IN FAMILY JUSTICE COURTS OF THE REPUBLIC OF SINGAPORE

[2018] SGHCF 16

HCF/DCA No 170 of 2017

Between

UMU

… *Appellant*

And

UMT

… *Respondent*

HCF/DCA No 34 of 2018

Between

UMT

… *Appellant*

And

UMU

… *Respondent*

GROUNDS OF DECISION

[Family Law] — [Matrimonial assets] — [Damages for pain and suffering]
[Family Law] — [Matrimonial assets] — [Division]
[Family Law] — [Maintenance] — [Child]

UMU
v
UMT and another appeal

[2018] SGHCF 16

High Court — HCF/DCA No 170 of 2017 and HCF/DCA No 34 of 2018
Debbie Ong J
15, 24 October 2018

12 November 2018

Debbie Ong J:

1 These were appeals against orders on ancillary matters made by a District Judge ("the DJ"). The appellant in HCF/DCA 170/2017, who was the respondent in HCF/DCA 34/2018, shall be referred to as the "Wife". The appellant in HCF/DCA 34/2018, who was the respondent in HCF/DCA 170/2017, shall be referred to as the "Husband". The only issues in dispute were the division of assets and maintenance for the parties' three children: "P", "Q" and "R", who were 22, 19 and 13 years old respectively.

Division of assets

Compensation moneys

2 The Husband was unfortunately involved in a road traffic accident in April 2012 and suffered serious injuries. A consent order was recorded in his favour for the sum of $520,000, comprising $425,000 for general damages,

$75,000 for special damages and $20,000 for interest ("the Consent Order"). Of this sum, he had received $433,828.94, after payment of costs to solicitors ("the Compensation").

3 A key dispute in this appeal was whether the Compensation is a matrimonial asset ("MA"). The DJ held that the Compensation received by the Husband is a MA but did not include the entire sum of the Compensation in the pool of MAs. She included sums received for special damages (medical expenses, past loss of earnings, damage to motorcycle and surveyors' fees) in the pool; it was noted that the expenses in respect of these had been paid from parties' assets. She also included damages for the Husband's pain and suffering, noting that the Wife had taken care of him and attended to his needs. However, she did not include the sum awarded for future medical expenses (as the Wife accepted that this should not be included) and the sum for future loss of earnings (as "it would be more appropriate to take this into account as part of [the Husband]'s means for the issue of maintenance instead of division of assets"). On a pro rata basis, the DJ thus included $149,237.20 in the pool of MAs.

4 The Wife argued as a preliminary point that the DJ should have assessed the Compensation as $450,722.17 instead of $433,828.94, because the sum of $16,893.23 was paid to the Husband's solicitors in relation to the maintenance proceedings taken out by the Wife against the Husband as well as the parties' divorce proceedings, and was not related to the personal injury suit. The Husband submitted that this expense was legitimately incurred as "actions would have been commenced against him" if he had not paid. As the sum of $16,893.23 was legal costs incurred by the Husband in proceedings unrelated to his personal injury claim, there was no reason for this sum to be deducted from the compensation he received. Thus, the Compensation should be valued at $450,722.17.

5 The Wife argued that the entire Compensation, except the sum for the Husband's future medical expenses, should be included in the pool of MAs for division. She submitted that the DJ was wrong to break it down into various components, because parties had settled on a global basis and there was no agreed breakdown. The Wife submitted that the Compensation is a quintessential matrimonial asset as it was acquired by the personal effort of the Husband, *ie*, effort in litigating, negotiating and settling. She also argued that the DJ was wrong to exclude the sum awarded for the Husband's future earnings from the pool, because the entire sum had been dispensed and was already available to the Husband without being contingent on any future event happening.

6 The Husband submitted that the entire Compensation should be excluded from the pool of MAs because it was paid to him to compensate for his loss as a result of the traffic accident. It was therefore personal to him as it was not acquired through the efforts of either party.

7 A good starting point in understanding the context within which this issue arises is in the Court of Appeal's decision of *NK v NL* [2007] 3 SLR(R) 743 at [20]:

> … The division of matrimonial assets under the [Women's Charter] is founded on the prevailing ideology of marriage as an equal co-operative *partnership of efforts*. The contributions of both spouses are equally recognised whether he or she concentrates on the economics or homemaking role, as both roles must be performed equally well if the marriage is to flourish. When the marriage breaks up, these contributions are translated into economic assets in the distribution according to s 112(2) of the [Women's Charter]. … [emphasis added]

8 The definition of a matrimonial asset in s 112(10) of the Women's Charter (Cap 353, 2009 Rev Ed) ("the Charter") focuses on two key features:

first, it is an asset acquired *by effort* and not by gift or inheritance, and second, it is an asset acquired *during* marriage or has a connection to the efforts of the spouses *during* marriage. Assets with these two characteristics have been described as "quintessential matrimonial assets": see Leong Wai Kum, *Elements of Family Law in Singapore* (LexisNexis, 3rd Ed, 2018) ("*Family Law*") at para 16.041; *TNC v TND* [2016] 3 SLR 1172 at [40]; *TND v TNC* [2017] SGCA 34 at [9]. Assets which do not have these characteristics may be "transformed" into matrimonial assets if they were ordinarily used or enjoyed by parties, constituted the matrimonial home or were substantially improved by the efforts of the parties *during* the marriage: see s 112(10) of the Charter.

9 I note that compensation for tortious wrongdoing aims to restore a person to a position that he or she would have been in had the wrong not been committed against him or her. Compensation for pain and suffering are not assets acquired by the efforts of a spouse during marriage. I did not accept the Wife's submission that litigating and negotiating for a settlement amount to "effort" in this context. Such an interpretation would be highly artificial, because the Husband's entitlement to the Compensation arose not from litigation *per se*, but from him being the victim of a tort.

10 An analogy was made to lottery winnings in the submissions. In *Ng Sylvia v Oon Choon Huat Peter and another* [2002] 1 SLR(R) 246, the High Court held that a property purchased with lottery winnings could be included in the pool of MAs for division. Professor Leong in *Family Law* at paras 16.062–16.063 commented on this decision:

> [16.062] … A property acquired as a windfall presents challenges to inclusion as matrimonial asset. The Women's Charter section 112(10) does exclude "any asset … that has been acquired by one party … by gift or inheritance" from "any … asset of any nature acquired … during the marriage" as matrimonial asset. It is possible to argue that a

> purposive reading of "gift or inheritance" would also include, by analogy, property acquired by other sorts of windfall including lottery winnings.
>
> [16.063] … The point that lottery winnings may be equated with "gift or inheritance" was not argued before the Judge. The author suggests that the decision is supportable. If one bears in mind that matrimonial assets are the material gains of the marital partnership it is not necessary to exclude the entire of property acquired by windfall. … If marriage is truly an equal co-operative partnership of different efforts for the spouses' mutual benefit, why should they not share their good fortune?

11 Thus lottery winnings already present challenges to their inclusion as MAs despite the possible connection between lottery winnings and the key characteristics of MAs (see [8] above). It could be argued that some utilisation of effort and matrimonial funds for the purchase of lottery tickets arise in the acquisition of lottery winnings. On the other hand, there is no element of effort in respect of damages received as compensation for the victim of a tort for his personal suffering. Lottery winnings could also be said to be part of the good fortune to be shared by both spouses in a marital partnership, while tortious damages are personal to the injured spouse.

12 Some components of compensation, such as lost earnings due to the accident prior to the divorce, may be considered assets acquired as they are intended as compensation for the income the spouse would have expended effort to acquire had he or she not been injured. Such income would have been earned if the accident had not occurred, and would be subject to division. Special damages such as hospital and transport expenses do not raise any issue in this context as any sums paid would be to reimburse the injured party for expenses actually incurred.

13 The DJ's decision is largely in line with these positions except for her decision to include the sum awarded for the Husband's pain and suffering in the

pool of MAs. The DJ noted that the Wife had taken care of the Husband after his accident. However, the Wife's contributions in tending to the Husband are relevant in the determination of the just and equitable proportion of assets each party should receive, rather than in the identification of an asset as a MA. The DJ's approach also gives the Wife twice the credit for caring for the Husband after the accident – once in determining the pool of MAs, and once more in apportioning the pool. I also accepted the Husband's submission that compensation for pain and suffering was personal to him.

14 The Wife's argument that parties could not agree on the breakdown of the Compensation does not prevent the court from taking a broad brush approach in determining the proportion which should be included in the pool of MAs. The court's discretion under s 112 of the Charter has always been exercised in broad strokes.

15 Further, the Wife's argument that the sum awarded for the Husband's loss of future earnings should be included in the pool of MAs because they were already available to him is inconsistent with the principle that only assets acquired during marriage, not after, should be divided. Instead, as the DJ correctly noted, this sum is relevant to the Husband's ability to pay maintenance after the divorce.

16 I am of the view that only the proportion of the Compensation corresponding to special damages and the Husband's past loss of earnings until the date of interim judgment ("IJ"), as well as interest, should be included in the pool of MAs. Special damages are to reimburse the victim for expenses incurred, and where such expenses have been made out of the matrimonial pool earlier, they should be placed back into the pool.

17 As directed, the parties had subsequent to the hearing on 15 October 2018 submitted what these sums should be. The Wife argued that the court should have regard to a letter to court dated 26 October 2015 ("the Letter") in which the Husband quantified his special damages to be $120,487. She also pointed out that according to the Letter, the relevant sum to be added to the pool of MAs, which includes the loss of bonuses and base salary up till the date of IJ, as well as interest, should be $201,370.39. However, the Wife's reliance on the Letter is misplaced. It contains the breakdown of the Husband's entire claim for over $1m; the figures are not pegged to the sum which the Husband *actually* received.

18 On the other hand, the Husband accepted the DJ's breakdown of the damages awarded, which is in turn based on the breakdown set out in the Consent Order. In addition, the Husband submitted that, on a pro rata basis, his loss of earnings from the date of the Consent Order to the date of IJ is $7,142.86.

19 I note that the agreed sum for special damages (as set out in the Consent Order) is $75,000. I further note that the bulk of the Husband's claim for special damages comprises his loss of earnings from the date of the accident (28 April 2012) to the date of the Consent Order (3 November 2015), which is about three years and six months. On a broad brush basis, I included a further sum of $7,500 in the pool of MAs, representing his loss of earnings from the date of the Consent Order to the date of IJ (14 April 2016), a period of about five months. As for interest, on a pro rata basis, I included a further $4,000 in the pool of MAs.

20 Thus, of the sum of $520,000 awarded to the Husband, only $86,500 should be included in the pool of MAs, comprising the sum of special damages ($75,000), loss of earnings from the date of the Consent Order to the date of IJ

($7,500) and interest ($4,000). Since the Husband received only $450,722.17, I found it reasonable to include into the pool of matrimonial assets the sum of $74,975 from the Compensation, being ($86,500/$520,000) x $450,722.

Insurance proceeds

21 The Husband surrendered several insurance policies after the commencement of divorce proceedings. The surrender values of those policies total $114,593.27. The DJ held that the Husband did not obtain the Wife's consent to surrender those policies and must account for the full surrender value.

22 The Husband argued that the DJ was wrong to do so, because he had to surrender the policies to pay for family expenses as a result of his accident. He pointed out that at the material time, he was struggling to pay for spousal and child maintenance. In response, the Wife highlighted that the Husband surrendered more than $100,000 of insurance policies while he was paying $760 a month in maintenance and allowance to her and one of their children, Q. The Wife also pointed out that the Husband had in a voluntary affidavit deposed that he had used moneys in the Maybank account (in which the proceeds were deposited in) to pay for his own personal expenses including maintenance for his mother, betting and gaming and to repay loan sharks.

23 I note that the policies were surrendered in April to July 2016. The IJ was granted on 14 April 2016. These policies are MAs, identified at the operative date of IJ, and their values ought to be included in the pool. Short of reasons and evidence persuading the court why these sums should be allowed to be deducted from the pool, the DJ's decision to add $114,593.27 back to the pool of MAs was not unreasonable.

Assets held on trust

24 The Husband claimed that he held 80% of an investment in a Castlewood Group property on trust for a certain Mr S. The DJ rejected this claim. First, Mr S failed to corroborate the Husband's assertion in his (*ie*, Mr S's) affidavit. Second, the document which the Husband produced belatedly was not dated and Mr S' purported signature differed significantly from that in his (*ie*, Mr S') affidavit. The Husband argued that the DJ was wrong, but did not provide any reason to support his contention. Thus, the DJ's finding was reasonable.

Value of land in the Philippines

25 The Husband contended that the value of a parcel of land in the Philippines should be worth $100,000, not $57,000 as the DJ found. The Husband submitted that the Wife had access to the property and had every opportunity to obtain a valuation report. Since she had failed to do so, the court should accept his value. However, as the Wife pointed out, the DJ based her valuation on the Husband's own evidence (in his affidavit of assets and means) of a similar plot of land with an asking price of the equivalent of $57,000. Since this was the best evidence available to her in the absence of valuation reports, the DJ's valuation was not unreasonable.

Alleged loan from the Husband's mother

26 The Husband claimed that he had taken a loan of $50,000 from his mother in 1991 which should be returned to her from the pool of MAs. This was supposedly for renovations and for the furniture and fittings of the previous matrimonial flat. The Husband's mother filed an affidavit confirming this. The DJ however rejected this argument. She found it odd that the Husband's mother

was only now urging the Husband to repay her moneys, some 26 years after they had been allegedly loaned to him. The Husband did not offer any new arguments on appeal beyond asserting that the DJ was wrong.

27 In the circumstances, the DJ was not wrong in disregarding this alleged loan. There was no objective evidence to show that there had indeed been such a loan and even if made, was made long ago prior to the marriage in 1991.

Division ratio

28 In *ANJ v ANK* [2015] 4 SLR 1043 ("*ANJ*"), the Court of Appeal set out a structured approach for the division of assets which requires to court to assess parties' direct and indirect contributions. This approach was subsequently held to be inapplicable to long single-income marriages, where the court should tend towards equal division instead: *TNL v TNK and another appeal and another matter* [2017] 1 SLR 609 ("*TNL*"). In *UBM v UBN* [2017] 4 SLR 921 ("*UBM*"), it was clarified that a single-income marriage includes a marriage where one party was primarily the breadwinner and the other primarily the homemaker.

29 This was a long marriage of about 22 years. However, the DJ held that this was not a single-income marriage, because the Wife had been working as a quality control inspector until 2003, when she stopped working to look after the children. She further noted that the Wife resumed work in 2015 to meet the family's financial needs. She therefore concluded that the *ANJ* approach should apply instead of the *TNL* approach. The DJ found that the Husband made 100% of the direct contributions, while the Wife made 70% of the indirect contributions. Thus, the Wife was entitled to 35% of the assets (adverse inference aside). The DJ also held that she would have reached the same outcome even if she had applied the *TNL* approach.

30 The Wife relied on *UBM* and argued that the DJ should have applied the *TNL* approach, because the Husband was primarily the breadwinner while W was primary the homemaker. She emphasised that for her employment during the early years of the marriage, she only earned $650 to $900 a month. The Husband supported the DJ's reasoning.

31 The evidence supported the Wife's submission that the Husband was the primary breadwinner while the Wife was the primary homemaker. It would be appropriate to approach this case as one involving a single-income marriage.

32 This was a 22-year marriage where the Wife cared for three children and cared for the Husband after the road traffic accident. As I had stated earlier, the Wife's contributions on caring for the Husband after the accident ought to be taken into account at this stage of the exercise of discretion. As the DJ noted at [57] of her grounds of decision, "each party had their respective part to play and it was a partnership of joint efforts". I was of the view that inclining towards equal division would be appropriate in this case; I added another 10% to the DJ's assessment of awarding 35% to the Wife, resulting in a division of 45:55 in favour of the Husband.

Adverse inference

33 The DJ drew an adverse inference against the Husband by increasing the Wife's share of the assets by 5%. The DJ noted that the Husband had failed to comply with an order for discovery and had withdrawn sums amounting to about $675,000 from his bank accounts for the period from April 2015 to December 2016. The DJ did not accept the Husband's explanation that he had gambled the moneys and used them to repay loan sharks and other people because those assertions were not supported by evidence.

34 The Husband argued that the DJ had "disregarded" his various explanations, and cited *UBM* for the proposition that "inability to account past transactions or even some lack of diligence in themselves do not necessarily justify an adverse inference drawn against a party".

35 The sums which he withdrew (around $675,000) are very significant, considering that the entire pool of MAs is valued at only slightly above $1m. The Husband's conduct cannot simply be dismissed as an innocent inability to account for past transactions where this is a large sum withdrawn within about a year of the IJ and some months after the IJ. On the available evidence and explanations, it is unlikely that the entire sum could be attributed to family expenses.

36 In the circumstances, the DJ was not wrong to award the Wife an uplift of 5%. Thus I awarded the Wife 50% of the pool of MAs.

Maintenance for children

37 The Husband was earning $1,352 at the time of these proceedings, but the DJ found that he had an earning capacity of $2,500 per month. The DJ noted that even though the accident was in 2012, the Husband was able to earn over $80,000 a year in 2014 and 2015, though it suffered a drastic reduction to $42,335 in 2016. The DJ further relied on the Husband's recent medical reports which indicate that his performance in memory and attention had been improving.

38 The Husband argued that the DJ failed to recognise that notices of assessment of a particular year refer to income earned in the previous year. Thus, he earned over $80,000 in 2013 and 2014, and his income fell to $42,335 in 2015. He also pointed out that the latest medical report dated 27 June 2016

states that he was still suffering from cognitive impairments in memory, attention and executive functioning, slurred speech and memory impairment.

39 I note that the reports are not the most current. The Husband's submissions did not address the fact that he had continued to earn more than $80,000 a year for two years after his accident, and more than $40,000 three years after the accident. There was no suggestion that the Husband's condition had deteriorated over the years. Under these circumstances, the DJ was not wrong in finding that the Husband's earning capacity was $2,500 a month.

40 I note that the sum awarded for future loss of earnings in his personal injury suit is relevant to his ability to pay maintenance: see [15] above. I also observe that despite the Husband's submission that the Wife was a university graduate and had the capacity to earn more than $1,450 a month, it was not disputed that the Wife had been a homemaker for many years, and she had only earned $650 to $900 a month when she was working during the early years of the marriage.

Maintenance for P

41 The Husband submitted that while he was willing to pay a share of P's tertiary education fees, the DJ was wrong to order him to bear the full costs. He argued that the Wife should bear her share as well. In light of the Husband's resources, and the fact that P was already in her final year, the DJ's order was not unreasonable. I ordered the Husband to pay P's tertiary education fees from the date of the DJ's order until her completion of the course.

Maintenance for Q

42 As for Q, the Wife submitted that the Husband should had taken out an application for variation on the premise that Q had started serving National Service so that the court can be apprised of all the relevant information. As the Wife did not dispute that Q had started serving National Service, I accepted that Q no longer required maintenance upon enlistment.

43 Based on the Husband's resources, the DJ's order for the Husband to pay Q's polytechnic fees was not unreasonable. I ordered the Husband to pay Q's polytechnic fees from the date of the DJ's order until his completion of the polytechnic course. The order on the additional sum of $300 for his maintenance shall terminate upon the date of his enlistment.

Maintenance for R

44 As for the DJ's order that the Husband pay $500 a month as maintenance for R, this was not unreasonable in light of his resources, and I affirmed it.

Conclusion

45 For the above reasons, I allowed both appeals in part on the following terms:

(a) Only the proportion of the Compensation corresponding to special damages, H's loss of earnings calculated until the date of IJ and interest shall be included in the pool of MAs. This sum totals $74,975.

(b) The Wife shall be entitled to 50% of the pool of MAs.

(c) The Husband shall pay Q's polytechnic fees from the date of the DJ's order until his graduation and an additional sum of $300 until the date of his enlistment for National Service.

46 The appeals on all other issues were dismissed.

47 As both appeals were allowed in part, I ordered parties to bear their own costs.

Debbie Ong
Judge

Lee Ee Yang and Wilbur Lua
(Covenant Chambers LLC) for the Wife;
Seenivasan Lalita and Isabel Chew Maggie
(Virginia Quek Lalita & Partners) for the Husband.

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