

HONG KONG / JUDGMENT

S v. L

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cacv 205/2007 in the high court of the hong kong special administrative region court of appeal
civil appeal no. 205 of 2007 (on appeal from HCMC NO. 2 of 2006)

BETWEEN S Petitioner and L Respondent

Before : Hon Rogers VP and Le Pichon JA in Court Date of Hearing : 3 October 2007 Date of
Judgment : 3 October 2007 Date of Handing Down Reasons for Judgment : 12 October 2007

REASONS FOR JUDGMENT

Hon Rogers VP: 1. This was an appeal from a ruling of Saunders J given on 1 June 2007. The matter before the judge was an application that he should recuse himself from hearing any further matters in these proceedings. The judge declined to recuse himself and ordered costs against the petitioner. On this appeal the petitioner sought orders that Saunders J should not adjudicate upon any further aspects of HCMC 2 of 2006 and that all further proceedings and hearings in that matter should be listed to be heard before some other judge of the High Court. At the conclusion of the hearing of this appeal this court allowed the appeal and made the orders sought with costs here and below to the petitioner.

Background

2. The parties to these proceedings met whilst at college in the United States. The petitioner, the wife, came from Hong Kong and the husband came from the United States. They were married in 1987 and in December 1996 twin daughters were born to the marriage. Throughout the course of the marriage of the husband worked in and was concerned in the family business. That involved manufacturing goods and that has, for some time, taken place in the Mainland. 3. The husband moved out of the family home in July 2004. Nevertheless, in December 2004 there was a family trip to London but, at the end of it, the wife returned to Hong Kong and the husband remained in London. The wife presented the divorce petition in August 2005 and these proceedings have had a very long and involved a history which it is not necessary to recite in detail. 4. For present purposes, it suffices to say

that the husband has declined to return to Hong Kong. In a letter dated 27 September 2005, solicitors acting on behalf of the husband referred to the wife's anger explosions and made reference to the fact that the husband believed that his departure would ease tensions brought about by the numerous arguments between himself and his wife. The letter continued "The Kissel's case weighed very heavily on our client's mind, especially from the similar family circumstances such as the fact their children also attended Hong Kong International School." 5. In October 2005, the husband filed an affidavit in which he referred to the wife being a devoted follower of Sekhem. That is something which he claims to have instigated and encouraged. The affidavit continues that she had paid for services of "many healers" to treat her anger management. It is then said that he believed that one of the healers engaged by the wife was engaged for the purpose of casting a spell on himself in an attempt to procure a reconciliation against his will. The affidavit also talked about the wife having rocks and crystals on the floor and having chanting music played in the background as well as burning candles and incense. The husband complained of an occasion when the couple were in London when a Miss Ong, who was a Sekhem devotee, forcibly grabbed him after an argument. The husband said that he believed that the wife supported Miss Ong's behaviour. It is also stated in the affidavit that during an argument whilst the wife was packing at the hotel the wife threatened him with the words "If you don't go back today, don't think about going back to Hong Kong again if you want to be alive." 6. Our attention was also drawn to a letter which was written at about the same time as the affidavit was sworn, namely on 27 October 2005, by a Jeff Katz, Chief Executive of Bishop International, which was said to be a corporate investigations and strategic intelligence company. He said in the letter that the husband had approached him: "...because he has serious concerns for his personal safety. His principal worry is that were he to return to Hong Kong he might be the target of extreme violence as the result of an acrimonious separation from his wife. He has told me that his wife has specifically threatened that he would be killed if he returned. It seems to me that Mr Lyon's fears are not unfounded." 7. The letter goes on to express Mr Katz' opinion that; "While it is possible that the Mrs Lyons' threats would not be carried out, in my opinion it is reasonable to expect Mr Lyons to act upon the threats to his personal safety, which in this case means avoiding Hong Kong." 8. In May 2006 the husband produced a report from a psychiatrist, Dr Clinton Van Zandt. The background to the obtaining of this report need not be the subject of comment other than that the husband obtained this report in lieu of obtaining a report from a psychiatrist who it had been agreed would produce reports in respect of both the husband and the wife. That report referred to the husband's concerns as to his physical safety and, for the first time, mentioned that the husband had reason to believe that he had "been under surveillance by unknown individuals and people he believes may be in the direct hire" of the wife or persons associated with her. 9. That, in summary, is the total of the evidence, much of it clearly hearsay, upon which it is said on the husband's behalf that he should not return to Hong Kong for his own personal safety. When the husband made application that he should not return to Hong Kong for the purposes of these proceedings that application was rejected. 10. In late July 2006 an application was made before the judge below that the husband should have access to the twins. That

application was made on the basis that the husband would not return to Hong Kong because of his fears of physical injury. The upshot of the proceedings was that it was arranged that the husband would have visiting access to the twins whilst they were all in the United States. In the course of that judgment the judge said: “ 28. I am obliged to say that I find that some of the beliefs expressed by the father through Dr van Zandt’s affidavit were not those which would necessarily be held by a sane and rational person. I refer in particular to the beliefs in black magic. 29. I should make it clear that I do not consider that the father’s fear of physical injury, should he return to Hong Kong, is either irrational, or a sign of mental instability. It is a situation I have encountered in other cases, particularly involving expatriates who are married to Chinese persons who have mainland connections. The fear may be described as being akin to a fear for personal safety held by someone married to a person of Italian extraction, living in New Jersey. Whether justified or not, I accept that there are circumstances which make such a fear rational.” 11. Later in the judgment when considering the question of access in the United States the judge said: “ 73. In making the orders that I now make I have endeavoured to balance the competing factors involved in this case. I recognise the mother’s genuine concern about the length of time since the children have seen their father, and consequently the care which must be taken as they are reintroduced to their father. I recognise the father’s genuine desire to see the children, and while I do not necessarily accept his reasons for not coming to Hong Kong, his unwillingness to come to Hong Kong must, in the circumstances, be accommodated.” 12. On 2 November 2006, solicitors acting on behalf of the husband wrote to the solicitors acting for the wife and commenced the letter by indicating that the husband did not wish to return to Hong Kong because of fears for his physical safety. The letter stated in bald terms that the husband did not propose to pursue any order or direction from the court for either custody of, or access to, or information to be provided by the wife about, his children. The letter then went on, in some detail and at considerable length, to deal with financial aspects and the husband’s claims in respect of profits generated by the business. 13. The following day there was a further hearing before the judge. That would seem to have been a call over hearing which the court had ordered. At the commencement the following exchange took place between counsel acting on behalf of the wife and the judge: “ MRS IRVING : I think that was your indication last time, my Lord, but I think in all matrimonial cases, there is a level of acrimony that can be dealt with in FDR in some occasions, and our view, as I put it to you last time, is we believe it’s worth a try. Once we know what we’re dealing with in terms of assets, I think it’s -- it’s a negative approach perhaps, to put it this way, to say it’s not going to work so let’s not do it. Once we know that we’re dealing -- well, now it appears we’re dealing only with the money. It seems that Mr Lyons has decided that he is no longer interested in seeing his children... COURT : No, it’s plain that that’s not the position from the letter. MRS IRVING : I’m sorry? COURT : He’s desperately concerned to see his children but recognises the reality of the situation and has made a decision not to press the matter at the present time. That’s very different. MRS IRVING : But the reality of the situation... COURT : I accept that the reality of the situation is that if you accept the withdrawal of the appeal on the terms offered, there will be no further steps in relation to the children. But you cannot

properly characterise the way in which this letter has put it as being that he is no longer interested in seeing the children. MRS IRVING : He is not making any application to this court for access... COURT : I accept that, but you cannot properly put it that he is not interested in seeing the children. MRS IRVING : He has made a decision not to see his children then. COURT : I accept that. That is a proper way of putting it.” 14. Shortly thereafter there was this exchange between the solicitor acting on behalf of the husband and the court: “ MR JAMISON : I was grateful to your Lordship for correcting my learned friend as to the characterisation of what’s happened and has been stated in the most recent letter... COURT : She’s right in that it’s a somewhat surprising step for him to take in the light of the way things went in San Francisco. MR JAMISON : Well, my Lord, maybe that’s right, I don’t have sufficient knowledge to say that, but what I can say is that it was a step taken with no little heartache and certainly not taken casually. And really, the conclusion on my client’s part, I understand, is that the normal arrangements that one would like to see, the sharing of the children’s lives between the parents, simply won’t work in the context of this family. COURT : Despite the fact that it’s been demonstrated that it can work in San Francisco. MR JAMISON : Well, my Lord, that’s the conclusion he’s come to. COURT : My overriding concern in all of this is for the children. MR JAMISON : Of course. COURT : So I’m going to kick both sides in this respect. There is fault, I believe, on both sides. I think your client has some basis upon which he can make the assertions he does. She is equally entitled to say, “Why on earth are you doing this when things are starting to come right?”. Again, nobody is thinking of the best interests of the children. Ms Irving is completely correct when she says that this is a decision that leaves the children stranded high and dry. Who’s going to tell them? MR JAMISON : Well, my Lord, I think the thinking of my client was that it would be more anguish for the children to persevere with the situation where they’re having poison dripped in their ears... COURT : I understand why he says that but in the light of the way things went, I wonder why on earth he comes to that conclusion. He hasn’t reflected properly on what happened. MR JAMISON : My Lord, I will pass your comments back to him and give him the indication that I think you’re giving to me, that he should persevere.” 15. The next hearing was on 6 December 2006. At the commencement, before counsel or the solicitors said anything the judge said: “ COURT : Before we begin, Ms Irving, there is something I wish to say to you all. I have had the opportunity of reviewing the transcript from the last hearing. Throughout this matter my concern has been to direct everybody’s attention to the real issues at hand in each particular hearing and to try and avoid either the use of pejorative language or the parties being in a situation where they continually trade accusations about each other without advancing the resolution of the issues. As a result of my concern for the welfare of the children, and in the light of the development in relation to the children that was advised to me at that hearing, I regret that I used language which was both inappropriate and intemperate. For that I sincerely offer my apologies to both parties. I have given consideration as to whether, in the light of that inappropriate language, I ought to recuse myself. My preliminary view is that that is not necessary. I will, of course, listen to any submissions that you may wish to make to me on that matter, whether now or at some time in the future. Do you wish me to adjourn so that you can give consideration to what I

have said, or can we proceed further now? MRS IRVING : My Lord, for our part, we would proceed, because obviously we couldn't address you on this matter without taking instructions from our client anyway. COURT : Mr Rogers? MR ROGERS : For my part or our part, we are certainly content to proceed today and see how it goes. I am not in a position to advance an application. I have no instructions in connection with any question of recusal." The application below 16. It was in those circumstances that application was made to the judge that he should recuse himself from the case. The application was made on the basis that, in the words of the Court of Final Appeal in *Deacons v White and Case*

[2003] 3 HKC 374 at 383: " The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead to a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased" 17. It was said that what had been said in the decision of 24 July 2006, particularly paragraph 29, would have led the reasonable and well-informed observer to consider that the judge felt that it was rational for an expatriate who had been married to a person of Chinese race with connections in the Mainland to fear for his safety. The clear implications are stark, to say the least. It is said on behalf of the wife that the reference to kicking both parties was, particularly in the light of that, something which the reasonable and well-informed observer would consider showed that there was a real possibility of bias against the wife. It was said that the wife had put no difficulties in the way of the husband speaking to the children: it was the husband's choice not to come to Hong Kong to see the children; it was the husband's choice not to seek access to the children but to confine his attention to monetary matters. 18. In his judgment, the judge referred to the various arguments but appears to have concentrated on the question as to whether his decisions were in fact biased. This appeal 19. Before this court, Mr Scott SC advanced essentially the same arguments on behalf of the wife as he had in the court below. Ms Ismail, who appeared for the father in this court but not in the court below, argued strongly that there was no indication of bias whatever. The relevant question must be what impression is given on a fair minded, rational and informed assessment. I have no doubt that any fair reading of the decision of 24 July 2006, with particular reference to, but reading it in its context, paragraph 29, would lead the fair minded and well-informed observer to conclude that the judge considered it rational that an expatriate married to a person of Chinese race, albeit with tenuous connections to the Mainland, should fear for his safety, if not his life, should there be any major disagreement. This is emphasised by the fact that the judge considered that the fears of the husband should be accommodated. I would add that the reference to " a person of Italian extraction" would be understood, in the context, as being to someone of violent criminal tendencies, despite the fact that the reference really would not stand up to any rational analysis. 20. These matters only have to be stated for it to be appreciated that there is no other course in this case other than for the judge not hear this case any longer. Not only are there racial implications, but those implications can only be perceived as having been expressed because of the relevance to the parties. The fair minded and

informed observer would conclude that there is a real possibility of bias. 21. That the wife did not make an immediate application after the decision was handed down on 24 July 2006 that the judge should recuse himself is understandable. Parties should be slow to accuse a judge of bias, particularly where they are handling difficult cases. After the remarks on 6 December in which the judge appeared to attribute conduct to the wife which merited reprehension, the application was probably unavoidable. 22. I would add that this matter has been considered on the basis of how it would appear to the outside but well-informed observer. The inevitable conclusion is not avoided in any respect by a consideration of the exchange which took place in the course of the application to the judge to recuse himself. During the course of that application, the following interchange took place: “ MR SCOTT : Now, what I will propose to do now, briefly, is to show that even on the father’s case there are no circumstances whatsoever which he relied on at any stage in this case to ground his fear for his personal safety on triad involvement. COURT : I think it even goes beyond triad. I think the important expression is Mainland connections; Guangxi, PLA, that sort of thing, it’s not... MR SCOTT : Cheap hit men put him... COURT : Whatever, yes, and general power.” 23. I wish to make clear that that exchange has not formed part of the basis of the conclusion to which I have come. Nevertheless it has to be said it does nothing to lead to any other conclusion than that to which I have felt myself driven. 24. It was for these reasons that I was disposed to allow this appeal. Since the hearing attention has been drawn to the fact that when the judgment was announced there was no reference to a certificate for 2 counsel in the court below. That would appear to be merited and I would make a further order nisi that the costs below should include a certificate for 2 counsel. In accordance with the practice of this court no certificate for 2 counsel is given in this court as it is considered that parties are entitled to have leading counsel in the court of appeal should they so choose. Hon Le Pichon JA: 25. I agree. (Anthony Rogers) Vice-President (Doreen Le Pichon) Justice of Appeal Mr John Scott SC & Ms Frances Irving, instructed by Messrs Hampton, Winter & Glynn, for the Petitioner/ Appellant Ms Roxanne Ismail, instructed by Messrs Clifford Chance, for the Respondent/ Respondent

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