BMI
v
BMJ and another matter

[2017] SGCA 63

Court of Appeal — Civil Appeal No 40 of 2017 and Summons No 125 of 2017
Andrew Phang Boon Leong JA, Judith Prakash JA and Steven Chong JA
8 November 2017

Family Law – Consent Orders

9 November 2017 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the oral judgment of the court):

1 This is an appeal against the dismissal of the Wife's application to set aside a matrimonial consent order ("the Consent Order") entered into more than 17 years ago, in 2000, on the basis of fraudulent and material non-disclosure by the Husband. The Consent Order has been fully implemented and the Wife has received about $13m thereunder in settlement of her claims on the division of matrimonial assets. Nevertheless, the Wife now seeks to set aside the Consent Order on the basis that the Husband fraudulently failed to disclose his interests in various businesses when the Consent Order was made.

2 After considering the parties' arguments and the evidence before us, we find that the appeal ought to be dismissed.

Wife's amendment application in Summons No 125 of 2017

3 Before proceeding to detail the reasons for the dismissal of the appeal, we note that we dismissed the Wife's belated application, *vide* Summons No 125 of 2017, to amend her original summons to, among other things, include innocent and negligent non-disclosure as alternative grounds for the setting aside of the Consent Order (in addition to fraudulent non-disclosure). This amendment application was not only made at the eleventh hour, but was an attempt to put forward a case which was evidently not the case that the Wife had run before the court below (as was clear, among other things, from the judgment presently under appeal and, indeed, from the very nature of the application itself). Therefore, even though the Wife claimed that she was not relying on any new evidence, we took the view that allowing the application would have resulted in material prejudice to the Husband, who was not given the opportunity to address these alternative grounds at first instance. In any event, and as we will elaborate upon in a moment, the Wife did not adduce any evidence to persuade us that any alleged non-disclosure, fraudulent or otherwise, would have been material. Furthermore, and crucially, the Consent Order has in fact been fully implemented. As this Court made clear in *AYM v AYL* [2013] 1 SLR 924 ("*AYM*"), the court has no power to vary a matrimonial order that has been fully implemented, except in the *limited* case of fraud. Hence, we did not see how any non-disclosure by the Husband that was not fraudulent would have furnished a basis for us to set aside the Consent Order.

4 We now return to our reasons for dismissing the substantive appeal.

Fraud as a limited exception to the principles laid down in *AYM* v *AYL* and lapse of time

5 First, we agree with the High Court Judge that the fact that the Consent Order has been fully implemented and the subsequent lapse of time are not factors which would, by themselves, prevent the court from intervening on the basis of s 112(4) of the Women's Charter (Cap 353, 2009 Rev Ed) *if* there was cogent evidence of fraudulent and material non-disclosure by the Husband. We have already alluded to our ruling in the case of *AYM* at [30] that fraud is a *limited* exception to the general principle that the court has no power under s 112(4) to vary a matrimonial order that has been fully implemented. However, in this regard, we should once again emphasise that the threshold for establishing fraud is a high one which will not be met unless there is cogent and compelling evidence. It is a threshold which is, *ex hypothesi*, not easy to satisfy.

6 In addition, we agree with the ruling of the High Court in *Teh Siew Hua v Tan Kim Chong* [2010] 4 SLR 123, which the Judge relied on, that the express words of s 112(4) preclude the application of the time-bars under the Limitation Act (Cap 163, 1996 Rev Ed) as well as the equitable defences of acquiescence or laches. This is, of course, subject to the principle which we laid down in the case of *AYM* that the court does not have the power to revisit or reopen an order of court with respect to the division of matrimonial assets that has been completely implemented, except in the limited case of fraud (at [22]).

Relevance of the the fact that the Wife's allegations of non-disclosure had been ventilated and taken into account when the parties entered into the Consent Order

7 Second, also in agreement with the Judge below, we reject the argument that the Wife should not be allowed to rely on fraudulent non-disclosure as a basis for setting aside the Consent Order because she had compromised these

allegations by entering into the Consent Order. It is true, as the Judge noted at [21] of her Grounds of Decision ("GD"), that in the setting of a *contractual* consent order, a party cannot compromise a claim for non-disclosure and then later revive the underlying claim which has been compromised (see Sir David Foskett, *Foskett on Compromise* (Sweet & Maxwell, 8th Ed, 2015) at para 6-01). However, it is well-established that matrimonial matters are different from ordinary civil cases in that the binding effect of a settlement embodied in a consent order stems from the court order itself and not from the prior agreement of the parties (*AYM* at [15]). Hence, if there was *fraudulent* non-disclosure that was *material*, such that proper disclosure would have led the court to making a *substantially different order*, then the fact that the parties and the court had considered the allegations of non-disclosure would not, by itself, preclude the court from setting aside the earlier order that was made on the basis of fraud.

8 On this point, we also refer to the recent decision of the UK Supreme Court in *Sharland v Sharland* [2016] AC 871, where it was observed that, in a situation where there is fraudulent non-disclosure by one of the parties to a matrimonial dispute, "the court is in no position to protect the victim from the deception, or to conduct its statutory duties properly, because the court too has been deceived" (at [32]). In the related case of *Gohil v Gohil (No 2)* [2016] AC 849, the same court similarly held that the duty of a spouse to make full and frank disclosure of his or her resources is owed *to the court* and that it is *the court* which is disabled from discharging its duty of oversight so "any order, by consent or otherwise, which it makes in such circumstances is to that extent flawed" (at [22]). These observations by the UK Supreme Court, which the Judge below relied on, are generally in line with the ruling of this Court in *AOO v AON* [2011] 4 SLR 1169 inasmuch as the court, whilst respecting the agreement entered into by the parties, cannot be expected to be a "mere rubber

stamp". However, it is unnecessary, in our view, to deal definitively with the precise ramifications of both these cases in relation to the Singapore legal landscape because, as we shall elaborate upon in a moment, this appeal must necessarily fail on its facts.

9 Returning to the present appeal, we are of the view that the fact that the Wife's allegation of non-disclosure had been ventilated and taken into account when the parties entered into the Consent Order is still an important and relevant factor. This is because, *as a general principle, where the issue of non-disclosure was ventilated and expressly considered in reaching a matrimonial settlement, then the courts should be slow to reopen the settlement on the very same basis unless there is* ***clear evidence*** *that the non-disclosure was fraudulent and that the parties would have entered into, and the court would have made,* ***a substantially different order*** *if proper disclosure had been made*. This general principle is in line with the interests of finality which is an important consideration in the context of matrimonial disputes and one of the *raisons d'être* of s 112 itself, as we noted in the case of *AYM* (at [22]).

Insufficient evidential basis for a finding of fraudulent and material non-disclosure by the Husband

10 This brings us to the primary factual reason for dismissing the appeal. The Judge, in our assessment, was entirely justified in finding that the Wife's allegations of fraudulent and material non-disclosure lack sufficient evidential basis, and are without merit. As carefully detailed by the Judge in her GD, the allegations are largely speculative, and based on tangential observations made in previous court judgments, admissions by third parties in those previous proceedings, newspaper reports and magazine interviews. Therefore, the evidence before the court falls far short of the high threshold for a finding of fraud to be made.

11 Furthermore, we agree with the Judge that, even if the Husband had deliberately misrepresented his total assets, the possibility of non-disclosure was a factor which both the Wife and the court were cognisant of at the time the Consent Order was made. Put simply, the non-disclosure by the Husband, if any, was *not material*. The assumption that there was some measure of non-disclosure of assets by the Husband was the reason why the Wife received such a high amount under the Consent Order, even though their marriage was a short one that had only lasted about five years before the commencement of divorce proceedings. The Wife was also unable to substantiate her claim that any non-disclosure would have been material by reference to any valuation of the relevant assets. Hence, the Wife has failed to show that the court would have come to a different decision or that another reasonable person in her position, at the time of the Consent Order, would have come to a different settlement even if her allegations as to the Husband's interests in the various businesses were proved to be true. Indeed, as we earlier noted, this analysis will extend to the majority of cases where the possibility of non-disclosure was taken into account as part of the settlement, and one of the parties subsequently tries to reopen the settlement on the basis of new evidence that there was, in fact, such non-disclosure. Such evidence would generally not be material because, *ex hypothesi*, the possibility of non-disclosure would already have been factored in at the time the settlement was reached.

12 Accordingly, we dismiss this appeal. In so doing, we reiterate our observations in the case of *AYM* at [30] that parties cannot reopen settlements at will, or continue to make claims indefinitely for benefits received by the other party after the division of matrimonial assets has been completed. There is a need for finality, unless fraud is clearly established.

Costs and consequential orders

13 We will hear the parties on costs.

Andrew Phang Boon Leong	Judith Prakash	Steven Chong
Judge of Appeal	Judge of Appeal	Judge of Appeal

Eugene Thuraisingam, Suang Wijaya and Chooi Jing Yen (Eugene Thuraisingam LLP for the appellant;
Davinder Singh SC, Randolph Khoo, Veronica Joseph and Tricia Ho (Drew & Napier LLC) for the respondent.