

HONG KONG / JUDGMENT

# TJ v. XGM

## COURT

Family Court

## DECIDED

22 January 2016

## CASE / FILE NUMBER

FCMP220/2015

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bjbj FCMP 220/2015 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MISCELLANEOUS PROCEEDINGS NO. 220 OF 2015

BETWEEN TJ Applicant and XGM Respondent

Before : HH Judge Bruno Chan in Chambers. Date of Hearing : 14 January 2016. Date of Decision : 14 January 2016. Date of Reason for Decision : 22 January 2016.

Reasons for Decision (Leave for s 29AC MPPO Application)

On 8th October 2015 the Applicant applied by way of originating summons for leave under section 29AC of Part IIA of the Matrimonial Proceedings and Property Ordinance, Cap. 192 ( MPPO ) to make application for financial relief against her former husband the Respondent herein upon the dissolution of their relatively brief and childless marriage earlier by a court in PRC. In support of her leave application the Applicant had filed 2 affirmations. On 14th January 2016 after hearing her counsel I granted the Applicant leave with reasons for my decision to be handed down later, which I now do. Relevant Background The Applicant now aged 30 was born and raised in Taizhou City, Jiangsu Province, PRC. She became acquainted with the Respondent, now aged 29 and also from Taizhou, when both were studying in the same university in Shanghai in 2004, and later started dating each other. In February 2008 the Respondent came to work in Hong Kong as a finance associate on a working visa, while the Applicant also came to Hong Kong in September 2009 first as a student of the City University, and afterwards remained here to work also on a working visa. At around the same time in 2009 a flat in Tower 1 Harbour Green, Shum Mong Road, Kowloon was purchased in the Respondent s sole name for HK\$8.9 million paid for by his father with the assistance of a bank mortgage and where the parties started to cohabit in about June 2010. It is the Applicant s case that the property was intended to be a wedding gift for

their planned marriage. Which the parties did on 10th June 2011 when they registered their marriage in Hong Kong, and after holding a wedding banquet in their hometown in Taizhou, they returned to Hong Kong where they continued to reside in the said property as their matrimonial home. After the marriage the parties carried to work and both in the financial field. Their relationship however started to deteriorate in about mid-2012 after serious disagreement over certain securities accounts with funds and equities worth at one time in excess of HK\$4 million held under the Applicant's name but operated by the Respondent, and after attending a funeral of her paternal grandfather in PRC, the Applicant returned to Hong Kong in July 2012 to find that she had been barred from entering the matrimonial home and had to stay with a friend. As a result the parties had since not resumed cohabitation, and that the Applicant subsequently discovered that the Respondent had without her knowledge or consent sold the former matrimonial home in November 2012 for HK\$13 million and is believed to have received a net sale proceeds of not less than HK\$4.1 million. On 9th June 2014 the Respondent instituted divorce proceedings in the People's Court of Hailing District, Taizhou City, Jiangsu, PRC (PRC Proceedings). Upon being served with the PRC divorce papers, the Applicant filed an application with the said Taizhou Court on 7th July 2014 to challenge its jurisdiction to entertain their divorce, and on 31st July 2014 she instituted her own divorce proceedings in Hong Kong under FCMC No. 10156 of 2014 seeking divorce and general ancillary relief against the Respondent (Hong Kong Proceedings). On 8th August 2014 the Taizhou Court dismissed the Applicant's application to challenge its jurisdiction to entertain their divorce. As a result on 20th August 2014 the Applicant appealed to the Intermediate Court of Taizhou against that decision, but her appeal was subsequently dismissed on 8th October 2014. In November 2014 the Applicant applied to the original Taizhou Court for re-hearing of her application which was refused, and when the Taizhou Court proceeded to fix a hearing of the Respondent's case for divorce on 26th November 2014, it was postponed to 29th December 2014 at the Applicant's request, and at that adjourned hearing during which the Applicant did not attend, the Taizhou Court heard the Respondent's application and adjourned its judgment to a later date. Meanwhile at the 1st Appointment hearing of the Applicant's Hong Kong Proceedings on 12th December 2014 attended by the Applicant acting in person and the Respondent's solicitors, the parties were ordered to file and exchange their Form E within 28 days and that 1st Appointment was adjourned to 2nd February 2015. Shortly thereafter the Respondent issued a summons on 2nd January 2015 for an order to stay the Hong Kong Proceedings on the ground of forum non conveniens in favour of the PRC Proceedings in Taizhou which was opposed by the Applicant and subsequently adjourned for argument pending the filing of her affirmation in opposition. However, on 6th February 2015 the Taizhou Court handed down its judgment in favour of the Respondent and granted a divorce to dissolve the parties marriage. On 9th March 2015 the Applicant filed an appeal against that decision, which was subsequently dismissed by the Intermediate People's Court of Taizhou City on 6th May 2015. The Applicant has since not taken any steps in her divorce case in Hong Kong which is presumably to have been abandoned, and instead on 6th October 2015 she launched her leave application under Part IIA of MPPO which as noted above came before me on 14th January 2016. Applicable Law and Principles Section 29AB of Part IIA of MPPO provides that where a marriage has been dissolved or annulled, or the parties to a marriage have been legally

separated, by means of judicial or other proceedings in a place outside Hong Kong, and the divorce, annulment or legal separation is recognised as valid by the law of Hong Kong, either of the parties to the marriage may apply to the court for an order for financial relief, which is what the Applicant now seeks to do. There is however a filter mechanism under section 29AC to regulate the making of such application:

- (1) No application for an order for financial relief may be made unless the leave of the court has been obtained in accordance with rules of the court.
- (2) The court must not grant leave unless it considers that there is substantial ground for the making of an application for an order for financial relief.
- (3) The court may grant leave under this section despite the fact that an order has been made by a competent authority outside Hong Kong requiring the other party to the marriage to make any payment or transfer any property to, or for the benefit of, the applicant or a child of the family.
- (4) Leave under this section may be granted subject to any conditions the court thinks fit. Section 29AE also sets out the jurisdictional requirements: The court has jurisdiction to entertain an application for an order for financial relief if any of the following requirements is satisfied either of the parties to the marriage was domiciled in Hong Kong on the date of the application for leave under section 29AC; or on the date on which the divorce, annulment or legal separation obtained in the place outside Hong Kong took effect in that place; either of the parties to the marriage was habitually resident in Hong Kong throughout the period of 3 years immediately before the date of the application for leave under section 29AC; or throughout the period of 3 years immediately before the date on which the divorce, annulment or legal separation obtained in the place outside Hong Kong took effect in that place; or either of the parties to the marriage had a substantial connection with Hong Kong on the date of the application for leave under section 29AC; or on the date on which the divorce, annulment or legal separation obtained in the place outside Hong Kong took effect in that place. In addition section 29AF imposes a duty on the court to consider whether Hong Kong is the appropriate venue for the application:
  - (1) Before making an order for financial relief, the court must consider whether in all the circumstances of the case it would be appropriate for the order to be made by a court in Hong Kong, and if the court is not satisfied that it would be appropriate, the court must dismiss the application.
  - (2) The court must in particular have regard to the following matters
    - (a) the connection that the parties to the marriage have with Hong Kong;
    - (b) the connection that those parties have with the place where the marriage was dissolved or annulled or where they were legally separated;
    - (c) the connection that those parties have with any other place outside Hong Kong;

- (d) any financial benefit that the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a place outside Hong Kong;
  - (e) if an order has been made by a competent authority outside Hong Kong requiring the other party to the marriage to make any payment or transfer any property to, or for the benefit of, the applicant or a child of the family
  - (i) the financial relief given by the order; and (ii) the extent to which the order has been complied with or is likely to be complied with;
  - (f) any right that the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any place outside Hong Kong and, if the applicant has not exercised that right, the reason for that;
  - (g) the availability of any property in Hong Kong in respect of which an order for financial relief in favour of the applicant may be made;
  - (h) the extent to which any order for financial relief is likely to be enforceable;
  - (i) the length of time that has elapsed since the date of the divorce, annulment or legal separation. The leave application must also follow the procedure prescribed by Rule 103A of the Matrimonial Causes Rules ( ) as follows: An application for leave to apply for an order for financial relief under section 29AC of MPPO must be made ex parte by originating summons in Form 27; and supported by an affidavit by the applicant stating the facts relied on in support of the application with particular reference to the matters set out in section 29AF of that Ordinance. The affidavit in support must give particulars of the judicial or other proceedings by means of which the marriage to which the applicant relates was dissolved or annulled, or by means of which the parties to the marriage were legally separated, and must state, so far as is known to the applicant the names of the parties to the marriage and the date and place of the marriage; the occupation and residence of each of the parties to the marriage; whether there are any living children of the family and, if so, the number of the children and each child's full names (including surname) and the date of birth or, if it be the case, that he or she is over 18; whether either party to the marriage has remarried; the full particulars of each party's property and income; and the grounds on which it is alleged that the court has jurisdiction to entertain an application for an order for financial relief under section 29AB of the MPPO. In *C v H* [2012], HKFLR 199, the very first case in which leave application was brought under section 29AC, Poon J (as he then was) very helpfully laid down the proper approach and guidance in his judgment for such leave application at p206:
28. To obtain leave under section 29AC(2), the applicant must pass the threshold of satisfying the court that there is substantial ground for the making of the substantive application. Lord Collins explained the threshold in *Agbaje v Agbaje* thus:

33. In the present context the principal object of the filter mechanism [that is, section 13 of Part III of the 1984 Act] is to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse. The threshold is not high, but is higher than serious issue to be tried or good arguable case found in other contexts. It is perhaps best expressed by saying that in the context substantial means solid I hold that the same threshold applies to section 29AC of Part IIA.
29. The applicant bears the burden of meeting the threshold: *Z v Z* (foreign divorce: financial provision) [1992] 2 FCR 152. In discharging the burden, the applicant must present before the court all the relevant facts in support. And the court will consider all the circumstances of the case to see if the burden is discharged. In this connection I wish to mention three points.
30. First, the applicant must satisfy one of the three formal jurisdictional requirements in section 29AE. This is obvious, if none of those formal requirements is satisfied, the court simply does not have jurisdiction to entertain the substantive application for financial relief. It would be clearly wrong for the court to grant leave.
31. Second, the applicant must also satisfy the court that provisionally it would be appropriate for the order to be made by a court in Hong Kong under section 29AF. This point needs further explanation.
32. Under section 29AF(1), the court is under a duty to consider at the substantive hearing whether Hong Kong is the appropriate venue for the application for financial relief. The English courts have consistently taken into account the criteria set out in section 16 of the 1984 Act (the English equivalent of section 29AF of Part IIA) and the relevant circumstances in considering leave. As explained in *Rayden and Jackson on Divorce and Family Matters*, 18th Edition, para 26.10: The duty imposed under the MFPA 1984, s 16 to consider at the substantive hearing whether England or Wales is the appropriate venue for an application for financial relief is a matter for consideration at the leave stage. If on the application for leave to apply it is clear that if leave were given the application must founder at the first hurdle of s 16(1), then it would clearly be wrong for the court to grant leave to apply in the first instance.
33. At the leave stage, the court cannot and will not come to a definitive view if Hong Kong is the appropriate venue. Therefore it should be sufficient if the applicant can establish, provisionally, that Hong Kong is the appropriate venue in order to pass the threshold for obtaining leave.
34. Now, in considering section 29AF(1), the court is required to have regard to the factors listed in section 29AF(2). And many of the factors are common with those which would be relevant in a *forum non conveniens* inquiry. Before *Agbaje v Abaje*, when considering the section 16(2) factors in the 1984 Act, the English authorities had demonstrated a consistent approach of refusing leave where a foreign court was, or had been, seized of the matter on the ground that comity required that foreign orders should be recognized and respected and

forum shopping should be discouraged: see Rayden, *supra*, para 26.11. This is no longer the law after *Agbaje v Agbaje*, which held that the forum conveniens and stay principles are not engaged in Part III cases. As Lord Collins expounded: 49 But the forum non conveniens principles were developed to deal with cases in which it was necessary to decide, which of two jurisdictions was the appropriate one in which proceedings were to be brought. Section 16 does not impose a statutory forum non conveniens test. It does not require the court to determine the only appropriate forum where the case may be tried more suitably for the interests of the parties and the ends of justice. No choice between jurisdiction is involved. The whole basis of Part III is that it may be appropriate for two jurisdictions to be involved, one for the divorce and one for ancillary relief. 50 The next question is whether principles of comity will add anything useful to the analysis. 51 First, comity is sometimes used not simply in the sense of courtesy to foreign states and their courts, but also in the sense of rules of public international law which establish the proper limits of national legislative jurisdiction in cases involving a foreign element. In that sense it will be contrary to comity for United Kingdom legislation to apply in a situation involving a foreign country when the United Kingdom has no reasonable relationship with the situation. This is not the case here. There is nothing internationally objectionable in legislation which gives a court power to order financial provision notwithstanding a foreign decree of divorce, whether or not the foreign court has ordered financial provision, provided that the forum has an appropriate connection with the parties or their property. The whole point of the factors in section 16(2) is to enable the court to weigh the connections of England against the connections with the foreign jurisdiction so as to ensure that there is no improper conflict with the foreign jurisdiction. That is why in *Holmes v Holmes* [1989] Fam 47, 53, Purchas LJ was right to note that section 16 reflected the principles of comity as between competent courts.

35. Third, while Part IIA aims at remitting the presence of a failure in a foreign jurisdiction to afford appropriate financial relief, the statutory test does not require the applicant to prove hardship, injustice or exceptionality as a pre-condition in order to obtain leave: *Jordan v Jordan* [2001] 1 WLR 210; approved in *Agbaje v Agbaje*, per Lord Collins at paras.60-64. Such factors, if present, are cogently relevant to the court's consideration for granting leave. Their absence is however not fatal. But it does not mean that whenever a spouse is dissatisfied with the financial provision obtained in a foreign jurisdiction, he or she should be encouraged to apply for further financial relief under Part IIA. Part IIA does not give the spouse a free ticket to do so. He or she should take heed of what Lord Collins said in *Agbaje v Agbaje*:
65. But equally it is not the intention of the legislation in England and Wales to allow a simple top-up of the foreign award so as to equate with an English award. His Lordship then went on to explain the point by distinguishing Part III of the 1984 Act from the Scottish provisions and observed: Instead a more flexible approach was deliberately adopted. There will be some cases, with a strong English connection, where it would be appropriate to ask what provision would have been made had the divorce been granted in England. There will be other cases where the connection is not strong and a spouse has received adequate

provision from the foreign court. Then it will not be appropriate for Part III to be used simply as a tool to top-up that provision to that she would have received in an English divorce. He later reiterated: 72 It is the purpose of Part III to allow a spouse (usually, in current conditions, the wife) with some English connections to make an application in England to take advantage of what may well be the more generous approach in England to financial provision, particularly in so-called big-money cases. There is no condition of exceptionality for the purpose of section 16, but it will not usually be a case for an order under Part III where the wife had a right to apply for financial relief under the foreign law, and an award was made in the foreign country. In such cases mere disparity between that award and what would be awarded on an English divorce will certainly be insufficient to trigger the application of Part III.

36. Any intended applicant should firmly bear these judicial observations in mind and think through his or her case very carefully before commencing proceedings under Part IIA. It was with these guidance in mind that I considered and granted the leave application on the following basis and reasons. The Application First, as far as the jurisdictional requirements under section 29AE is concerned, the Applicant has shown to my satisfaction that she was either a habitual resident in Hong Kong or had a substantial connection with Hong Kong since 2009 by being first as a student at the City University and thereafter on full time employment in Hong Kong up to the time of her application. Similarly as was the Respondent. The Applicant has also provisionally demonstrated to my satisfaction that Hong Kong is the appropriate venue for an order for financial relief to be made by a court in Hong Kong under section 29AF(2) having regard in particular to those matters stipulated therein, conveniently adopting the same approach of His Lordship in *C v H* as follows:
- 29AF(2)(a) - Connection with Hong Kong: As stated above, both parties have since the late 2000s lived and worked in Hong Kong, it was where they had conducted the whole of their married life and held substantial bank and securities accounts as well as their matrimonial home worth over HK\$10 million, and where both appeared to have established their career;
- 29AF(2)(b) - Connection with Taizhou City: While it is true that both parties came from Taizhou where their parents and immediate family still reside, and that it is part of the Applicant's financial claims against 7 properties in PRC, it is however the Respondent's case in the Hong Kong divorce proceedings that he did not own any property beneficially in Hong Kong or otherwise, nor did he own any property together with the Applicant in PRC as he so stated in his divorce application filed in the PRC Proceedings. Now that the Respondent had obtained his divorce in Taizhou and that the Applicant appeared to have exhausted all her legal challenges there, it seems to me that neither would have little or any further connection with Taizhou;
- 29AF(2)(c) - Connection with other place: There is no evidence to suggest that either party has any connection with anywhere else;
- 29AF(2)(d) - Any financial benefit obtained or obtainable outside Hong Kong: It is significant that the Taizhou Court has made no order for financial provision for the Applicant, nor for that matter did the Respondent make any application for financial order in the PRC Proceedings in which he represented to the Taizhou Court that there were no matrimonial assets to be distributed, on

which the Applicant clearly takes issue; 29AF(2)(e) Any order by a foreign authority: As noted above the Taizhou Court has made no order whatsoever for financial relief for either the Applicant or the Respondent other than an order dissolving their marriage; 29AF(2)(f) Any right to apply for financial relief outside Hong Kong: The Applicant could supposedly apply for financial relief in Taizhou Court, but she has not because she has been advised by her lawyers that she would suffer a number of juridical disadvantages if the matter were to be tried in Taizhou Court, in particularly of her case that the sale proceeds of the former matrimonial home and the funds previously held in her securities accounts are now being held by the Respondent's father but there is no concept of trust under PRC law, and unlike Hong Kong courts, the PRC courts do not have power to join any third party allegedly holding assets on trust for one of the spouses in their divorce proceedings. This is significant as it was the Respondent's case before the Taizhou Court that there was no matrimonial assets to be distributed between the parties; 29AF(2)(g) Availability of property in Hong Kong: As alluded above, it is the Applicant's case that the sale proceeds of the former matrimonial home in excess of HK\$4 million plus several million dollars worth of equities in the Applicant's securities accounts now believed to be held by the Respondent which form the basis of her intended application for financial relief against him; 29AF(2)(h) Enforceability of any financial order: There is no question of enforcing any order for financial relief in Hong Kong where the Respondent has lived and worked since 2008; 29AF(2)(i) Lapse of time since divorce: It was in February 2015 when the Taizhou Court granted the divorce to the Respondent while the Applicant took out the present leave application in October of the same year, hence a lapse of 8 months during which she had actively taken various legal challenges against that order including appeals and rehearing, for which I do not believe that she had been guilty of any undue delay, and which would certainly not form any ground for refusing leave. Above all, as in the case of C v H supra, but for the PRC Proceedings and the subsequent dissolution of the parties marriage by the Taizhou Court, no doubt the Applicant would have been able to continue with her Hong Kong divorce proceedings and her application for financial relief in the usual manner in Hong Kong. While there is no question that it had been a short childless marriage during which both parties were gainfully employed with their own career, it is also true that substantial assets had been involved including a matrimonial home and securities accounts with a combined worth in the tune of HK\$10 million being used and held by either parties during the marriage, and that whatever issues or disputes between them over these assets, they can now only be dealt with by the Hong Kong court since the Taizhou Court has not done so and that it does not appear to be advisable or practical for the Applicant to do so in that court in the circumstances of her case. Hence the only option left for the Applicant is to take out proceedings under Part IIA. It is for all these reasons that I granted leave to the Applicant, and according with direction to fix a hearing for her Part IIA proceedings. ( Bruno Chan ) District Judge Mr. Eugene Yim instructed by M/S S. W. Wong & Association for the Applicant. PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk hUD\_ h&St he=Q he=Q he=Q he=Q he=Q he=Q he=Q h&St he=Q gd!u9 h}'8 hR} hsf. he=Q he=Q he=Q hm9q hrFO gd[L h/X hC2! hsf. h:PD h:PD h {+ h {+ hl7o hl7o hl7o hl7o h:PD h:PD h/X h/

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