

HONG KONG / JUDGMENT

TWYR v. NMC

COURT

Family Court

DECIDED

15 November 2016

CASE / FILE NUMBER

FCMC4937/2011

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bjbj FCMC 4937 / 2011 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 4937 OF 2011

BETWEEN TWYR Petitioner and NMC Respondent

Coram: Deputy District Judge K K PANG in Chambers (Not Open to Public) Date of Hearing : 25
October 2016 Date of Judgment : 15 November 2016

J U D G M E N T (Interpretation of Consent Order)

Background

AUTONUMOUT This is the substantive hearing of the respondent Wife) Amended Summons filed on 13 March 2015, pursuant to Order 45 rule 6(1) of the Rules of the District Court, to enforce an order for the sale of the former matrimonial home in the terms and conditions as provided by the Consent Order made by Deputy District Judge A. Yim on 19 September 2011. AUTONUMOUT The parties were married in November 2000 in Hong Kong. They had a son born in June 2001. The petitioner (Husband) commenced proceedings for divorce on the ground of 1 year by consent on 16 April 2011. The parties were able to reach an agreement in settlement of both the future arrangements for the child of the family and their claims for ancillary relief. The parties filed the consent summons containing the terms of their agreement on 13 June 2011 and the Consent Order in terms of their joint application was made on 19 September 2011 (Consent Order). AUTONUMOUT The terms of the Consent Order, ame 1u@S [(WgQ eKNTSp h>kKNF S(WT{ OBf/e N@b g g X<\0W wq\W]\Os^ Q#L_js^ SKNirmi c irmiKN c chQxe OBf/e N@b g g irmiKN/e bFO NP irmiKN N\O ZZU} \ \$R)YgQ X<\0W wq\W]\Os^ Q#L_js^ virmiKNmi k @b g N irmi ^P[sYX N1uT{ Nrsyb TP[sYt^ rkKNMR Y!q1 TP[sY6^ TP[sY (W6r &TGRMR S(Wr TP[sY6^ 1uU} \ \$R

1uU} \ \$R ^P[sY P[sYt^ e6Rx[mi OBF/e irmiKN c chQxe pbk] OBF/e @b g g irmiKN/e bFO NP irmiKN y for the sale to be paid by the Husband. AUTONUMOUT The Decree Absolute was granted on 25 October 2011. However, the parties together with the child of the family continued living in the said property until the Wife and the child moved out in 2015. The Husband is still living in there. Up to-date, the Husband has been paying the monthly mortgage repayments, rates and managements and utilities of the said property. According to the valuation provided by the Wife, the market value of the said property as at 7 August 2016 was HK\$10,620,000. AUTONUMOUT The common background is that up to-date neither has the Wife paid the Husband the HK\$3 million or any part thereof, nor has he transferred the said property to her. AUTONUMOUT The paragraph 2 of the Wife s Amended Summons prayed as follows: cgq v,{2)YgQ irmi X<\0W wq\W]\Os^ Q#l_js^ irmi vmi k &N1uHT @b g N irmiI irmiKN c irmiKN c chQxe irmi hQxe/e irmiKN not have any real intention to divorce. The Husband further alleged that his divorce Petition and the Consent Order are false and both are liable to be set aside. AUTONUMOUT During the call-over hearing dated 13 April 2016, however, Ms A Yip S C confirmed that the Husband is no longer taking any issue on the divorce proceedings nor the validity of the Consent Order, and that he was agreeable to an order in terms of the part of the paragraph 2 of the Wife s Amended Summons that tracks the exact wordings of the paragraph 2 of the Consent Order, but opposed the Wife s application to insert the underlined part into the order to be made, on the ground that the underlined part is not written in the Consent Order. At the present hearing, Ms L Lau further confirmed that the Husband was also agreeable to include the wordings irmi hQxe/e irmiKN irmiKN c irmiKN c chQxe e paragraph 2 of the Consent Order was clear, viz the Wife was to pay the Husband HK\$3 million to buy out his interests in the said property. The Husband would continue to pay for the mortgage until it is paid off. The natural and ordinary reading of the undertaking meant the Husband would continue to pay the mortgage repayments as and when they fell due until the entire mortgage was fully repaid, in line with the phrase OBF/e hQxe vuBfHT /f(WGP- irmi evuBfRQP[/f0O 0@b gRQP[Rcbd discharge the mortgage. This is illogical and absurd. Why could not the Wife pay the bank directly? Clearly, the whole settlement was to give the Husband a lump sum of HK\$3 million for use as he saw fit. If the order was for the Husband to pay off the entire loan upon transfer, it could have written clearly and there would be no room for argument. Wife s Case AUTONUMOUT On the other hand, the Wife argued: The paragraph 2 of the Consent Order had to be read in conjunction with the Husband s undertaking to pay the mortgage of the said property. The natural and ordinary reading of the Consent Order as a whole had to be that (a) the Husband should sell the said property to the Wife for HK\$3 million within 90 days from the Decree Absolute; (b) the Husband was required to continue to pay the on-going mortgage instalments of the mortgage pending the sale; and (c) to discharge the outstanding mortgage upon the sale of the said property to the Wife. The difficulty of the Husband s contention was that his interpretation presupposed that the Wife was able to obtain a mortgage loan in place of the previous one after the said property was sold to her. However, there was no dispute that the Wife was a housewife at the time when the Consent Order was made. No bank or financial institution would be prepared to offer a mortgage loan to the Wife in such circumstances. The parties could not have contemplated that the Wife would have to obtain a new mortgage loan as the sole mortgagor and/or borrower in order to complete the sale, bearing

in mind that both parties were employed in the field of financial industry at some stage previously. Had the parties intended that the Wife should obtain a new mortgage loan in her sole name in place of the previous one, this could have been easily spelt out in the Consent Order. Much emphasis was placed on the words OBF/e king should be contrasted with the paragraphs 4 and 5 of the Consent Order. It could be seen that in the latter the timeline and schedule for the making of periodical payments were precisely prescribed. By so comparing the undertaking and the said paragraphs of the Consent Order, it became obvious that the words OBF/e as trite that a vendor in a conveyancing transaction must be in a position to convey the property contracted to be sold free from all encumbrances. A mortgage or charge over the property that was not discharged at the date of the assignment would obviously constitute a blot on the title of the assignor. The above well-established principle offered strong support to the Wife's interpretation that the Husband was required to sell the property to her free from all encumbrances. Additionally, the Consent Summons which resulted in the Consent Order was drafted by the Husband's solicitors whereas the Wife was unrepresented at the time. The *contra proferentem* rule dictates that where there was a doubt about the meaning of a contract, the words would be construed against the person who put them forward: see 7.08, Lewison on the Interpretation of Contracts. The rationale behind the *contra proferentem* rule was crisply explained by Lord Mustill in *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Limited* in [1996] 2 HKLR 161 at 168A-B:- the basis of the *contra proferentem* in principle is that the person who puts forward the wordings of a proposed agreement may be assumed to have looked after his own interests, so that if words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not. Applying the *contra proferentem* rule and its underlying rationale to the present case, the words of the Consent Order should therefore be construed adversely against the Husband and the Wife's interpretation had to be preferred. In the premises, the Husband should bear the risk of any resulting ambiguity (assuming there was any ambiguity). For the above reasons, contrary to the assertions by the Husband, what the Wife was seeking here was not to change or vary the substantive nature of a consent order, but simply to enforce and if necessary, request for a ruling on the meaning of the Consent Order. Applicable Principles of Law AUTONOMOUT Both parties referred to the following general approach to contractual interpretation that has been helpfully summarised by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896:

- (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
- (2) The background was famously referred to by Lord Wilberforce as the matrix of facts, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

- (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear.
- (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.
- (5) The rule that words should be given their natural and ordinary meaning reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. AUTONUMOUT The parties also accept that the general approach to the construction of a consent order is identical to that of the construction of a contract of compromise. My View AUTONUMOUT To resolve the parties dispute, first the court will look at the express terms. The court will take a purposive and commercial approach to the construction of contracts as per the approach set down in Investors Compensation Scheme. As a starting point, the meaning of the document is to be found in the Consent Order itself, so the court tries to find the ordinary and natural meaning of the words as they are written down. This is because the courts do not easily accept that people have made linguistic mistakes, particularly in formal documents. However, the wording must make sense in the relevant commercial setting and so the court will investigate the full background circumstances to the agreement. The court will take an objective approach to ascertaining the meaning of the words in question. The aim of the inquiry is to ascertain the contextual meaning of the relevant contractual language. AUTONUMOUT With the above matters and principles in mind, I now turn to the circumstances of the present case. AUTONUMOUT In my view, it is clear that the natural and ordinary meaning of the Consent Order is that the Husband would continue to timely pay the mortgage repayments in accordance with the terms of the mortgage until full payment. At the same time, I accept that to adopt the Wife's interpretation that the Husband shall pay off the mortgage loan when he sells the said property to the Wife is to try to add into the Consent Order a condition that is not written in there. I also take the view that the Wife's interpretation is questionable as follows. Were the Wife correct, and it was therefore necessary to pay about HK\$4 million (that was the amount of the outstanding mortgage loan in 2011) to the mortgagee bank, why would the Wife be required to pay HK\$3 million to the Husband ht<N gdLf gdLf gdLf gdLf gdLf gdLf gdLf {vqlhv

h9-- gd{fA gdcz hwF0 hwF0 h9-- mWmWmW h{fA h{fA h{fA h{fA gdcz gdw% gdw% v]C-Cv hJ \$ hJ \$ hJ \$ gd*c gdcz lP8l hJ \$ h046 h046 tZtZtZtZ gdtJr gdcz gd*c wokofbfbkb]bYbYb]b]bU]bYU h046 h046 htJr htJr htJr htJr gdtJr htJr h046 htJr gdcz gd* gd* gdtJr gdcz gd9-- gdcz ? The rhetorical question is why the Wife could not pay HK\$3 million to the bank directly. On the contrary, such arrangement will make perfect sense if the purpose is to give the Husband a lump sum of HK\$3 million for use as he sees fit.

AUTONUMOUT The Wife argued that the Husband s interpretation is faced with some difficulties. I shall deal with her arguments as follows. Firstly, about the argument that the Husband s interpretation presupposes that the Wife is able to obtain a mortgage loan in place of the existing mortgage, Ms L Lau actually confirmed that that is not the Husband s case. In my view, if the Wife is unable to obtain a new mortgage, the Husband can transfer his interest in the said property to the Wife subject to the existing mortgage. I have not lost sight that the Husband has agreed with the existing mortgagee that he would not sell or transfer any of his interest in the said property without the written consent of the mortgagee bank, and his failure to observe such agreement is an event of default, and on the happening of an event of default, the mortgage bank might terminate the facilities agreement and demand immediate repayment of all outstanding mortgage loan. However, it is also clear that by the paragraph 2 of the Consent Order, the parties have agreed that the Husband shall sell the said property to the Wife subject to the existing mortgage. That must be how they will carry out the performance of the paragraph 2 of the Consent Order. If and when the mortgage bank calls loan, apparently, it will be the Husband who is responsible to meet the bank s demand, pursuant to his personal undertaking to pay the mortgage repayment as and when it falls due. AUTONUMOUT Secondly, as to the Wife s proposition that it is trite that a vendor in a conveyancing transaction must be in a position to convey the property contracted to be sold free from all encumbrances. With all due respect to Mr E. Yim, I do not agree that that is always the case. For my part, what a vendor sells is very much a matter of agreement between the parties. In the present case, in my view, it is not part of the parties agreement that the Husband will pay off the existing mortgage loan when he sells the said property to the Wife for HK\$3 million. AUTONUMOUT Thirdly, regarding to Wife s argument that applying the contra proferentem rule the Wife s interpretation must be preferred, suffice to say, in my view, there is no uncertainty in the terms recorded by the parties that brings into play the canons of construction on ambiguities. The court will only resort to applying the contra proferentem rule if the meaning cannot be found using the general rules of interpretation outlined in the above. As said in the above, in my view, the meaning of the paragraph 2 of the Consent Order is clear. Disposal AUTONUMOUT By reason of matters aforesaid, I shall make an order in terms of the paragraph 2 of the Wife s summons as amended by deleting the following words: irmiKN c irmiKN c chQxe ed to make the order that the Wife is to pay 50% of the costs of the present application. AUTONUMOUT It is therefore order that: an order in terms of the above paragraph (20); it is further ordered nisi that the Wife shall pay 50% of the Husband s costs of the Summons dated 13 March 2015 and Amended on 13 January 2016, including reserved costs, with certificate for Counsel s attendance. The order nisi becomes absolute 14 days after the order is made unless a party

has applied to the court for varying the order. (K K PANG) Deputy District Judge Ms Lorinda Lau instructed by S W Wong & Associates, solicitors for the Petitioner Mr Eugene Yim instructed by Jackson Ho & Co, solicitors for the Respondent 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 }sis}s h9-- &`#\$ &`#\$ 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 [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 :T'ZaG 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"/> \$66to (1Z* qcO8 C+c* Z,gD UL;i `4)l `4)l UL;i qcO8 `Yh; QzKGQzKG & 6" CACV Judiciary English.dot Judiciary Microsoft Office Word Judiciary CACV CACV 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="{FE6F8F6D-4978-4836-AB1C-DF21F86F2ACD}" 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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