

HONG KONG / JUDGMENT

HSYJ v. CCMR

COURT

Court of First Instance

DECIDED

15 August 2016

CASE / FILE NUMBER

HCMP1255/2016

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bjbj HCMP1255/2016 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL MISCELLANEOUS PROCEEDINGS NO. 1255 OF 2016 (ON AN INTENDED APPEAL FROM FCMC NO. 5305 OF 2012) BETWEEN HSYJ Petitioner and CCMR Respondent Before: Hon Cheung and Chu JJA in Court Date of Judgment: 15 August 2016

JUDGMENT

Hon Chu JA giving the Judgment of the Court: This is the respondent's renewed application for leave to appeal against the decision of Deputy District Judge KK Pang ("the Deputy Judge") given on 26 November 2015 granting leave to amend the ancillary relief order made by consent on 11 September 2013. The petitioner opposes the application and has put in a skeleton argument. Having considered the papers, we consider it is appropriate to determine the application on the basis of the written arguments without holding an oral hearing, pursuant to Order 59 rule 2A(5) (a) of The Rules of the High Court, Cap. 4A.

Background

The respondent and the petitioner were husband and wife. They were married in 1992 and have one child who was born in November 1997. The divorce proceedings were commenced in April 2012. The decree nisi was granted on 11 January 2013, which was made absolute on 16 October 2013. On 7 June 2013, an order for joint custody of the child of the family was made. In respect of her ancillary relief application, the petitioner had filed her Form E on 22 October 2012 pursuant to the court's directions made on 25 September 2012. The respondent, however, has not filed any Form E. It is not in dispute that the petitioner and the respondent were co-owners of a property in Granville Garden in Shatin (Granville Garden property); and the petitioner is the registered owner of a property located in Shatin Centre in Shatin (Shatin Centre property). The ancillary relief order of 11 September 2013 On 11 September 2013, the petitioner and the respondent attended an adjourned ancillary relief hearing before the Deputy Judge. Both parties appeared in

person. In the course of the hearing, the case was stood down between 10:02 am and 11:56 am for the parties to conduct discussions with a view to resolving the ancillary relief proceedings amicably. When the hearing resumed, the petitioner, on the nomination of the respondent, reported to the court the results of the discussions which covered monthly maintenance for the child of the family, monthly and lumps sum maintenance for herself, the sale of the Granville Garden property and the distribution of the proceeds of sale as well as the arrangement for the Shatin Centre property, with which the present application is concerned. The Deputy Judge took note of the parties agreement as reported by the petitioner. An order in Chinese was later drawn up and sealed (11 September 2013 Order). Although the order did not expressly state that it was made by consent, it is not in dispute, and there can be no doubt, that it is a consent order. The 11 September 2013 Order contained the follow provisions: In the recital, The respondent s undertaking that he shall continue to pay the outstanding mortgage repayments of Shatin Centre property until the mortgage is fully discharged, together with the management fees, rates and ground rent. The respondent s further undertaking that he shall pay to the petitioner a lump sum of \$1.5 million out of the net proceeds of sale of Granville Garden property. In the main part of the order, The respondent shall pay to the petitioner monthly maintenance in the sum of \$20,000 until the death of either of the parties or if the petitioner shall re-marry, whichever is earlier.

- (2) The respondent shall pay to the petitioner monthly maintenance for the child of the family in the sum of \$10,000 until he attains the age of 18 or completes full-time education. The respondent shall pay to the petitioner a lump sum of \$50,000 upon the grant of decree absolute. Within six months from the grant of decree absolute, the petitioner and the respondent shall sell the Granville Garden property at the market price, with the related expenses to be deducted from the proceeds of sale. There is no order as to costs. Subsequent proceedings In October 2014, the petitioner issued a judgment summons against the respondent for non-payment of maintenance since August 2014. In his affirmation filed in June 2015 in opposition to the summons, the respondent claimed that the beneficial interest in the Shatin Centre property belonged to him. In her affirmation in reply, the petitioner refuted the claim and referred to the parties agreement reached on 11 September 2013 and the 11 September 2013 Order. On 22 July 2015, the respondent issued a summons applying for (i) the sale of the Shatin Centre Property and the payment of a lump sum maintenance of \$1 million to the petitioner out of the proceeds of sale; (ii) the downward adjustment of the monthly maintenance payment to the petitioner; and (iii) the cessation of monthly maintenance payment to the child of the family. On 19 November 2015, the respondent agreed that Flat A 18th Floor Sun Ning Building Shatin Centre Shatin shall all go to the petitioner, that it is not necessary to make change(s) to the property rights because it is presently in the petitioner s own name, and that the respondent shall pay the mortgage repayments until [the mortgage] is fully discharged.) By then, both parties were legally represented. The respondent opposed the application, contending there was no agreement between the parties that the beneficial interest of the Shatin Centre property should go to the petitioner, and that the Deputy Judge being functus officio, had no jurisdiction to amend the 11 September 2013 Order. On 24 November 2015,

after hearing counsel's submissions and referring to the transcript of the hearing on 11 September 2013, the Deputy Judge gave leave to amend the 11 September 2013 Order by inserting in the beginning of the recital the following: 10u-N ^ASkQ [irmimi khQxkHT granted the respondent's application to amend his 22 July 2015 summons (see paragraph 12 above) by deleting the application to sell the Shatin Centre property. The respondent's applications for leave to appeal. The respondent applied to the Deputy Judge for leave to appeal to the Court of Appeal against the order amending the 11 September 2013 Order. By his judgment handed down on 4 May 2016, the Deputy Judge refused the application. By the present summons issued on 18 May 2016, the respondent renews his application for leave to appeal to this Court. In summary, the respondent's intended grounds of appeal are twofold, namely,

- (1) The Deputy Judge erred in finding that the parties had agreed that the entire ownership of the Shatin Centre property would go to the petitioner. By ownership, the respondent was referring to the Chinese term *mi k* in the draft Notice of Appeal which complains that the Deputy Judge did not give reasons for his decision and did not accede to the respondent counsel's request to adjourn the amendment application for argument. No arguments on this ground were advanced in the respondent's statement in support of the present application. We take it that this ground is no longer pursued. Discussions Under section 63A of the District Court Ordinance, Cap. 336, leave to appeal will not be granted unless the applicant satisfies the court that the intended appeal has a reasonable prospect of success, or there is some other reason in the interest of justice that the appeal should be heard. Reasonable prospect of success involves the notion that the prospect of succeeding must be more than fanciful, without having to be probable: *SMSE v. KL* [2009] 4 HKLRD 125. In respect of the first intended ground of appeal, we are of the view that it is unarguable having regard to the transcript of the 11 September 2013 hearing. When the petitioner reported on the results of the discussions between the respondent and her (p.7 lines A to H, Bundle p.44), she stated in the clearest of terms that the Shatin Centre property would all go to her, that the property was already in her name, and that the respondent would be responsible for the mortgage repayments until the mortgage was discharged, together with the water and electricity bills, rates and management fees ([hQxk W@b g ebTd\ Pmi k Pmi k sponsible for paying the rates and management fees. The respondent was present throughout the hearing. While he had responded on other matters (see Transcript p.11 lines H to S, Bundle p.48), he raised no disagreement to what was said by the petitioner and the Deputy Judge about the title and arrangement of the Shatin Centre property. On the basis of the transcript, it is abundantly clear that the court was informed at the hearing that the parties had agreed that the petitioner shall have the Shatin Centre property. The Deputy Judge did not err in finding that the parties had agreed that the title in the property shall remain with the petitioner. Mr Ho for the respondent argued that the petitioner, in reporting to the Deputy Judge the terms of their agreement, only referred to the Shatin Centre property, but did not specifically say that the entire ownership *mi k*) *mi k*) *mi k*) agreement on the Shatin Centre property in that his omission to record it in the 11 September 2013 Order is indicative of the parties not

having agreed on a transfer of interest. It is further said that in the light of sections 5(1) and 6 of the Conveyancing and Property Ordinance, Cap. 219 and the decision in *Ho v. Shatin Centre* stem from a complete misapprehension of the facts of the case. The undisputed fact is that petitioner is the registered owner of the Shatin Centre property. By the time of the hearing on 11 September 2013, the respondent had not filed a Form E. He had neither claimed to have an interest in the Shatin Centre property nor sought any relief in respect of the property. There was simply no suggestion that the petitioner's legal title did not carry with it the beneficial interest of the property. There was no issue of effecting a transfer of the beneficial interest in the property, be it to the petitioner or to the respondent. Accordingly, from an objective and layman's point of view, there was no ambiguity in the words of the petitioner when she informed the Deputy Judge that the property would all go to her. There was no need for any clarification. Given that the petitioner is the registered owner and the respondent was not asserting that she did not have beneficial interest in the Shatin Centre property, there is no proper factual support for Mr Ho's argument that the Deputy Judge meant that the petitioner would remain as the legal owner while the respondent would continue to be the beneficial owner. Likewise, the argument that the parties had not agreed on a transfer of interest is wholly misplaced. The parties agreement, as reported by the petitioner to the court at the hearing and as found by the Deputy Judge, was only that the Shatin Centre property would go to the petitioner. No transfer of interest in the property was involved since the petitioner is the registered owner and there was no issue at the hearing that the beneficial interest in the property did not also reside with her. Mr Ho sought to rely on the agreement that the respondent shall continue to make mortgage repayment, rates and management fees as affording evidence of [the] existence of constructive and/or resulting trusts. We are unable to accept this argument. Quite apart from the fact that the respondent never asserted any interest in the Shatin Centre property at the hearing, the mere fact that the respondent has been discharging the mortgage repayments and other outgoings does not give rise to a constructive and/or resulting trust in his favour. As to the second ground of appeal, Mr Ho argued that the Deputy Judge was functus officio and did not have power to grant the amendment under Order 20 rule 11 because it was not a clerical mistake or an error arising from accidental slip or omission. The argument is premised on his contention that the parties had not reached an agreement on the transfer of interest in the Shatin Centre property. We have for reasons set out above rejected the contention. The amendment to the 11 September 2013 is to record the parties agreement that the Shatin Centre property shall all go to the petitioner. This agreement was related to the Deputy Judge at the hearing, but was omitted from the formal order. It is open to the Judge to give leave to amend under Order 20 rule 11. For the above reasons, none of the intended grounds of appeal enjoys reasonable prospect of success. There is also no other reason in the interest of justice for the intended appeal to be heard by the Court of Appeal. We therefore refuse leave to appeal. As the intended appeal is totally without merit, we further order pursuant to Order 59 rule 2A(8) of The Rules of the High Court that no party may request a reconsideration of our determination under rule 2A(7) at an oral hearing inter partes. Costs Previously, the petitioner had applied by summons dated 21 June 2016 for leave to lodge her

skeleton argument, list of authorities and statement of costs out of time. In granting the application, Lam VP had ordered that the costs be borne by the petitioner to be assessed together with the costs of the respondent's leave to appeal application. As to the respondent's leave to appeal application, applying the normal rule of costs follow event, we order the respondent to pay the petitioner the costs of the application. The petitioner asks for costs on indemnity basis. While we accept that the intended appeal is without merits, we do not think this is such a bad case, or that there are other circumstances, warranting awarding costs on a higher basis. Costs would be assessed on party-and-party basis. Both the petitioner and the respondent have provided statements of costs for summary assessment. They both fail to comply with Practice Direction 14.3 in that (i) they do not provide a statement of costs in the prescribed format; (ii) they do not have the solicitors' certification as required by paragraph 10; and (iii) contrary to paragraph 13 of the Practice Direction, they have claimed the costs of preparing the statement of costs (i.e. item (1)(e) of the respective statement). The parties' solicitors are reminded of the importance of strict compliance with the Practice Direction. Their attention is drawn to paragraph 15 of the Practice Direction, pursuant to which the court may impose costs sanctions against parties and their legal representatives for failure to comply with the Practice Direction without reasonable grounds. With respect to the respondent's costs of the summons of 21 June 2016, we assess it at \$1,500. As to the petitioner's costs of the leave to appeal application, we take note of the fact that this is not a complex matter, and the documents and arguments in this application are the same as the leave application heard before the Deputy Judge. We are of the view that the time incurred by the main fee-earner is excessive on party-and-party basis in respect of: (i) perusal of papers (item (1)(a), (b), (c), (d) and (f)); and (ii) corresponding with the petitioner and counsel (items (3)(a) and (4)(a)). There is possibly an element of overlapping between items (3)(a) and (4)(a). The disbursement item should also contain proper breakdowns. Taking a broad brush approach, we summarily assess the petitioner's costs at HK\$38,000.

Disposition

Accordingly, we make the following orders: The respondent's summons is dismissed. No party may request a reconsideration of the determination of the respondent's summons under Order 59 rule 2A(7) of The Rules of the High Court at an oral hearing *inter partes*. The costs to be paid by the petitioner to the respondent on the summons filed on 21 June 2016 are summarily

assessed at \$1,500. The respondent pays the petitioner the costs of the application for leave to appeal summarily assessed at HK\$38,000. (Peter Cheung) Justice of Appeal (Carlye Chu) Justice of Appeal Ms Fiona K S Chan, instructed by Yung & Au, for the petitioner. Mr Matthew Ho, instructed by Mike So, Joseph Lau & 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 h/s2 h/s2 h/s2 o\oGo h/s2 h/s2 |m^R h :f umcZcNJ gdMBi gdsg {qkqkgT h :f hMBi h :f hMBi &`#\$ wbQIEbEA7E7E7 gdsg [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"/> A{ d 32DV 32DV setup Normal.dotm Judiciary Microsoft Office Word Judiciary hong Kong 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="{DFF3C88B-C09B-48ED-B5CD-F036C2BB8706}" 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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