

HONG KONG / JUDGMENT

ML v. YJ

COURT

Court of Appeal

DECIDED

18 December 2009

CASE / FILE NUMBER

CACV89/2008

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bjbj cacv 89/2008 in the high court of the hong kong special administrative region court of appeal civil appeal no. 89 of 2008 (on appeal from HCMC NO. 13 of 2006) BETWEEN ML Petitioner Respondent Before: Hon Le Pichon, Cheung JJA and Sakhrani J in Court Date of Hearing: 14 December 2009 Date of Judgment: 14 December 2009 Date of Handing Down Reasons for Judgment: 18 December 2009 REASONS FOR JUDGMENT Hon Le Pichon JA: This was an application by the petitioner for leave to appeal to the Court of Final Appeal under section 22(1) (b) of the Hong Kong Court of Final Appeal Ordinance from a judgment of this court dated 17 June 2009. At the conclusion of the hearing, leave was granted. My reasons appear below. The appeal arose out of parallel divorce proceedings in Hong Kong and Shenzhen, with matrimonial assets situated in both Hong Kong and the PRC.

Background

For the detailed facts, reference should be made to the judgment of Lam J below and the judgments of this court. In brief outline, the parties are mainlanders who were married in Shenzhen in April

1992. By the mid-1990s, they had acquired the right of abode in Hong Kong. They maintained matrimonial homes in both Hong Kong and Shenzhen. The assets of the parties have been found to be substantial (well over \$800 million). While the part situated in Hong Kong is relatively small, it is nonetheless of significant value (around \$66 million). The marriage broke down irretrievably. The petitioner filed a petition for divorce in May
2006. Two days later, the respondent issued High Court proceedings (HCA
- 1088) against the wife, the issue being whether certain assets situated in Hong Kong in her name were held in trust for the respondent or whether, as was the petitioner's case, the assets were matrimonial assets. The petitioner sought ancillary relief and applied for maintenance pending suit. The respondent never challenged the jurisdiction of the Hong Kong courts and, in fact, did not oppose the making of a decree nisi on 13 November 2006. Nevertheless, several weeks earlier, in late October 2006, the respondent commenced parallel proceedings in Shenzhen for divorce, custody and division of the matrimonial

assets (which did not include any of the assets claimed in HCA

- 1088) stated to have an aggregate value of RMB 14.68 million. The petitioner's attempt to stay the PRC proceedings was unsuccessful. The hearing in Shenzhen took place on various dates over several months commencing in late June
2007. At about that time, the Hong Kong trial for ancillary relief was set down for 15 days commencing 5 March 2008. The Shenzhen court handed down its civil judgment dated 6 November 2007 on 14 November 2007. The petitioner did not appeal that judgment. On 3 December 2007, the respondent issued a summons seeking, *inter alia*, a permanent stay of the ancillary proceedings to strike out the wife's claim for ancillary relief and for rescission of the decree nisi. The summons was heard as a preliminary issue at the commencement of the trial for ancillary relief. Lam J dismissed the respondent's summons and proceeded with the trial for ancillary relief. This court (by a majority) allowed the appeal on the preliminary issue on the basis that recognition of the Shenzhen decree should not be refused on public policy grounds, accepting that the consequence of recognition would be that the Hong Kong court would not have jurisdiction to grant ancillary relief, notwithstanding the fact that there were matrimonial assets in Hong Kong. Questions of great general or public importance In his amended motion for leave to appeal, Mr SC who appeared for the petitioner, set out five questions that were said to be of great general or public importance. These read:
1. Whether on a proper construction of section 61 of the Matrimonial Causes Ordinance, recognition of an order granting a decree of divorce outside Hong Kong *ipso facto* deprives the Hong Kong Court of its jurisdiction to give effect to orders granting ancillary relief.
 2. Whether the Hong Kong Court is deprived of its jurisdiction to make a decree nisi absolute by reason only of the recognition of an order by a PRC Court dissolving the marriage.
 3. Whether orders made under sections 4 and 6 of the MPPO shall not take effect by reason only of the recognition of an order by a PRC Court dissolving the marriage.
 4. Whether a Hong Kong Court can and should exercise its discretion to refuse recognition of a decree of divorce made outside Hong Kong by reason of the fact that such recognition would deprive the right of a spouse to have access to the Hong Kong Court to pursue his/her legitimate claim for ancillary relief and/or for the orders for ancillary relief to take effect.
 5. Whether a Hong Kong Court can properly exercise its discretion to refuse recognition of a decree of divorce made outside Hong Kong, with the consequence that the Hong Kong Court can give effect to an order made by the Court of Hong Kong granting ancillary relief in circumstances where the party seeking to rely on the decree has conducted proceedings in Hong Kong on the basis that two different sets of proceedings (one in Hong Kong and one outside Hong Kong) would deal with different parts of the family fortune. While Mr S's submissions focused on two of the questions, namely questions 2 and 5, he made it clear that he was not abandoning the remaining questions. In fact, the questions posed fall into

two groups. Questions 1 to 3 are different formulations of the question of the Hong Kong court's jurisdiction to grant ancillary relief when there has been recognition of an order of the PRC court dissolving the marriage (the jurisdiction point). Questions 4 and 5 concern the Hong Kong court's discretion to refuse recognition of a decree of divorce made outside Hong Kong on public policy grounds and its proper exercise (the public policy point). The jurisdiction point Cross-border marriages are not uncommon in Hong Kong. Many families not only have a right of abode in Hong Kong but also in a jurisdiction outside Hong Kong and maintain ties and matrimonial assets in both jurisdictions. The jurisdiction point arises where a divorce granted outside Hong Kong is recognised by the Hong Kong court but there has been no adjudication of the matrimonial assets within Hong Kong. The jurisdiction of the Hong Kong courts to grant ancillary relief in such circumstances is the issue. Mr Yu contends that on a proper construction of the statutory scheme, recognition of the PRC divorce does not have the effect of precluding the jurisdiction to pronounce the decree absolute, having regard to the genesis of section 61(3) of the Matrimonial Causes Ordinance (the MCO) which reflected the spirit of the Hague Convention on the Recognition of Divorces and Legal Separations and viewing the statutory scheme as a whole. As I understand it, the argument of Mr Shieh SC (who appeared for the respondent) is not that the jurisdiction point is not one of great general or public importance; rather, it is said that the interpretation put forward by the petitioner is unarguable and bound to fail. But whether or not Mr's interpretation is correct is not the relevant question at this stage. In my view, the jurisdiction point is plainly one of great general or public importance and fit to be referred to the Court of Final Appeal for decision. The public policy point Section 61(2)(b) of the MCO confers on the court a discretion to refuse recognition of a divorce obtained outside Hong Kong if, and only if its recognition would manifestly be contrary to public policy. This provision is derived from Article 10 of the Hague Convention which refers to public policy (*ordre public*). Mr Yu submitted that the Hong Kong authorities dealing with the concept of *ordre public* show that the focus is on the needs, rights, interests and welfare of the society as a whole. The right to marriage and the spouses' rights at its dissolution are mentioned in the Hong Kong Bill of Rights and financial provision and the fair adjudication of matrimonial assets are some of the necessary incidents of the dissolution of a marriage. He made reference to article 35 which guarantees to Hong Kong residents access to the courts and argued that orders for ancillary relief are pivotal to the continued functioning of families and, hence, the collective welfare and interest of society. Mr Shieh contended that leave should not be granted because the matter is factually sensitive, requiring a case-specific answer. In my view, the present case has sufficient generic features to render it a suitable case for the Court of Final Appeal to consider the limits of public policy in the context of the MCO. Public policy is an elusive concept. Its reach and what considerations may properly be taken into account by the court in the context of the MCO when exercising its discretion are serious and weighty matters as they impact upon the recognition or otherwise of a divorce obtained outside Hong Kong. As such, they merit elucidation by, and guidance from, the highest court. Or otherwise In view of the conclusion reached, it is unnecessary to consider whether leave should also be granted under the or otherwise

ground. Hon Cheung JA: I agree. Hon Sakhrani J: I also agree. (Doreen Le Pichon) Justice of Appeal (Peter Cheung) Justice of Appeal (Arjan H Sakhrani) Judge of the Court of First Instance Mr Benjamin Yu SC & Ms Anita Yip, instructed by Messrs Ho, Tse, Wai & Partners, for the Petitioner/Applicant Mr Paul Shieh SC & Mr Jeremy S K Chan, instructed by Messrs Hampton, Winter & Glynn, for the Respondent/Respondent 1udk 1udk H; < jFen & 6" ABC-Final (fair)1 Administrator Microsoft Word 9.0 Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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