

HONG KONG / JUDGMENT

LMYM v. LSW

COURT

Court of First Instance

DECIDED

26 October 2007

CASE / FILE NUMBER

HCMP1534/2007

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HCMP1534/2007

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

Miscellaneous Proceedings No. 1534 of 2007

(On an Intended Appeal from FCMC 11418 of 2004)

BETWEEN:

LMYM Applicant

and

LSW Respondent

Before: Hon. Yeung and Yuen JJA in Court

Date of hearing: 24 October 2007

Date of Judgment: 26 October 2007

JUDGMENT

Hon. Yeung JA: I agree with the judgment of Yuen JA. Hon. Yuen JA: There are two summonses before us, both filed by Ms Loke, one on 22 August 2007 (the August 2007 summons) and the other on 20 October 2007 (the 20 October 2007 summons). August 2007 summons The August 2007 summons is the main summons. Before I deal with it, it may be helpful to set out briefly the procedural and factual background. Brief procedural background On 15 March 2006 Deputy District Judge C.K. Chan granted LSW (Mr Lau), the petitioner in FCMC 11418/2004, a decree nisi of divorce based on 2 years separation from LMYM (Ms Loke). On 22 June 2007 Deputy District Judge Levy heard the application for ancillary relief. On 18 July 2007 the judge handed down a written judgment making various orders. On 14 August 2007 Ms Loke sought leave to appeal from

Deputy District Judge Levy's orders. The application for leave was rejected on paper by Tang V-P on 15 August 2007. On 22 August 2007 Ms Loke applied to this Court for leave to appeal by way of the August 2007 summons. Brief factual background The parties had signed a Deed of Separation on 5 August 2002 drafted by Ms Loke's solicitors, Mr Lau not being represented by solicitors. Before the Deed was signed, Mr Lau had assigned his interest in the matrimonial property to Ms Loke. At the time of the hearing before Deputy District Judge Levy, the value of the property was about \$2.6 million and the sum owing to the mortgagee was about \$350,000. Before the Deed was signed, Ms Loke had also transferred out of the parties joint bank account a sum of \$1.2 million which she then deposited into her sole account. After the Deed was signed, the net proceeds of sale of a property in Macau jointly held by the parties were also received by Ms Loke. The net proceeds amounted to about \$120,000. As for the Deed, it provided (amongst other things) that:

- Mr Lau would pay Ms Loke a monthly sum of \$12,100 until the Husband makes a lump sum payment of HK\$830,000.00 to the Wife in accordance with the provisions of this Deed (clause 3);
- Mr Lau shall on or before 31st August 2005 or upon ceasing to be an employee of The Hong Kong and Shanghai Banking Corporation Ltd., whichever is the earlier, make a lump sum payment of HK\$830,000.00 to the Wife for her benefit (clause 6); - the Husband and the Wife agree that the provisions contained in this Deed are in full and final settlement of all claims which either might have against the other including their respective estates on death, and the Husband and the Wife agree to request the Court to make the terms of this Deed an order of the Court upon the decree nisi being pronounced and to invite the Court to dismiss any claims for ancillary relief they may have against each other (clause 7). Mr Lau is still employed by HSBC. However he did not on or before 31 August 2005 make a lump sum payment of \$830,000 to Ms Loke pursuant to clause 3. Hearing before Deputy District Judge Levy for ancillary relief At the hearing before Deputy District Judge Levy for ancillary relief, neither party advanced a position which was in accordance with the objective construction of the Deed of Separation. Ms Loke argued that she was entitled to two sums of \$830,000 each. This was rightly rejected by the judge who held that the sum referred to in clause 3 was the same as that referred to in clause 6. The sum of \$3,670,000 sought by Ms Loke was clearly unjustified. As for Mr Lau, he said he thought the sum of \$830,000 was payable on 31 August 2005 or on his ceasing to be an employee of HSBC, whichever was the later, rather than whichever was the earlier. This was not accepted by the judge. However the judge took into account the fact that both parties agreed (and the judge also found) that there had been full disclosure of assets. The judge accordingly accepted that Mr Lau would only have the sum of \$830,000 available to him from his pension or provident fund when he left HSBC (the sum of \$830,000 being about half of the amount he would receive upon leaving HSBC). Deputy District Judge Levy's Decision Having correctly set out the applicable legal principles at paras. 19-22 of her judgment and considered the parties respective positions, the judge made the following orders:

- (1) Mr Lau to continue to pay Ms Loke \$12,100 a month on the 25th of each month, until either party died or Ms Loke remarried or the sum referred to in (2) below was fully paid, whichever was the earlier;
- (2) Mr Lau to pay Ms Loke the sum of \$830,000 within 14 days of his receiving his provident fund when he leaves HSBC;
- (3) no order as to costs. Intended Appeal It is from this decision that Ms Loke has sought leave to appeal in the August 2007 summons. Her grounds of appeal have been set out in an affidavit sworn on 14 August 2007 and expanded in written submissions. I have considered these grounds and concluded that the intended appeal is without merit. Discussion First, the passages under the title Grounds of Appeal which deal with procedural matters are immaterial. As for the substantive grounds (in contrast to procedural grounds), it is to be noted that Ms Loke has not asserted that the orders did not provide sufficiently for her. Ms Loke alleged instead that Mr Lau was unwilling to sign the Deed of Separation. However there is no evidence to support this. Ms Loke's allegation that some discrepancies in Mr Lau's signature indicates his unwillingness to sign the Deed is unsubstantiated. As for Ms Loke's argument that Mr Lau has breached some clauses of the Deed of Separation, the judge was well aware that he had not paid the sum of \$830,000 to Ms Loke on 31 August 2005. However the judge accepted the evidence that Mr Lau would only be able to pay this sum upon his leaving HSBC and it was on that basis that the judge made the order set out at para. 17(2) above. The judge was entitled in the exercise of her discretion to make that order on the evidence before her. As for Ms Loke's allegations concerning the decree nisi, it can no longer be disputed that the decree is a valid one. Ms Loke's application to appeal the decree nisi out of time has been dismissed by this Court (Cheung and Yuen JJA) in HCMP 1085/2006 on 17 July 2006. Leave to appeal to the Court of Final Appeal was refused on 18 October 2006.

Orders

In the circumstances, there being no merit in the intended appeal from Deputy District Judge Levy's order, leave to appeal is refused. Ms Loke's application for leave was rightly rejected by Deputy District Judge Levy and by Tang V-P. There is no reason whatsoever why this Court should grant a stay of execution of the order. Accordingly, paras. 1, 2, 3, 5, and 7 of the August 2007 summons must be dismissed. Paragraphs 4 and 6 of the August 2007 summons deal with the decree nisi. As I have pointed out in para. 23 above, Ms Loke's application for leave to appeal that decree out of time has been dismissed. There is no ground whatsoever for this Court to dismiss the petition now, or to set aside the decree nisi, or to stay execution of that decree. Although it appears a decree absolute has not yet been granted, there is no reason why it should not be granted. Accordingly, paras. 4, 6 and 9 of the August 2007 summons must also be dismissed. Further, para. 11 of the August 2007 summons seeks judgment on admissions for Case FCMC11418 of 2004 being a derivative of Case HCA1819 of 2006 and Case CACV 77 of 2007". HCA1819/2006 is an action where Ms Loke is the plaintiff and HSBC and the person for whom Mr Lau left Ms Loke are the defendants. CACV 77/2007 is an appeal from orders made in that action.

The application for judgment on admissions in either FCMC11418/2004 or in HCA1819/2006 in para. 11 is not understood. In any event this Court is a court of appellate jurisdiction and such an application should not have been made before it. Accordingly I would make no order on para. 11 of the August 2007 summons. As for para. 8 of the August 2007 summons, this was for an order that the Court approve the Wife's application to the Bank of Communications for her repayment on 04 November 2007 of the Mortgage Loan for her sole residential property at Felicity Garden so as to release her above-named Husband's position of being the guarantor under Article 2 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. As I have noted above, this Court is a court of appellate jurisdiction and such an application should not have been made before it. I would also make no order on para. 8 of the August 2007 summons. As for para. 10 of the August 2007 summons, this states the Court is under the obligation to handle the dispatch of monetary interest from The Hong Kong and Shanghai Banking Corporation Limited being the Husband's employer Bank to the above-named Applicant/Wife The monetary interest appears to be 4 supermarket coupons of \$50 each and \$100 in cash sent to Ms Loke. This is irrelevant to the issues before this Court. Insofar as Ms Loke considers that she is no longer entitled to receive the vouchers and cash as a decree nisi has been granted, it is a matter for her whether she decides to return them to the sender. The Court's jurisdiction is not engaged and para. 10 of the August 2007 summons should also be dismissed. As it is apparent from the above that Ms Loke has failed in the majority of her applications and has in any event not obtained any orders in her favour, there is no ground for making any order for the costs of this ex parte hearing.

20 October 2007 Summons I now come to the 20 October 2007 summons. The background to this summons was that on 11 October 2007 Ms Loke sent to the Registry a summons asking for an order that the word affidavit be substituted for the word affirmation in an order made on 28 September 2007 by Deputy District Judge K.W. Wong in FCMC 11418/2004 (the 11 October 2007 summons). Ms Loke had sent the 11 October 2007 summons to the Registry by post and in it she had written that the summons should be fixed before this Court for hearing on 23 October 2007. On 15 October 2007 a letter written on behalf of the Registrar was sent to Lok [MYM] at Ms Loke's address. In that letter the writer indicated that the application contained in the 11 October 2007 summons should be made to the judge who had made the order (i.e. Deputy District Judge K.W. Wong). The 11 October 2007 summons (and affidavit in support) were returned. The mistyping of the word in place of Loke in that letter caused Ms Loke to issue the 20 October 2007 summons for an order that the Court rectify the mistake and correct the name in the record of Case HCMP1534 of 2007 by the proper name with reference to the name of the above-named Wife so as to change the surname from LOK to LOKE accordingly under O.20 r.11 of R.H.C. The 20 October 2007 summons is completely unnecessary. The letter was not a judgment or order of the Court and Order 20 rule 11 does not apply. In any event, as perusal of the court file would have shown, the name of Ms Loke on the record of HCMP1534 of 2007 is accurate and needs no correction. There was simply a typographical error on the letter which was rectified by a letter dated 22 October 2007. In the circumstances the 20 October 2007 summons must be dismissed. Although Mr Lau was served with the summons, he did not appear and therefore it is not necessary to make any order as to costs. Costs orders The costs orders on both summonses are orders nisi. (W. YEUNG) (MARIA YUEN) Justice of Appeal Justice of Appeal

The Applicant, in person, present - PAGE - - PAGE - @HP LaserJet 1200 Series PCL 6 LPT1:
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