cannot and will not come to a definitive view if Hong Kong is the appropriate venue. Therefore it should be sufficient if the applicant can establish, provisionally, that Hong Kong is the appropriate venue in order to pass the threshold for obtaining leave. The term Substantial Connection AUTONUMOUT Mr. Clough referred me to the case of YS v. TTWD, FCMC 676 of 2011, where Her Honour Judge Melloy found that just

because a person has a substantial connection in one jurisdiction, it does not necessarily follow that he/she cannot have a substantial connection elsewhere (see paragraph 18 of the Judgment). I noted in that case Mr. Clough represented the petitioner wife who was found by the learned Judge to have a substantial connection in Hong Kong to enable her to commence the divorce suit. AUTONUMOUT As to a person who can have substantial connection with more than one jurisdiction over the same period of time, I fully agree with Judge Melloy's decision. Such issue, however, had been considered in the Court of First Instance in the earlier case of *S v. S* [2006] 3 HKLRD 751 when Hon Hartmann J (as he then was) considered the statutory provisions under section 3(c) of the Matrimonial Causes Ordinance, Cap.179 which bestowed jurisdiction on our courts when the petitioner has a substantial connection with Hong Kong. Quoting his Lordship's Judgment at paragraph 13 :-

13. In my view, when considering the meaning and extent of the phrase, it is important to recognize that the legislature saw fit to qualify it with the indefinite article . It is not therefore necessary for a petitioner to demonstrate that his substantial connection with Hong Kong is the only substantial connection he has with any jurisdiction or that his connection with Hong Kong is the most substantial connection he has with any jurisdiction. No exercise of comparisons is required. It is sufficient if he demonstrates that, among others perhaps, he has substantial connection with Hong Kong. AUTONUMOUT I also noted that Mr. Clough represented the petitioner husband in this *S v. S* case who had, however, been found not to have a connection of sufficient substance with Hong Kong to invoke jurisdiction on his divorce suit. Mr. Clough, however, made no submissions or reference to this case except the case of *YS v. TTWD*. AUTONUMOUT Adopting the approach laid down in the *C v. H* case, the first issue to be considered is whether the Wife can satisfy the requirements of section 29AE (c) that she was substantially connected with Hong Kong either at the time of this application (i.e. 12 March 2012) or at the time when the Macau divorce took effect (i.e. 28 October 2011). AUTONUMOUT In the *S v. S* case (supra), the term substantial connection was considered by his Lordship which I find useful. Quoting the relevant passages on substantial connection in his Lordship's Judgment as follows :-
15. But, of course, if the Hong Kong courts are to exercise jurisdiction, it must be shown on a balance of probabilities that a petitioner not merely has a connection with Hong Kong but that, bearing in mind the scope and purpose of the Ordinance, the connection is substantial . 16. Substantial is a plain enough English adjective. We all understand what it means at least in substance (if I may be excused the play on words). I say that because it is not a word that lends itself to precise definition or from which precise deductions can be drawn. To say, for example, that there has been a substantial increase in expenditure does not of itself allow for a calculation in numerative terms of the exact increase. It is a statement to the effect that it is certainly more than a little but less than great. It defines, however, a significant increase, one that is weighty or sizeable.

17. It speaks for itself, I think, that an artificially constructed connection will not be a substantial one. A connection must be real in the sense, for example, that it has not been engineered for temporary tactical advantage. It was not the intention of the legislature (in passing s.3(c) into law) to create a convenient off-shore divorce jurisdiction. As it has been said in an earlier authority, the subsection is not intended for birds of passage .
18. As the jurisdiction looks to the determination of matrimonial proceedings, a material factor will be whether both parties to the marriage have lived in Hong Kong and, if so, how long they have lived here as man and wife. But those factors will not necessarily be determinative. In each case the factors to be considered will be different and the weight to be given to them, in the factual context of each case, will no doubt be different too.
19. In summary, whether for the purposes of the Ordinance a connection is substantial or not can only be determined on the basis of a broad objective assessment, taking all relevant factors into account. AUTONUMOUT I find the above passages extremely useful when considering the term substantial connection . Although his Lordship in that case was considering jurisdictional issue under the Matrimonial Causes Ordinance, Cap.179 for commencement of divorce proceedings in Hong Kong, I see no reason why the term substantial connection should be given a different meaning in the context of the newly enacted Part IIA of the MPPO, Cap.192, which likewise bestows jurisdiction on commencement of financial reliefs proceedings. I do not believe the legislature intent is to give a different interpretation. Thus, I will adopt and follow his Lordship s views on the meaning of substantial connection when considering section 29AE (c) of the MPPO. Analysis and Discussion
- (a) Jurisdictional requirement AUTONUMOUT Mr. Clough submitted that the Wife, having had permanent resident status in Hong Kong, she went to Macau and settled in there to assist the Husband would not affect her status or connection with Hong Kong. The connection with Hong Kong would not be broken and would not prevent the Wife from acquiring a connection with Macau. This is a continuous connection despite the fact that the Wife was not physically present in Hong Kong. The Wife, as in most if not all cases, followed the Husband and physically lived in Macau for the family should not thus be taken as breaking up her connection with Hong Kong. The Wife s marriage was celebrated in Hong Kong. She and the Respondent both worked and lived in Hong Kong prior to their moving to Macau. The fact that the Wife has a permanent resident status in Hong Kong in itself is supportive of her connection; for otherwise, she would not be given the legal right to work and live in Hong Kong. AUTONUMOUT The main issue here is whether the Wife s connection is substantial within the meaning for the purpose of Part IIA of MPPO for the court to exercise jurisdiction (see paragraph 15 of S v. S case). The answer to this issue would have to be considered from a broad objective assessment taking all relevant factors into account (see paragraph 19 of S v. S case). AUTONUMOUT In the Wife s Affirmation, the factors for supporting substantial connection are stated in paragraph 3 therein, namely :-

- (a) the marriage was in Hong Kong;
- (b) possession of Hong Kong permanent resident status;
- (c) having lived and worked in Hong Kong prior to settling in Macau;
- (d) having travelled frequently between Hong Kong and Macau for visits after settling in Macau;
- (e) intention to move back to Hong Kong permanently with the daughter. AUTONUMOUT Factors under (a), (b) and (c), in my view, only show a connection with Hong Kong. There ought to be some other existing factors which, if I may use the word elevate the connection to be a substantial one. Furthermore, the substantial connection so established, under section 29AE(c) must exist as at the date of the application for leave or at the effective date of the Macau divorce (my emphasis). AUTONUMOUT Marriage in Hong Kong is a historical fact in 1997 and cannot be supportive of the jurisdictional requirement under section 29AE (c). Nowadays, parties are free to choose where to register their marriage. Having acquired a status to live and work in Hong Kong could not be taken as having a substantial connection. A person's status was given under a legal right whereas substantial connection requires consideration of other subsisting factual circumstances. To take a day to day example, a person who was not given the legal right to live and work in Hong Kong but nevertheless having investments and business here and paying profit taxes may, in my view, be considered to have had substantial connection. The fact that the Wife had once worked and lived in Hong Kong is historic and by itself cannot be supportive of the substantial connection requirement. AUTONUMOUT Factor (d) is not supportive either. Frequent travelling for visits is far short of establishing substantial connection. AUTONUMOUT Factor (e) is an intention which may or may not be materialized in the coming future. I noticed that the Wife is still living in Macau as her Macau address was used in the supporting Affirmation. The Affirmation was even not affirmed in Hong Kong. It was affirmed in the Notary Office in Macau by the Wife producing her Macau SAR identity card. It seems the Wife simply travelled to Hong Kong and appeared in Court for this hearing. Any other supporting factors? AUTONUMOUT I have enquired Mr. Clough whether the Wife is paying any tax in Hong Kong or has any properties or investments here in Hong Kong. No such information could be provided. AUTONUMOUT Considering all the available evidence and circumstances, I am not satisfied that a connection with sufficient substance with Hong Kong has been shown by the Wife, whether as at the date of this application or the date when the Macau divorce took effect, so as to give the Hong Kong courts jurisdiction to entertain her application under Part IIA of the MPPO. Accordingly, it is my finding that the Hong Kong courts do not have jurisdiction.
- (b) Appropriate venue AUTONUMOUT Had I been wrong in finding against the Wife on the jurisdictional requirement, the Wife would, in my view, also fail for the reason of not being able to establish that Hong Kong is the appropriate venue. This is indeed the second limb requirement of the threshold laid down in the C v. H case. AUTONUMOUT The financial reliefs intended to be sought by the Wife, apart from any other maintenance payments

claim, relate to five landed properties all situated in Macau. In the supporting Affirmation, the Wife deposed that the Macanese courts had been misconceived in their understanding of the Hong Kong divorce law in terms of assets held by married couples whose marriage was registered in Hong Kong are to be considered separate from each other because of a separate property system (see paragraph 4 of the Affirmation). AUTONUMOUT Quoting the passages in the C v. H case on the issue of appropriate venue :-

33. At the leave stage, the court cannot and will not come to a definitive view if Hong Kong is the appropriate venue. Therefore it should be sufficient if the applicant can establish, provisionally, that Hong Kong is the appropriate venue in order to pass the threshold for obtaining leave.
34. Now, in considering section 29AF(1), the court is required to have regard to the factors listed in section 29AF(2). And many of the factors are common with those which would be relevant in a forum non conveniens inquiry
35. Third, while Part IIA aims at remitting the presence of a failure in a foreign jurisdiction to afford appropriate financial relief, the statutory test does not require the applicant to prove hardship, injustice or exceptionality as a pre-condition in order to obtain leave .. Such factors, if present, are cogently relevant to the court s consideration for granting leave. Their absence is however not fatal. But it does not mean that whenever a spouse is dissatisfied with the financial provision obtained in a foreign jurisdiction, he or she should be encouraged to apply for further financial relief under Part IIA. Part IIA does not give the spouse a free ticket to do so .
36. Any intended applicant should firmly bear these judicial observations in mind and think through his or her case very carefully before commencing proceedings under Part IIA. AUTONUMOUT At this juncture, I should perhaps also mention that it is the Wife who had decided to commence divorce proceedings in Macau. Such decision was, as I was informed by Mr. Clough, however made upon legal advice being given to the Wife. In any event, I am not in any position to comment or under any duty to investigate whether the Macau divorce suit was rightly started. I am also not in any position or duty to go behind the Macau divorce suit to ascertain whether proper legal advice had been given to the Wife in the first place. The fact and reality right at the moment is that a Macau divorce suit had been commenced and finalized with no financial reliefs granted to the Wife. AUTONUMOUT Mr. Clough, in his able submissions, saw fit to take the point that fairness dictates that the Hong Kong courts should exercise jurisdiction to consider the Wife s financial reliefs. This would in fact accord with the Macanese courts unwillingness to interfere with the Hong Kong property regime based upon their misconception of the Hong Kong divorce law. There is no question of which of the two jurisdictions is appropriate whether Hong Kong is a forum conveniens. Proceedings in Macau were the more appropriate forum for the divorce but not for the determination of division of matrimonial assets consisting of the landed property. It was an exercise in comity by the Macanese courts that determined their approach to the property and the limits of their exercise of their national jurisdiction in cases involving a foreign

element. Hong Kong's relationship is obvious since the Macanese courts were applying the Hong Kong separate property regime. There is no improper conflict with the jurisdiction of Macau and for Hong Kong courts to exercise jurisdiction embraces concepts of comity rather than conflicts with them. AUTONUMOUT With due respect to Mr. Clough, I do not agree. I can see the force of Mr. Clough's argument within the spectrum of all the circumstances of the case under section 29AF(1) which I must consider. However, it seems to me that the submissions focus upon the legitimacy of the Hong Kong courts to exercise its jurisdiction without any conflict with the Macanese courts. In my view, whether Hong Kong is the appropriate venue must be provisionally established by considering all the circumstances and with particular attention to those factors under section 29AF(2) in order to pass the threshold for obtaining leave (see paragraph 33 of C v. H case). The exercise of jurisdiction, whether it is in comity or in conflict, is only one of those many factors for consideration in determining, provisionally, the appropriate venue. I have to consider those factors under section 29AF below before I can come to any conclusion as to the appropriate venue. AUTONUMOUT On section 29AF(2)(a), I have decided against the Wife on her connection with Hong Kong in the preceding paragraphs. I will not repeat here. AUTONUMOUT On section 29AF(2)(b), the parties connection, or indeed the Wife's connection, with Macau is self-evident. This provision does not require the courts to differentiate between which jurisdiction to be more proper for the divorce in a forum non conveniens sense as Mr. Clough had stated in paragraph 22 (page 9 of 10) of his written submissions. AUTONUMOUT On section 29AF(2)(c), I find the connection the parties have outside Hong Kong is Macau. AUTONUMOUT On section 29AF(2)(d), in consequence of the Macau divorce suit, the Wife was not provided with any financial benefit. Provided the first important hurdle of jurisdictional requirement can be satisfied, this factor might tend to be in favour of the Wife. AUTONUMOUT On section 29AF(2)(e), there was no financial reliefs given by the Macanese court to which this court can take into account of when considering the appropriate venue issue. AUTONUMOUT On section 29AF(2)(f), the Wife had exercised her rights under Macanese law in applying for financial reliefs. This is not a case where the Wife reserved her position on financial reliefs to be dealt with under Part IIA in Hong Kong. Quite contrary, the Wife had, using the phrase of Mr. Clough in his written submissions, exhausted her rights including appeal on financial reliefs in Macau with no fruitful results and then now turned to the Hong Kong courts. AUTONUMOUT On section 29AF(2)(g), the Wife has not been able to identify any property available in Hong Kong in respect of which an order for financial relief in her favour could be made. AUTONUMOUT On section 29AF(h), the Wife has provided in her exhibit marked CMC-3 a legal opinion from Macanese lawyer on recognition of Hong Kong courts order. AUTONUMOUT On section 29AF(i), the date of the Macau decree of divorce is 28 October 2011. I accept that there is no delay when bringing this application on 12 March 2012. AUTONUMOUT Considering all the circumstances and relevant factors under section 29AF(2), including the fact that all the landed properties are situated in Macau, I will find against the Wife for not being able to establish Hong Kong is, provisionally, the appropriate venue. AUTONUMOUT Accordingly, my conclusion is that the Wife would, but for my finding against her on jurisdictional

requirement, also fail in this application.

- (c) Any Top-up award ? AUTONUMOUT On the third limb of the threshold as laid down in paragraph 35 of the C v. H case, I noted Mr. Clough s submission that the Wife is not forum shopping to seek a more generous award. The Wife is simply coming to Hong Kong as the appropriate forum and asked for her application to be heard on merits. The Macanese courts had simply declined jurisdiction to hear the Wife s financial reliefs application. AUTONUMOUT I accept that this is not a case where a meager or relatively small award was given which the Wife is now seeking to, say, top-up by bringing this application as an attempt to have the so called second bit of the cherry . AUTONUMOUT While I have sympathy with the Wife s present situation, this does not mean the statutory pre-requisite requirements on jurisdiction and appropriate venue under Part IIA can be ignored for the reason that the Wife s financial claims had not been heard in the foreign jurisdiction. AUTONUMOUT In the circumstances, I have no alternative but to dismiss the Wife s ex parte application dated 21 March 2012 for the reasons set out in this Decision. Other matters AUTONUMOUT At paragraph 11 of Mr. Clough s written submissions (page 3 of 10), it stated the Wife had commenced proceedings under the Married Person s Status Ordinance, Cap,182, to protect her position. I was, however, not been provided with any further information on those proceedings.

Orders

AUTONUMOUT I now make the following Orders :

- (a) The Applicant s Summons dated 21 March 2012 be dismissed;
- (b) There be no Order as to costs. (George Own) Deputy District Judge Mr. Neal Clough instructed by Messrs. Ip & Heathfield, Solicitors for the Applicant 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 hz>' hz>' h!U; h!U; h!U; hysr hysr hysr hysr gd8q gd8q gdysr gdysr gdysr gdysr gd!U; gdz>' gdz>' gd!U; gd!U; gd!U; gd8q gd8q h!U; h4V? umimd gdL5 h[:E h[:E h[:E h[:e h0zi h[C &`#\$ :pLQ [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 :TZA G 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"/> (xYr ,n4? yHdA Jja8 Jslf (dZx ,n4? yHdA (dZx d gWj & 6" English.dot Tai Yin Sheung Lilian Microsoft Office Word Judiciary CACV CACV Title Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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