IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 18

Civil Appeal No 172 of 2020
(Summons No 5 of 2021)

Between

UJN

… *Appellant*

And

UJO

… *Respondent*

In the matter of HCF/Divorce (Transferred) No 2337 of 2016

Between

UJN

… *Plaintiff*

And

UJO

… *Defendant*

GROUNDS OF DECISION

[Family Law] — [Matrimonial assets] — [Division]

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v
UJO

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Court of Appeal — Civil Appeal No 172 of 2020 (Summons No 5 of 2021)
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Woo Bih Li JAD:

Background

1 This is a matrimonial dispute. In the court below, the judge delivered his judgment on 17 September 2020 in respect of various ancillary matters between the parties. On 16 October 2020, the husband filed an appeal against the judge's decision in respect of the division of matrimonial assets.

2 On 18 January 2021, the husband filed CA/SUM 5 of 2021 ("the Application") for leave to adduce further evidence for the main appeal. The Application pertained to six documents which may in turn be classified into three categories:

(A) **Evidence in respect of bonus from a previous employer ("ZP")**

(i) Bank statement for POSB savings account number xxxxxx104 ("the POSB a/c") showing a deposit of $1,496,572.85 was made into this joint account on 26 March 2015. I will refer to this statement as "the POSB statement of account".

(ii) Email from ZP to the husband dated 2 December 2020 enclosing a copy of his payslip for March 2015 and a March 2015 Reward Statement.

(iii) A letter from DBS Bank Ltd to the husband dated 11 January 2021 setting out details of three fund transfers from the POSB a/c on 27 March 2015.

(B) **Evidence in respect of a property in New York and a property in London**

(i) Statutory declaration by a former superior of the husband ("MC").

(ii) Emails between MC and the husband and selected pages from MC's account with JP Morgan.

(C) **Valuation report by RHT Valuation Pte Ltd**

This valuation was dated 8 January 2021 on the value of a property at Loyang ("the Loyang Property") as at 1 January 2017.

3 I will refer to the three categories as Category A, B and C respectively. On 1 March 2021, I allowed the Application in respect of the Category A

documents and dismissed it in respect of the other two categories. I set out my reasons below.

The law on an application for further evidence

4 The law on the introduction of fresh evidence is governed by s 59(4) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), O 57 r 13(1) read with O 55D r 11(1) of the Rules of Court (Cap 322, R5, 2014 Rev Ed) or r 831(2) of the Family Justice Rules 2014 (S 813/2014). The question is whether there are special grounds to allow such evidence. The criteria for "special grounds" is set out in three requirements from *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") which has been applied in Singapore:

(a) First, the evidence could not have been obtained with reasonable diligence for use at the hearing below.

(b) Second, the evidence, if given, would probably have an important influence on the result of the case, though it may not be decisive.

(c) Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

5 The husband also referred to *Anan Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 for the following propositions. If the appeal is against a decision after a trial or a hearing bearing the characteristics of a trial, the requirements in *Ladd v Marshall* should apply with full rigour, otherwise the court remains guided by *Ladd v Marshall* but is not obliged to apply it strictly. Even in the first category of appeals, the court should

still consider the interests of justice in assessing whether to allow the fresh evidence to be adduced.

6 The wife did not disagree with the above principles. The dispute was on the application thereof.

7 I add one other important point. The court should generally be disinclined to allow a party to adduce fresh evidence on appeal if that evidence is in aid of a position which is inconsistent with the applicant's position below. Although a contradictory position may itself suggest that the fresh evidence is not credible, this is not always the case. It may be that the fresh evidence is credible although it may in turn then suggest that the position taken below by the applicant was false or misleading. In any event, even if the fresh evidence were credible, this does not mean that its credibility trumps other considerations. The interest of finality in proceedings is still relevant and the interest to hold parties to their positions is equally, if not more, important as it would often be unfair to the opponent and to the court if a party were to take one position in the hearing below and yet be allowed to resile from it on appeal. The waste of court resources is another factor. Indeed it could also be said that running a contrary case on appeal is an abuse of process as the appeal would not really arise from dissatisfaction with the decision below but really with the conduct of the case below on the part of the dissatisfied party (see [32] of *JWR Pte Ltd v Edmond Pereira Law Corp and another* [2020] 2 SLR 744).

Preliminary observation

8 I would also say at the outset that although the wife argued that the hearing below was akin to that of a trial because of numerous interlocutory

applications, I do not agree that it was akin to a trial. Therefore, the *Ladd v Marshall* requirements need not be applied stringently.

Category A

9 The evidence from the Category A documents was to address a finding made by the judge below that the husband had not accounted for US$1.5m in bonus from ZP as he did not prove that the bonus was deposited into the parties' joint account (*ie*, the POSB a/c). The judge below drew an adverse inference against the husband for this non-disclosure, as well as for other non-disclosures. He added this sum to the pool of matrimonial assets to be divided between the parties.

10 According to the husband, the Category A documents showed that a substantial part of the US$1.5m was in fact deposited into the POSB a/c. The POSB statement of account, the March 2015 Reward Statement and the payslip from ZP would establish that a sum of $1,475,822, being the equivalent of US$1,165,000, had been deposited into the POSB a/c on 26 March 2015. The balance of US$335,000 was deferred. Therefore, the documents showed that the judge below was wrong to conclude that the husband had failed to account for the entire US$1.5m. Moreover, the wife must have known about the deposit as she unilaterally transferred $500,000 to her own bank account the very next day and $50,000 to a bank account of each of the two sons jointly held with her.

11 The husband alleged that the wife had agreed all along that his salary and bonus from ZP had been credited into the parties' joint account, *ie*, the POSB a/c. It was only after the first hearing (out of four hearings) on 2 May 2019 that the question of this bonus was specifically raised by the wife in her

affidavit of 16 May 2019. In his supporting affidavit for the Application, the husband said (at para 13) that "[b]y then it was too late to adduce new evidence".

12 The wife's affidavit in this Application did not disagree that the evidence was credible and she said the $500,000 was given to her. However, her submissions argued that the evidence "holds no conclusive probative evidence".

13 First, she argued that although the husband was saying that a sum of $1,475,822 had been credited into the POSB a/c, the POSB statement of account showed that a different sum of $1,496,572.85 had been credited. It seemed to me that from the payslip attached to the email from ZP, it was obvious that the $1,475,822 was part of a larger sum of $1,496,572.85 which was the aggregate sum after including a basic salary and a benefit allowance and after taking into account some deductions. When these were taken into account, it did seem that the $1,496,572.85 actually deposited into the POSB a/c included the $1,475,822 bonus and therefore there was no discrepancy.

14 The wife's second argument was that the US$1,165,000 (which is the equivalent of $1,475,822) was different from the bonus sum of US$1.5m. However, the short answer is that the US$1,165,000 is part of the US$1.5m. Even if the credit entry in the POSB a/c did not show that the entire sum of US$1.5m was deposited, it would still show that the equivalent of US$1,165,000 had been deposited.

15 The wife's third argument was that there was no contemporaneous evidence to show that the US$1.5m bonus was paid in tranches or that the US$1.5m was forfeited as the husband had previously suggested. In my view, this was a matter for argument if the evidence were allowed. *Prima facie*, the evidence did suggest that a substantial part of the US$1.5m bonus had been

deposited into the POSB a/c. If the husband had previously said that the US$1.5m bonus had been forfeited, this might suggest an inconsistency in his explanation but not in his substantive position, *ie*, that he had accounted for it. Thus, an inconsistent explanation that was not inconsistent with his substantive position was not an inconsistency which would justify denying the Application in respect of the Category A documents. Whether the bonus (or a substantial part of it) had been forfeited or had in fact been deposited into the POSB a/c, the result was the same. It would have been accounted for in one way or another if his evidence were believed. The question in the Application was whether to allow him to adduce the new evidence.

16 The wife did not agree that the husband had insufficient time to adduce the fresh evidence in the proceedings below. I agree that even if her argument about the US$1.5m bonus was only raised after the first hearing, the husband still had sufficient time to adduce the evidence. On the other hand, she ought to have been aware of the evidence. Furthermore, whatever the reason for the husband's omission to adduce that evidence at the hearing below, the evidence, if allowed, might well show that an error was made by the judge below because the relevant evidence had not been produced before him then. The sum involved is not a small sum.

17 Hence, I was of the view that it was in the interest of justice to allow the Application in respect of the Category A documents. The wife should also consider whether she still wishes to challenge these documents at the substantive appeal or to accept them and act on the basis that the husband has established that US$1,165,000, out of the US$1.5m bonus, was in fact paid into the POSB a/c. If she accepts them, then the remaining point, in respect of these documents, is what consequence they would have on the substantive appeal.

Category B

18 The Category B documents pertained to the husband's interest in a property in New York and in a property in London. The husband is a joint owner of the properties. MC is the other joint owner. Although they had invested in these properties together and although the husband is a joint owner, he wanted to use these documents to establish that his real interest in them was limited only to 50% of any profit or capital appreciation of these properties and not 50% of the value of these properties. His position was that he had only contributed 50% of the deposit of the purchase price, which was typically 10% of the purchase price, and the rest of the purchase price was paid by MC.

19 The husband wanted to use the statutory declaration from MC to corroborate this position. In addition, the selected pages from MC's JP Morgan account showed certain payments of sums in the currency of the United States of America and of the United Kingdom. However, they did not show that these sums were in fact used to pay for these properties. Even if they had been so used, they would not rule out the possibility that the husband had reimbursed MC for 50% of the sums or had some arrangement with MC to that effect.

20 While the statutory declaration could fill that gap, if adduced and believed, it was an untested piece of evidence from MC. Importantly, at the hearing below, the husband had initially proceeded on the basis that he owns 50% of these properties and would thus be entitled to 50% of their value. Furthermore, he knew that the wife disputed the value he had ascribed to these properties because she was proceeding on the premise that he owns 50% of them. Initially, he did not disabuse her of this premise. Their dispute was on the quantum of the 50% value. It was only subsequently that the husband adopted a different position. Hence, in his voluntary affidavit of 24 October 2018, he

suggested that he was entitled to 50% of the profits from the sale of the properties and also that he did not receive any rental income. That affidavit also asserted that he had not contributed any money towards these properties. The problem for the husband was that this affidavit of his contradicted his earlier position that he owns 50% of these properties. The judge below did not accept the husband's belated allegation that he was only entitled to 50% of the profits and not 50% of these properties.

21 For the Application, the husband did not dispute that his initial position before the judge below was different. All he could do was to submit that, "arguably, this (meaning the new position) could have been more clearly spelt out by his previous solicitors, but … [he] should not be prejudiced due to this administrative oversight".

22 As mentioned, the purpose of the Category B documents was to establish a very different case from that initially taken by the husband, *ie*, to show that the husband was entitled only to 50% of the profits and not to 50% of these properties. It is clear to this court that the husband had no good reason for the change in position. It was absurd to describe his initial position as an administrative oversight. I do not think it is just to allow him to use these documents to change his position, although it is true that he had already begun to change his position before the judge below. The point is that he was already contradicting himself below and was attempting to continue with the contradiction on appeal with the Category B documents.

23 In addition, the husband did not have a good reason for the late attempt to introduce such evidence. He explained that MC was now retired and was very slow in responding to emails and was not willing to be dragged into the divorce proceedings unnecessarily. After the decision below was given, he told MC that

his help was needed and MC agreed. However, the emails from MC which he sought to introduce in the Application did not suggest any reluctance on the part of MC. The husband also did not produce for the Application any prior written communication from him to MC to enlist MC's help. Therefore, his explanation was a bare one unsupported by independent evidence and even contradicted to some extent by the emails in Category B which he was attempting to rely on.

24 There is one other point. As mentioned, the husband's latest position for the Application was that he contributed only 50% of the deposit for these properties. However, in his voluntary affidavit of 24 October 2018, he said that he did not contribute any money towards these properties. This was yet another material inconsistency reflecting the lack of credibility of his latest position.

Category C

25 The Category C document is a valuation of a property in Loyang owned by the parties. The valuation is dated 8 January 2021 and values the Loyang Property at $3.8m as at 1 January 2017. The judge below had valued this property at $6m as at the date of interim judgment ("IJ") on 5 October 2016. The difference between the date of 1 January 2017 and 5 October 2016 did not appear material for present purposes.

26 However, the husband complained that the judge's decision was an arbitrary valuation which was made without having heard parties specifically on the matter as the parties had proceeded on the premise of a prior valuation done by the same valuer. The same valuer had previously valued the Loyang Property at $7.3m, but as at 11 January 2019, and the wife had accepted this value. However, the judge decided not to use this value as he was of the view that the valuation date should be as at the date of the IJ instead. This was because

the husband had made renovations to the Loyang Property after the date of the IJ and the judge was of the view that it would be fairer to use the IJ date as any gains or losses arising from the renovations should be attributed to the husband.

27 I am of the view that although it might be said that the judge's use of the IJ date was different from what the parties might have come to anticipate, the husband's complaint that the judge's valuation was arbitrary was an exaggeration calculated to give the impression that the judge had gone on a frolic of his own. It is important to bear in mind that the parties had initially already come up with their own valuations as at the IJ date. Using different data which each had gathered and relied on, but not a formal valuation report, the husband had initially valued the Loyang Property at $5m and the wife had initially valued the property at $7.9m. It was only subsequently, apparently at a case conference by another judicial officer, that the parties were directed to obtain a valuation of the Loyang Property as at a date after the renovations were done. This resulted in the valuation report as at 11 January 2019. However, this was not a case where the parties had not even addressed the value of the property as at the IJ date. Furthermore, the judge's valuation of $6m was based on the data that the parties had placed before him and not his own data. Therefore, it was inappropriate of the husband to argue that the judge had reached an arbitrary decision.

28 What the husband was complaining about was that, during the hearings, the judge did not explicitly convey to the parties that he was intending to use the IJ date as the date of valuation. Had the judge done so, the husband could have obtained a formal valuation instead of sticking to the data he had gathered.

29 I did not think that this was a valid ground for trying to adduce the Category C document. First, as mentioned, the parties had already adduced

evidence of the value of the Loyang Property as at the IJ date. It was up to them if they wished to gather data on their own to support a value or to obtain a formal valuation. They chose the former route. The judge could not be faulted for acting on the premise that each party had already stated his/her position.

30 More importantly, the use of the IJ date by the judge was in fact advantageous to the husband. Had the valuation of $7.3m as at 11 January 2019 been adopted, this would have been to the husband's detriment. After taking into account the then outstanding mortgage sum of $2,827,700.88, the net value of the Loyang Property would have been $4,472,299.12. However, using the judge's $6m figure as at the IJ date and after taking into account the then outstanding mortgage sum of $3,153,166, the net value was $2,846,834 instead. The judge had ordered the wife to transfer her interest in the Loyang Property to the husband in exchange for payment by the husband of 45% of that net value. As the net value used by the judge was lower than the one as at 11 January 2019, the judge's approach meant that the husband would be paying a lower sum to the wife. Yet the husband was complaining about the judge's decision.

31 The real reason why the husband was trying to introduce the Category C document was that he was trying to reduce the gross value of the Loyang Property as at the IJ date further, *ie*, from $6m (as assessed by the judge) to $3.8m as stated in the latest valuation report before taking into account the outstanding mortgage sum. However, it must be remembered that the $3.8m figure is also lower than his own initial assessment of $5m based on the data which he himself had gathered and used.

32 In my view, the husband was trying to change his position by taking a second bite of the cherry. As mentioned, he had the opportunity to state what the value of the Loyang Property as at the IJ date was. He availed himself of

that opportunity, adopted a certain approach and came up with his figure. It was not open to him to complain that he had been denied the opportunity to come up with a valuation as at the IJ date. He could have obtained a formal valuation initially. He chose not to do so and adopted a different approach. In the circumstances, it would not be in the interest of justice to allow him a second bite.

Conclusion

33 Accordingly, I allowed the Application in respect of the Category A documents (with consequential directions) and dismissed the Application in respect of the other two categories. Taking into account the wife's unsuccessful objection in respect of the Category A documents, I granted the wife 70% of the costs of the Application.

34 In determining the quantum of the wife's costs, I took into account the parties' conduct in respect of the Application. I have already criticised some of the husband's arguments. In addition, the husband had accused the wife of protracted litigation. This was an attempt to justify the necessity of the Application. However, as can be seen from my observations above, the Application arose either because of his own omission or because he was simply trying to change his position. Alternatively, he should have confined his allegation to saying that he had been distracted by various applications without making any accusation against the wife. His accusation was therefore a distraction and should not have been made.

35 Unfortunately, the wife took the bait. She should have simply denied the accusation, reserved her position and focused on the main issues arising from the Application. Instead she went into a very long and detailed discourse on the

various interlocutory applications that had been made in the proceedings below to elaborate as to why she disagreed with the accusation. This incurred unnecessary time and costs as that discourse was not helpful to the court for the purpose of deciding the Application. In assessing the quantum of the wife's costs of the Application, I disregarded the work done for her in respect of that discourse and assessed 100% of her costs to be $8,000 inclusive of disbursements. The husband was ordered to pay her 70% of that sum amounting to $5,600 forthwith as her costs of the Application.

Woo Bih Li
Judge of the Appellate Division

Godwin Gilbert Campos and Vathany Raveentheran (Godwin Campos LLC) for the applicant;
Chai Li Li Dorothy (DCMO Law Practice LLC) for the respondent.