

HCMP 2523/2015

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
MISCELLANEOUS PROCEEDINGS NO 2523 OF 2015
(ON INTENDED APPEAL FROM FCMC 4685 OF 2012)

BETWEEN

EMILY LO

Respondent
(Petitioner)

and

CALVIN FRANCIS LO

Applicant
(Respondent)

Before : Hon Lam VP and Hon Poon JA in Court

Date of Written Submission : 8 and 22 October 2015

Date of Judgment : 25 November 2015

J U D G M E N T

Hon Poon JA (giving the Judgment of the Court) :

Introduction

1. By a judgment dated 26 January 2015, HH Judge Bruno Chan (as the Principal Family Judge then was) disposed of the ancillary applications by the Wife and the Husband by ordering :

“(1) The Juniper Property and the Taikoo Shing Flat be sold as soon as possible, and their net sale proceeds together with those of the Camelot Height Property of HK\$10 million be used to

pay off the parties' debts and liabilities save for legal costs due by the Wife to the Husband and the Husband's Mother from the preliminary issue.

...

(6) There be a costs order *nisi* that each party do bear his/her own costs of these proceedings, such order to be made absolute at the expiration of 14 days."

2. Both the Wife and the Husband applied leave to appeal to the Court of Appeal. The Husband wanted to appeal against [1] and [6] of the Judge's order. The Wife pursued her application only because the Husband did. By a judgment dated 24 September 2015, the learned Judge refused to give leave to the Husband. He then dismissed both applications with no order as to costs.

3. The Husband now applies to this Court for leave to appeal.

Discussion

4. The principle for granting leave to appeal under section 63A of the District Court Ordinance, Cap 336 is well established. The Husband bears the burden of satisfying this Court that his appeal has a reasonable prospect of success. A reasonable prospect of success means an appeal with prospects that are more than fanciful but which do not need to be shown to be probable. When the applicant seeks to challenge the findings of facts made by the court below, unless he can show that the judge misunderstood the evidence, or failed to appreciate its effect; or overlooked some other documentary evidence, or other indisputable evidence which should have compelled him to a different conclusion, this Court will not interfere those findings of fact.

5. In his notice of appeal, the Husband raised a number of grounds but, according to Mr Coleman, SC, his counsel, the key error of the Judge concerned his approach to the repayment by the Husband to the Mother of a sum of HK\$10 million from the sale proceeds of Camelot Heights. The Husband's case was that it was a loan from the Mother, which was rejected by the Judge. Mr Coleman took a number of points :

(1) The challenge against the loan and its repayment was not raised or pursued until the Wife's written closing submissions after trial – it was a forensic afterthought.

(2) The Wife had not taken out an application under Section 17 of the Matrimonial Proceedings and Property Ordinance, Cap 192, to set aside the payment from the Husband to the Mother.

(3) No argument was put that the money should otherwise form an "add-back".

(4) The case is distinguished from *LWYA v KYW*, CACV 151/2013, which the

Judge relied on, since the issue of add-back or gift or disposition had not been identified and was not clear as arising.

(5) The disposition of the case assumed that the HK\$10 million was available to the Husband and was his asset. However, no questions were put in cross-examination of the Husband or the Mother about the loan.

6. Mr Coleman therefore contended that the Judge was wrong in finding that the HK\$10 million is an asset of the Husband which forms a part of the marital assets subject to division between the Husband and the Wife.

7. We have considered how the Judge approached the issues pertaining to the said sum of HK\$10 million at [72] to [107] of his judgment. We respectfully agree with his approach and analysis. What Mr Coleman has submitted above is in fact a repetition of his submissions before the Judge for leave to appeal. The Judge dealt with those submissions in [8] to [13] of his decision dated 24 September 2015. We have considered the Judge's reasoning there and, again, respectfully agree with him entirely.

8. The other grounds of appeal concern the Judge's failure to take into account the Wife's refusal to mediate and his errors in relation to the findings that he made on her family loans. We have read the relevant parts of his judgment with care. We do not think the Judge has erred as complained. In fact, Mr Coleman has made no submissions on those grounds at all, which speaks volume of the lack of merits in them.

9. All the grounds of appeal concern findings of fact made by the Judge. We do not think the Husband has satisfied the test for granting leave as set out in [4] above.

Conclusion

10. We refuse to grant the Husband leave to appeal.

11. We further order the Husband to pay the Wife costs of the application and summarily assess it at HK\$28,000.00.

12. Before we leave this case, we wish to endorse the Judge's observation on the failure of duties owed by the parties and the solicitors at the beginning of his judgement of 26 January 2015. It is high time that those advising matrimonial litigants should make some real, meaningful and serious efforts to dissuade them from pursuing litigation in a way which is, as the Judge quite rightly described, simply non-sensical, with resultant financial disaster to both parties.

(Johnson Lam)

Vice-President

(Jeremy Poon)

Justice of Appeal

Mr Coleman SC, instructed by Hampton Winter and Glynn, for the applicant (respondent)

Mr Mairéad Rattigan, instructed by Stevenson, Wong & Co, for the respondent (petitioner)

Appeal History

Case Number	Date	Reported in	Remarks
HCMP2523/2015	<u>25/11/2015</u>		
FCMC4685/2012	<u>26/01/2015</u>		
	<u>16/04/2014</u>		
	<u>09/08/2013</u>		

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