

HONG KONG / JUDGMENT

ML v. YJ

COURT

Court of First Instance

DECIDED

20 March 2008

CASE / FILE NUMBER

HCMC13/2006

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

bjbj

HCMC 13/2006

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MATRIMONIAL CAUSES NO. 13 OF 2006

BETWEEN

ML Petitioner

and

YJ Respondent

Before: Hon Lam J in Chambers (No open to public)

Date of Hearing: 5, 6 & 7 March 2008

Date of Decision: 7 March 2008

Date of Reasons for Decision: 20 March 2008

REASONS FOR DECISION

Cross-border divorces and background of the case

In these days, the courts often have to deal with litigations with cross-border elements. Matrimonial disputes are no exception. In the Hong Kong context, a substantial number of our families have links with more than one jurisdiction. In particular, it is not uncommon for a family here in which a spouse spends much of his or her time in mainland China or a family owning substantial assets both here and in the mainland. Shuttling between here and the mainland is a way of life for many local citizens.

When such a family breaks up, it can generate complicated legal problems in many aspects. To start with, parties may have disagreement as to the forum for getting a divorce. In an ideal world, the resolution of issues arising from the dissolution of a marriage should be litigated in one jurisdiction. But this is not always achievable.

In Hong Kong, we adopt the English approach in considering whether Hong Kong proceedings should be stayed by applying the principle of *forum non conveniens* (see *Louvet v Louvet* [1990] 1 HKLR 670, *DGC v SLC*, CACV 37 of 2005, 1 August 2005; *de Dampierre v de Dampierre* [1988] 1 AC 92). We also follow the English approach in exercising our *in personam* jurisdiction in granting what is known as anti-suit injunctions: *Asha Harkishin Premisingh v Harkishin Isarsingh Preminsingh Kinshinani* CACV 845 of 2000, 30 Nov 2001; *Airbus Industrie v Patel* [1999] 1 AC 119; *Turner v Grovit* [2002] 1 WLR 107).

Like commercial disputes with cross-border features where the courts of two different jurisdictions can properly be regarded as the logical forum (see *First Laser Ltd v Fujian Enterprises Co Ltd* HCA 4414 of 2001, 12 Dec 2002), the same can occur for matrimonial disputes. Thus in *W v W* [1997] 1 FLR 257, Holman J made these observations,

There is clearly a very considerable middle ground between these two tests which appears to be largely uncharted by precedent. There must be many cases and situations where the court cannot say that the foreign jurisdiction is

clearly

the more appropriate forum, yet where England is not necessarily the

natural forum

or where continuation of the foreign proceedings would not be vexatious or oppressive. Within that middle ground it seems that a party may be forced to litigate simultaneously in two jurisdictions.

This is what happened in the present case. There are parallel proceedings for divorce in Hong Kong and in Shenzhen. The parties were married in Shenzhen in April 1992. They had two children, one born in 1992 whilst the other one born in 1999. The family came to Hong Kong in mid 1990

- s. The Husband had businesses both in Hong Kong and mainland and there were matrimonial homes in both jurisdictions. Since 2003, the Husband had spent more time in the mainland than in Hong Kong. Whilst the Wife and the children mostly lived in Hong Kong, they would return to the Shenzhen matrimonial home every weekend. By early 2006, the marriage had broken down irretrievably. There are substantial assets both in Hong Kong and the mainland.

On 18 May 2006, the Wife presented a petition for divorce in Hong Kong. The Husband did not challenge the jurisdiction of the Hong Kong court. He filed a Form 4 on 15 June 2006 indicating an intention to defend the suit and advancing claims for custody and ancillary relief. The petition was amended by consent on 9 August 2006 and the Husband filed another Form 4 indicating he would not defend the amended petition. On 3

August 2006, the Wife filed her Notice of application for ancillary relief. Interim custody for the children was sought by both parties. On 15

September 2006, Deputy Judge Remedios granted interim custody of the younger son to the Wife. No interim custody order had been made regarding the elder son. Before that, on 1 September 2006, a consent order for interim maintenance pending suit was made. Parties have been content to treat that interim order as the order for maintenance pending suit since then.

On 13 November 2006, a decree nisi of divorce was granted by consent in the Hong Kong proceedings.

On 23 October 2006, the Husband issued divorce proceedings in the Shenzhen court. He sought financial relief regarding assets of RMB

14,658,030. On the materials before this court, those assets represented a small portion of the total assets in dispute. I am aware that the Husband said he did not own some of the assets alleged by the Wife to be owned by him beneficially. However, even on his own case, there are assets in Hong Kong that have not been put forward in the Shenzhen proceedings.

The Wife only learnt about the divorce proceedings in Shenzhen in November 2006. She made attempts to stop the Shenzhen proceedings, both here and in Shenzhen. Though she issued a summons in the Hong Kong proceedings to ask for an anti-suit injunction on 18

January

2007, she subsequently decided not to proceed with it. Instead, she applied for a stay of the Shenzhen proceedings in the PRC court. That failed on 26

March 2007. The Wife appealed in the mainland. The appeal was dismissed on 18 May 2007.

Meanwhile, the question of custody was heard in Hong Kong. On 23 May 2007, Recorder Yuen SC granted custody of both children to the Wife with reasonable access to the Husband.

Back in the mainland, the divorce case was heard on three days in between June and September 2007. The Wife was legally represented by mainland lawyers and took part in the proceedings. The Shenzhen court came to a decision on 6 November 2007. The decision included an order for divorce dissolving the marriage. It distributed the properties put forward by the parties in the Shenzhen proceedings (including two Hong Kong properties). It also rejected the Husband's claim for custody of the two children.

The consequence of parallel proceedings in both jurisdictions is well-described by Munby J in *R v R* [2005] 1 FLR 386 at para.56,

The consequence is that in a case where both the English court and a foreign court assert jurisdiction, where neither is prepared to relinquish jurisdiction and where there is no unconscionable conduct justifying the English court granting a permanent anti-suit injunction, the litigants will ultimately be left to litigate freely in both jurisdictions. In such circumstances there is almost bound to be a race, each party striving to be the first to obtain the more advantageous judgment in his or her preferred court

That is hardly desirable, but this is an area in which perfect justice is probably unattainable and even practical justice may not always be achievable.

Even though at times we have to accept that a race is inevitable, the court still retains a jurisdiction not to stop the race altogether, but to ensure the race is run on a level playing field and neither party steals the march by manipulating proceedings to his or her forensic advantage. Thus, the English courts have developed what is known as a *Herman* injunction. Since we are not dealing with such an application, I simply refer to the judgment Munby J in *R v R* [2005] 1 FLR 386 at paras.42 to 59 for a very illuminating account on that topic. What I want to highlight by reference to the jurisprudence on *Herman* injunction is that the court will intervene on the ground that it is unconscionable for a party to take procedural steps or points in one set of proceedings to gain unfair advantage over his opponent in the other set of proceedings. That is the rationale for *Herman* injunction. And I believe *Herman* injunction is but a facet of the public policy underlying our conflict of laws principles.

As I said, we are not dealing with *Herman* injunction. We are now further down the road. The PRC divorce had actually proceeded quicker than the Hong Kong proceedings. By a judgment of the Shenzhen Intermediate People

s Court pronounced on 14 November 2007, a divorce was granted. The court also granted an order regarding the distribution of some matrimonial assets. But there are quite substantial portion of matrimonial assets (some in Hong Kong, some hidden in the mainland according to the case of the Wife) that were not dealt with since they had not been put forward (or in the case of hidden assets in the mainland, the Wife, as permitted by the mainland laws, reserved her right in view of insufficient evidence she had).

At this juncture, it is necessary to mention another set of legal proceedings taken out by the Husband in Hong Kong. On 20 May 2006, the Husband issued a writ in HCA 1088 of 2006 against the Wife. In that action, the Husband claimed that the Wife held the assets and shares in several companies on trust for him. On its face, it is a proprietary claim based on alleged trust. Up to now, there is only an endorsement of claim. The Husband has not filed any Statement of Claim in the action. Some of the assets were sold and the proceeds were paid into court by consent. Further, again by consent, a monthly sum of \$450,000 was paid out from the money in court to the Wife. That figure matched the maintenance pending suit figure provided for in the consent order of 1 September 2006 made in the Hong Kong divorce suit.

It is noteworthy that those assets were not referred to in the PRC proceedings and therefore are not subject to any order for distribution in the PRC judgment.

The Husband

s case in the Hong Kong proceedings has always been that upon the termination of monthly payments funded by CMTIL (a listed company in Hong Kong in which he had been the vice-chairman) upon his departure from the management of CMTIL, he told the Wife that she could use the assets in Hong Kong for the maintenance of herself and the children. He explained why he commenced HCA No.

A1088 of 2006 in his Form E affirmed on 2 August 2006. As a result of that action, the proceeds of sale of certain properties were paid into court by the Wife. The Husband said the following regarding a settlement reached with the Wife on the proceeds,

A settlement was reached to deposit into the Court the net sale proceeds pending the determination of the ancillary relief application in the divorce proceedings.

The divorce proceedings referred therein are obviously the divorce proceedings in Hong Kong. It is thus the common intention of the parties that there would at least be a determination on the distribution of the Hong Kong assets identified in HCA No. A1088 of 2006 in the Hong Kong proceedings. The Husband had sought assistance from the Hong Kong legal system to procure a restriction on the Wife

s disposal of the Hong Kong assets. He also took active part in the Hong Kong divorce proceedings. In his Form E, he also claimed ancillary relief against the Wife. Having submitted to the jurisdiction of the Hong Kong courts, the Husband cannot be heard to dispute this court s in personam jurisdiction over him.

On 29 June 2007, this court gave directions for the substantive hearing on ancillary relief in the Hong Kong proceedings. It was known to all the parties that the hearing was to commence on 5 March 2008. Directions were also given for the filing of evidence.

Parties filed evidence in accordance with the directions and those embodied in the order of Hartmann J made in September 2007.

Further, the court also gave directions for a FDR hearing in the Family Court in December 2007.

Every step taken in these proceedings up to December 2007 indicated that the Husband was content with concurrent parallel proceedings: the PRC proceedings were to deal with some of the family assets whilst the Hong Kong proceedings would deal with those which had been left out of the scope of the PRC proceedings.

The application of the Husband

On 3 December 2007, the Husband took out a summons placing reliance on the PRC judgment dissolving the marriage and sought the following relief,

- (a) Stay of the Hong Kong proceedings permanently;
- (b) Striking out or dismissal of the Hong Kong proceedings;
- (c) Rescission, withdrawal or annulment of the decree nisi;
- (d) Declaration that the decree nisi shall not be made absolute.

The basic premise of the Husband is as follows: since the marriage had been dissolved by the PRC judgment, Hong Kong court no longer has jurisdiction to grant any decree absolute. Since an order for ancillary relief cannot take effect until the grant of a decree absolute, it would be futile to proceed with the ancillary relief hearing.

I agree that if the PRC judgment were recognized in Hong Kong, its effect would be that the marriage was effectively dissolved and Hong Kong court can no longer grant any decree absolute. I do not think the fact that a decree nisi had been granted could make any difference. Even though the wording of the decree nisi suggested that a decree absolute would be made if there was no person (other than the other party to the suit) showing cause why the decree should not be made absolute within 6 weeks, the decree nisi would not become absolute in the absence of an application, see Rule 65 of the Matrimonial Causes Rules; *Seaford v Seifert* [1968] P 53 at p.71D.

Whilst Section 17 of the Matrimonial Causes Ordinance and Section 18 of the Matrimonial Proceedings and Property Ordinance do not contain any explicit prohibition on the making of a decree absolute after a foreign decree has been granted to dissolve a marriage, I do not see any escape from that result. As held in *Seaford v Seifert* [1968] P 53, once a marriage is dissolved the court cannot dissolve it again by a subsequent decree absolute. I do not think it makes any material difference whether the marriage is dissolved by death or by a foreign decree recognized in Hong Kong. See also the discussion by at paras. 2 and 16 of the English Law Commission Working Paper No. 117 on Financial Relief after Foreign Divorce published in 1980 citing *Moore v Bull* [1891] P 279.

For this purpose, it is the date of the decree absolute that matters, not the decree nisi. A decree nisi does not have the effect of dissolving the marriage: see *Fender v St John-Mildmay* [1938] AC 1; *Manser v Manser* [1940] P 224.

This was precisely the reason why Ormrod J considered that it was necessary to accelerate the grant of decree absolute in *Torok v Torok* [1973] 1 WLR 1066. Had it been sufficient to preserve the jurisdiction of the court to deal with ancillary relief with a decree nisi, Ormrod J would not need to be bothered about the expedition of decree absolute.

Thus, even though on the wordings of Sections 4 and 6 of the Matrimonial Proceedings and Property Ordinance the court can make an order for ancillary relief after a decree nisi, that must be read together with Section 25(1)(b) of that ordinance. In a case where the court cannot grant a decree absolute, it is pointless to make any order for ancillary relief that can never take effect.

It follows from the above analysis that a foreign decree is something that an applicant for decree absolute should mention in his or her application under Rule 65(3) of the Matrimonial Causes Rules as circumstances that ought to be brought to the notice of the court. The respondent should be given an opportunity to be heard on the effect of such foreign decree before the court decides whether a decree absolute can still be granted.

Ms Eu SC submits on behalf of the Wife that this court could ante-date the decree absolute pursuant to Order 42 Rule 3(2) to a date prior to the PRC judgment to circumvent the difficulty occasioned by the dissolution of the marriage by the PRC judgment. With respect, I agree with Mr Shieh SC that such a course is not appropriate. Given that it is a matter that goes to jurisdiction, it would not be right for the court to ante-date a decree absolute which the Wife had not even applied before the PRC judgment, see *In re Keystone Knitting Mills*

Trade Mark [1929] 1 Ch 92 at p.107; *Kailay Engineering Co v Farrance* [1999] 2 HKC 765.

Thus, the crucial issue is whether the PRC divorce should be recognized in Hong Kong.

The custody order and maintenance for the children

Before I turn to that crucial issue, I wish to put a rider on the potential impact of the PRC divorce. The above analysis cannot have any impact on the custody order made by the Recorder in May 2007. A custody order does not depend on the making of a decree absolute. Neither is an order for maintenance of the children under Section 5 of the Matrimonial Proceedings and Property Ordinance.

Thus Mr Shieh readily accepts that this court must have jurisdiction to deal with the questions of maintenance for the children irrespective of its power to order ancillary relief for the Wife. Counsel suggests if the court accedes to the Husband

s application, the rest of the hearing can be utilized for determining maintenance for the children.

Once this is accepted, I see no basis to ask for a permanent stay of the whole suit. Nor do I see any basis for striking out the petition or dismissing the whole suit. At the highest, the Husband's application could only result in the dismissal of the Wife

s claim for ancillary relief. Also, this court could not grant a decree absolute. But I have reservations about rescinding the decree nisi. Though logically this should be done when the court concludes that a decree absolute should not be granted, it is a matter of discretion (see *S v S* [2002] 1 FLR 457). Ms Eu correctly points out that there was nothing wrong about the decree nisi when it was granted. It was simply overtaken by subsequent events. In the case of death of a party, it does not appear necessary to rescind a decree nisi. In view of my conclusion on the recognition of the PRC divorce, I prefer to leave the point open.

Should the PRC divorce be recognized?

Part IX of the Matrimonial Causes Ordinance provides for the recognition of overseas divorces. The English Law Commission Working Paper No.117 traced the origin of the English counterpart of these statutory provisions to the Hague Convention on the Recognition of Divorces and Legal Separation 1970. The Law Commission identified

limping marriage

as the mischief that the statute aimed to cure.

Counsel seemingly proceeded on the assumption that the PRC divorce is overseas divorce within the meaning of Section 55 of the Matrimonial Causes Ordinance. Mr Shieh submitted it is a divorce obtained by means of judicial proceedings in a country outside Hong Kong. There is no contrary submission from Ms Eu.

For my part, I have some doubts whether this is so. Hong Kong is part of the People

s Republic of China and it may not be correct to describe the PRC divorce as a divorce obtained in a country outside Hong Kong though it is definitely a divorce obtained outside Hong Kong.

Section 56(3) is a provision dealing with the situation where a country comprising territories with different systems of law. But that sub-section only put a gloss on the operation of Section 56(1) and (2). The whole of Section 56 presupposes that there is an overseas divorce. One must go back to Section 55 to see whether the divorce concerned is an overseas divorce. There is no equivalent of Section 56(3) in respect of Section 55.

I note that there is a specific section providing for the interpretation of the word

country

in Section 62(1). However, that subsection only deals with colonies or other dependent territories of the United Kingdom. It does not help with regard to mainland PRC divorce.

It may be that even if a PRC divorce cannot be recognized under Section 55, it may still be recognized under common law principle of recognition that is preserved under Section 59.

As I said, counsel have not addressed this court in details in respect of the applicability of Section 55 to PRC divorce. In the circumstances, notwithstanding my above misgivings, I shall proceed in this judgment on the assumption (but without deciding) that Section 55 is applicable.

Section 56 sets out the grounds for recognition. One of the grounds is that either spouse was a national of the country in which the divorce was obtained at the time of institution of the relevant proceedings.

It cannot be disputed that the Husband and the Wife were Chinese nationals when the PRC proceedings were instituted. The Shenzhen court had so decided and it is conclusive by reason of Section 58.

The crucial issue in the present context is whether recognition should be refused under Section 61. Section 61(1) is not applicable because at the time of the PRC divorce, the marriage was still subsisting notwithstanding the decree nisi granted in the Hong Kong proceedings. See the discussion above regarding the effect of a decree nisi under Hong Kong law.

Turning to Section 61(2), given the Wife

s participation in the PRC proceedings after her unsuccessful attempts to ask for a stay thereof, she cannot rely on the grounds set out in Section 61(2)(a). The question is whether recognition should be refused under Section 61(2)(b) on the ground that

its recognition would manifestly be contrary to public policy

.

Obviously, the recognition of foreign divorce serves a different purpose from the recognition of a foreign arbitral award. However international comity is a common concern underlying both regimes. It is therefore noteworthy that a similar ground for refusing enforcement of a Convention arbitral award is provided for under Section 44(3) of the Arbitration Ordinance. In that connection, the Court of Final Appeal gave some guidance on the meaning of public policy in *Hebei Import & Export Corp v Polytek Engineering* (1999) 2 HKCFAR 111. In particular Bokhary PJ said at p.123H,

In my judgment, the position is as follows. Before a Convention jurisdiction can, in keeping with its being a party to the Convention, refuse enforcement of a Convention award on public policy grounds, the award must be so fundamentally offensive to that jurisdiction

s notions of justice that, despite its being a party to the Convention, it cannot reasonably be expected to overlook the objection.

In the same case, Sir Anthony Mason NPJ observed at p.139 E to G that in such context public policy must be given a narrow construction and

it has been generally accepted that the expression
contrary to public policy of that country
means contrary to the fundamental conceptions of morality and justice.

With respect, I entirely agree with these observations. Even in the context of Section 61(2)(b) of the Matrimonial Causes Ordinance I have no doubt that a party seeking to oppose the recognition of an overseas divorce has to surmount a very steep hurdle. The public policy consideration under that section must be one that is consistent with our conflict of law policy.

Further, given the provisions in Section 61(2)(a), the public policy referred to in Section 61(2)(b) must be referring to factors other than those related to a fair opportunity to participate in or to contest the overseas divorce, see the judgment of Oliver LJ in *Chaudhary v Chaudhary* [1984] 3 All ER 1017 at p.1032 g to h.

Counsel refer this court to several English authorities on public policy in the context of refusal to recognize overseas divorce under the English statute of similar wordings. Without being discourteous to counsel, I do not propose to discuss all of them in this judgment as I do not think it is necessary. In *Chaudhary v Chaudhary* [1984] 3 All ER 1017 at p.1024g and j, Wood J had the following to say regarding the residual discretion to refuse recognition,

I do not believe that any judge would invoke the doctrine of public policy unless he felt that it was clearly right and just to do so.

The combination of circumstances which a court in this country may need to consider when exercising its discretion under the head of public policy are limitless and I would not seek to define any limits. To those who say that such a wide discretion brings uncertainty into the law, I would reply that in many branches of the family jurisdictions today there is an extremely wide discretion given to the court.

In *H v H* [2007] 1 FLR 1318 at p.1368, deputy High Court Judge Stephen Wildblood QC deduced the following propositions from the English cases on the topic,

- (a) The power to refuse recognition should be exercised sparingly;
- (b) The principle of comity is a relevant consideration;
- (c) The subsection confers a residual discretion;
- (d) The conduct of the parties leading up to the divorce may be a relevant factor;
- (e) Motivation (such as in the exceptional circumstances of *Chaudhary*) may also be relevant;
- (f) The consequences to the parties of a refusal of recognition may also be considered.

Both Mr Shieh and Ms Eu are happy to accept these as the relevant considerations that this court must take into account. What counsel disagrees with each other is what these considerations dictate as a matter of policy on the facts of the present case.

Ms Eu places reliance on the following judgment of Oliver LJ in *Chaudhary v Chaudhary* [1984] 3 All ER 1017 at p.1033g,

In my judgment it must plainly be contrary to the policy of the law in a case where both parties to a marriage are domiciled in this country to permit one of them, while continuing his English domicile, to avoid the incidents of his domiciliary law and to deprive the other party to the marriage of her rights under that law by the simple process of taking advantage of his financial ability to travel to a country whose laws appear temporarily to be more favourable to him.

As the deputy judge said in *H v H*, Chaudhary was an exceptional case. The husband in that case simply had no good reason to go to Kashmir other than obtaining a collateral advantage from a talaq divorce, see the reason given by Balcombe J in the Court of Appeal at [1984] 3 All ER 1036 for distinguishing that case with *Quazi v Quazi* [1980] AC 744.

The facts in the present case are materially different. The Husband said he needed a PRC divorce in any event given the lack of recognition of a Hong Kong divorce in the mainland. There is a difference in the expert opinions as regards the effect of Hong Kong divorce in the mainland after 1997. None of the experts have testified before this court. If necessary, I will prefer the opinion of the Husband

s expert since the Wife

s expert actually acted as her lawyer in the mainland proceedings. This casts a shadow over the impartiality of the Wife

s expert. Also, the main plank of the opinion of the Wife

s expert is the case of

ong Kong divorce could be doubtful.

Yet I do not think it is essential to resolve the difference in opinions in the present context. First, in my view it is enough that there is a doubt over the effect of the Hong Kong divorce in mainland. Unless such a doubt can be regarded as fanciful, the Husband cannot be criticized for applying for a PRC divorce.

Second, this is clearly not a case where the Husband chose a jurisdiction with no substantial connection with him to obtain a collateral advantage by seeking a divorce there. The marriage was contracted in Shenzhen and there are matrimonial homes in Hong Kong as well as Shenzhen. The Husband spent more time in the mainland whilst the Wife spent most of her time in Hong Kong. The family assets are located in both jurisdictions.

Even though the Petition pleads that both parties are domicile in Hong Kong, I do not think the court can ignore the reality. Domicile has not been the focus of arguments at the hearing. However, on the evidence available, it is at least arguable that the Husband had his domicile in the mainland when he commenced divorce proceedings in Shenzhen.

Furthermore, a talaq divorce is very much different from the Shenzhen proceedings in which the Wife had actively participated with legal representation.

One must also bear in mind that Chaudhary was decided before the important House of Lords decisions on conflict of law in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 and *de Dampierre v de Dampierre* [1988] 1 AC 92.

I do not think one can simply say this is a case similar to Chaudhary and refuse recognition on that basis.

In reading the English authorities, it has to be borne in mind that the jurisdictional difficulties for ancillary relief in cases of foreign divorce was solved in England by the enactment of Part III of the Matrimonial and Family Proceedings Act in 1984 on the recommendation of the Law Commission. Part III gives the English courts the jurisdiction to grant ancillary relief based on a foreign divorce provided that leave is granted by the English court on substantial ground to entertain such application.

We do not have the equivalent legislative changes in Hong Kong. Counsel are unable to tell me why Hong Kong still does not have similar legislation. Our legislature apparently has not been alerted to the potential seriousness of the problem. Given our status as an international city and the number of cross-border marriages we have in Hong Kong, I am of the view that the matter should receive urgent attention. Much of what had been said in the English Law Commission Working Paper applies to the situation in Hong Kong as well.

Bearing in mind international comity and what I have said at the beginning of this judgment, other than cases where an anti-suit injunction has been granted, it has to be accepted that it is not against our fundamental notion of justice for a party to pursue concurrent parallel divorce proceedings in a different jurisdiction where a petition has already been presented against him or her in Hong Kong. Since a race is bound to take place, it is equally impossible to say it is against our public policy to recognize an overseas divorce just because a race is won in the overseas jurisdiction.

It does not matter that the procedures in the overseas jurisdiction are such that it would be relative quicker for a divorce to be obtained there. Nor does it matter that the award that a spouse can obtain in the overseas divorce by way of ancillary relief is substantially less than what he or she can obtain in Hong Kong. Thus, Pearce J said as follows in *Igra v Igra* [1951] P 404 at p.412,

Different countries have different personal laws, different standards of justice and different practice. The interests of comity are not served if one country is too eager to criticize the standards of another country or too reluctant to recognize decrees that are valid by the law of the domicile.

But the case law on Hermain injunction illustrates that it is against our fundamental notion of justice if the race is distorted by forensic tactics. In such situations, we do not regard it as acting against international comity to interfere by exercising our in personam jurisdiction over a litigant to redress the distortion. I believe this is the relevant public policy one must pay regard to when consideration is given to Section 61(2)(b) in dealing with the recognition of an overseas divorce in concurrent proceedings type of situation.

In the present context, the distortion is not so much about the Husband obtaining unfair advantage in getting a head-start by making tactical stay applications in Hong Kong. I readily accept that this is not a case for Hermain injunction.

But there is distortion nonetheless. The distortion is in respect of the finishing line. As I have tried to demonstrate in the recital of the history of these proceedings, parties have all along been litigating on the basis that the two different sets of proceedings (one in Hong Kong and another one in Shenzhen) would deal with different parts of the family fortune. It was common intention that there will be an ancillary relief hearing in Hong Kong to resolve the distribution of the assets that have not been litigated in Shenzhen.

If this court were to accede to the present application of the Husband, it would in effect frustrate that common intention. Worse still, the Husband contended that the order for maintenance pending suit should be discharged if the Wife

s claim for ancillary relief is dismissed. The consent order in HCA No. A1088 of 2006 for monthly payment out to the Wife to match the maintenance pending suit would have to be discharged as well. The Wife would cease to be able to resort to the money in court for her continuous maintenance.

Further, it is the intention of the Husband to pursue HCA No.

A1088 of 2006 based on his proprietary interests in the assets identified in that action. In the context of that action, the court is confined to the consideration of strict property rights between the parties and could not exercise the power under the Matrimonial Proceedings and Property Ordinance notwithstanding that this should clearly be a case of property distribution between divorced spouses. This is hardly consistent with the underlying precepts of our matrimonial law that reflects our notion of justice and fairness between married persons.

In my judgment, to allow the Husband to do that is unconscionable. The Wife would have to face an entirely new battle and all the costs that have been incurred so far in the present proceedings would have been wasted.

In granting the PRC divorce, the Shenzhen court was not made aware of the Husband

s intention to use that divorce as a ground for frustrating the ancillary relief proceedings in Hong Kong.

It must be mentioned that this is not a case where the Husband had contracted another marriage during the interim period between the PRC judgment and this judgment. The Wife indicates to this court that she will abide by the distribution of properties by the Shenzhen court insofar as properties that had been subject to such distribution are concerned. She only intends to pursue in Hong Kong the undistributed assets and hidden assets. The only practical effect on this court's refusal to recognize the PRC divorce is to frustrate the Husband's latest tactical manoeuvre to terminate the Wife's ancillary relief application against him in Hong Kong.

Mr Shieh submits that the Wife can re-open the Shenzhen proceedings to seek further distribution of the family assets that have not yet been distributed in the PRC judgment. He informs the court that the Husband offers undertakings to give consent for such a course to be taken. But this is beside the point. The fact that the Wife can have redress in the Shenzhen court does not mean that it is not unconscionable for the Husband to derail the Hong Kong ancillary relief hearing at this late stage.

Mr Shieh urges this court to bear in mind that what the Wife is really interested in pursuing here is her case of hidden assets in the mainland and there would be problems in enforcement even if the Wife were successful. But the Wife's

ancillary relief application in Hong Kong is by no means confined to those hidden assets. The undistributed Hong Kong assets are also substantial. Further, the allegations of hidden assets are well canvassed in the evidence filed in the Hong Kong proceedings and the Husband has responded to the same in his evidence. As far as I can tell on the materials before me, very little had been done in the PRC proceedings in that regard. Thus, it was the common intention of the parties that the case on hidden assets would be litigated in Hong Kong. There may or may not be difficulties in enforcement. But that should not be a ground for condoning the frustration of the Hong Kong proceedings at this stage.

By analogy with the underlying rationale for the grant of Hermain injunction, given that it is unconscionable on the part of the Husband to manipulate the procedures to his advantage, it would have been open to this court either to grant an injunction to restrain the Husband from relying on the PRC divorce to prevent a decree absolute to be granted in these proceedings or to order the Husband to take whatever steps within his power to re-open the PRC proceedings (if necessary with the consent of the Wife) to procure the deferment of the effective date of the PRC divorce to a date after the grant of a decree absolute in the Hong Kong proceedings.

However, on the exceptional facts of the present case it is simpler for this court to hold that the PRC divorce should not be recognized under Section 61(2)(b) due to the unconscionable use of the PRC divorce on the part of the Husband.

For these reasons, I dismissed the Husband

s application on 7

March 2008.

Need for legislative reform

Even though I were able to hold on the exceptional facts of the present case that the Hong Kong ancillary relief proceedings should be continued despite the PRC divorce, it is solely due to my finding of the unconscionable use of the PRC divorce by the Husband. In a case where the court finds nothing unconscionable (and the pursuit of concurrent parallel proceedings in the absence of any anti-suit injunction cannot be regarded unconscionable per se), an overseas divorce will be recognized and because of Section 25(1)(b) of the MPPO a Hong Kong court will not be able to grant ancillary relief.

As mentioned above, there is an urgent need for the legislature to consider whether we should have in place similar legislation as Part III of the Matrimonial and Family Proceedings Act in 1984 bearing in mind the number of marriages with cross-border elements in our society.

I intend to release this judgment for publication with the names of the parties suitably edited with anonymity. Any party who has any comments on such a course should write to this court within 7 days.

(M H Lam)

Judge of the Court of First Instance

High Court

Ms Audrey Eu, SC & Ms Anita Yip, instructed by Messrs Chaine, Chow & Barbara Hung, for the Petitioner

Mr Paul Shieh, SC and Mr Jeremy S K Chan, instructed by Messrs Hampton, Winter & Glynn, 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

1udk

1udk

&`#\$

Dgy

i\$&J3

A^i)

Qy:X

Dgy

A^i)

Qy:X

Qy:X

Qy:X

'k^0

'k^0

'k^0

hca.dot

setup

Microsoft Word 9.0

Judiciary Hong Kong

Title

Microsoft Word Document

MSWordDoc

Word.Document.8

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=60957

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/ml-v-yj-2008-ml-v-yj>

Prepared on 28 October 2026 · Esheria