

HONG KONG / JUDGMENT

KEIKO MARUKO v. YOSHIO MARUKO

COURT

Court of Appeal

DECIDED

4 August 1995

CASE / FILE NUMBER

CACV32/1995

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj CACV000032/1995 IN THE COURT OF APPEAL 1995, No.32 (On appeal from the District Court of Hong Kong Divorce Jurisdiction Suit No.5812 of 1991) (Civil) BETWEEN KEIKO MARUKO Petitioner (Respondent) YOSHIO MARUKO Respondent (Appellant)

Coram: Hon Mortimer, Liu and Ching JJ.A. Date of hearing: 26th July 1995 Date of handing down reasons for decision: 4th August 1995

DECISION

Ching J.A. : (delivering the decision of the Court) On 28th September 1994, the Judge in the Family Court delivered a judgment by which he ordered the husband to pay to the wife the sum of \$10,000,000 and costs. \$5,000,000 was to be paid in one sum on or before 31st December, 1994. The balance was to be paid in five equal yearly instalments of \$1,000,000 each on or before 31st December each year commencing on 31st December, 1995. Upon the payment of the first \$5,000,000 the wife was to transfer to the husband all her interest in the former matrimonial home and in a condominium unit in Thailand, both of which had been purchased in their joint names. Otherwise each was to retain all property in his or her name. It is agreed that the wife's 10% shareholding in a family company, Aphro International Limited, had been overlooked and that it was intended that that shareholding should also be transferred to the husband. The parties are Japanese, both being in their middle to late forties. They married in 1972 in Japan and came to make their home in Hong Kong shortly thereafter. There are two children of the family, a son Yuki, born in January, 1974, and a daughter Miki, born in September, 1976, both in Hong Kong. The husband and the two children hold the status of landed immigrants in Canada, where it appears they intend to live. Yuki intends to study for another year or two. Miki has had a setback but intends to resume her studies, which it is thought might take another four years, in the United States of America. When the parties married money was not plentiful and both worked. They have achieved considerable success. Apart from her employment the wife gave private

lessons in the Japanese language and in the electronic organ. Her last employment was with Thomas Cook where at the time of her resignation she was a sales and marketing manager at a monthly salary of \$43,150 with an annual Chinese New Year bonus of an extra month. She was entitled to an annual airfare allowance for herself and her family to the extent of \$40,000. Previously she had worked for Northwest Airlines in a position which also entitled her to first class air travel for herself and her family between Hong Kong and the United States of America. She resigned from Thomas Cook during the course of these proceedings in order to look after and to spend more time with Miki during her difficulties. The husband was and is in the garment field, basically as an agent selling clothing to Japan. Some years ago when his employers closed down their business he began his own, trading as a sole proprietor under the style or name of Aphro Enterprises. This was incorporated as Aphro Enterprises, Ltd., in the mid 1980's and was and is his main business. When it was incorporated he allotted 10% of the shares to the wife and 90% of the shares to himself. His clients are Japanese and the business depends upon his personal contacts. He has been successful. The company owns three properties in Hong Kong. He has interests in other companies some of which own properties and he has properties in his own name apart from those in which he and the wife are joint owners. There was no direct evidence of the standard of living but clearly it must have been good. The expenditure by way of credit cards each month was not inconsiderable. There are club memberships including membership of golf clubs and in particular there is a debenture in the Discovery Bay Golf Club which is now worth about \$1,250,000. The divorce was occasioned, if not caused, by a relationship which the wife formed with the Co-Respondent, a Canadian national. The wife now lives with him and pays her own way, broadly speaking, other than for rent. The relationship has lasted for about five years. The wife feels that the relationship is a stable one which she hopes will progress. There are, however, no plans for marriage. The Co-Respondent has been divorced twice and the wife now once and it is not possible in these times to see where this relationship might lead. In his appeal the husband, of course, claims that he has been ordered to pay too much. One of his arguments was that the Judge has, or may have, applied a mathematical formula of one-third of the total assets to the wife and two-thirds to the husband. It is true that the award roughly results in these apparent proportions. However, there is no indication that the Judge applied any mathematical formula and it is not possible to work backwards from the result to argue that he did. Mr Ramanathan, for the husband, argued that the Judge accepted the wrong approach in valuing Aphro Enterprises, Ltd. The wife had the business valued by and called as her witness Mr N. Allen, a well-known and highly respected accountant. He arrived at his conclusion by taking the higher of the net asset value and the value calculated by the earning multiples method. He used a factor of four rather than the 12 or 13 which might be used for a publicly listed company. He valued the company at just over \$17,000,000. Mr Ramanathan asserted that as there was no intention of selling the company and as its business depended upon the husband's personal contacts the proper valuation for the purposes of these proceedings was just under \$11,000,000 being the net asset value. Mr Ramanathan also complained that the Judge had misunderstood Mr Allen's evidence in thinking that Mr Allen had allowed for contingencies. The difficulty facing the husband is that Mr Allen applied the conservative factor of four and it may well be that that factor does take contingencies into account. Mr Allen was not seriously attacked in cross-

examination in this respect. More importantly, as the argument progressed, it seemed that an over-emphasis was being placed on the value of the company. Section 7(1)(a) of the Matrimonial Proceedings and Property Ordinance, Cap.152, requires the Court to have regard to the income and earning capacity of the parties as well as their property. So far as property is concerned, the husband has assets other than his shareholdings in the company. He also has a very large earning capacity whether he chooses to exercise it within the framework of a limited company or otherwise. In the present case no difficulty was demonstrated in paying the first \$5,000,000. Indeed it was paid before the parties came before us. Nor was it shown that there would be any difficulty in paying the five instalments of \$1,000,000 each. Indeed, after we had announced our decision, the parties agreed that the second tranche of \$5,000,000 should be paid in three rather than five years. Mr Ramanathan put before us the basic and well-known proposition that a lump sum award should not be one which cripples the husband's business. Basic and well-known though the proposition may be, there was simply no evidence that the husband's business would be crippled by the award. Mr Ramanathan next complained that the Judge had not taken into account the wife's earning capacity. In his judgment he said : ".....(c) the wife though free to rejoin the work-force, should not be the victim of an award which compels her to do so. The resources available and her contribution to them allow for an award that makes this optional." Mr Ramanathan points out that the wife was earning in the region of \$600,000 per annum and had other perquisites. He reminds us that in her affidavits she had proceeded upon the basis that she would be working and he questions the necessity of her resignation and subsequent failure to resume work. Finally he points out that this is not a case where there is so much money available that the husband could pay a sum sufficient for the wife to become a lady of leisure. There is considerable force in these arguments but they are to be tempered by the following. Insofar as the resignation is concerned, the question is largely irrelevant. The factor to be taken into account is the wife's earning capacity, not her actual earnings. In her favour it is to be said that she was told that Miki was suffering from a serious mental disorder. Happily, that seems to have been something of a false alarm but as a caring mother her concern cannot be faulted and there is no evidence that she could have taken leave of absence rather than resign. Insofar as her present earning capacity is concerned, she has never denied it. After the trauma of these proceedings has been finally put behind her, it may well be that she will again go out to work. An award of \$10,000,000 added to her present assets of about \$650,000 but less such sums as she may have to pay towards costs would hardly allow her to live as a lady of leisure, especially not to the standard to which she was accustomed. The judgment on this point could have been more happily worded but it is clear that the attack upon it omits an important consideration which the Judge took into account, namely her contribution to the family which was a valuable one. Perforce, the husband worked long hours and was away from Hong Kong for considerable periods. It was left to the wife to look after the home and the children, albeit with the help of servants. That is a contribution not to be ignored. Throughout the marriage she contributed financially at least by way of airfares and it is to be noted that it is not alleged that she spent all or the major part of her earnings on herself. A fair reading of this part of the judgment is that in all of the circumstances the wife should have enough for at least her everyday needs to a decent standard but that she could choose to work if she wanted more. Finally, the gravamen of the

husband's argument was that the award was simply too much having regard to their individual assets. The husband's assets were calculated as being just under \$22,000,000 and the wife's at just over \$4,000,000. The calculation, however, was defective. It proceeded on the basis that the company was worth just under \$11,000,000 rather than just over \$17,000,000. It ignored the fact that the wife was to transfer back her shareholding in Aphro Enterprises, Ltd., and her share of the matrimonial home and the condominium in Thailand. It deducted from the husband's assets as a present liability the future expenses of the children's education. It ignored the husband's income and the possible appreciation of his assets. There may be genuine disagreement within the permissible generous ambit of opinion as to what the wife should have but certainly it is not shown that the wife is being given too large a proportion. The husband's appeal should therefore be dismissed with costs, to be taxed if not agreed. We were told by Miss Alice Mok, for the wife, that the wife had lodged a cross-appeal only because the husband had appealed. Two questions arose. The first was whether the husband had made full disclosure and, if not, whether and by how much the wife's award should be increased. The second was whether security for payment of the second tranche of \$5,000,000 should be ordered. The Judge found that the husband had no hidden resources by inference or otherwise. Miss Mok points out that the husband was less than forthcoming in his disclosure. Notwithstanding his duty to make full and frank disclosure without being asked, it had been necessary to serve a questionnaire. The husband took an enormously long time to answer. When he did, the answers were unsatisfactory. Some of the answers proved to be incorrect or untrue. Others were incomplete. So, for instance, a further bank account was disclosed a day before a resumed hearing after a lengthy adjournment occasioned by the illness of the son of the husband's counsel. The disclosure was accompanied by a single sheet of a bank statement showing an overdraft of nearly \$1,000,000. No credible explanation was advanced for the failure to make earlier disclosure. In evidence, on many occasions the husband claimed that the accountant of his company could supply the answers to questions. If so, the need for the accountant to file an affidavit should have been apparent. None was filed. When leave was given to call the accountant nonetheless, he could give no relevant information. Most importantly, the husband's bank statements showed deposits totalling over \$3,500,000. He claimed that the money belonged to Japanese clients for whom he was holding on trust. He had no records. When asked to explain payments out from his bank accounts he identified only two of them as repayments to those clients in a very small proportion to the whole. This was, as Miss Mok asserted, most unsatisfactory. There were other matters. For instance, one of the bank accounts disclosed showed activity on the part of Aphro Enterprises long after it had ceased to do business and after Aphro Enterprises, Ltd., had been incorporated and there was no explanation. The need for full and frank disclosure in proceedings such as these is basic. In the present case, on the documents and on the record, grave suspicions must arise that the husband had not fulfilled his obligations. The Judge found that he was a very active businessman spending much of his time out of Hong Kong and that the sheer volume of transactions and the lapse of time made it plausible that there should be gaps in his memory and in his records. The Judge, of course, had the benefit of seeing and hearing the witnesses even though that benefit, in the present case, may have been smaller than usual. It cannot be said that he was clearly wrong. However, even if he was wrong, the question would arise as to the amount

by which the wife's award should be increased. The difficulty here is that there was little evidence as to the actual standard of living enjoyed by the parties and as to the actual amounts needed by the wife. To increase the award by way of inference against the husband in these circumstances would be to take a shot in the dark. The second point in the wife's cross-appeal was settled by agreement and therefore did not fall to be argued. The husband agreed that the second tranche of \$5,000,000 was to be paid within three years rather than five by way of two instalments of \$1,666,667 each on or before 31st December, 1995 and 1996, and a final instalment of \$1,666,666 on or before 31st December, 1997. Meanwhile, the matrimonial home and the Discovery Bay Golf Club debenture is to stand as security for these payments. The parties should have liberty to apply in case of difficulty in resolving the form or terms of the security. In the circumstances the wife's cross-appeal is also dismissed. She has succeeded in obtaining her security and, indeed, in shortening the time for the payment of the second tranche of \$5,000,000. However, more should have been done to resolve these issues before the appeal was heard. In the circumstances it would be fair for the husband to have half of his costs in the wife's cross-appeal, to be taxed if not agreed. (Barry Mortimer) (B. Liu) (Charles Ching) Justice of Appeal Justice of Appeal Justice of Appeal Representation: Ms Alice Mok, inst'd. by Stevenson Wong & Co., for Petitioner/ Respondent Mr K. Ramanathan, inst'd. by M/s So & Co., for Respondent/Appellant PAGE - PAGE * MERGEFORMAT - &`#\$ CACV000032/1995 KEIKO MARUKO v. YOSHIO MARUKO Normal tempuser Microsoft Word 9.0 Judiciary Hong Kong SAR Judiciary Hong Kong SAR CACV000032/1995 KEIKO MARUKO v. YOSHIO MARUKO Title Microsoft Word Document MSWordDoc Word.Document.8 CACV000032/1995 KEIKO MARUKO v. YOSHIO MARUKO Normal tempuser Microsoft Word 9.0 Judiciary Hong Kong SAR Judiciary Hong Kong SAR CACV000032/1995 KEIKO MARUKO v. YOSHIO MARUKO Title

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=12392

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/keiko-maruko-v-yoshio-maruko-1995>

Prepared on 26 October 2026 · Esheria