

HONG KONG / JUDGMENT

YSYM v. LHB

COURT

Court of First Instance

DECIDED

23 September 2014

CASE / FILE NUMBER

HCMP1514/2014

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

bjbj hcmp 1514/2014 in the high court of the hong kong special administrative region court of appeal miscellaneous proceedings no. 1514 of 2014 (on AN INTENDED appeal from FCMC NO. 19025 of 2012) BETWEEN YSYM Petitioner Respondent Before: Hon Kwan and Chu JJA Date of Decision: 23 September 2014 D E C I S I O N Hon Kwan JA (giving the decision of the Court): This is a renewed application for leave to appeal to the Court of Appeal arising out of an application for ancillary relief. The parties will be referred to as the Husband and the Wife notwithstanding they have been divorced. The Husband, who is a doctor employed by the Hospital Authority, is the applicant. He had legal representation up to March 2012 and has been acting in person thereafter. As noted in the judgment of HH Judge Bruno Chan on 11 February 2014 (the Judgment , all the disputes arising from the breakdown of the marriage were bitterly and acrimoniously fought. The Judgment was given after a six-day trial and ran into 77 pages. By the Judgment, the judge made these orders for ancillary relief:

- (1) the Husband shall, upon the decree nisi of divorce being made absolute and in any event not later than 31 December 2014, transfer all his share and interests in the former matrimonial home (the Property) to the Wife absolutely and free of all mortgages and encumbrances at his costs and expenses;
- (2) until the transfer he shall continue to pay the monthly mortgage repayment, utilities and management fees of the Property as before and as and when they fall due;
- (3) the above terms shall be in full and final settlement of all claims between the parties which shall be dismissed; and
- (4) the Husband shall pay to the Wife \$20,000 per month for the maintenance of each child of the family totalling \$40,000 per month until the child reaches the age of 18 or completes full time education whichever is later. By a subsequent order, the judge ordered the Husband to pay the Wife her costs of the ancillary relief proceedings on a full indemnity basis, on account of his flagrant breach of duty to make full and frank disclosure of his financial means and his persistent attempts to continue to lie about them in court as set out in detail in the Judgment. The Husband issued a summons on 7 March 2014 seeking leave to appeal against the Judgment to the Court of Appeal. This was heard by the judge on 29 May 2014 and

he gave judgment on 10 June 2014 refusing leave. This second judgment (the Decision) ran into 11 pages and explained in detail why the judge considered the grounds of the intended appeal as lacking reasonable prospect of success. The Husband renewed his application to this court for leave to appeal by a summons issued on 23 June 2014. Apart from seeking leave to appeal, he also applied for stay of execution of the order in the Judgment, presumably pending the determination of the intended appeal, if leave to appeal should be granted. With his summons, he submitted a skeleton submission of 15 pages with 2 schedules, and a small bundle of documents consisting of those documents he considered important to his arguments. This skeleton submission exceeded considerably the length permitted for a written submission in an application for leave to appeal as provided in Practice Direction 4.1 Part B paragraph 15, which is 5 pages. But as his skeleton submission had come to this court s attention late and as the Wife s counsel had already responded to it on 7 July 2014, this court did not ask the Husband to reformulate his submission to comply with the Practice Direction, in the interests of saving costs. The Court of Appeal has mentioned on more than one occasion that over elaborate submissions in this kind of application do not assist the court and may defeat the objective of dealing with such applications with reasonable despatch, and litigants have been forewarned two years ago that the length restriction for submissions in the Practice Direction must be strictly adhered to (Law Siu Leung formerly known as Law Ip Po, the administrators of Law Har Sio-Ying, deceased v The Occupiers & Chan Chi Wah, HCMP 1311/2012, 4 September 2012, 11; CWG v MH & Ors, HCMP 2409/2013, 9 January 2014, 9 to 11). This court refused to take into consideration a letter of the Husband dated 13 August 2014 making submissions on 130 pages of transcript and his second letter dated 15 August stating his intention to provide a complete set of the transcript of the six-day trial, presumably with the intention to make yet further submissions on the full transcript. He was informed by this court that if he wished to make further submission exceeding the permitted length in the Practice Direction, he would first need to seek a direction from the trial judge permitting him to do so. In the end, the Husband did not seek such direction from the trial judge, and we proceeded to consider his application on the basis of his submission of 23 June and the Wife s response of 7 July. We think it appropriate to determine this application on paper without an oral hearing, pursuant to the power given in Order 59 rule 2A(5) of the Rules of the High Court. For leave to appeal to be granted, the requirement in section 63A(2) of the District Court Ordinance, Cap 336 must be satisfied, namely, that the appeal has a reasonable prospect of success, or that there is some other reason in the interests of justice why the appeal should be heard. The Husband relied on both limbs in his submission. It is well established that a reasonable prospect of success means an appeal with prospects that are more than fanciful but do not need to be shown to be probable. In the Husband s summons, he listed 14 grounds he intended to pursue in his appeal. Save for the first ground (which relates to a complaint about the lack of opportunity to call witnesses to testify for him) and the last ground (which relates to the exercise of the judge s discretion in awarding maintenance for the children of the family), all the other grounds of appeal are challenges against the findings of fact of the judge, whether they be primary findings or findings by inference. Thus, it was contended that the judge was wrong

in rejecting his evidence and in finding that he had failed to make full and frank disclosure in relation to an interest in certain private medical clinics referred to as in the Judgment (which the Husband alleged was legally and beneficially owned by his mother Madam To, in partnership with two others, one Dr Lee and one Madam Law who is the mother of another doctor Dr Yen, also employed by the Hospital Authority) and an interest in a taxi (which the Husband alleged was beneficially owned by his elder brother; the taxi was held by a limited company of which one share was allotted to the same Dr Lee and another share was allotted to one Madam So, the wife of the elder brother). It was also asserted that the judge was wrong in finding that his alleged loan of \$548,000 from his mother, if indeed a loan, should be treated as a soft loan, and that the judge was wrong in finding the Wife a truthful witness in the evidence she gave. To successfully challenge all these findings of fact, as the Husband recognised in that he had cited in his submission the judgment of the Court of Appeal in *KNM v HTF*, HCMP 288/2011, 7 September 2011, the burden is firmly on him to demonstrate that the trial judge misunderstood the evidence, or overlooked important evidence or in some way came to conclusions of fact that, in the context of the evidence as a whole, were plainly illogical or in some other way plainly wrong (*KNM v HTF*, 2 and 23). This burden is not discharged by just repeating his evidence and submissions in the court below, by nitpicking without regard to the context of the evidence as a whole, by taking parts of the judgment out of context, by asserting that the judge failed to give weight to certain pieces of evidence, or by complaining of matters which the judge did not appear to have taken into account merely because they were not mentioned in the judgment. We have thoroughly considered the husband's challenges on findings of fact in grounds (2)(ii) to (xiii) in his summons. We do not think he has discharged the burden mentioned above. These grounds have apparently been canvassed in his leave application before the judge and have been dealt with comprehensively in the Decision. We are in full agreement with the Decision and it is not necessary for us to repeat the judge's reasoning and observations in it. As for his challenge against the exercise of discretion of the judge in the maintenance award to the children of the family in ground (2)(xiv), it is well established that it is not enough to establish that the appeal court might, or would have made a different order. As stated by Asquith LJ in *Bellenden (Formerly Satterwaite) v. Satterwaite* [1948] 1 All ER 343 at 345, which was concerned with an order for maintenance for a divorced wife, it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere. See also the statements of Lord Hoffmann in *Piglowska v Piglowski* [1999] 2 FLR 763 at 784C to H. The appeal court permits a plurality of views in matters of maintenance which require the trial judge to weigh up a number of factors of different considerations and accords the trial judge flexibility in the discretion to be exercised. We see no basis to interfere with the judge's exercise of discretion in the maintenance of the children in this case. We need only deal with ground (2)(i), which, as we understand from the submission of the Wife's counsel, Mr Alfred Cheng, was raised in the leave application before the judge in the Husband's contention that the judge was biased

against him and was abandoned but revived in the application before us. In this ground, the Husband complained that the judge failed to provide guidance to him as he was a litigant in person about calling witnesses to testify for him. In his submission, he stated that he remembered he had applied at least four times to call witnesses to testify for him, on 21 June 2013 (pre-trial review), 23 October 2013 (pre-trial review), 5 and 6 November 2013 (first and second days of trial). However, the Wife objected to his calling the witnesses and the judge did not warn him of the effect of such an objection. Hence, the trial proceeded without an opportunity given to him to call his witnesses. And he asserted that his failure to call witnesses was not his fault but was due to the Wife's objection. The judge did not tell him what he could have done in view of the Wife's objection. He had no legal training and did not know what he could do. This theme that he had no opportunity to call witnesses to testify for him permeated his submission in respect of some of the other grounds of appeal. Thus, he complained that as a lay person, he was not aware that the letter of Dr Lee dated 12 December 2011 (in which she stated that the Husband had no financial interest in HMC) and the letter of HMC's accountant Ms Lau dated 13 December 2011 (in which she stated that the Husband had received no income or benefit from HMC) were not to be regarded as conclusive evidence and thought those letters were sufficient evidence. He claimed he did not know the legal standard of proof of documents or that he should have filed affirmations from Dr Lee and Ms Lau. He asserted that to achieve a fair finding, Ms Lau should have been called and his mother could have given oral evidence if [his] application had successfully been made. The same applied to the partners of HMC, namely, Dr Lee and the mother of Dr Yen. He claimed they should have been called to give oral evidence, but for the fact that [his] application was repeatedly abandoned. In respect of the interest in the taxi, again he claimed that he genuinely believed that in producing the documents he considered relevant to this issue, this was sufficient evidence to show he did not have financial interest in the taxi and he was not aware that the documents were not to be regarded as conclusive evidence. So he did not know he should have filed affirmations from Dr Lee, his brother and his sister-in-law. He asserted that to achieve a fair finding, the shareholders of the company holding the taxi should have been called as witnesses. As noted by the judge, neither Dr Lee nor the accountant of HMC, Ms Lau, had filed any affirmation but had only written the letters exhibited to the Husband's affirmation. In the case of the Mother, she had made a lengthy affirmation for the Husband in the custody dispute and attended the custody hearing to give evidence as his witness, but she made no affirmation in the ancillary relief proceedings (not even a letter or simple statement as in the case of Dr Lee and Ms Lau) and was not called by the Husband to testify. The judge noted the ease with which the Husband could have arranged for Dr Lee, Ms Lau, his mother and his brother to testify and given the importance and relevance of their evidence to the Husband's case, and his assessment of the Husband as a highly intelligent person and a very capable litigant, drew the inference against him that the absence of evidence from these material witnesses was probably due to the thinking that their evidence would not hold up under scrutiny in court. Mr Cheng submitted on behalf of the Wife that the Husband had never formally applied to call his mother and Dr Lee as witnesses and had at most indicated that his evidence could be corroborated by these

witnesses. Counsel stated that the judge had explained to the Husband three times (at the two pre-trial reviews on 21 June 2013, 23 October 2013 and at trial) that if he were to apply to call witnesses, the Wife had the right to object on the ground of delay. The judge had also explained the legal principles on which such an application would be allowed and it was left to the Husband to consider if he would still pursue his application to call witnesses. In the end, no application was made by the Husband. Having gone through the transcript of the hearing on 21 June 2013, 23 October 2013, 5 and 6 November 2013 with care, we are satisfied that the above account given by the Wife's counsel is correct. The Husband most certainly did not make any application at the two pre-trial reviews or on the first or second days of trial to call any one as his witness. The judge had explained to him most indefatigably both at the pre-trial reviews and at the trial the options open to him in adducing evidence to prove his case and the possible courses of action that might be taken by the Wife as a result. At all times, it was entirely up to the Husband to decide what option to take in what he perceived to be his best interest. There is no question of the judge guiding him to take any particular course, nor is that the role of the judge as an impartial adjudicator in a civil dispute. At the pre-trial review on 21 June 2013, which was five months before the trial was due to start, the judge had given the Husband a comprehensive explanation of what would be expected of him to establish his case that he had no interest in HMC. At page 5 of the transcript lines R to T, there was this exchange between the judge and the Wife's counsel Mr Cheng: gbOq TbO1\ g OO1\ \$R Pirmi @u`O NUO"V n the judge, Mr Cheng and the Husband on the disclosure of documents said to be in the possession or control of the individuals alleged to be partners in HMC. At page 11 of the transcript lines G to L, the judge explained to the Husband if he really had no connection with HMC, and he was not able to get the partners of HMC to disclose documents, the only alternative for the Wife might be to subpoena the partners to attend court to produce documents, but that would be a matter for the Wife whether she should take this course on the legal advice she received. At page 12 lines A to B, the judge specifically enquired with the Husband whether he would call Dr Lee as his witness and his answer was he had not thought about it. The judge then said to him at line C that if Dr Lee had made an affirmation for use at the trial, the Wife could ask her to attend court and at lines I to J, the judge said this to the Husband: UrU"V T#j1\ T#j#j QOUR e\N"V HQ g e,{ QOUBO QOUBO OKNMR bO1\q bOvQ s required to prove his case and the implications whether he should call or not call any witness at the trial. Whether a witness was to be called by him had nothing to do with the disclosure of documents, whether by him or by that witness. Even if Dr Lee was unable or unwilling to produce documents, clearly she could give evidence to support the Husband's case on many matters. At the pre-trial review on 23 October 2013, just short of two weeks before trial, there was again discussion between the judge and HQ`O} \_+^q bO \ e g~^ u g k PbON `O g UOR@u`O @uOR @u`O g`Ox gBf|v V\$R^ S f0R BfHQ 1\\*Yr & @b gI ^MRbO I{ \ OI{0R5 TbT N`O1\ nZibT N#"V, by Dr Lee and his brother within the week of 23 October, with the view of calling them as witnesses. Mr Cheng informed the court he would reserve his position after he had seen the new affirmations, as the Husband was seriously out of time in serving affirmations for use at the trial, for which trial dates had been fixed and reserved. The judge told the Husband if the Wife sought an

adjournment to deal with the new affirmations, and if the trial dates were vacated as a result, the Wife might seek costs against the Husband. In the end, he made a considered decision not to call any witness, did not file any affirmation from anyone who might be expected to support his case, and chose instead to rely on the letters of Dr Lee and Ms Lau he had exhibited earlier to his affirmation. There was plainly no unfairness to the Husband, nor was he ever deprived of the opportunity to call any witness. There is no substance in the argument he sought to advance in ground (2) (i). For all the above reasons, we are satisfied that the intended appeal does not have reasonable prospects of success, nor is there any other reason in the interests of justice why the appeal should be heard. The application for leave to appeal must be refused. The application to stay the order in the Judgment pending appeal must likewise be refused. As this leave application is entirely without merits, we further order under Order 59 rule 2A(8) that no party may under rule 2A(7) request the determination to be reconsidered at an oral hearing inter partes. We make the following order nisi on costs with a gross sum assessment. As the unsuccessful party, the Husband should pay the Wife's costs of this application. Five bundles in two sets were placed before this court by the Wife's solicitors consisting of 1,870 pages for each set. Most of them are entirely unnecessary. The Wife's counsel referred to only a small number of documents in his submission. We would disallow the bulk of the photocopying charges incurred in the sum of \$3,740 and substitute that with \$600 as we are of the view that no more than 300 pages of documents would be required to be photocopied for the purpose of this application. We would reduce solicitors' charges by \$2,500 for professional work and make no reduction to counsel's fees. The amount of reasonable fees we would allow to the Wife is \$17,879.90. Any party who seeks to vary the above order nisi and gross sum assessment shall lodge a written submission within seven days hereof, with leave to the other party to reply in writing within seven days thereafter. (Susan Kwan) Justice of Appeal (Carlye Chu) Justice of Appeal Written submissions by Mr Alfred C P Cheng, instructed by Chaine, Chow & Barbara Hung, solicitors for the petitioner (respondent) Written submissions by the respondent, acting in person (applicant) The paragraph numbering in the copy of the Judgment in the court file of the present proceedings is slightly different from the copy of the Judgment that the judge and the parties have been working on, in that the paragraph numbering of the copy Judgment in the court file is one numeral behind that of the other copy. The paragraph numbering of the copy Judgment in the court file shall be used in this judgment. Quoted in full in the Judgment, Quoted in full in the Judgment, Judgment, Judgment, Judgment, Judgment, 71, 72, 80, 83, 101, 106 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 F G H I J K L M N O P Q R S T U V gd63 gd63 [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 :TzAG 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?\$O 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"/>
H; <jFen ABC Final Judiciary ABC (new) HCMP.dotx kwokkuen bau Microsoft Office Word
Judiciary ABC Final ABC Final Title Source Erica Microsoft Office Word 97-2003 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=95003

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/ysym-v-lhb-2014>

Prepared on 27 October 2026 · Esheria