

HONG KONG / JUDGMENT

WSW v. CKU

COURT

Court of Appeal

DECIDED

3 August 2016

CASE / FILE NUMBER

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bjbj Cacv 249/2015 in the high court of the hong kong special administrative region court of appeal civil appeal no. 249 of 2015 (on appeal from FCMC NO. 3040 OF 2008)

BETWEEN WSW Petitioner CKU Respondent

Before: Hon Cheung, Yuen and Poon JJA in Court Date of Hearing: 26 May 2016 Date of Judgment: 26 May 2016 Date of Reasons for Judgment: 3 August 2016 R E A S O N S F O R J U D G M E N T
Hon Cheung JA:

1. I agree with the Reasons for Judgment of Yuen JA. Hon Yuen JA:
2. This is an appeal by the respondent in FCMC3040/2008 from a Judgment of HH Judge Bruno Chan given on 17 March 2015 in respect of ancillary relief. At the conclusion of the appeal on 26 May 2016, we dismissed the appeal with costs. My reasons appear below.

Background

3.1. In 1987, the petitioner (then in her mid-20

- s) married Mr W. She had two children with him, a son () born in 1988 and a daughter () born in 1990. Mr W had a teenage daughter () by a previous marriage. 3.2. Mr W was a successful businessman who had a company (EToys) which had a substantial turnover. The family lived in a townhouse in Kowloon (House T8). 3.3. Unfortunately in 1992, when EW, WKL and WKK were 18, 4 and 2 years of age respectively, Mr W died. 3.4. Under his will, he appointed the petitioner and two directors of EToys executors and trustees of his estate1. 3.5. Under his codicil, House T8 was bequeathed to the petitioner until EW, WKL and WKK attained 21 years of age, at which time the property would be bequeathed to all 4 persons (ie the petitioner and the 3 children) in equal shares. 3.6. Further, under the will, the residuary estate was to be divided among them as follows:

- 35% to the petitioner;
 - 25% to WKL upon his attaining the age of 21;
 - 20% to WKK upon her attaining the age of 21;
 - 20% to EW upon her attaining the age of 28. 4.1. In 1992, the petitioner began a relationship with the respondent who was then in the process of divorcing his wife. He is 8 years older than the petitioner and was a director in his father's company (SC Manufactory), a plastic and furniture manufacturing business. 4.2. In 1993, the parties had a son () together. The respondent moved into House T8. In 1996, the parties registered their marriage. Later that year, they had a daughter (). The petitioner's children by Mr W were treated as children of the family.
5. Beginning in 1993, the petitioner took part in running the business of EToys as a director. Investments in properties 6.1. Also, the petitioner and, to a lesser extent the respondent, began to invest in real properties in Hong Kong and the PRC. Only the properties which have given rise to dispute are referred to below. 6.2. In 1993 the petitioner and respondent formed a company (). Both the petitioner and the respondent were directors and registered shareholders (of 1 share each), but the respondent signed a declaration of trust of his share in favour of the petitioner. 6.3. In August 1993, TJ bought the adjoining house (House T7) at a price of \$14.5m². This was sold in 2005 for \$20.8m. 7.1. In the same year, the petitioner bought the 5th China property³ in her sole name. This was for her parents occupation. 7.2. In 1994, the petitioner bought the 7th China property in her sole name at RMB4.5m. This was sold in 2012 for RMB2.4m. 8.1. In 1995, the parties bought the 3rd China property in their joint names. 8.2. In 1997, the parties bought the 2nd China property in their joint names. 9.1. In 2003, the petitioner bought the 4th China property at RMB319,000 in her sole name. This was sold in 2009 for RMB289,000. In the same year, she bought the 1st China property at RMB3.4m, also in her sole name. This was sold in 2011 for RMB2.19m. 9.2. In 2006, the parties bought the 6th China property in their joint names⁴. Divorce 10.1. In 2006 the parties separated. 10.2. In 2008 the petitioner filed for divorce. A decree nisi was granted in August 2008.
11. Also in 2008, EToys closed down, as a result of which no further income was produced whether by way of a salary for the petitioner or dividends for the beneficiaries of Mr W's estate. Ancillary Relief Judgment
12. The hearing of the ancillary relief proceedings took 27 days between May 2013 and January 2015. Apart from the parties, the respondent's father also gave evidence which is relevant to one of the grounds of appeal discussed below⁵. 13.1. On 17 March 2015 the learned judge handed down a Judgment of 65 pages. The judge's findings which are relevant to this appeal are:
- (1) the petitioner had mixed her children WKL and WKK's funds with her own in funding some, but not all, investments⁶;

- (2) the petitioner had not made full disclosure of her assets;
- (3) the respondent had a real prospect of an inheritance from his father in the foreseeable future. 13.2. In conclusion, the judge held that the petitioner's net worth was about \$10m⁷ (which would be decreased by the future needs of herself and the children⁸), and that the respondent's net worth was about \$6.35m⁹ (which would be increased to a similar amount¹⁰ by a very real prospect of a substantial inheritance from his father in the foreseeable future¹¹, the father having previously said that he had reserved a sum of \$6.9m for the respondent¹²). 13.3. The judge found that this was an unusual case in which the parties had established their own assets, investments and businesses prior to entering into the marriage, with the intention that they would maintain separate finances (except for the investments in the 2nd, 3rd and 6th China properties bought in joint names)¹³. In light of this, and the proximity of their net worth (taking into account the respondent's inheritance position), the judge held (para. 140):
140. In the premises and for all the reasons articulated above, it is my firm view that fairness between the parties will be achieved for each to exit the marriage retaining their own assets under their own name or possession and with their half share of their joint investments which they will no doubt require to meet their own needs in future under a clean break situation which is clearly their common intention, and this means that the 3 China Properties in their joint names shall be sold with their net proceeds be divided equally between the parties . Appeal
14. The respondent appealed. Discussion
15. The respondent first submitted that the judge had made a computing error in that:
- (1) the judge had omitted to include in the marital pot the petitioner's share in the sales proceeds of House T7. The respondent submitted that (a) the property was sold for \$20m, and (b) the judge had found that the petitioner had invested her own funds together with WKL's and WKK's (of which her proportion was 44%)¹⁴. Accordingly (the respondent submitted), the petitioner's proportion of the proceeds of sale would be \$8.8m (\$20m x 44%), and this sum should have been added to the petitioner's assets;
- (2) the judge had failed to include in the petitioner's assets the proceeds of sale of the 1st, 4th and 7th China properties, which the judge had found were her own investments, not involving funds from the respondent or WKL and WKK. 16.1. With respect, I do not think there has been a computing error. To address (2) first, in fact the 1st, 4th and 7th China properties were loss-making investments. The 1st China property was bought at RMB3.4m and sold for RMB2.19m. The 4th China property was bought at about RMB319,000 and sold for RMB288,570. The 7th China property was bought at RMB4.5m and sold for RMB2.4m. 16.2. As for (1) House T7, the property was bought at \$14.5m (on mortgage) and sold at \$20.8m. The Wife's 44% share of the gross proceeds would therefore be about \$9.15m. The judge found that the proceeds of sale of House T7 and/or some of the China properties¹⁵ was the likely security (channelled through a Singapore company) which the petitioner

provided for obtaining overdraft facilities from Standard Chartered Bank in the sum of US\$1.3m (about HK\$10.14m). The respondent thereupon submitted that the judge erred in not attributing this sum, but only \$5m, as the petitioner undisclosed cash and/or other assets 16. 16.3. With respect, the judge was entitled to adopt the sum of \$5m, taking into account the fact that the petitioner had been the undisputed sole provider for the financial needs of 4 children, either in their teens or in their early 20 s, 3 of whom had attended American boarding schools or universities¹⁷. 16.4. The evidence was that the family s monthly expenses were \$320,000 (about \$3.8m a year) mainly as a result of 3 of the children having gone abroad for university¹⁸. In assessing the undisclosed cash and/or other assets at \$5m, the judge had considered on the one hand, the expenses of maintaining the high standard of living enjoyed by the family, and on the other hand, whether the petitioner would have tried to economize if she did not possess some undisclosed cash and/or other assets¹⁹. The assessment that a sum of \$5m remained at the date of hearing was made by an experienced judge who had referred to substantial materials, who had seen and heard the parties, and who explicitly referred to the legal principles applicable when a party has failed to make full disclosure²⁰. I see no reason to find his assessment was a result of a computing error.

17. The other submission of the respondent was that the judge was wrong to have taken into account the prospect of his inheritance when there was no evidence that his father had any health issues and the father had testified that he had no concrete plans as to how to distribute his remaining estate after deducting the business s outstanding loans. 18.1. In my view, the judge was entitled on the evidence to make such a finding. The father was 89 years old at time of trial and was winding down his business. The respondent was the only son who had assisted in his business, as his other son had emigrated to Australia. As such, the respondent would therefore be a natural object of his bounty. 18.2. In 2012, the father had sold some properties for \$12m and had told both parties that he had reserved \$6.9m for the respondent. He did not detract from that statement in his testimony²¹. Further the father s company was occupying a valuable self-owned property in Tsuen Wan which had not been sold. 18.3. In other words, there was evidence before the judge that the respondent had a real prospect of inheriting from his father such a sum as would bring his net assets up to a similar amount as the petitioner
- s. On the evidence the judge made a finding of fact with which an appellate court would not interfere. Order
19. For the reasons set out above, I dismissed the appeal with costs²². Hon Poon JA:
20. I agree. (Peter CHEUNG) Justice of Appeal (Maria YUEN) Justice of Appeal (Jeremy POON) Justice of Appeal Ms Annie Lai and Mr Joshua Choy, instructed by Lam, Lee & Lai, for the petitioner Mr Eugene Yim, instructed by Christine M Koo & Ip, for the respondent 1 It would appear that, unlike the petitioner, the other executors and trustees did not take an active part in managing the estate. 2 Figures in this Judgment are approximate as the precise figures are immaterial. 3 This follows the number designated to the property in the

