

Ong Boon Huat Samuel v Chan Mei Lan Kristine
[2007] SGCA 19

Case Number : CA 38/2006
Decision Date : 20 March 2007
Tribunal/Court : Court of Appeal
Coram : Chan Sek Keong CJ; Judith Prakash J; Tan Lee Meng J
Counsel Name(s) : The appellant in person; Nicole Loh (Harry Elias Partnership) for the respondent
Parties : Ong Boon Huat Samuel — Chan Mei Lan Kristine

Family Law – Matrimonial assets – Division – Property purchased during marriage in husband's sole name after wife pulling out of purchase – Whether such property wife wanting to have no part in amounting to matrimonial asset to be divided between parties upon divorce – Section 112 Women's Charter (Cap 353, 1997 Rev Ed)

Family Law – Matrimonial home – Matrimonial home purchased jointly by husband and wife – Husband and wife paying lump-sum down payment but wife solely responsible for monthly loan payments – Manner in which matrimonial home to be divided between parties upon divorce

20 March 2007

Judgment reserved.

Judith Prakash J (delivering the judgment of the court):

1 This case concerns the division of matrimonial assets upon the end of a brief and childless marriage. The appellant husband (“the Husband”) and respondent wife (“the Wife”) were married on 1 July 2000. Slightly over two years later, on 29 November 2002, the Wife applied for leave under s 94 of the Women’s Charter (Cap 353, 1997 Rev Ed) (“the Act”) to commence divorce proceedings before the expiration of three years from the date of marriage. Her application was dismissed. Nevertheless, the parties did not reconcile and the Wife filed a second divorce petition on 17 July 2003. The decree *nisi* was granted on 19 September 2003. The district judge in the Family Court found that, effectively, the marriage lasted for only 19 months.

2 This appeal concerns the division of two matrimonial assets, namely, the apartment known as 259 Onan Road (“the matrimonial home”) and the apartment situated at 373 Onan Road #01-10 Malvern Springs (“Malvern Springs”). It is necessary to elaborate on the manner in which these two properties were acquired.

3 The matrimonial home was jointly purchased by the parties in July 2000. The Husband and the Wife made lump sum payments of \$74,740.46 and \$39,659.54 respectively from their accounts with the Central Provident Fund Board (“CPF”). The Husband made an additional cash down payment of \$137,600. The remainder of the purchase price was financed by a bank loan.

4 The parties agreed that the Wife would be responsible for the monthly loan instalments and would pay these from her CPF account. Thus, from August 2000 to August 2003, the Wife alone paid the monthly instalments of \$1,837.90. From September 2003 onwards, however, when the instalments were increased, the Husband started to contribute to them. In February 2004, the Wife’s CPF contributions decreased to \$1,000.00 a month and the Husband thereafter correspondingly bore the remainder of each instalment.

5 In February 2002, the parties entered into a sale and purchase agreement to purchase

Malvern Springs in their joint names. The parties' intention *at that point in time* was for Malvern Springs to replace their matrimonial home, which was by then in a state of disrepair. Given that the Wife's funds were being used to finance the loan for the matrimonial home, the parties agreed that the Husband would be solely responsible for financing Malvern Springs. As the Husband was unable to obtain financing in his sole name, the parties also agreed that the mortgage loan for Malvern Springs was to be applied for in their joint names. The Husband made the initial 10% down payment for Malvern Springs.

6 Shortly afterwards, the parties' relationship broke down and when the time came to sign the mortgage documents, the Wife refused to sign them unless the Husband agreed to enter into a deed of financial settlement ("the Deed") with her to formally record an agreement with regard to Malvern Springs. Under the Deed, the Husband was to undertake to be solely responsible for all monthly instalments, the second 10% of the purchase price, interest, stamp duty, penalty, outgoings, costs, bank charges and fees and legal costs incurred in relation to Malvern Springs. The Husband did not consent to the Deed and as a result the Wife pulled out of the purchase in April 2003. Abortive costs of \$10,684.04 were thus incurred.

7 The Husband then proceeded to purchase Malvern Springs in his sole name in May 2003. The Wife had no knowledge of this until it was revealed in the Husband's fourth affidavit filed for the purposes of the ancillary matters in the divorce proceedings.

8 At this juncture, it is important to note that the values of both properties have moved in opposite directions. While the matrimonial home has drastically decreased in value, Malvern Springs has appreciated in value. The matrimonial home was purchased for \$688,000 but a valuation obtained by the Wife in June 2005 showed its then value to be only approximately \$550,000. A shortfall will thus be incurred if the matrimonial home is to be sold now. On the other hand, Malvern Springs was purchased for \$804,155 and, according to the Wife's estimate based on the sale price attained for a smaller unit at that time, was worth more than \$1m in February 2005. The Husband disputed that estimate, but only as to the degree of capital appreciation, and not to the fact that no capital loss had been suffered in respect of Malvern Springs.

Proceedings in the courts below

9 When the issue of division of matrimonial assets was first heard in the Family Court, the position of Malvern Springs was a hotly contested issue. The district judge considered that Malvern Springs should be included in the pool of matrimonial assets to be divided because the parties had intended it to replace their matrimonial home. The district judge made the following ancillary orders on 18 April 2005 (see *Chan Mei Lan Kristine v Ong Boon Huat Samuel* [2005] SGDC 187 at [3]):

- (a) The [Wife] was entitled to 18.56% of the net total value [*ie*, net profit of Malvern Springs – shortfall in the sale price of the matrimonial home – the Husband's cash loss – abortive costs of Malvern Springs] of both properties at 259, Onan Road (the matrimonial home) and 373, Onan Road, #01-10 Malvern Springs (Malvern Springs property) which, using the [Husband's] amended calculations, amounted to \$22,596.64.
- (b) The [Husband] was given the option either to sell the Malvern Springs property or he could retain it upon paying the [Wife] the said \$22,596.64.
- (c) The matrimonial flat was to be sold within 6 months.
- (d) No order on other claims of both parties.

(e) [The Husband] to pay \$1 per month as maintenance to [the Wife].

(f) Costs of Divorce Petition to [the Wife] fixed at \$1,500 and costs of \$2,000 for the ancillary proceedings.

10 The Husband was dissatisfied and appealed against the orders made by the district judge. On appeal, the High Court judge reduced the Wife's share of the net total value of the two properties from 18.56% to 15% after taking into account the unsatisfactory state of the Husband's financial affairs. The High Court judge left the district judge's orders otherwise untouched.

The parties' arguments and the findings of the lower courts

11 It was not disputed that the matrimonial home was to be divided. The brunt of contention instead arose from the Wife's claim to a share in Malvern Springs.

12 The Husband's main argument in this court and the courts below was that Malvern Springs should *not* be included in the pool of matrimonial assets to be divided, *ie*, the Wife should not be entitled to any share in Malvern Springs. The main reason he gave was that the Wife had, from the very beginning, maintained that she was not interested in the purchase of Malvern Springs and that she should not be responsible for any liability that might arise from the same. That being so, she should not now be allowed to take advantage of the Husband's astute investment decision in purchasing Malvern Springs.

13 The Wife argued that Malvern Springs should be included in the pool of matrimonial assets because it was purchased during the marriage and was originally intended to replace the matrimonial home. Further, the parties' agreement was that the Wife would continue to service the monthly loan instalments in respect of the matrimonial home while the Husband financed the purchase of Malvern Springs. The Wife argued that it would be unjust and inequitable to now deny her a share of Malvern Springs because the arrangement resulted in her financing a negative asset (being the matrimonial home) while the Husband financed a profitable asset (being Malvern Springs).

14 The district judge and the High Court judge both agreed with the Wife. They found that Malvern Springs should be included in the pool of matrimonial assets to be divided because it was acquired during the marriage and was intended to constitute the parties' new matrimonial home. Further, the High Court judge found that the Husband could only afford to purchase Malvern Springs because the Wife was helping to finance the matrimonial home. She was, to that extent, financially strapped and unable to help finance Malvern Springs. The Wife had thus contributed to the purchase of Malvern Springs by relieving the Husband from the financial burden he would otherwise have borne with respect to the matrimonial home. The High Court judge concluded that she was therefore entitled to a share in Malvern Springs: see *Chan Mei Lan Kristine v Ong Boon Huat Samuel* [2006] SGHC 108 ("the GD") at [16].

Our decision

Should Malvern Springs be included in the matrimonial asset pool?

15 Having heard the submissions on appeal and having reconsidered the evidence, we have come to a different conclusion from the courts below. With respect, it is our determination that Malvern Springs should *not* be included in the matrimonial asset pool for division and consequently that the Wife should not get a share of Malvern Springs. This determination is, in our judgment, the only one that is consistent with the Wife's position from the beginning that she was to have no part

in the purchase of Malvern Springs and all liabilities associated therewith would be borne by the Husband.

16 The Wife's position *vis-à-vis* Malvern Springs was clearly enunciated in her affidavits. At para 11 of her first affidavit filed on 10 November 2003, the Wife said:

The [Husband] was the one who wanted to buy this property. I was already unable to afford buying another property as all my monies were already being used to finance our matrimonial home's outstanding loan. Therefore, it was agreed that the [Husband] would be the one fully financing the purchase of Malvern Springs. However, for the [Husband] to obtain a mortgage loan from the bank for such a purchase, the mortgage loan had to be applied for by both him and [me]. Therefore, the [Husband] asked me to be a joint owner of Malvern Springs and to apply for the mortgage loan with him so that he can continue with the purchase but it was made very clear that I will not be paying anything for Malvern Springs. This is confirmed by the fact that the [Husband] was the one who paid the initial 10% downpayment for the property. [emphasis added]

17 She continued at para 13:

The purchase of Malvern Springs was then aborted and I believe that the developers and the bank are seeking compensation and damages for the non-completion of the purchase. I pray that the Court will order that any losses, damages, interest, payments are to be borne by the [Husband] as it was really his sole decision to buy Malvern Springs and he had agreed to finance it solely himself therefore I should not be liable for any of its losses or damages now. [emphasis added]

18 In her second affidavit filed on 5 December 2003, the Wife continued to protest that she should not be liable for the abortive costs associated with Malvern Springs. She said at para 13:

I note that the [Husband] has made no mention of the Malvern Springs issue in his Affidavit but this is a matrimonial asset which should be divided during the divorce proceedings as well, even though it is in fact a liability now. This liability should not be shared between the [Husband] and [me] but should be borne by him solely as this liability was not incurred for our joint benefit but for the [Husband's] sole benefit. It was his intention to invest his monies into this property and had nothing to do with me. I was only to assist in obtaining a mortgage loan for him. It was understood that this property would belong wholly to him. Therefore, the liability should also be his solely. [emphasis added]

19 Notably, these affidavits were filed before the Wife found out that the Husband had purchased Malvern Springs in his own name. The Wife's subsequent affidavits made no reference to Malvern Springs.

20 In our view, it is evident that the Wife had from the beginning wholly dissociated herself from the purchase of Malvern Springs. She testified in her first affidavit (see [16] above) that the purchase of the property was the Husband's idea and she had only agreed to be a party to the mortgage because the Husband was unable to obtain financing in his sole name. At that time, the parties' relationship had already deteriorated.

21 After the parties' relationship had completely broken down, the Wife made her intentions exceptionally clear by seeking to enter into a legally binding agreement which would confirm that she would not be responsible for any liabilities arising from Malvern Springs. In a letter from the Wife's

solicitors to the Husband's solicitors dated 4 April 2003 in which the Deed was proposed, it was made clear that the Wife would execute the mortgage documents to avoid both parties being sued by the developers of Malvern Springs, but only on the basis that the Husband would be solely responsible for the financial costs of the purchase and would indemnify her against any claims made in relation to that property. Her solicitors gave the Husband one day to accept these terms and, in the absence of such acceptance, the letter stated that the Wife would reserve her rights to seek an indemnity from the Husband for any losses, costs and damages sustained by her. When the Husband refused to enter into the Deed, the Wife put her intentions into effect by completely withdrawing from the purchase.

22 The Wife's second affidavit (see [18] above), filed before she found out that the Husband had purchased Malvern Springs in his sole name, is consistent with this view of the facts and is particularly telling. Importantly, she testified that the liability should be borne solely by the Husband because it was incurred "for the [Husband's] sole benefit" and that the parties' understanding was for Malvern Springs to "belong wholly to [the Husband]".

23 Having realised that the Husband had gone ahead with the purchase of Malvern Springs on his own, and that Malvern Springs had turned out to be a profitable investment, the Wife adopted a radically different position in these proceedings and claimed a share of Malvern Springs. We have no doubt that, had Malvern Springs turned out to be an imprudent investment, the Wife would have maintained her position that she should have nothing to do with the purchase. In our view, the Wife cannot now claim what she once rejected. If the Wife maintains that she has nothing to do with the liabilities associated with Malvern Springs, then she similarly can have no share in its profits.

24 On the facts, the Husband went ahead to purchase Malvern Springs in his sole name because he was facing substantial financial loss and was in danger of being sued by the developers if the initial purchase was aborted. Importantly, the purchase took place at a point in time when the parties' marriage had already completely broken down. To recall, the Husband purchased Malvern Springs in May 2003 and the Wife filed the second divorce petition shortly afterwards in July 2003. The Husband paid for both the first 10% down payment and the second 10% instalment of the purchase price from his cash savings, and has been paying the monthly loan instalments ever since.

25 In the light of all the circumstances, we see no reason why Malvern Springs should be included in the matrimonial pool of assets to be divided between the parties. While it may be that Malvern Springs was acquired *during* the marriage, and therefore technically falls under the definition of a matrimonial asset contained in s 112(10) of the Act, we must emphasise that the court's power to divide any matrimonial asset is a discretionary power. This is obvious from ss 112(1) and 112(2) of the Act, which provide:

(1) The court shall have power, when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage, to order the division between the parties of *any matrimonial asset* or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportions as the court thinks just and equitable.

(2) It shall be the duty of the court *in deciding whether to exercise its powers under subsection (1)* and, if so, in what manner, to have regard to all the circumstances of the case ...

[emphasis added]

26 Thus, it is not mandatory for the court to exercise its powers of division under s 112 and the court may generally decline to do so where a valid reason is given: *Wong Kam Fong Anne v Ang Ann Liang* [1993] 2 SLR 192 at 200, [31]. For the reasons given above, the present case is one in which

there is good reason for the court *not* to divide Malvern Springs.

27 We would also add that, while it may have been the intention of the parties in February 2002 that Malvern Springs should replace their matrimonial home, it was very clear that by May 2003, when the Husband purchased Malvern Springs in his sole name, such an intention no longer existed. In this regard, we must disagree with the approach of the lower courts in placing emphasis on the parties' original intention that Malvern Springs should become the new matrimonial home.

Division of the matrimonial home

28 Having excluded Malvern Springs from division, we now turn to consider the division of the matrimonial home. In a short and childless marriage, the division of matrimonial assets will usually be in accordance with the parties' direct financial contributions as non-financial contributions will be minimal. Thus, in *Wang Shi Huah Karen v Wong King Cheung Kevin* [1992] 2 SLR 1025, a case where the wife left home after a year, the High Court divided the matrimonial home solely in accordance with the parties' direct financial contributions. In the present case, it has been established that the direct financial contributions of the parties to the matrimonial home are in the proportions of 64:36 from the Husband and the Wife respectively. The Wife rightly did not make a claim for any non-financial contributions.

29 As stated above at [8], the matrimonial home has drastically decreased in value. On the basis of the figures we were given, the shortfall that will be incurred if the property is to be sold for \$550,000 is approximately \$70,000 (after refunding the parties' respective CPF contributions and repayment of the bank loan). It should be noted that the Husband had also obtained a lower valuation of \$500,000 and if the property achieves a price closer to that value then the shortfall would be even larger. Further, as the CPF has a first charge on the property, the parties' CPF contributions will have to be refunded in priority to the bank loan. This means that the parties are liable to be sued by the bank for the shortfall.

30 The matrimonial home is presently in a bad state of disrepair and is infested with termites. It is currently unoccupied. We were informed by the Husband during the hearing that the approximate cost of repairing the property is \$20,000 but no evidence was given in support of this.

31 The order made by the courts below was that the matrimonial home should be sold within six months (see [9] above). The Wife continued to press for an early sale whilst the Husband asked for a postponement. We are of the view that in the particular circumstances of this case, an immediate sale of the matrimonial home would be inequitable. As the parties' CPF contributions will first have to be refunded, the Wife will get a *full* refund of her direct financial contributions. On the other hand, the Husband stands to lose his entire cash down payment of \$137,600. Indeed, the district judge made similar observations at [32] of his grounds of decision. In addition, given that the Wife is now residing in the UK, the Husband is, effectively, the borrower who will, at least in the immediate future, have to shoulder the full burden of paying the bank the amount of the shortfall or face being sued by it.

32 It therefore appears to us that the equitable thing to do would be to allow a postponement of the sale of the matrimonial home for a limited period to give him the chance of selling it at a higher price. In the meantime, the matrimonial home can be rented out and the rent received can be used to defray the cost of repairs and to pay the loan instalments. It would, however, only be fair to grant the Husband's prayer for a postponement for the sale if the Wife's liability is not increased thereby. Therefore, for the period that the matrimonial home remains unsold the Husband must bear, solely, all the expenses relating to it including the loan instalments, service charge and property tax (though he may recoup these from the rental proceeds, if any) and such payments by him shall not affect the

proportions in which the parties own the property, namely, 64% to the Husband and 36% to the Wife (see [28] above).

33 Accordingly, we make the following orders with regards to the matrimonial home:

(a) The Husband shall be entitled to hold on to the matrimonial home for a period of up to three years from the date of the making of this order. During that period the Husband may, but shall not be obliged to, sell the matrimonial home. In the event the Husband decides to exercise his right of sale, he should give the Wife at least four weeks' notice of the completion of the sale. Should the Wife fail to execute all documents necessary to effect the transfer within four weeks from receiving such notice, the Registrar of the Supreme Court shall be empowered to execute the sale documents in the Wife's stead.

(b) If the Husband does not sell the matrimonial home by the expiration of three years from the date of the making of this order, the Wife shall be entitled to effect the sale. Similarly, she should give the Husband at least four weeks' notice. Should the Husband fail to execute the necessary documents to effect the transfer within four weeks from receiving such notice, the Registrar of the Supreme Court shall be empowered to execute the necessary documents to effect the sale in the Husband's stead.

(c) The Husband shall bear the monthly loan instalments and all other expenses associated with the matrimonial home until such time as the property is sold.

(d) Upon the sale of the matrimonial home, the net proceeds of sale are to be divided between the Husband and the Wife in the proportions of 64:36 respectively after deduction of the following:

(i) the refunds to both parties' CPF accounts of all moneys utilised for the acquisition of the matrimonial home together with accrued interest;

(ii) the sum paid to settle the outstanding bank loan;

(iii) the Husband's cash contribution towards the initial down payment of \$137,600.00 and stamp fees of \$10,668.00 amounting to a total of \$148,268.00;

(iv) the costs of repair works carried out to the extent that these have not already been recovered from any rental proceeds collected; and

(v) the costs of sale including legal costs and housing agent's commission.

On completion of the sale, the Husband shall render to the Wife an account of the manner in which the sale proceeds and the rental proceeds, if any, have been applied and shall pay the Wife her proportionate share of any moneys that remain.

(e) If a loss is incurred upon sale, the loss is to be apportioned between the Husband and the Wife in the proportions 64:36 respectively. The Husband shall, if necessary, be entitled to recover from the Wife, as a debt due and payable to him, any amount which he has paid towards discharging the loan that is in excess of the amount which the bank would have been able to recover from him had it held him responsible for only 64% of the total outstanding amount, inclusive of interest, payable to it.

(f) Both parties shall have liberty to apply to the High Court, if necessary, in connection with the implementation of these orders.

Should the Wife be allowed a share in the Husband's savings for indirectly contributing to them?

34 We would like to address one final point. It appears that the courts below were strongly influenced by the consideration that, by paying the full amount of the monthly loan instalments for the matrimonial home, the Wife had indirectly contributed to the Husband's ability to finance Malvern Springs. They concluded that this conduct entitled her to a share in Malvern Springs. Thus, the High Court judge observed at [16] of the GD:

In substance, however, the understanding between the parties never included any participation at all. But this did not mean that the Wife had relinquished her interest in the Malvern Springs property – or any of the matrimonial assets for that matter. It was a simple matter of division of financial labour, so to speak. ***Her contribution, in fact, to the purchase of the Malvern Springs property was in the form of relieving the Husband with respect to his otherwise heavier financial burdens vis-à-vis the matrimonial home.*** [emphasis added in bold italics]

35 We have already given our reasons above why the Wife should not be entitled to a share in Malvern Springs. The question remains: Should this court on the other hand treat the Husband's savings accumulated after the purchase of the matrimonial home, which he used to partly finance Malvern Springs, as a matrimonial asset that should be divided between the parties?

36 We are of the view that the Wife should not get an additional sum on top of her direct financial contributions for two reasons. Firstly, the monthly loan instalments paid by the Wife constituted direct financial contributions and went towards increasing her percentage share in the matrimonial home in the event of a divorce. To allow her a sum in addition to her direct financial contributions would be giving her an unnecessary bonus. It is indeed unfortunate that the matrimonial home has depreciated in value, but this should not be a relevant factor for the court to take into account especially when it divides matrimonial assets in accordance with direct financial contributions. It is also relevant to note that all these contributions came from her CPF account and therefore even if the property is sold at a loss, her contributions will be returned to her in full together with accrued interest.

37 Secondly, allowing the Wife an additional sum would, in our view, be contrary to the parties' original financial agreement. Let us relook the terms of this arrangement. When the matrimonial home was purchased, the Husband paid a large initial cash down payment of \$137,600.00 from his savings. He additionally exhausted his CPF savings by making a lump sum payment of \$74,740.46. Therefore, the most probable reason for the parties agreeing that the Wife should be responsible for the monthly loan instalments was simply that the Husband had exhausted the bulk of his cash savings and his entire CPF savings. Notably, this arrangement subsisted long before the purchase of Malvern Springs was contemplated. The basic point is that the parties would probably have continued this financial arrangement *even if Malvern Springs had not been purchased*. Simply put, this appears to be the crux of their arrangement – in so far as the matrimonial home was concerned, the Husband would make a large initial down payment and the Wife would pay the monthly instalments.

38 This being so, we are unable to agree with the High Court judge's observations reproduced at [34] above. In the first place, the parties' financial arrangement never envisaged that the Husband should bear the financial burdens of contributing to the matrimonial home in so far as the monthly instalments were concerned. This being so, we find it somewhat artificial to say that the Wife had, by

her contributions, relieved the Husband of his financial burdens *vis-à-vis* the matrimonial home.

39 In any case, there was no evidence before us that the Wife had claimed an entitlement to the Husband's savings as a matrimonial asset. The only ancillary matters heard in the lower courts were with regards to maintenance and the division of the matrimonial home and Malvern Springs.

Conclusion

40 For the reasons given above, we allow the appeal and set aside the orders made below in relation to the division of matrimonial assets. They shall be replaced by the orders set out in [33] above. The Husband shall be entitled to his costs of the appeal before the High Court judge, to be taxed if not agreed. As regards the costs of this appeal, as the Husband appeared in person he is not entitled to legal costs but he shall be entitled to recover reasonable disbursements in relation to this appeal. The security deposit shall be refunded to him.

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