

HONG KONG / JUDGMENT

ALDL v. FTFC AND ANOTHER**[2020] HKFC 180**

COURT

Family Court

DECIDED

25 September 2020

CASE / FILE NUMBER

FCMC13698/2013

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj FCMC 13698/2013

**[2020] HKFC 180 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NUMBER 13698 OF 2013**

BETWEEN ALDL Petitioner and FTFC 1st Respondent and TMPM 2nd Respondent

Coram : District Judge A. Tse in Chambers (Not Open to Public) Date of Judgment : 25 September
2020

J U D G M E N T (Leave to Appeal)

This is the Respondent Husband s (the Husband) application for leave to appeal against an order for variation of maintenance pending suit and legal costs provision dated 22 November 2019. The background to this case is set out in the Judgment. I do not propose to repeat them here.

Applicable Legal Principles Under section 63A(2) of the District Court Ordinance (Cap.336), no leave to appeal shall be granted unless the Court is satisfied that the intended appeal has reasonable prospect of success or that there is some other reason in the interests of justice that the appeal should be heard. Reasonable prospect involves the notion that the prospect must be more than fanciful without having to be probable: see *SMSE v KL* [2009] 4 HKLRD 125 at 17. The granting of maintenance pending suit is a discretionary remedy. On appeal, the Court of Appeal will not exercise the discretion afresh. Instead, it will only interfere with the decision when the discretion was wrongly exercised, such as being contrary to the principle or the primary judge had wrongly taken into account irrelevant matters or ignored relevant matters [see *MWY v HWM* HCMP 120/2017, 16 May 2017; *WW v LLN* [2019] HKCA 1278 at 15-17.] In *CHWA v LNLAI* [2019]

HKCA 1017 at 3.1, the Court of Appeal, in refusing leave to appeal, stressed the interim nature of [maintenance pending suit] which generally requires the Court to adopt a broad brush approach in deciding the amount to be awarded. It is also for a limited duration until the final resolution of the issue of financial relief of the parties. Inevitably there will be adjustment to the final order to be made in the event of overpayment or underpayment of [maintenance pending suit]. The threshold for appealing against an order for maintenance pending suit is a high one. The court is inclined to leave factual questions of expenses and income for determination at the ancillary relief hearing. The Court of appeal also stated that appeals against maintenance pending suit orders are rare and the powers of interference [of an appeal court] are strictly limited : K v K [2011] 1 HKC 66 at 1, 3; Hewitt, Family Law and Practice in Hong Kong (3rd ed. 2018), 6.076. The Husband s Grounds of Appeal First Ground The Husband argued that the Court erred in finding that, in relation to the medical expenses (\$86,000 per month) incurred by the Petitioner Wife (the Wife), her self-help measures at a beauty salon including low dosages of ultra sound and laser, body treatments and massages, eye treatments and facial treatments, all by beauty therapists, were necessary or useful to manage or reduce the rate of deterioration of the Wife s CFS condition when in fact it was clear from the fact that the Wife still stated that her CFS condition had been deteriorating despite having spent a huge amount of expenses for the above treatments. The Husband submitted that the Court erred in finding that the Wife had already been spending over HK\$100,000 per month for beauty treatments at the beauty parlour early in 2008 before contracting CFS when the evidence showed that the amount spent by the Wife was only HK\$108,090 in 2008 (averaging HK\$9,008 per month). He argued that a reasonable amount would be HK\$25,000 per month. The Husband s criticism of the award of HK\$86,000 per month completely ignores the fact that CFS is a multisystem illness that is by definition debilitating, subject to relapse from activity or stress. As was pointed out in the Judgment, it is a chronic condition and a patient can only manage or reduce the rate of deterioration. Even the Husband s own expert admitted that the treatments received by the Wife help to promote a personal sense of wellness. The Husband was wrong to say that the HK\$86,000 per month was only for beauty parlour treatments. In fact, the sum covers all of the Wife s monthly medical and dental expenses as well. It also included deferred treatments for her teeth, podiatric treatment and measures for her feet, regular clinical monitoring for the retinal degeneration in her eyes and treatment for various post cancer surgery complications. By its very nature, an order for maintenance pending suit is designed to hold the ring and to ensure that the claimant can live reasonably pending the final determination of her claims. While questions of whether the Wife has been suffering from CFS and the effectiveness of her treatments will need to be resolved at trial, the Court is entitled to hold the ring for the Wife, as depriving the Wife of these expenses can do irreparable damage to her health, whereas the Husband s ability to pay is uncontested and adjustments can be made to compensate him if the Wife s case were eventually rejected. The reference to HK\$100,000 per month for beauty treatments in early 2008 was clearly a typographical error. If the Court had used the HK\$100,000 per month as a reference, it would not have awarded a lower sum of HK\$86,000 per month. There cannot be in dispute that the Wife has been diagnosed with cancer. She is suffering from the after effects of surgery and her medical expenses have risen dramatically. 2nd Ground of Appeal The Husband argued that the Court erred in finding that the Wife had satisfied

the 4 limbed test set out in *Currey v Currey* [2006] EWCA 311 which was adopted and applied in Hong Kong by the Court of Appeal in *HJFG v KCY* [2012] 1 HKLRD 957, specifically the 2nd limb, namely that the Wife can provide no security for borrowing, or none which can be reasonably be offered when in fact the Wife reasonably could. The Wife is and was the legal and beneficial owner of a property known as 19B PR and 2 car parking spaces in Tai Wai, which is the Wife's only home. These properties are unencumbered and valued at HK\$12,610,000. The Husband submitted that the Wife could reasonably have used these properties as security to provide herself with borrowing up to at least HK\$3.6 million especially when the Husband was willing and had in fact agreed with the Wife to (1) act as the personal guarantor of a mortgage loan of up to HK\$3.6 million; and (2) repay the monthly mortgage instalments of the mortgage. The Husband says that the burden is and was on the Wife to satisfy the Court that she could not have reasonably used her home as security to borrow loans for her legal costs. The failure to satisfy this limb would mean that no legal costs provisions would be granted. He also asserted that the Court was wrong to rely on the facts of *LCYO v JEK* (FCMC 4880/2014); *DX v LN* (FCMC 7870/2014); and *W v C* (FCMC 2201/2014) to find that it was wholly unfair and unreasonable to expect the Wife to raise litigation funding by mortgaging her only home as the facts of the present case were highly distinguishable from all the above cases, because the Husband had agreed to act as guarantor and pay the monthly mortgage. Whether the Wife could reasonably use her home as security for a mortgage is a question of fact. In *Rubin v Rubin* [2014] 1 WLR 3289, Mostyn J held at 13(5): In determining whether the applicant can reasonably obtain funding from another source the court would be unlikely to expect her to sell or charge her home or to deplete a modest fund of savings. This aspect is however highly fact specific. If the home is of such a value that it appears likely that it will be sold at the conclusion of the proceedings, then it may well be reasonable to expect the applicant to charge her interest in it. In *A v A* (maintenance Pending Suit: Legal Fees) [2001] 1 WLR 614, Holman J held: This wife has always been dependent on her husband. She is locked into a bitter struggle with him, whose outcome is of intense importance to her. She has an acute need for good legal representation and in circumstances in which her lawyers do not always have to be desperately economizing relative to the husband. He himself is spending huge sums on the litigation. He can in my judgment, afford to pay the sums I have ordered and it is reasonable that I should require him to do so. In *Sears Tooth v Payne Hicks Beach* [1997] 2 FLR 116, 118-119, Wilson J referred to: a grave and widespread problem encountered increasingly in the Family Division: namely, how can a spouse, usually a wife, who is ineligible for legal aid but who has negligible capital, secure legal advice and representation in order to pursue her rights against her husband, particularly one who is rich, litigious or obstructive or whose financial circumstances are complex or unclear? This is the Wife's only home. She is and has for a long time been unemployed and has no income. No bank would ever grant her a mortgage. The suggestion of a mortgage was only considered by the Wife because the Husband offered to be the guarantor and repay the mortgage on her behalf. The amount of legal costs contribution requested by the Wife is a mere fraction of the Husband's assets. Under the Husband's offer, not only would he be paying the whole of the HK\$3.6 million but also interest on the mortgage. The Husband's insistence on the Wife obtaining a mortgage on her only home can only have one purpose: that is to put a dagger over her head to hamper her efforts in pursuing

her claim or to put pressure on her to materially induce her stance on settlement and lead her to accept a settlement that was less than fair because of concerns about her only home. This is wholly unreasonable. 3rd Ground of Appeal The Husband argued that the Court erred in law by assessing that the quantum of Legal Cost provision was HK\$300,000 per month on the basis of historical legal costs incurred. He further complained that: That the Wife had spent her savings on renovation and the beauty parlour and consequently it was unfair for the Husband to pay for her outstanding legal costs; That the Wife's solicitors had continued to represent her for three years despite the accrual of outstanding legal fees indicates that the Wife could expect continued legal representation. It was the Husband's case that an order for legal costs provision should not include historical legal costs incurred. He relied on Rubin (*supra*). In fact, Rubin is not authority for the proposition that a legal costs provision order should never cover historical costs. It was held that a legal services payment order should not be awarded to cover historic unpaid costs unless the court was satisfied that without such a payment the applicant would not reasonably be able to obtain in the future appropriate legal services for the proceedings. In that case, the wife's application fell foul of that principle in that she sought to recover costs which had already been incurred in circumstances where there would be no further substantive litigation within the jurisdiction. In *re F (A Child)* [2016] 1 WLR 4720, the Court had to determine whether the father should be ordered to fund the mother's legal costs, including both outstanding and prospective fees. Cobb J made the following findings: In Rubin (cited by the Husband in his skeleton at 18), Mostyn J was not concerned with legal costs funding in ongoing proceedings but was dealing with truly historic costs which had arisen in two separate sets of proceedings which had already concluded (24); In a number of leading cases (including *A v A* (cited in Currey) and *G v G*), the courts made no distinction between prospective and outstanding legal costs (24(i)-(ii)); It was not necessary for an applicant to demonstrate that her solicitor downed tools (in other words, given up) before she could apply for legal costs funding where historic costs had been incurred. It was only necessary to show that the solicitors were reaching the end of their tolerance. The reference to the solicitors threatening to down tools in Rubin at 16 should not be interpreted too literally 26; A judge needed to exercise discretionary powers with a view to promoting fairness between the parties: Currey, this needed to be done with a mix of realism and caution 27); As long as the client was indebted to the solicitor, there was a risk that the professional relationship could be impacted. The solicitor might, for instance feel constrained in taking important steps in the proceedings. Further, the debt itself might materially induce the client's stance on settlement and could lead to her to accept a settlement that was less than fair because of concerns about litigation debt. The Husband's reliance on Rubin with no mention of the other relevant cases was unfair and misleading. By the time of her application, the Wife already owed her solicitors around HK\$1.8 million. Prior to the completion of the hearing, the Wife had taken out an application for third party specific discovery covering 19 years. If the Wife were to succeed in that application, not only would the Wife's solicitors have to go through 19 years of bank statements for both the Husband and M, it is likely that an accounting expert would have to be engaged. The issue of the beneficial interest in the 6 properties remained unresolved. According to the Wife's solicitors estimate of costs, this would cost about another million. As to the Wife's spending at the beauty parlour, the law does not require a spouse to drastically change her living standards in

order to sustain the costs of litigation. In *A v A* [2001] 1 WLR 605 at 610, Holman J remarked: Just at the moment they are, after the provision of a C roof over her head and food in her mouth, [legal costs are] the wife's most urgent and pressing need and expense. She could manage without holidays, though I have made some provision for them. She could no doubt manage for a while without buying new clothes. She could manage without her manicures, pedicures and yoga and keep fit classes, for all of which I have on the facts of this case, made provision. She could even manage without the provision for forms of private medical care (to which the family has been accustomed) for, if necessary, she could fall back on the NHS. But she simply cannot make any progress with the dominating issue in her life if she cannot pay her lawyers, and for this the state will not provide. This case involves complicated legal issues and possibly expert accounting evidence. The Wife has been seriously ill. It is important for her to remain legally represented to avoid proceedings being held in limbo. In *GDML v EJR* [2019] HKFC 65, the respondent father had already contributed some HK\$3 million to the legal costs of the applicant mother (in addition to other living expenses). The Court increased the mother's litigation funding from the father as she had instructed new solicitors. This was necessary because the previous firm had imposed a lien over the case file as a result of unpaid legal fees. The order was made so that the mother could remain legally represented and the case could be expeditiously moved to trial (39-42). The Husband assumed that the Wife's solicitors would continue to represent her despite non-payment for 3 years. This assumption is unjustified and has been explicitly rejected by case law. In *Wyatt v Vince* (Nos.1 & 2) [2015] 1 WLR 1228, the evidence accepted by the deputy judge was that the wife's solicitors had agreed to extend credit to her for services rendered to her until his determination of her application for a costs allowance order but that, were the application to fail, the partners of the firm would meet in order to determine whether, and if so on what basis, they could continue to act for her. According to the husband, this evidence should have led the deputy judge to decline to be satisfied that the solicitors would not continue to act for her until the determination of her application, at any rate in the event that she were to execute a charge in their favour on whatever she might recover of the sort held to be lawful in *Sears Tooth v Payne Hicks Beach* [1997] 2 FLR 116. Lord Wilson held at 40: I disagree. In circumstances in which the wife already owed the solicitors about 88,000 for their work done on her behalf on an application in which her ultimate recovery from the husband was likely to be comparatively modest and conceivably even non-existent, it was unreasonable to consider that they would, still less should, continue to act for her on that basis against an evidently litigious husband who was causing substantial escalation of the interlocutory costs in a manner which clearly caused him no difficulty. Lastly, in *W v C* [FCMC 2201/2014, 11 August 2014, the Court held that: I regard that the so-to-speak Currey test should not be taken as an exhaustive test. The only governing principle remains that the court will make such order as it considers reasonable in all the circumstances of the case. The conditions in *Currey v Currey* were adopted by the Hong Kong Court of Appeal as providing prudent guidance to both judges and practitioners in this jurisdiction, but still the court has to consider all other factors that may influence the outcome of the application as well as the interaction between them and the conditions of the Currey test so as to achieve a reasonable and fair result. Requiring the Wife to be at the Husband's mercy, exerting pressure with the risk of losing her only asset or expecting the Wife's solicitors to continue to act without

Conclusion

Orders

Research copy · Verify against the source

schemas.openxmlformats.org/officeDocument/2006/bibliography"
SelectedStyle="\APASixthEditionOfficeOnline.xml" StyleName="APA" Version="6"></b:Sources> <?
xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem
ds:itemID="{35D143D2-555C-49B7-A951-2C46A6395B25}" xmlns:ds="http://
schemas.openxmlformats.org/officeDocument/2006/
customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/
officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Word
97-2003 Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=131284

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/aldl-v-ftfc-and-another-2020>

Prepared on 28 October 2026 · Esheria