

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO. 52 OF 2022 (CIVIL)
(ON APPEAL FROM CACV 150 OF 2021)

BETWEEN

LM

PK
SS

and

Petitioner

1st Respondent
2nd Respondent

MOOT PROBLEM

Facts

1. LM is a female South African citizen, born in Cape Town in 1989. PK is a female Irish citizen, born in Hong Kong in 1990 with permanent residency in Hong Kong. They met in 2011 at graduate school in Durban, South Africa, whilst playing for the university women's football team. They quickly developed a romantic relationship and began cohabiting together from 2012. They married in Johannesburg in 2017.
2. PK's parents, who live in Hong Kong, are deeply religious and did not approve of PK's homosexual relationship with LM and therefore refused to attend the wedding. However, in 2018 PK's father, SS, transferred to her the beneficial ownership of a Tsuen Wan flat immediately next to their own as a gift to encourage PK to move back to Hong Kong.
3. In October 2019, PK and LM agreed that LM would undergo IVF treatment using her own eggs and anonymously donated sperm. LM became pregnant in February 2020.
4. In March 2020, PK was headhunted to a senior position at an international bank in Hong Kong. LM was reluctant to travel during the pregnancy but, owing to the Pandemic and the difficulties of travel back and forth, LM and PK agreed that their child would be born in Hong Kong. LM sought and obtained a 7-year dependent visa (with permission to work) on the basis of her marriage to PK in April 2020 and they both arrived in Hong Kong shortly thereafter. LM and PK immediately moved into the Tsuen Wan flat. Due to the move and her pregnancy, LM had given up her job as a public school teacher and was unable to work when she arrived in

Hong Kong. LM had spent all of her savings on the IVF treatment and so was entirely financially dependent upon PK.

5. Although PK's relationship with her parents significantly improved after her arrival, PK and LM's relationship rapidly deteriorated. PK began to chastise, insult and occasionally physically assault LM.
6. After the birth of their child, RMS, in November 2020, PK's mistreatment of LM intensified. PK substantially reduced the family budget and fired the foreign domestic worker that had been hired to assist LM in caring for RMS and the Tsuen Wan flat. PK cancelled LM's mobile telephone contract and cancelled Internet access at home, effectively cutting LM off from her family in South Africa. LM had difficulty obtaining sufficient daily necessities and began to psychologically deteriorate.
7. After speaking with an NGO social worker, LM obtained legal aid and filed a petition of divorce against PK citing the latter's unreasonable behaviour, and seeking maintenance pending suit and interim maintenance for RMS.
8. Upon being served with the petition, PK returned home together with her father, SS. PK told LM that she had to leave the flat as she had transferred back ownership to SS. When LM refused to leave, SS then began to throw LM's belongings out of the door of the flat, breaking several of her football trophies. SS also used derogatory and homophobic slurs, screaming at LM that she and her "*bastard*" had to leave immediately. During this altercation, LM's social worker arrived at the home and telephoned the police, who arrived and separated the parties, advising them to resolve the matter in court and not to engage in further violence. The police took no further action.
9. The next day, LM's solicitors filed an application by summons within the divorce proceedings under section 17 of the Matrimonial Proceedings and Property Ordinance (Cap 192) ("**MPPO**"), seeking to set aside the gift by PK to SS of the beneficial ownership in the Tsuen Wan flat ("**the s.17 summons**"), and filing a *lis pendens* with the Lands Registry. They also filed a separate summons within the divorce proceedings under sections 3 and 3A of the Domestic and Cohabitation Relationships Violence Ordinance (Cap 189) ("**DVO**"), seeking non-molestation

orders and against both PK and SS, and their ouster from the Tsuen Wan flat (“**the DV summons**”).

Family Court Proceedings

10. The call-over hearings of the DV summons and the s.17 summons were heard together with the 1st First Appointment hearing. Prior to the hearing, the HHJ Varadkar directed, by consent, that SS be added as a respondent to the proceedings for the purposes of the s.17 summons and the DV summons.
11. At the 1st First Appointment hearing, HHJ Varadkar made ‘interim interim’ orders for child maintenance and maintenance pending suit in favour of LM against PK, on the assumption that LM and RMS will continue to live in the Tsuen Wan flat. The judge then directed that the petition be stayed pending the determination at a preliminary-issues hearing as to whether there was jurisdiction for divorce proceedings in cases of same-sex marriages.
12. With respect to the DV summons, LM’s applications against PK were resolved by mutual non-molestation undertakings, and an undertaking that she would not return to the Tsuen Wan flat. However, SS refused to provide such undertakings and requested the matter be set down for trial. PK took no further part in the determination of the DV summons.
13. At the trial of the DV summons, SS did not dispute the facts alleged by LM but argued that the Family Court lacked jurisdiction as PK and LM were not ‘spouses’ within the meaning of the DVO, and further that the Family Court could not make an ouster order in respect of the Tsuen Wan flat since the Family Court lacked jurisdiction to entertain divorce proceedings under the Matrimonial Causes Ordinance (Cap 179) (“**MCO**”) and therefore could not make a set aside order under the MPPO since their marriage not a ‘monogamous marriage’ as required by MCO section 9.
14. After considering the matter, HHJ Varadkar made a non-molestation order against SS. Applying the decisions of the Court of Final Appeal in *Leung Chun Kwong v Secretary for the Civil Service and Director of Immigration v QT*, the judge held that a restrictive definition of ‘spouse’ to exclude same-sex partners would result in unjustifiable discrimination against LM. Therefore, applying a constitutional reading, ‘spouse’ should be defined to include “*any party to a marriage entered into*

outside Hong Kong according to the law of the place where it was entered into, regardless of whether the parties to the marriage are of the same or the opposite sex”.

15. However, HHJ Varadkar dismissed LM’s application for an ouster order, reasoning that section 9 and 2 of the MCO, together with Article 37 of the Basic Law, read together with article 19 of the Hong Kong Bill of Rights, limit the institution of marriage and the availability of divorce in Hong Kong to persons of the opposite sex. The judge referred to the *obiter dicta* of the *per curiam* judgment in *QT* at §67 and reasoned that since their marriage was void there was no need to extend divorce law to include same-sex couples, and accordingly there was no jurisdiction to set aside transactions under s.17. If there was no jurisdiction for the court to set aside the re-gift of the Tsuen Wan flat to SS, then the court could not reasonably make an ouster order.
16. SS immediately appealed against the non-molestation order. LM then filed a respondent’s notice seeking to contend by cross-appeal that the Court of Appeal should make an ouster order, relying upon the interpretation of ‘valid marriage’ in *Ng Hon Lam Edgar v Secretary for Justice*. On appeal, the Court of Appeal agreed with the Judge and refused both the appeal and cross-appeal. The parties were granted leave to appeal further to the Court of Final Appeal.

Questions of Great and General Public Importance

17. The questions approved by the Appeal Committee of the Court of Final Appeal are as follows:
 - (i) Should the word ‘spouse’ be interpreted within the DVO to include a party to a same-sex marriage performed abroad?
 - (ii) Should the words “*monogamous marriage*”, “*spouse*”, “*husband*” and “*wife*” in the MCO and MPPO be interpreted to include same-sex couples married celebrated outside of Hong Kong according to the law of the place where it was entered into and between persons having the capacity to do so?