

HONG KONG / JUDGMENT

SO YUK PING v. TAM SUM SHING

COURT

District Court

DECIDED

12 November 2014

CASE / FILE NUMBER

DCMP2760/2013

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bjbj DCMP 2760/2013 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MISCELLANEOUS PROCEEDINGS NO 2760 OF 2013

IN THE MATTER OF the property known as ALL THAT 1 equal undivided 4th part or share of and in SECTION L OF LOT NO 2217 IN DD 104 (House No 4 on G/F including the Garden Yard, Ian Court (Phase I), 84 San Wai Tsuen, Yuen Long, New Territories, Hong Kong) (the Charged Property) and IN THE MATTER OF a Charging Order Absolute imposing charge on the Charged Property dated 3rd day of November 2009 and registered in the Land Registry by Memorial No 09111301830014 (the Charging Order Absolute and IN THE MATTER OF Order 50 Rule 9A and Order 88 Rule 5A of the Rules of the District Court

BETWEEN SO YUK PING (appeal by the plaintiff against Master W.Y. Ho s decision made on 3 September 2014 dismissing the plaintiff s application for an order for sale of the defendant s property, which is subject to a charging order absolute dated 3 November 2009 (the Charging Order). The defendant s property in question is situated at House No 4 on G/F including the Garden Yard, Ian Court (Phase I), 84 San Wai Tsuen, Yuen Long, New Territories (the Yuen Long Property). According to the plaintiff s affirmation, the market value as at April 2014 was about HK\$2,100,000. The Charging Order came about as follows. In 2009, the plaintiff commenced an action against the defendant under DCCJ No 1666 of 2009 (the 2009 District Court Action) seeking to enforce certain court orders she obtained in the United States. On 26 May 2009, judgment was entered in default (the Default Judgment) and the defendant was to pay the plaintiff the sum of US\$33,746.46 and interest on the sum of US\$28,733.17 at specific rates plus costs (the Judgment Sum). As at the date of the hearing of this appeal, the Judgment Sum stood at around HK\$369,856.23, based on the plaintiff s calculation at the prevailing US\$/HK\$ exchange rate. A charging order nisi was made on 17 August 2009, which was made absolute on 3 November 2009 (and subsequently amended on 17 March 2010). Pursuant to the Charging Order, the Yuen Long Property stands charged with the Judgment Sum. On 29 October 2013, the plaintiff took out an originating summons in these proceedings to enforce the Charging Order by seeking, amongst

other things, an order for sale of the Yuen Long Property. The originating summons was subsequently amended on 4 December 2013 to include, for service purposes, another address of the defendant in addition to the Yuen Long Property which was originally included. The second address is 1st Floor & Flat Roof Adjacent Thereto, No. 94 Reclamation Street, Kowloon, Hong Kong the Kowloon Property). There were a number of call-over hearings in the course of 2014 and on 3 September 2014, Master W.Y. Ho dismissed the plaintiff's application under the amended originating summons, with costs to the defendant. The plaintiff lodged her Notice of Appeal on 12 September 2014. Throughout the present proceedings and until 8 October 2014, the defendant had acted in person. On 8 October 2014, which is just over one week before the appeal hearing, a Notice to Act was filed on his behalf and he was represented by counsel at the appeal hearing. One thing is of note from the above chronology. While the Charging Order was granted in November 2009, it was not until almost 4 years later in October 2013 that the plaintiff commenced the present enforcement proceedings. THE PARTIES The plaintiff and the defendant are ex-wife and husband. They were married in 1989 and since about 2004, they had been involved in two sets of family court proceedings, first in the United States and then in Hong Kong under the action FCMP 228 of 2006 (the FCMP Proceedings). I shall refer to the judgment of HH Judge Bruno Chan in the FCMP Proceedings (the FCMP Judgment) below, both parties legal representatives having indicated to the court at the end of the hearing that they have no objection to me doing so. Paragraphs 3, 7 to 14 of the FCMP Judgment set out the background of the parties, their marriage and the US court order made in September 2005, which later formed the subject-matter of the 2009 District Court Action. In the FCMP Proceedings, the plaintiff sought, amongst other things, various reliefs under section 10 of the Guardianship of Minors Ordinance, Cap 13, namely: an order for custody of their three children; an order that the defendant do pay certain monthly sums for the children's maintenance; and an order that the defendant transfer his interest in the Yuen Long Property to her in trust for the benefits of the children. The trial commenced on 14 July 2009. While the hearing took up 9 days in total, the trial in fact spanned across the 3 years that followed and was only concluded in January 2012 (for reasons set out in paragraphs 15 and 16 of the FCMP Judgment). The judge handed down judgment in February 2012. His decision was set out in paragraphs 58 and 59 of the FCMP Judgment. I set out below the outcome below: by that time, the two elder children were already over the age of 18 and the defendant had conceded custody of the son, the youngest child, to the plaintiff; the defendant was ordered to pay a sum of HK\$2,000 per month as maintenance for the son; and the judge refused the plaintiff's claim in respect of the Yuen Long Property. I should highlight two relevant matters in relation to the FCMP Proceedings. First, the defendant was all along acting in person. Secondly, in the course of the trial, the judge became aware of the 2009 District Court Action and the Charging Order and he made express references to them in the FCMP Judgment see paragraphs 14, 18, 53, 57 and 58. SUBSEQUENT DEVELOPMENTS Two matters which took place subsequent to the handing down of the FCMP Judgment in February 2012 are of note in the context of the present appeal. First, the plaintiff and the son who were then residing in the US returned to live in Hong Kong in about March 2013. For reasons which are not necessary to be disclosed in this judgment, the defendant obtained custody care and control of the son in March 2014 and with the support of the defendant, the son returned to the US to continue his study just

shortly before the hearing before Master W.Y. Ho. Secondly, the defendant sold the Kowloon Property in June 2014, again shortly before the hearing before the Master, and the sale proceeds amounted to HK\$2,450,000. From the land search records, the defendant had become the owner of the Kowloon Property in about mid-2013 and as confirmed by counsel during submissions, he received it from his deceased parent.

LEGAL PRINCIPLES The legal principle governing an application to enforce a charging order by way of an order for sale pursuant to Order 50 rule 9A of the Rules of the District Court, Cap 336H, is not in dispute. The grant of an order for sale is within the court's discretion, which must be exercised judicially. A judgment creditor is *prima facie* entitled to enforce his judgment unless the debtor establishes some good reason to the contrary. The competing equities of the party should be carefully weighed: see, eg, *Union Finance Ltd v Leung Wai Ling* [2000] 2 HKC 821 at 823G, 824A.

THE DEFENDANT'S OPPOSING REASONS The defendant put forward three main grounds to oppose the plaintiff's application. First, the Default Judgment entered in the 2009 District Court Action was tainted with irregularity and should not be enforced or given effect to in the first place. Secondly, the defendant will suffer financial hardship from the sale of the Yuen Long Property. Thirdly, the defendant is suffering from mental health problems and needs the property as a place to live in. I shall deal with these grounds of opposition one by one.

First ground Irregularity On the irregularity ground, counsel for the defendant submitted that the legal documents in the 2009 District Court Action, including the writ and the documents relating to the application for the Charging Order, were not served on the defendant and that the defendant had no knowledge of and did not participate in any part of the proceedings. The Default Judgment and the Charging Order were thus obtained irregularly and should be set aside. The defendants filed two affirmations and two letters with the court in opposition to the plaintiff's application. In his first affirmation filed in January 2014, he said that in the FCMP Proceedings, he informed the judge that the plaintiff had obtained judgment against him in the 2009 District Court Action in his absence and without notice to him. According to the defendant, the judge, upon hearing this, criticised the plaintiff's solicitors (in those proceedings) for obtaining judgment in the District Court by trick and as a result the plaintiff's then solicitors did not dare take any action in relation to the 2009 District Court Action for over three years. The defendant repeated this allegation in his letter sent to the court on 12 June 2014. The plaintiff not surprisingly opposed this ground by pointing out that the defendant has never taken any step to set aside the Default Judgment or the Charging Order. The defendant countered this by highlighting the fact that the defendant was all along acting in person and had no legal representation throughout the relevant time. He did not have the legal knowledge to protect his interests by taking out the appropriate application. However, as soon as he found out about the 2009 District Court Action, he reported the matter to the judge in the FCMP Proceedings and disputed the Default Judgment. Having heard the judge criticise the plaintiff's (then) solicitors in court, he thought that the matter was settled (in his favour) and could be put to rest and he did not need to worry any more about the Default Judgment or the Charging Order. Further, the judge refused to accede to the plaintiff's claim regarding the Yuen Long Property at the conclusion of the FCMP Proceedings. Therefore, in the defendant's mind, the plaintiff's double attempt to take the Yuen Long Property away from him had failed completely and any dispute over that property must have been all over. Counsel for the defendant submitted that this belief that the fight over

the Yuen Long Property was over was shared by the three children as shown in their letters attached to the defendant's letters filed with the court. The plaintiff's solicitor argued that the fact remains that there has been no formal application taken out by the defendant to challenge the Default Judgment. While the court may give leeway to litigants in person who do not fully comply with the rules, they do not enjoy any privilege in legal proceedings by reason of their acting in person. The fact that the plaintiff has not enforced the Charging order for a few years is neither here nor there as she has the right to take out an application for an order for sale. The defendant might have been labouring under the misapprehension that the plaintiff would not enforce but this has no bearing on the present application. Once the plaintiff took out the originating summons, it was up to the defendant to seek legal advice. In any event, the plaintiff's solicitor queried: the defendant has been legally represented since 8 October 2014 and if the irregularity complaint was indeed genuine, why hasn't the defendant's lawyer taken out a summons to set aside the Default Judgment on an urgent basis? At least, the defendant should have asked for an adjournment of the appeal hearing. None of this was pursued by the defendant's legal team and the plaintiff contended that it should not be open to the defendant to now say that the Default Judgment was irregular. I consider that the irregularity ground is a factor which weighs heavily against the enforcement of the Charging Order. Although the defendant's evidence as set out in paragraph 23 above is not supported by any transcript of the FCMP Proceedings, his evidence in this regard has not been challenged by the plaintiff. The plaintiff has filed a total of five affirmations in support of her application. In her reply affirmations, she responded, rebutted and dealt with some of the allegations made in the defendant's earlier affirmations or letters with care and in detail. But she has not made any attempt at all to rebut the defendant's allegations relating to his remarks made at the trial regarding the 2009 District Court Action and the judge's corresponding response and criticism. I would therefore accept the defendant's unchallenged evidence in this regard. I agree that the defendant, who was previously not legally represented, should not enjoy any privilege as such and that his failure to take out a formal application to set aside the Default Judgment should be examined critically by the court. On the other hand, one must appreciate the reality that a litigant in person, who does not have any legal training, may not appreciate the importance of taking, or have the knowledge to take, the requisite steps in full compliance with the rules and regulations of the court in order to protect or uphold his legal interests. Depending on the circumstances of each case, it would not be in the interests of justice to deny him his substantive legal rights or interests merely because he does not follow the relevant rules as much as a legally represented person would. In this case, it should not be overlooked that since 2009, the defendant had been involved in two sets of proceedings, namely, the 2009 District Court Action and the FCMP Proceedings. The latter was no doubt a long drawn out battle as far as the defendant was concerned. And these proceedings overlap with each other on a number of factual and legal matters, namely, the US court orders and the claims over the Yuen Long Property. At the same time, the defendant had to cope with both proceedings, instituted by the (legally represented) plaintiff in parallel, on his own without any lawyer advising or representing him. In my view, the defendant had done what could reasonably be expected of him in the circumstances by voicing out his concern over the Yuen Long Property in the FCMP Proceedings. I also accept his unchallenged evidence to the effect that he genuinely thought that

the legal claims over the Yuen Long Property was over after he made his complaint to the judge and accordingly he took no further step to overturn the Default Judgment or the Charging Order. His stance is also consistent with the inaction on the part of the plaintiff in respect of the Charging Order over the subsequent years. This also seems to be the view of the children. The two elder children wrote in one of their letters in April this year: We don't understand how our mother could pursue legal actions with the same case/issue in multiple courts to try to gain more money. Counsel for the defendant indicated at the hearing that the defendant does intend to apply to set aside the Default Judgment and the Charging Order. However, during the week preceding the hearing, the legal team had been preoccupied with collecting the necessary papers and instructions from the defendant in preparation for the appeal hearing. In coming to the above conclusion, I do not make any finding as to whether the service of the writ in the 2009 District Court Action was indeed irregular or not. (In fact, I believe that counsel for the defendant might have overstated her case by saying that the defendant had never participated in any part of that action since the wording of the Charging Order does seem to indicate that the defendant was present at the hearing when the order was made absolute.) My conclusion is merely that in the circumstances, there is justification for giving the defendant at least an opportunity to revisit the orders made in that action. And this is a factor which weighs heavily against enforcing the Charging Order.

Second ground Financial hardship The defendant highlighted a number of matters regarding his means in support of this ground of opposition. First, he says he is a person of very limited means. He can only take up casual work and has no stable source of income other than letting out the garden which forms part of the Yuen Long Property as car park. Secondly, in his letter filed with the court, the defendant said that the plaintiff had refused to take care of the son upon his return to the US. The defendant is prepared to use whatever means to support the financial needs of the son and bear the costs of his living and education in the US. If the Yuen Long Property is forced to be sold at a low price, that would adversely affect his ability to do so. On the other hand, the plaintiff invited the court to look at the alleged hardship against the backdrop that the defendant had only very recently disposed of the Kowloon Property and pocketed a sum of over two million dollars see paragraph 19 above. There is simply no question of hardship. On the basis of the evidence before me, I consider that the financial circumstances of the defendant, after taking into account the needs of his children, constitute a factor which weighs against making the order for sale for the following reasons. The starting point is the FCMP Judgment in which the judge made factual findings as to the defendant's means see paragraphs 52, 54 and 57. He concluded that the defendant had limited earnings or earning capacity and that while there was no evidence before the court of the defendant's alleged indebtedness to his sister in the sum of HK\$480,000 being mortgage payments in respect of the Yuen Long Property, it was entirely possible that financial assistance may have been provided by the sister. I of course agree with the plaintiff's submission that the above only reflected the situation as at February 2012 and one significant and relevant development since then must be the sale of the Kowloon Property by the defendant. However, I think it is equally important to give weight to the other recent development, namely that the defendant is now solely responsible for the son's care and education, whether financially or otherwise. The unchallenged evidence is that the plaintiff will no longer contribute anything in this regard. In the evidence filed by the

defendant, including several letters written by the children, a number of serious allegations were made against the plaintiff suggesting unreasonable and at times irresponsible behaviour on her part. I do not propose to go into any of them in any detail as this appeal is clearly not the proper forum for adjudicating upon any such dispute. However, what is clear to me from this part of the evidence is that, first, the son does look to the father for support in relation to his education and living expenses, and the father is more than prepared to take up the responsibility and answer his needs, so long as his financial position would allow him to. The son wrote in his letter in June this year: Due to her [ie, the plaintiff s] actions, the court needs to understand that without the help of my father, I m not able to continue school or college in the US without his financial support. I need to count on his support until I go to college for me and my sisters living situation, rent, and living expenses. My dad has asked his friends to borrow money for my living expenses. Secondly, this is a sentiment shared by the father and all his children. The two elder children wrote in their letter: We intend for this letter to better explain our perspectives and defend our father s properties from our mother because we desperately need the financial support from these properties for our brother s living and education. Counsel for the defendant explained to the court that the defendant has used or will use the sale proceeds to pay off debts in the region of HK\$600,000, part of which are owed to his sister who helped him settle mortgage payments in the past few years. I consider that this allegation is consistent with the observation made in the FCMP Judgment see paragraph 41 above. Also, it is not disputed that a sum of HK\$122,000 was already paid to settle the defendant s maintenance and costs liability. The defendant intends to reserve the rest of the proceeds for his son s living and education expenses in the US over the years to come. In my view, he is justified in doing so. Lastly, I accept the defendant s submission that the sale of the Yuen Long Property would also take away his only stable means of income, ie, the letting out of the garden. Third ground Mental health problem In the FCMP Judgment, the judge took note of the mental condition of the defendant see paragraphs 45 to 49. The defendant also produced a report issued by the Castle Peak Hospital in April this year confirming that he is suffering from recurrent depressive disorder. The defendant said that the Yuen Long Property is his only place of residence and this is where the social worker would visit him from time to time. I consider that the defendant s mental condition and the importance of having a stable home to stay is a factor, though of a lesser weight than the factors above, against the court exercising its discretion in favour of an order for sale.

CONCLUSION

I am satisfied that the defendant has shown that there are good reasons why the Charging Order entered against the Yuen Long Property should not be enforced. The three grounds of opposition put forward by the defendant together weigh heavily against the making of any order for sale. Accordingly, I would dismiss the appeal. I make an order nisi that the plaintiff pay the defendant s costs of the appeal with certificate for counsel and that there be summary assessment of the defendant s costs on the papers. I direct that the defendant lodge and serve his statement of costs within 7 days from the date of this decision and the plaintiff lodge and serve his list of objections within 7 days thereafter. I further order that the plaintiff s own costs be taxed in accordance with

the Legal Aid Regulations. (Winnie Tsui) ~tgX~XI h?d< h?d< h?d< h?d< gd?d< gdAF gdy9 ynyf^f h? d< h?d< h,J. gdAF gdAF xnxn h,J. h,J. h?d< h l gdAF hYk_ hvgM h{t h{t h l hu[? hYk_ hYk_ h5eu h5eu hYk_ h{t h{t h l hNI5 hNI5 h l hYk_ gd l gd l hc~3 hc~3 h l h l h l hnmL heDI heDI hnmL hnmL hh;= heDI h"; hnmL heDI h .4 h"; gdy9 hnmL hnmL gdy9 ld`d`d` hG-d %Deputy District Judge Mr Ng Man Kin, of Kwok, Ng & Chan, assigned by the Legal Aid Department, for the plaintiff Ms Josephine Tjia, instructed by Yip & Co., for the defendant 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 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 A B C D E F G H I J K L M N O P Q R S T U V gdWR< gdAF gdy9 &`#\$ gdI9 gdI9 gdI9 gdWR< [Content\_Types].xml Iw}, \$yi} \_rels/\_rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v )I`n 3Vq%`#q x}r :TZA G I u3 L+M2 e\O\* \$\*c? )6-r IqbJ#x ,AGm T[XF64 E)` # R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/_relsPK theme/theme/themeManager.xmlPK theme/ theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> c2[Ru e*d` c2[LT+'LT+'%T+' Mak Yuen-kev Normal.dotm Judiciary Microsoft Office Word Judiciary Hong Kong Title <b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"></ b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{A88AA271-AF9B-4307-9061-4953E63C4B35}" xmlns:ds="http:// schemas.openxmlformats.org/officeDocument/2006/ customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/ officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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