

HONG KONG / JUDGMENT

C v. S**[2022] HKCA 1033****COURT**

Court of Appeal

DECIDED

12 July 2022

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CACV 84/2021

[2022] HKCA 1033 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 84 OF 2021 (ON APPEAL FROM HCMP NO. 929 OF 2017) BETWEEN C Plaintiff and S (Re : Hadkinson Order) Defendant Before : Hon Cheung and Chow JJA in Court Date of Decision : 12 July 2022 D E C I S I O N Hon Cheung JA (giving the Decision of the Court) :

Introduction

On 26 January 2022, we handed down our judgment (“Judgment”) granting the Mother’s application for a Hadkinson order against the Father. We ordered that the Father’s appeal regarding the custody of N shall not be heard unless he complied with the order dated 5 June 2015 made by Judge Own in FCMP 67/2010 concerning the payment of N’s maintenance and the Mother’s carer’s allowance. Unless otherwise stated, we will adopt the terms and expressions in the Judgment. By a Notice of Motion dated 23 February 2022 (‘Notice of Motion’), the Father applied for leave to appeal to the Court of Final Appeal. We will deal with the application on paper. Our view Section 22(1)(b) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) provides that leave to appeal will only be granted if the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court of Final Appeal for decision. The Father did not formulate any question of great general or public importance in the Notice of Motion. Nor did he dispute the law on the conditions for making a Hadkinson order. Instead, the Father contended that we erred in the ‘finding of facts’ and in our conclusion on whether the conditions for a Hadkinson order are met. The Father advanced six grounds of appeal. We will deal with the grounds in turn. 1) Ground 1 In the Notice of Motion, the Father contended that the issues involved in the appeal are of great general or public importance for the ‘protections and best interest of the Child and other children’ needed rights for justices and protections. The Father further contended that granting a Hadkinson order ‘naturally has a great general or public importance’ and that a wrong application will potentially ‘open the floodgate’. The Father also contended that barring him to be heard would deprive the

rights of N and have a negative impact on N's life. In our view, Ground 1 is not a proper ground for granting leave to appeal to the Court of Final Appeal. Whether or not a Hadkinson order should be made by the Court is a factsensitive matter and depends on the individual circumstances of a case. In [37] to [47] of the Judgment, we have considered whether each of the conditions for making a Hadkinson order is satisfied with reference to the facts of this case. There is no basis for suggesting that the Judgment will lead to a floodgate of Hadkinson applications. As far as N's rights are concerned, we have considered how the Father's nonpayment has a detrimental impact on N's education and general wellbeing in [43] of the Judgment. Therefore, there is no merit in Ground 1. 2) Ground 2 The Father's argument under Ground 2 is that, unlike cases such as *Hadkinson v Hadkinson* [1952] P 285 and *de Gafforj v de Gafforj* [2018] EWCA Civ 2070, there is no 'direct linkage' between the alleged contempt and the appeal in this case given that they 'related to different issues' and were 'heard in different levels of Courts'. Ground 2 is not reasonably arguable. *Hadkinson* and *de Gafforj* do not lay down any requirement for the so-called 'direct linkage' as contended for by the Father. Nor do they establish that the Court's jurisdiction to make a Hadkinson order is necessarily confined to the factual circumstances of those cases. In any event, we agree with the Mother's submission that the maintenance order which had been breached and the appeal lodged by the Father are linked as they both relate to N's affairs. We have also specifically addressed the impact of the Father's nonpayment of N's maintenance on N's wellbeing in [43] of the Judgment. The Father also relied on [27] and [28] of *TCWF v LKKS* [2013] 2 HKC 549 in support of his submission that this Court is not an appropriate forum to make the Hadkinson order because the enforcement of the maintenance order was 'strictly under the case management of the Family Court' and he should not be deprived of 'the normal avenue of appeal'. In our view, the Father's reliance on *TCWF v LKKS* is misplaced. That case concerned an application made to the Court of Appeal, instead of the Court of original jurisdiction, for leave to disclose documents for enforcement proceedings in other jurisdictions. The passages relied on by the Father should be read in that context. Further, in [10] of *de Gafforj* (which was cited in [21] of the Judgment), it was held that a Hadkinson order 'can be made at any stage of proceedings, both at first instance and on appeal'. Hence, we are not satisfied that there is any substance in the Father's arguments on the proper forum in making the Hadkinson order. 3) Ground 3 Ground 3 concerns the condition that the contempt in question must be deliberate and continuing. The Father argued that he had been in full compliance of the maintenance order for more than five years. The Father also contended that our conclusion was made 'without a proper examination of all facts and evidence', including his 'paying pattern' in the past. These matters have been considered by us in [37] to [41] of the Judgment. The fact remains that the Father had no defence to the liability to pay N's maintenance and the Mother's carer's allowance and that he admitted to the liability at the hearing before us. We have also addressed the Father's alleged inability to pay in [39] and [40] of the Judgment and concluded that his assertion is 'clearly not justified' in view of his previous legal representation and his borrowing capacity. In any event, these are all factual matters and do not involve any question of great general or public importance. Therefore, there is no basis to grant leave to appeal under Ground 3. 4) Ground 4 Under Ground 4, the Father relied on [17] of *de Gafforj* and argued that we erred in concluding that there is an impediment to the course of justice. The Father also

contended that his non-payment did not make it more difficult for the Court to ascertain the truth or to enforce the orders which it may make given that the Family Court at no time displayed ‘a hint of difficulty in the enforcement of its orders in this case’. In our view, [17] of *de Gafforj* does not stand for the unqualified proposition that non-payment of outstanding maintenance can never be an impediment to the course of justice. As explained in [18] of *Laing v Laing* [2007] 2 FLR 204 (cited in [31] of the Judgment), the issue of whether the contempt impedes the course of justice depends upon ‘the relevant situation of the parties, the circumstances of the nonpayment and the effect of such nonpayment on the course of justice in the particular case’. Each case must therefore be decided on its own facts. In [43] of the Judgment, we have also addressed the difficulty in enforcing the two Court orders with reference to the history of the case. Ground 4 is not reasonably arguable. 5) Ground 5 Under Ground 5, the Father contended that we erred in holding that the Hadkinson order is a remedy of last resort in this case. The Father referred to a number of enforcement mechanisms open to the Mother, such as garnishee proceedings and judgment summons. In [44] of the Judgment, we have addressed the enforcement proceedings commenced by the Mother in detail and concluded that there are no other effective means to secure compliance of the Court orders by the Father. This was an assessment based on the circumstances of this case. Since no question of great general or public importance is involved, we will not grant leave under Ground 5. 6) Ground 6 Ground 6 concerns the proportionality of the Hadkinson order. The Father contended that the Hadkinson order is disproportionate and would put the best interest of N at risk by debarring him from being heard in the appeal. We have addressed the issue of proportionality in [45] and [47] of the Judgment. The conditions we imposed were no more than necessary and based on the Father’s undisputed liability to pay N’s maintenance and the Mother’s carer’s allowance. In our view, the proportionality of the Hadkinson order and its conditions are inherently factsensitive. As such, there is no basis to grant leave to appeal under Ground 6. 7) ‘Or otherwise’ For the sake of completeness, the Father also referred to some other factual matters in the Notice of Motion and his submissions. In accordance with the practice of this Court, we will defer the consideration of whether these matters justify granting leave under the ‘or otherwise’ limb to the Appeal Committee of the Court of Final Appeal.

Conclusion

None of the grounds advanced by the Father satisfies the threshold for granting leave to appeal to the Court of Final Appeal. Accordingly, the Notice of Motion is dismissed. We order the Father to pay the costs of this application to the Mother. Having considered the statement of costs submitted by the Mother, we summarily assess the costs at \$104,992. The Mother’s own costs are to be taxed in accordance with the Legal Aid Regulations. (Peter Cheung) (Anderson Chow) Justice of Appeal Justice of Appeal Mr G. Surman and Ms Peggy Pao, instructed by Stevenson Wong & Co. (assigned by the Director of Legal Aid), for the Defendant Plaintiff, unrepresented, acting in person

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