

HONG KONG / JUDGMENT

SSY v. CYS

COURT

Family Court

DECIDED

30 June 2008

CASE / FILE NUMBER

FCMC6872/2007

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

bjbj FCMC6872/2007 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MATRIMONIAL CAUSES NO. 6872 OF 2007 BETWEEN SSY Petitioner and CYS Respondent Coram: Her Honour Judge S.D. Melloy in Chambers (Not open to the public) Dates of Hearing: 11 and 12 June 2008 Date of Delivery of Judgment: 30 June 2008

J U D G M E N T

1. This is an application by a petitioner wife for ancillary relief. The parties have been married for a long time, some 29 years, but each agree that they have been separated also for a long period of time, either for 12 or 15 of those years.
2. The wife claims half of the family assets. The main family asset is the former matrimonial home in Yee Kuk Street in Kowloon. This property was sold by the husband shortly after the commencement of these divorce proceedings in June 2007. It has been the wife's case that the property was sold in order to defeat her claim for ancillary relief.
3. The husband claims that the wife has no claim to this property, as on his case, the parties had reached an agreement, in full and final settlement, in April 1996, when they separated. The wife denies that there was a settlement agreement. The husband said that it was agreed that the wife would retain another property, called the TLC property, and he was to keep the matrimonial property. For her part the wife also claims that in any event:
 - (a) the TLC property was non-matrimonial property; and
 - (b) it was sold in 2002.
4. Turning first to the law. As Miss Chan for the wife rightly pointed out, the law in Hong Kong has been clarified since the recent Court of Appeal decision in DD v DKW. In it the Honourable Mr. Justice Cheung JA sets out what Miss Chan refers to as the overriding principles of equity and fairness. The case also refers to the approach to be undertaken by the court when deciding matters such as these. I will refer to paragraph 69(3) in that regard.

That says: 5. First, computation of the available assets of the parties, such as property, income, including earning capacity and other financial resources which the parties have and are likely to have in the foreseeable future (see Charman paragraph 67); (2) distribution of the assets by reference to the three principles of need, generously interpreted, compensation and sharing. These principles can be gleaned from section 7(1) of the Matrimonial Proceedings and Property Ordinance and each of the matters set out in section 7(1)(a) to (g) can be assigned to one or another of these three principles (see Charman paragraph 68).

6. This is then the approach that the court will take when coming to a decision concerning ancillary relief. I will make reference to the section 7 factors in the body of this judgment.
7. The issues that need to be determined are as follows: was a settlement agreement entered into in 1996? and, in any event, is it binding on the court? should the TLC property be regarded as non-matrimonial property? What is the computation of available assets and how should those assets be divided bearing in mind the principles of need, compensation and sharing and the section 7 factors?
8. Turning to the first of those, was there a settlement agreement entered into in 1996? The husband maintains that the parties entered into an agreement in 1996 whereby the wife was to retain the TLC property and he was to retain the matrimonial home. He said that whoever remained in the matrimonial home was required to pay the mortgage, the utility expenses and to maintain the two children of the family. He says he did this. There was no requirement to pay the wife any maintenance.
9. The main difficulty with the husband's case is that there is no evidence to support what he says; no separation agreement has been produced; and no other independently verifiable witness who can support what he says. In any event, even if he was able to show that there was an agreement, it does not necessarily mean that that agreement was in full and final settlement or that the wife is barred from making a claim now. Connected to this is the related issue, namely whether or not the TLC property should be regarded as matrimonial property.
10. It is the wife's case that this was non-matrimonial property in that it was a gift to her by the husband and, therefore, should be taken out of the equation when considering any potential division of assets on divorce. In any event, she reiterates that it was sold in 2002.
11. The husband said in his closing, and I quote: I have been married for 20-plus years. In the first two years our finances were mixed together. Subsequently, we both went our own way financially. The petitioner made some money. She ran her own boutique but that made a loss, and there was a garment factory which also ran at a loss. The financial burden of the family fell on me. When we purchased the first property we had no savings. I earned a commission in 1992 and I let my boss keep the commission for me. In 1993 he released the commission and he lent me a further \$30,000. In addition, \$40,000 was borrowed. These sums were then put towards the downpayment on the first property. Subsequently, a second

mortgage was taken out using the first property as a pledge and \$100,000 was cashed. This was to use towards the purchase of the second property. That property was in the sole name of the petitioner. The mortgage repayments came from the rental income on the same property. In 1990 I sold the first property and the proceeds were then used as the downpayment of the third property. The mortgage repayment was for 12 years. The mortgage was discharged in 2002. In 1993 the petitioner left. When she left, in the presence of the children, there was an agreement: whoever lived in the property, i.e., the matrimonial home, would be responsible for the mortgage repayments. Whoever left would live in the second property and there would be no need to pay mortgage repayments or to support the children. The agreement was made in the presence of the children. The daughter did not wish to follow the mother. The mother moved out and removed all things from the property, including electric cooker. And then later he added after she left I supported the children and paid the mortgage single handedly. I lived a hard life at that time. I had to work and then I had to go home and cook the meals. When the children grew up they have not given me a penny. It has been me who had been supporting the family for 10 years-plus.

12. The wife, for her part, says that the parties separated in 1996 and up until that point they had both been working and contributing towards the family finances. She set up a jade business in 1993 which took her away from the family home from time to time but she did not regard herself as separated until 1996. In 1996 the children would have been 18 and 16 years old, respectively. She said that she always helped to assist them financially.
13. She said that the husband gave her the TLC property to make up for the fact that they had not had a wedding banquet, something which had been a source of much regret to her. In any event, she sold the property to her sister in 2002 in order to repay business debts accumulated as a result of a failed internet caf venture. The wife set up the internet caf with the children of the family. The caf was not a success and it subsequently closed. Money had been borrowed for that purpose and other debts had accumulated. The wife was able to produce evidence to show this. There was nothing to suggest that the sale had not been arm's length.
14. In these circumstances it seems to me that had the parties divorced prior to the sale of the TLC property, then *prima facie*, it would most probably have been included in the computation of assets available for distribution. On the evidence before me I do not accept that the TLC property would have been regarded at that time as non-matrimonial property or that it would have been separated from the other assets and not included in the pool available for distribution. However, had a divorce taken place at that time, I have no doubt that the wife's business debts would also have been included in the computation and deducted from the assets available for distribution.
15. I accept that to a very large extent this is a moot point, given the fact that the property has been sold and that this took place a long time before divorce was even contemplated.

16. Insofar as the alleged settlement agreement is concerned, even if there had been some discussion between the parties and an informal understanding reached, I do not accept that this was in full and final settlement of the wife's claims for ancillary relief or that it is binding on this court now. Thus I accept that the wife has a valid claim for ancillary relief. What then is the computation of available assets?
17. The wife maintains that the following assets are available for distribution.
 - (a) the sale proceeds of the matrimonial home in the sum of \$1.46 million;
 - (b) a mandatory provident fund, and she refers to a fund worth \$500,000 and another worth \$59,000; and
 - (c) bank savings. Bank savings
18. Dealing with these in reverse order, each side has listed limited savings in their Form E's and other documents before the court. This does not include the proceeds of sale from the matrimonial home. \$11,000 is identified in the husband's accounts and \$5,000 for the wife. These are small sums of money and I do not intend to include them in the computation of available assets. Each will retain their own. MPF Funds
19. The husband's MPF fund was originally shown as HK\$59,000. During the hearing the wife alleged that the husband had a pension fund of \$500,000. This was based on information supplied to the wife by the parties' son. She said that it had also been discussed during the marriage. She was unable to produce any evidence to verify her position. The husband, meanwhile, produced an up-to-date MPF statement from AXA which confirmed that as at 31 December 2007 there was approximately \$75,000 in his MPF account. Consequently, I accept that he has an MPF fund of \$75,000. I do not accept that he has an additional pension worth \$500,000. Sale proceeds of the matrimonial home
20. The main thrust of the wife's application relates to the proceeds of sale from the matrimonial home. On 8 June 2007 the wife issued her divorce petition. It was served on the husband and he applied for legal aid. On 22 June 2007 the husband entered into a sale and purchase agreement for the matrimonial home in the sum of \$1,468,000. On 25 June 2007, \$430,000 was deposited into his bank account. On 20 July 2007 the assignment was executed and a further \$900,000 was deposited into his account. From 29 June 2007 to 21 August 2007 the husband then withdrew over a million dollars from his account, mainly in cash. In addition, the sum of \$200,000 was eventually paid into a stakeholder account held by the wife's solicitors pending the outcome of these proceedings.
21. The husband has continually been asked to explain the whereabouts of the withdrawn funds (see the Request for Further and Better Particulars dated 29 August 2007 as one such example). Apart from saying that in general terms he has used the funds to repay debts, he has failed to give a full explanation. He says that he was illiterate and that he would explain himself in court. During the hearing the husband said that he had creditors and that he had borrowed sums of money from third parties. No documentary proof was produced. He

refused to identify the people to whom he says he owes money. For the first time he maintained that he had gambling debts. Again this was not verified.

22. I did not find the husband at all credible in this respect. I warned the husband that I would draw an adverse inference if he was unable to produce evidence in support of what he said. In the absence of any being produced, I do now draw an adverse inference. Put simply, I do not believe the husband's story. Further, I accept the wife's case that the sale of the matrimonial home was intended to defeat her claim for ancillary relief and that the proceeds of sale should be included in the computation of assets available for distribution.
23. I have also noted that no section 17 application was made but no criticism is made of the wife in this respect as there were no transfers to third parties but simply cash withdrawals that cannot now be traced. Thus I accept that the following sums are available: the sums of \$430,000 and \$900,000 which were deposited into the husband's account from the proceeds of sale, plus the \$75,000 in the MPF fund. Thus, in total, there is a little over \$1.4 million to be distributed between the parties.
24. In deciding the appropriate division of assets, I have taken into account the section 7 factors and I will refer to them now under the relevant headings. Need The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future
25. I accept that each party needs somewhere to live, sufficient money to live on and a cushion for their old age. Each party is presently working; the husband is a garment factory worker earning \$8,500 per month and the wife is a security officer earning just under \$7,000 per month.
26. I have also noted the fact that the husband says that he needs to maintain the son from a subsequent relationship who he says is now living with him. He says that he has custody of the son. I am awaiting documentary evidence in support of that contention.
27. Turning next to the standard of living enjoyed by the family before the breakdown of the marriage. I accept that the parties enjoyed a normal standard of living. Insofar as their ages are concerned, the wife is 51 and the husband 61 years of age. Thankfully, there is no physical or mental disability and that is not something that I need to consider. Insofar as compensation is concerned, that was not argued and again does not appear to be something that I need to take into account. Sharing The contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family
28. I accept that each side has contributed fully, both in terms of the financial contribution they made and the contribution they made insofar as bringing up the children were concerned. I also accept that this is a reasonably long marriage, whether or not the parties separated in 1993 or 1996.

29. Thus, bearing in mind the dual concepts of need and sharing, it seems to me that this is not a suitable case to depart from the yardstick of equality. The assets shall be divided, roughly speaking, on a fifty-fifty basis.
30. Thus I will make an order as follows: The husband shall pay the wife \$700,000 in full and final settlement of her claims for ancillary relief. This will include the \$200,000 from the stakeholder account held at Stevenson, Wong & Co., and a further \$500,000 to be paid on or before 1 September 2008.
31. I will direct that the HK\$200,000 presently held in the stakeholder account at Stevenson, Wong & Co., will, in the first instance, be forwarded to the Legal Aid Department so that the issue of the Legal Aid statutory charge can be addressed. Costs
32. Insofar as costs are concerned, I will make an order that costs shall follow the event, so that the husband shall pay the wife's costs on a party and party basis, to be taxed if not agreed. The petitioner's own costs to be taxed in accordance with Legal Aid Regulations. (S.D. Melloy) District Judge Representation: Ms. A. Chan of Messrs Stevenson, Wong & Co., for the Petitioner Respondent, in person, present PAGE - PAGE CRT4/30.6.2008/JJP FCMC6872/2007/Judgment 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 &`#\$ &`#\$ FCMC6872/2007 setup Normal.dot setup Microsoft Word 9.0 FCMC6872/2007 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=63914

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

Prepared on 29 October 2026 · Esheria