

HONG KONG / JUDGMENT

KGL v. CKY AND ANOTHER

COURT

Court of First Instance

DECIDED

26 June 2007

CASE / FILE NUMBER

HCMP661/2007

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bjbj HCMP 661/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL MISCELLANEOUS PROCEEDINGS NO. 661 OF 2007 (ON AN INTENDED APPEAL FROM FCMC NO. 1453 OF 2002) BETWEEN Petitioner and 1st Respondent 2nd Respondent Before : Hon Cheung JA and Yuen JA in Court Date of Hearing : 22 June 2007 Date of Decision : 26 June 2007 D E C I S I O N Hon Cheung JA : AUTONUMOUT This is an application by the petitioner for leave to appeal against the judgment of H H Judge Chu given on 18 October 2006. The petitioner had previously applied for leave to appeal before the judge and Rogers VP. They refused the application.

Background

AUTONUMOUT The petitioner and the 1st respondent were former husband and wife. The 1st respondent was ordered to pay maintenance to the petitioner which she was unable to enforce. The 1st respondent had a relationship with the 2nd respondent. The petitioner discovered that the 1st respondent had made various payments to her. She took out an application under section 17 of the Matrimonial Proceedings and Property Ordinance (Cap.

192) (the Ordinance) to set aside the dispositions. AUTONUMOUT The 2nd respondent attended the hearing but the 1st respondent did not. The judge set aside the disposition of \$1,500,000 made by the 1st respondent to the 2nd respondent. However the judge also found that the 1st respondent was indebted to the 2nd respondent in the sum of \$480,000. Hence she deducted this sum from the \$1,500,000 leaving a balance of \$1,020,000. The judge ordered the \$1,020,000 to be transferred and assigned by the 1st respondent to the petitioner. The petitioner s case AUTONUMOUT Mr. Clough, counsel for the petitioner, asked for leave to appeal against the order of the judge deducting \$480,000 from the \$1,500,000. He argued that the effect of the judge s order is to defeat the purpose of the legislation which was intended to bring back into the family asset pool dispositions that would have the effect of reducing the amount of any financial provision which might be so granted, or frustrating or impeding the enforcement of any order which might be or has been made at the instance of the applicant under the relevant provisions of the ordinance . He submitted that the proposed appeal involves the following point, When a court has set aside a disposition on the basis

that it was made with the intention of defeating the applicant's claim is it within the discretion of the court to reduce that sum by a debt incurred subsequently (to the disposition set aside) to the person to whom the disposition was made? . Section 17 AUTONUMOUT The relevant part of section 17 of the Ordinance is as follows

- (1) Where proceedings for relief under any of the relevant provisions of this Ordinance (hereafter in this section referred to as financial provision) are brought by a person (hereafter in this section referred to as the applicant) against any other person (hereafter in this section referred to as the other party), the court may, on an application by the applicant- if it is satisfied that the other party has, with the intention aforesaid, made a disposition to which this paragraph applies and that if the disposition were set aside financial provision or different financial provision would be granted to the applicant, make an order setting aside the disposition and give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payment or the disposal of any property). The mode of proceedings AUTONUMOUT The judge in her decision on refusing leave dated 21 March 2007 stated this
18. At the hearing for ancillary relief on 15th September 2004, Mr Clough appeared for the Petitioner, and both the 1st Respondent and the 2nd Respondent were absent. During this hearing, Mr. Clough sought various transfer of property orders. He further sought only a nominal maintenance order for the Petitioner and an order that her application for a lump sum be adjourned sine die, with liberty to restore. My understanding at the time was that Mr. Clough had wanted to preserve the right of the Petitioner to re-open her applications for maintenance and lump sum/s if and when the 1st Respondent surfaced, and/or if and when there was any new evidence as to the family assets.
19. Among the various transfer of property orders then sought by Mr. Clough, he specifically sought an order for the 1st Respondent to transfer to the Petitioner the debt of HK\$1,545,000 owing from the 2nd Respondent to him, upon this Court setting aside the said dispositions. I recall asking Mr. Clough to propose the exact form of the order he was seeking, and he proposed the form of the order for the Court to consider and make, submitting that this court had the jurisdiction to make an order for a transfer of debt, such being a transfer of property order under s. 6 of MPPO, and the debt being a property . I accepted his submissions and proceeded to make an order in terms of Order 19 of the Ancillary Relief Order.
20. Hence, paragraph 19 of the Ancillary Relief Order was a transfer of property order and not a consequential direction , as referred to in paragraph 11 of his 2nd Submissions.
21. To put it simply, what the Petitioner is now seeking leave to appeal against is an order for ancillary relief, namely a transfer of property order against the 1st Respondent.

22. The 2nd Respondent has submitted that the s. 17 application was heard in the context of the overall claim for financial provision by the Petitioner, and that the factors in s. 7 of MPPO are relevant.
23. During the Re-hearing, the 2nd Respondent was the only person who gave oral evidence.
24. I accepted her evidence regarding a sum of HK\$45,000 being used for gifts to the 1st Respondent's parents, and made a deduction of the said sum of HK\$45,000 from the total dispositions of HK\$1,545,000 which I was asked to set aside. Mr Clough seems to be content with this deduction.
25. I then further accepted the 2nd Respondent's evidence in relation to the sums totaling HK\$480,000, which I also deducted from the total sums of HK\$1,545,000. The order I eventually made is that the 1st Respondent is to transfer to the Petitioner the debt of HK\$1,020,000 owing to him from the 2nd Respondent, after taking into account the two deductions of HK\$45,000 and of HK\$480,000.
26. In my view, I am entitled to exercise my discretion when making ancillary relief orders and to make the deductions after considering all the evidence before me and all the circumstances under s. 7 of MPPO.
27. Mr Clough has not satisfied me that I was plainly wrong in the exercising of my discretion, and thus in my view, the Petitioner has no realistic prospect of succeeding on the appeal. (emphasis added) My view AUTONUMOUT If the judge was asked, apart from avoiding the disposition, to make financial provisions for the petitioner, I cannot see how she could be faulted when at the time when she made the financial provision orders, she took into account the sum that was due from the 1st respondent to the 2nd respondent and deducted it from the amount of disposition that had been set aside. Irrespective of the merits of the point of law raised by the petitioner, the petitioner had chosen to adopt and agree to a mode of proceedings which entitled the judge to exercise a discretion by considering the actual amount of money that was available to the 1st respondent for the purpose of making financial provisions for the petitioner. She was entitled to deduct the sum in question. Rogers VP in refusing leave stated that in the light of the decision of 21 March 2007 I see no reasonable prospect of success. I agree with this view. Construction point AUTONUMOUT The intention of section 17 is to be ascertained by its construction. There is great strength in Yuen JA's view expressed during submission by counsel that section 17(1)(b) itself confers a discretion on the judge when making consequential orders upon setting aside the dispositions which after all were voidable and not void from the beginning. However, this being a leave application, it is not necessary to express a final view on the matter. In any event, as pointed out earlier, in view of the way the case was conducted before the judge, this issue cannot be the subject matter of an appeal at all.

Conclusion

AUTONUMOUT I would dismiss the application. Hon Yuen JA: AUTONUMOUT I agree. (Peter Cheung) (Maria Yuen) Justice of Appeal Justice of Appeal Mr. Neal Clo 1udk 1udk U V A B C D E F G H I J K L M N O P Q R S T U V (#p# (#p# (#p# ~smsmememe (#p# r p# r p# r p# r p# "@AB9D / Jz @m2z]C]6 -?jx uxB26I]C]6 & 6" abc-Cheung-HCMP.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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