

HONG KONG / JUDGMENT

YB v. LX**[2023] HKFC 141****COURT**

Family Court

DECIDED

28 July 2023

CASE / FILE NUMBER

FCMC596/2022

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bjbj Mbd1 FCMC 596/2022

**[2023] HKFC 141 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO. 596 OF 2022**

BETWEEN YB Petitioner and LX Respondent

Coram: Deputy District Judge W.Y. Ho in Chambers (Not open to Public) Date of Summons for
Leave to Appeal: 20 December 2022 Date of written submissions of the Respondent: 20 December
2022 Date of written submissions of the Petitioner: 13 April 2023 Date of the Respondent's written
Reply submissions: 5 May 2023 Date of Handing Down Judgment: 28 July 2023

Judgment

(Leave to Appeal paper disposal)

This is the Respondent's application for leave to appeal against my decision handed down on 9
December 2022 (the Decision).

BACKGROUND

The background of this case has been set out in the Decision at paragraphs 2

10. I shall not repeat the same. I shall adopt the same abbreviations used in the Decision. After the Decision was handed down, the Respondent filed a summons for leave to appeal against my decision on 20 December 2022. However, the Respondent failed to observe the guidelines

and standard directions relating to the applications for leave to appeal issued by HHJ CK Chan on 13 August 2018. At the hearing on 24 March 2023, I questioned about the failure to observe the standard directions. Counsel for the Respondent, Mr Yeung, explained they were unaware of the standard directions. Counsel for the Petitioner, Mr Poon, initially took the view they would not oppose the application for leave to appeal on the misunderstanding that they could raise their arguments at the substantive appeal hearing before the Court of Appeal (if leave were to be granted). Having reconsidered their position, Mr Poon asked the court for leave to file their submissions in opposition out of time. Having heard the parties submissions, I gave various time extensions to the parties so that they may file their submissions and affirmations out of time. On 21 December 2022, the Respondent filed a summons to vary the costs order nisi made in the Decision. However, by way of a consent summons filed on 12 May 2023, the parties subsequently agreed to have the argument on the costs order nisi be adjourned pending the decision of the present application for leave to appeal.

INTENDED GROUNDS OF APPEAL The draft notice of appeal (the draft Notice) lodged by the Respondent is voluminous; 18 pages long with numerous grounds of appeal and detailed particulars, submissions and/or arguments. Having read the intended grounds of appeal, I do not intend to deal with all the submissions/arguments/points raised in the draft Notice. Suffice to say I have considered the matters contained in the draft Notice and shall only deal with the salient matters raised. I succinctly summarize the intended grounds of appeal (with the salient particulars) to be as follows: Irrelevant matters have been taken into consideration and relevant matters were not considered in arriving at the Decision. The need to preserve the Properties was not a relevant consideration since the Petitioner agreed to sell the Properties. The adequacy of preserving the sale proceeds was sufficient to protect the Petitioner s interest. The Petitioner s credibility in coming to findings was disregarded. The finding that the Properties were investment properties is irrelevant. Erred in finding the Respondent knew of the impending divorce when he entered into the contract to sell the Properties. Various findings and/or conclusions were erroneous. Those findings and/or conclusions include: The Respondent made no proposals on how to secure the deposit. The finding that the sale of the matrimonial home was a dissipation of matrimonial assets. The Petitioner s non-disclosure was not material enough to automatically discharge the injunction. The case of *Shipman v Shipman* [1991] 1 FLR 250 is distinguishable from the present case. Failure to consider the application of the case of *UL v BK* [2013] EWHC 1735. The costs order nisi is erroneous. THE LAW Section 63A(2) of the District Court Ordinance provides that leave to appeal shall not be granted unless the intended appeal has a reasonable prospect of success or that there is some other reason in the interests of justice that the appeal should be heard. The relevant test of whether an appeal has a reasonable prospect of success is whether the applicant for leave can show that he has an arguable case with reasonable chances of success on appeal. In *Ho Yuen Ki Winnie and anor v Ho Hung Sun Stanley and anor*, HCMP 1009/2009, (unrep), Le Pichon JA stated at paragraph 16 of the judgment: - For leave to be granted, this court must be satisfied that the appeal has reasonable prospects of success . Merely showing that the appeal is arguable and not fanciful would not be sufficient. In my view, reasonable prospects requires something more

and, in that regard, some assistance may be derived from the test applied when setting aside a default judgment. In *KNM v HTF*, HCMP 288/2011, (unrep), Fok JA (as he then was) stated at paragraph 9: - The relevant test of whether an appeal has a reasonable prospect of success under section 63A is whether the applicant for leave can show that he has an arguable case with reasonable chances of success on appeal. A reasonable prospect of success therefore means an appeal with prospects that are more than fanciful but which do not need to be shown to be probable. (See also the case of *SMSE v KL* [2009] 4 HKLRD 125) WHETHER IRRELEVANT MATTERS HAVE BEEN TAKEN INTO CONSIDERATION AND RELEVANT MATTERS WERE NOT CONSIDERED IN ARRIVING AT THE DECISION. In summary, the points raised under this general intended ground of appeal were already raised at the hearing. As I have stated in the Decision, I have considered the salient submissions and have set out my findings and/or views on the submissions made. In so far as the Respondent claims the need to preserve the Properties as matrimonial assets is irrelevant as it was not argued, I have already set out my reasoning on why I felt it was necessary to preserve the Properties (see paragraphs 60 65 of the Decision). I shall not repeat my reasoning therein. The said paragraphs of the Decision also address the reasons why, despite the Respondent's willingness to pay the remaining sale proceeds either to court or to solicitors, I nevertheless was of the view that the injunction should be granted. As for the Petitioner's credibility and how it should have affected the Decision, the various submissions on the same raised at the hearing have been dealt with. In summary, it is not possible for the court at the interlocutory stage to make a finding on the overall credibility of the parties based on affirmations only. In so far as the parties are at odds on each salient issue, I have set out my views on which version of events I have accepted in so far as necessary to deal with the same. I find the Respondent's complaint on this matter to be without substance. In so far as the Respondent claims I made a finding on whether the Properties were investment properties and how it is irrelevant, his submissions are misconceived. Firstly, it is clear at paragraph 32 and 33 of the Decision, I did not find the Properties to be investment properties. Secondly, the discussion at paragraphs 32 and 33 of the Decision on whether the Properties were investment properties is in answer to the Respondent's affirmation (see paragraph 27 of the Decision). I fail to see how my comments on the nature of the Properties are irrelevant when the issue was specifically raised by the Respondent in his affirmation. In so far as the Respondent claims I erred in finding he knew of the impending ancillary relief claims in the divorce proceedings, I admit the sentence is loaded with several presuppositions, of which were not spelt out in the Decision. First, it is clear from the Respondent's affirmation that he moved out from the matrimonial home in November 2021. Having read the affirmations of the parties it is clear that it was this time the parties relationship broke down and the Respondent physically separated himself from the Petitioner. The parties must have anticipated that divorce was a real possibility, if not inevitable. This is supported by the fact that the Petitioner filed for divorce in Shenzhen on 12 January 2022, and subsequently filed for divorce in Hong Kong on 20 January 2022. Second, it must have been clear to the parties that any divorce proceedings would inevitably involve distribution of family assets. The parties have accumulated substantial wealth over

the marriage and have acquired various real estate over the course of the marriage. The Respondent must have been aware of the possibility that the Petitioner would make various ancillary relief claims against the matrimonial assets. This is now apparent from the relief pleaded in the divorce petition. In all the circumstances, and given the matters set out in the parties affirmations, I therefore concluded that the Respondent must have been aware of the impending ancillary relief claims when he sold the Properties. For the Respondent to assert he never anticipated any possible ancillary reliefs claims from the Petitioner at the time he sold the Properties would simply, in my view, be unbelievable. WHETHER THERE ARE VARIOUS FINDINGS AND/OR CONCLUSIONS THAT ARE ERRONEOUS. The intended grounds of appeal as summarized in paragraphs 7(2)(b)

- (e) hereinabove, and the particulars relating to these intended grounds as set out in the draft Notice, are basically a repetition of arguments raised at the hearing, of which I have dealt with in the Decision. I do not intend to repeat the same. As I have already considered the matters raised and have given my reasons as such, I find there to be no prospects of success on the intended grounds as raised. In so far as the Respondent takes objection to my observation at paragraph 63 of the Decision where I stated the Respondent made not proposals on how such sums could be secured for the purposes of the present proceedings, I find the intended ground of appeal misconceived. The reference to the deposit money and such sums read in context of paragraph 63 of the Decision clearly refers to the deposit money which has been transferred by the Respondent to his family members and does not refer to the remaining sale proceeds (assuming the sale went through) of the Properties. Nowhere in the submission of Mr Yeung or the Respondent's affirmations was there any assurance or even proposal suggested on how those distributed sums could be secured. THE COSTS ORDER NISI This intended ground of appeal is irrelevant for the purposes of this decision as the Respondent has filed a summons to vary the costs order and the parties have agreed to have the argument on the variation of the costs order be adjourned pending the decision of the present application for leave to appeal. SUMMARY The voluminous draft Notice of Appeal is largely a repetition of matters raised at the argument hearing and such arguments and/or submissions have already been dealt with in the Decision. In so far there are criticisms of various findings of the Decision, I find such complaints to be unmeritorious and misconceived for reasons set out above. Having considered the intended grounds of appeal and the Respondent's written submissions, I fail to see any prospects of success on the intended grounds of appeal. I have considered whether there is some other reason in the interests of justice why the appeal should be heard. I find there are none. By reason of the matters set out above, I dismiss the Respondent's application for leave to appeal. I see no reason why costs should not follow the event. I make a costs order nisi that the costs of the Respondent's application for leave to appeal be to the Petitioner, with certificate for counsel, to be taxed if not agreed. Unless any party applies to vary the costs order nisi within 14 days hereof, the costs order shall become an order absolute. (W.Y. Ho) Deputy District Judge Representation: Mr B. Poon instructed by Messrs. Augustine C.Y. Tong & Co. for the Petitioner Mr. M. Yeung instructed by Messrs. Cheung Fung & Hui for the Respondent PAGE

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