

HONG KONG / JUDGMENT

M v. M

COURT

Court of Appeal

DECIDED

21 May 2007

CASE / FILE NUMBER

CACV85/2007

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bjbj cacv 85/2007 in the high court of the hong kong special administrative region court of appeal civil appeal no. 85 of 2007 (on appeal from HCMP NO. 118 of 2007) IN THE MATTER of K, male, a child born on 3 October 2004 and IN THE MATTER of the Child Abduction and Custody Ordinance, Cap. 512, Laws of Hong Kong and IN THE MATTER of the Hague Convention on the Civil Aspects of International Child Abduction BETWEEN M Plaintiff Defendant Before: Hon Rogers VP, Le Pichon JA and Sakhrani J in Court Date of Hearing: 11 May 2007 Date of Judgment: 11 May 2007 Date of Handing Down Reasons for Judgment: 21 May 2007 REASONS FOR JUDGMENT Hon Rogers VP: This was an appeal from a judgment of Saw J given on 14 February 2007. The matter before the judge was an application under the Child Abduction and Custody Ordinance Cap.

512. That Ordinance provides that the provisions of the Convention on the Civil Aspects of Child Abduction (Convention) as set out in Schedule 1 shall have the force of law in Hong Kong. The judge dismissed the plaintiff s application that the child () be returned to Canada and made interim orders for access by the father. At the conclusion of the hearing, this appeal was dismissed with reasons to be given in writing.

Background

Both parents have had significant connections with Canada. The mother, the defendant in these proceedings, was born in Canada in 1970. At about the age of five she came to Hong Kong to live but completed her secondary and tertiary education in Canada. Since 1992 the mother has lived in Hong Kong. The father was born in Hong Kong in 1968 but he moved to Canada at a young age and was educated there. The parties met in Canada in 1998 and in April 2000 the father came to Hong Kong to look for a job. The parties were married in June

2001. In September of that year they went to Vancouver to attend a wedding. After that the father stayed behind to look for a job but, apparently because of the events of September 2001, he was unable to find any suitable employment. In 2002 the father worked in the I. T. Department of the bank in which the mother s family had a substantial interest. In February 2004 the father went to Canada again to look for a job but returned on hearing

that the mother was expecting their child. On his return he joined the successful business that the mother had established. At this stage the parties moved into a rented apartment in Tin Hau in July

2004. Then, as the judge recorded, in the latter part of 2005 the parties and K visited the father's parents in Vancouver and stayed for a time with them. Although the father appears to have been keen to return to Canada to live, it is clear that the mother was not and the judge accepted that the mother had reservations. The mother apparently agreed that the father should go to Canada to see if he could obtain employment whilst she and K remained in Hong Kong. The judge records that the mother said that she agreed to that proposal partly because she considered that it was unlikely that the father would obtain a job and secondly because she was distressed by his threats of divorce should she not comply with his wishes. In her affidavit, the mother says that she was deliberately noncommittal as to when she might go to Canada. In April 2006 the father went to Canada and succeeded in obtaining employment in July of that year. When the lease of the home in Tin Hau expired the mother and K moved to live with her parents in what the judge described as a spacious house in Jardine's Lookout. One matter which has been heavily relied upon by the father was that when the Tin Hau flat was vacated the mother arranged for the furniture and at least some of her and K's belongings to be shipped to Canada. The furniture was to be used in an unfurnished flat in the father's parents' house which the father was using. On 27 September 2006 the mother travelled to a Vancouver with K and stayed there until the end of October. In the period leading up to the mother's arrival in Vancouver she was clearly non-committal about the possibility of moving to Canada and the father was aware of that. The judge recorded at paragraph 43 of the judgment:
43. It is apparent to me from all of the material now filed that the mother was, in the period between April and late September 2006, becoming increasingly reluctant about the prospects of travelling to Canada at all, let alone the possibility of remaining there on a permanent basis. It is equally apparent from the material that the father was becoming more and more frustrated by what he perceived (and I believe correctly perceived) to be a reticence on the part of the mother to commit to moving to Canada permanently. The judge then went on to consider the various factors which were relied upon by the father as indicating that the habitual residence of the father and mother and, therefore, of K was in Vancouver. The crucial period was the period of 27 September 2006 to 31 October 2006. The judge considered the various matters very carefully and in particular the e-mail exchanges which had passed between the father and the mother. In paragraph 66 he set out the material parts of an e-mail sent by the mother to the father on 3 March 2006 and one from the father to the mother on 18 April 2006. There was a further e-mail of 12 September 2006 from the father to the mother and these together and separately indicated to the judge that the mother had not committed herself to living in Canada. The judge said at paragraphs 67 to 69 of the judgment:

67. To my mind, what appears from these and other email exchanges in evidence is that there was, as the mother states in her affidavit, a drifting apart in the period between April to September 2006. She says: Although the plaintiff might have made up his mind to move to relocate permanently to Vancouver this was certainly not my intention I had reservations throughout and doubts about the marriage.
68. I am satisfied that this is an accurate statement. She says in her affidavit:
41. In reality, I did not see how I could practically move to Canada as I had two businesses to run in Hong Kong. Furthermore, I wanted to see whether he would be able to secure long-term employment to determine whether this would indeed be a long-term move for the Plaintiff. In view of his previous endeavours, I did not, in all honesty, expect him to be successful in obtaining such employment.
42. As the months passed, we grew more distant. I was surprised to find that after 4 or 5 months apart, I did not really miss the Plaintiff. I also began to avoid speaking to him over the telephone, or through the web-cam, at the end of the summer as he became more and more adamant about [K] and my visit. We were also running out of things to say to each other.
69. What is not in doubt in my mind is that the visit by the mother and K to Vancouver commencing on 27 September was not intended by the mother to be a permanent relocation. The material before me clearly indicates that this particular trip was to be for a limited time. I am also satisfied that the father was aware of this prior to the date that the mother and K left Hong Kong for Canada. This appeal On this appeal, Ms SC, who appeared on behalf of the father, concentrated on what was the key point namely whether the habitual residence of K in the crucial period commencing 27 September 2006, when he left Canada with the mother, was Vancouver. This is a necessary ingredient in showing wrongful removal or retention of a child which would fall within the terms of Article 3 of the Convention. In this regard it was argued that the father and mother had a common settled intention to live in Canada and that that could not be changed unilaterally without communication. Initially Ms Eu argued that that common settled intention had been formed prior to the marriage and certainly had been maintained after the marriage. Later in the course of argument, Ms Eu mollified that by indicating that the discussions between the parties prior to the marriage were background material and that the common settled intention had been formed prior to the father's departure for Canada in the first part of 2006. That latter way of putting the submission accorded more with the way in which the case had been presented on behalf of the father in his founding affidavit: see paragraph 8 of the father's affidavit of the 3 January 2006 which was exhibited to the affirmation of Li Sau Lee affirmed on 17 January 2007. The mother answered those allegations and she satisfied the judge that she did not intend to relocate to Canada. In paragraphs 71 and 72 of the judgment the judge had said:

71. A very significant amount of material before me indicates an initial and then escalating reluctance on the part of the mother to relocate to Canada which by the time of the trip in late September was resolved insofar as the mother was concerned. I am satisfied that she had no intention of relocating to Canada on a permanent basis.
72. She may have intended, as she says, to return to Canada from time to time with K but that is not what is required to establish that K's habitual residence in Hong Kong had been lost and that he had become habitually resident in Canada. There was by the time that the mother and K arrived in Canada no agreement between her and the father to live together in Canada. That was the father's wish but it was not the mother's intention. There was no shared intention. The application must be dismissed. Eu attached particular significance to an e-mail dated 21 November 2006 sent by the mother to the father several weeks after her return to Hong Kong where the mother wrote: I do not want to move to Canada. I agreed to try it and to try again to save our marriage. It was suggested that this was an acknowledgement by the mother of a common plan to save the marriage by her going with K to Canada to join the father. It was said that this was similar to *Re (Minors) (Abduction) (No*
- 2) [1993] 1FLR 993 a case concerning a German mother and an English father. The family had previously lived in Scotland but had disposed of the business there and had gone to live in Germany. Waite J found that the essential nature and purpose of the sojourn in Germany was to provide a base for reconciliation and for planning a fresh start and that that constituted a settled purpose. In my view, *Re B* is of little assistance given that the critical question is a factual one, namely, whether there was any shared intention that the family should live in Vancouver. Each case must be decided by reference to its own facts. In my view the judge correctly stated the law and having carefully considered all the factors and judged what the mother had said against the contemporaneous e-mails he was, in my view, correct in his assessment of the situation. The various matters relied upon by the father do not demonstrate, either taken individually or collectively, that the mother did have the intention to reside in Vancouver. Looking at the facts, it appears that the mother had never formed that intention and the judge was quite correct in holding that the father had been aware, particularly in the period leading up to the mother's visit to Vancouver, that the mother did not have any intention of remaining in Vancouver with K. The strongest fact in favour of the father's case had been the shipment of the household effects to Canada. But given the circumstances of the father's need for furniture, the need to clear the Tin Hau flat and the fact that by no means all the personal effects of the mother, K and the maid had been shipped I do not consider it is open to this court to alter the judge's conclusion on the matter. Costs At the conclusion of the hearing this court made an order nisi of costs in favour of the mother. Attention had been drawn to the notes in the White Book under Order 121 against 121/0/5A which made specific reference to the case of *N O*, HCMP 4204/9898. That decision in respect of costs of a first instance application was given on 6 January 1999. In that case Hartmann J had said:

23. In the absence, therefore, of specific directions contained in the Child Abduction and Custody Ordinance, in my judgment, in Convention cases, our courts should adhere to the principles already established in children's cases and should be wary of awarding costs against an unsuccessful party except in exceptional circumstances. It is unnecessary and undesirable to attempt to limit or place into confined categories the cases which a court might, in Convention cases, regard as constituting exceptional circumstances. It must be observed that in the usual matrimonial custody cases the question at issue is the welfare of the child. The court has to consider, with all the help that the parties can give it, what is in the best interests of the child. In what has been referred to as Convention cases this is not necessarily so. The Convention cases are concerned with wrongful removal or retention of a child. It is thus a question of whether one party has acted wrongly. Indeed in this case the point at issue was the question of habitual residence. This was a question of fact. If that were established it would then have been said that the mother had acted in breach of the father's rights. The focus of these proceedings was thus the rights of the father as opposed to the best interests of the child. At first instance the applicant failed to establish the fundamental fact of habitual residence in Canada. The same point arose on appeal. It was thus, essentially, an appeal as to a finding of fact. Whilst I would not necessarily apply the same rule which has been developed in child custody cases to Convention cases, that matter does not arise acutely in this case as no application was made on behalf of the mother to disturb the order as to costs in the court below. However, when it comes to an appeal, where a party is claiming a breach of his rights but has failed to establish the criteria for his or her application because a key fact has not been established at first instance I see no reason why costs should not follow the event if the losing party seeks, unsuccessfully, to challenge that finding of fact. Hon Le Pichon JA: I agree. Hon Sakhrani J: I also agree. (Anthony Rogers) Vice-President (Doreen Le Pichon) Justice of Appeal (Arjan H Sakhrani) Judge of the Court of First Instance Ms Audrey Eu SC & Ms Anita Yip, instructed by Messrs Boase, Cohen & Collins, for the Plaintiff/Appellant Mr Enzo W H Chow, instructed by Messrs Hampton, Winter & Glynn, for the Defendant/Respondent PAGE - A B C D E F G H I J K L 1udk 1udk 2QX[2QX[2QX[2QX[H; < jFen & 6" ABC-Final (fair)1.dot setup Microsoft Word 9.0 Judiciary Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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