

Goh Yong Hng v Cheong Yen Teng (Zheng Yanping) (m.w.) and Another
[2003] SGHC 89

Case Number : Div P 602501/2002, RAS 720104/2002

Decision Date : 14 April 2003

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Irving Choh (CTLIC Law Corporation) for the Petitioner-Appellant; Angela Lee (Jansen, Menon & Lee) for the Co-Respondent-Respondent

Parties : Goh Yong Hng — Cheong Yen Teng (Zheng Yanping) (m.w.); Goh Yik Liang

Family Law – Grounds for divorce – Adultery – Costs against co-respondent – Whether costs incurred by private investigators reasonable

Family Law – Grounds for divorce – Adultery – Costs against co-respondent – Wife willing party to adultery – Proportion of costs of private investigators payable by co-respondent

1 This is an appeal by the petitioner (the husband) who is seeking an order that the co-respondent be made to pay him a sum of \$8,780 in reimbursement of the costs which the husband incurred in employing a firm of private investigators. In the District Court, the co-respondent was ordered to pay the husband only 25% of those costs.

Background

2 The husband filed the petition in these proceedings on 1 July 2002. He sought a divorce on the ground that his marriage with the respondent wife had broken irretrievably in that she had committed adultery with the co-respondent and he found it intolerable to live with her. Particulars of the alleged adultery were given. The first was that the wife and the co-respondent had committed adultery on 9 May 2002 in a flat in Bishan. The second particular was that on 15 May 2002, the co-respondent had impliedly admitted committing adultery with the wife in that he had volunteered to pay all the fees of the investigators.

3 Apart from asking for the dissolution of the marriage and the usual ancillary orders regarding property and children, the husband prayed that the co-respondent be ordered to pay the costs of the divorce proceedings and all costs incurred by him in obtaining the private investigator's report. This latter prayer was amended subsequently to ask for such costs to be paid by the wife and/or the co-respondent.

4 The petition was heard on 24 September 2002. Neither the wife nor the co-respondent contested it. Oral evidence was given by the husband and one Mr Philip Tan, the chief investigator of the firm of private investigators employed by the husband. The ancillary matters, including the issues as to costs, were adjourned to chambers.

5 For the purposes of the ancillary hearing, both the husband and the co-respondent filed affidavits. From these affidavits it appeared that the husband, the wife and the co-respondent had first met each other in January 2002. Subsequently, the affair had started. The husband had instructed Mr Philip Tan's firm on 8 May 2002 and operatives from the firm had kept surveillance on the wife and co-respondent on 9, 10 and 13 May. Subsequently, a meeting of the three parties at which Mr Tan was also present had taken place. At the time of the alleged adultery on 9 May, the husband and wife were still cohabiting and the husband asserted that he believed the wife was happy in the marriage. The co-respondent, however, asserted that the wife had expressed unhappiness to

him. He further averred that the parties' marriage had broken down before the affair had started. He vigorously contested the husband's application that he be made to bear the costs of the proceedings and the costs of the private investigation.

The decision below

6 The district judge made the following orders:

- (a) that the co-respondent pay to the husband the sum of \$2,195 being 25% of the private investigator's costs;
- (b) that the co-respondent bear 50% of the costs of the divorce proceedings fixed at \$1,500 ie the co-respondent was to pay \$750; and
- (c) that in respect of the issue as to the co-respondent's liability for costs, the co-respondent pay the husband costs of the same fixed at \$400.

The husband appealed against the first of those orders. He wanted the co-respondent to pay all of the investigation costs.

7 In her judgment, the district judge noted that as the co-respondent did not defend the allegations in the divorce petition, he was deemed to have admitted that he had committed adultery with the wife. The husband would not have been put to the expense of engaging a private investigator to gather the necessary evidence, but for the co-respondent's act of adultery. In granting the decree nisi, the court was satisfied that the husband had sufficiently proved the contents of his petition and in accordance with the principle that costs followed the event the co-respondent was *prima facie* liable, at least in part, for the costs of the private investigator.

8 The judge noted that the law relevant to the application was as set out in *Halsbury's Laws of England* (4th Ed) para 970 which states:

A co-respondent, against whom adultery is established, may be ordered to pay the whole or any part of the costs of the proceedings, but in exercising its discretion as to the costs which a co-respondent may be ordered to pay, the court may have to consider whether in fact the co-respondent was responsible either for the breakdown of the marriage or for the litigation.

She rejected the argument put forward by the co-respondent that the marriage had broken down before the adultery and therefore that he should bear no responsibility for its breakdown. Further, she distinguished the case of *Tan Kay Poh v Tan Surida & Anor* [1988] SLR 983 where Chao Hick Tin JC had refused to make an order for costs against the co-respondent. In that case it was clear that the wife had left the matrimonial home due to unhappiness with the husband before her adulterous relationship with the co-respondent started. In this case, the husband had asserted that the marriage was happy and the co-respondent's assertions to the contrary were uncorroborated. The parties were still living together at the time of the adultery and nothing much turned on the fact that the wife had not contested the divorce petition – it might simply have been because she had no defence to it.

9 The judge therefore found that in principle there was no reason not to make an order that the co-respondent pay costs to the husband. She then considered the issue of quantum. The husband was claiming the fees charged for surveillance, the issue of two investigation reports and the investigator's attendance in court. These totalled \$8,780. The judge directed herself that in

determining whether the co-respondent should be made to pay that full sum, the fees claimed must necessarily be subject to the test of reasonableness. She cited O 59 r 27(2) of the Rules of Court which applies to matrimonial proceedings by virtue of r 2 of the Matrimonial Proceedings Rules and states 'that there shall be allowed a reasonable amount in respect of all costs reasonably incurred'. She then posed the question whether the fees of \$8,780 were reasonable in amount.

10 The judge then held that it appeared from the evidence that the private investigators had gathered the necessary evidence of adultery on 9 May, the day after they were instructed. They had, however, continued to conduct surveillance on Friday, 10 May and Monday, 13 May. In her view, the work undertaken on these two days was not really necessary since the relevant evidence had already been obtained by 9 May. Mr Philip Tan had also attended the meeting of the parties held on 15 May. He was instructed to record the meeting on video but the judge was doubtful as to whether the video recording was in fact made as there was no reference to it in either the PI report or the husband's affidavit. As for Mr Tan's court attendance on 24 September for which an invoice for \$600 was rendered, the court's record showed that the total time occupied for the divorce petition was just ten minutes. This meant that the private investigator spent less than ten minutes on the stand and was only required to produce the photograph of the wife given to him for identification purposes and his two investigation reports.

11 The judge went on to hold that, having regard to the very short duration of the investigations, which were completed after three days of surveillance (the last two of which were not really necessary), the private investigator's observer's status at the meeting and the brevity of his second report, the very few photographs that were produced and his very brief court appearance as a formal witness, fees of \$8,780 were excessive. The investigator had charged \$8,100 for the investigation and attendance at the meeting. The amount was unjustifiable as the assignment was not complex and no obstacles were encountered during the investigations. In her view, a sum of \$4,390 equivalent to 50% of the amount charged was reasonable and would more appropriately reflect the work done in obtaining evidence of the adultery. Since the wife was a willing party to the adultery, she ordered that the co-respondent should pay the husband 25% of the original fee of \$8,780 ie 50% of the amount that she considered was a reasonable fee.

The appeal

12 Counsel for the husband pointed out that the private investigators had rendered three invoices, the first for \$7,170 for the surveillance, the second for \$1,010 for the meeting and video recording and the third for \$600 for the court attendance.

13 Counsel submitted that in respect of the first invoice, the district judge had erred in finding that the first day of surveillance was sufficient just because on that day the private investigators had observed the wife and the co-respondent entering an empty flat in Bishan and remaining there for some time. The finding was incorrect because at that point of time the husband was entitled to instruct the private investigator to carry out surveillance for the next two days to ensure that sufficient evidence was obtained for the purposes of the divorce. It was not a situation where the surveillance went on for nothing except to escalate costs. It was submitted that three days of surveillance was reasonable under the circumstances as there was no sure test to establish when there would be sufficient evidence to prove adultery particularly when the evidence obtained on the first day was circumstantial.

14 As for the meeting on 15 May 2002, the judge was wrong to infer that there was no recording when actually there was. The sum of \$1,010 was reasonable considering the urgency of the matter and that services were rendered after official hours. As for the court attendance fee of

\$600, whilst the hearing may have taken ten minutes the judge failed to take into account the waiting and travelling time which would have easily totalled one and a half to two hours.

15 Counsel for the co-respondent submitted that the judge's decision should be upheld. She endorsed the reasoning of the judge and also repeated the arguments that had been made on behalf of the co-respondent below ie that he was not responsible for the breakdown of the marriage and that it was heading for divorce when he was unwittingly drawn in and used as an excuse for the petition to be presented. Counsel submitted also that the disbursements incurred by the private investigator were inflated and unnecessary and that the court attendance fee was very high.

Decision

16 As regards the arguments made on behalf of the co-respondent that he was not responsible for the breakdown of the marriage, I take the view that since he did not appeal against the decision of the district judge, he had no basis on which to resurrect matters on which she had held against him. Before me, the question in issue was what was the correct proportion of the costs to be borne by the co-respondent and not whether he was liable for costs at all. I should state, however, that on the facts of this case, I think, with respect, that the district judge was correct to have distinguished *Tan Kay Poh's* case and to have held that the co-respondent here did bear prima facie liability for costs.

17 The first point here is whether the co-respondent should have been made responsible for all of the costs. Counsel for the husband submitted that the answer to that question was yes. The co-respondent had known from the time he first met the wife that she was a married woman as her children and his attended the same kindergarten. His conduct showed that he did not care whether she was married or not and therefore he should bear full liability. On the other hand, the judge considered that the wife was a willing party to the adultery and therefore the co-respondent was only responsible for half of reasonable investigation fees. I think that the judge was right on this point. There was no evidence to show that the wife had been unwilling and had had to be actively seduced by the co-respondent. On the other hand, her conduct after the marriage broke down showed that she did not want to preserve the marriage. She made no efforts towards reconciliation. The wife was a mature working woman in her late 20s and capable of making her own decisions. In the absence of evidence to the contrary, she must be considered as equally responsible for the adultery and thus for the breakdown of the marriage. Thus, it would not be fair to hold the co-respondent responsible for more than half of the cost of employing the investigator.

18 As regards quantum, the main issue was, as the judge correctly directed herself, whether the costs incurred were reasonable. The bulk of the costs related to the surveillance. Here, there were two issues, the first being whether it was reasonable to carry on surveillance for three days and the second being whether the amount charged for the three days surveillance was reasonable. As regards the first issue, with respect, I think that the judge's view that all necessary evidence had been obtained on the first day was based on hindsight. In the event, the husband had relied on the report of what had been seen on the first day in order to found his petition. In the event too, neither the wife nor the co-respondent had contested the assertion that they had committed adultery on that day during the time they spent in the Bishan flat. That, however, would not have been known by either the investigators or the husband at the end of the first day's surveillance. Whilst the fact that the wife and the co-respondent went into an empty flat and remained there for an hour or so on the evening of the 9th was suggestive of adulterous behaviour, it was not conclusive proof of such behaviour. As the investigators would have known, there is a heavy burden of proof for adultery. It was therefore reasonable for them to continue the surveillance on two other days to try and get additional evidence to support the circumstantial evidence obtained by the first day's work in case

the inference that the husband would want the court to draw from the events of 9th May was disputed by the wife and co-respondent.

19 As regards the issue of reasonable fees for the surveillance, an examination of the invoice shows that six operatives were employed in the surveillance on the 9th of May, three on the 10th of May and six on the 13th. From the report, the surveillance on 9th May took place between 10 o'clock in the morning and around 7.30 in the evening. The surveillance on the 10th May took place between 11am and 6.15pm whilst on the 13th of May, operations started at 9am and ended at 9.10pm. Thus, both the manpower employed and the time taken were substantial. The firm charged \$7,500 for the services of the operatives, \$140 for disbursements incurred in conducting searches on, amongst other things, vehicles and property, and \$30 for six video prints. After deducting a discount of \$500 the amount of the bill was \$7,170. The co-respondent did not adduce any evidence to assist the court in determining whether the bill was reasonable or not in relation to the fees generally charged by private investigators or in relation to the number of operatives used for the surveillance. In these circumstances, the only material before the court on which to assess the reasonableness of the bill was that in the bill itself and in the report. Based on the details in these documents, it does not appear to me that the quantum was excessive. Neither does it appear that the disbursements were excessive or unreasonable. There was no reason to impugn the total bill of \$7,170.

20 The second bill was for a sum of \$1,010 and was in respect of the covert video recording made on 16 May 2002. The judge appeared to consider that there was no evidence that such a recording was actually made. The second report issued by the investigation firm, however, stated expressly that the husband had asked for his meeting with the wife and the co-respondent to be recorded, covertly, on video. It was also noted that the objective of the meeting was to see what the co-respondent would say when the allegation of the adultery was made and that Mr Tan's presence as a witness was required. The co-respondent did not challenge the fact of the video being made. If he had, the husband could have produced the video and any further evidence he considered necessary to substantiate the reasonableness of the private investigation firm's bill for that service. To the extent that the judge considered the investigator's fees to be excessive because she did not believe in the existence of the videotape, I consider that she was in error. As for the amount charged for that service, it does seem to be on the high side bearing in mind the fees charged for three days of surveillance and that the meeting was not a very long one and Mr Tan turned up in the middle of it.

21 As regards the third bill of \$600 for court attendance, the only objection to this is that it seems high for ten minutes work. In this connection, I accept the submission made on behalf of the husband that ten minutes in court does not mean that only ten minutes of Mr Tan's time was taken up. He could very well have been out of the office for up to two hours. If he was, it would mean he charged approximately \$300 per hour.

22 From the first bill which the firm rendered it would appear that its operatives spent a total of 29 hours or so carrying out surveillance. The amount charged for this was \$7,000 (after the discount) which means that if only one man had been involved, the cost would have been \$241 an hour. In fact on the first day there were six men, on the second, three and on the third six. That means the cost per hour per operative was considerably less, probably in the region of \$50. In view of the firm's billing practices as reflected by the bill, it would seem that \$300 per hour for court attendance was excessive. In respect of that bill, I would allow \$100 per hour since Mr Tan was the chief investigator, giving a total of \$200, and in respect of the attendance on 15th May, I would allow \$400, \$200 being for Mr Tan's attendance and the other \$200 being for the cost of having someone present covertly to make the video. I also allow the \$10 charged on the third bill as the cost of

making video prints.

23 In total therefore, it would appear that reasonable investigation costs would have amounted to \$7,780. Accordingly, the amount payable by the co-respondent is half of that. The appeal is therefore allowed. The order below is varied so that the co-respondent shall pay the husband \$3,890 to account of the investigation costs. Whilst the husband has not succeeded entirely on his appeal, he has succeeded to an extent and must be awarded costs. I will see the parties on the appropriate amount of costs if they are unable to come to an agreement on the issue.

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