

HONG KONG / JUDGMENT

CCP v. CRM

COURT

Family Court

DECIDED

28 April 2011

CASE / FILE NUMBER

FCMC15571/2010

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bjbj FCMC 15571 / 2010 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 15571 OF 2010

BETWEEN CCP Petitioner and CRM Respondent

Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to public) Date of Hearing:
14 April 2011 Date of Judgment: 28 April 2011

J U D G M E N T (Maintenance Pending Suit)

Introduction

AUTONUMOUT This is an application by a Petitioner wife for maintenance pending suit pursuant to s.3 Matrimonial Proceedings and Property Ordinance Cap 192 (MPPO). The wife also seeks provision for her legal fees. The central issue AUTONUMOUT The central issue here is how much should the husband now pay to the wife as maintenance pending suit, bearing in mind, what appears, on the face of it to be a distinct lack of funds. This is acknowledged in part by the wife who says in her affidavit in support that she is very concerned that unless my financial position can be secured, I may not be able to maintain my financial status quo. It is on that basis that she makes this application.

Background

AUTONUMOUT The parties married in March 2006 after a 2 year period of cohabitation. The husband is 64 years of age and is a retired insurance executive. The wife is 57 and was previously employed in the executive search field. Both have previously enjoyed relatively high incomes, although it is fair to say that the husband earned significantly more than the wife. On the 24

November 2010 the wife issued divorce proceedings based on the husband's unreasonable behaviour. A decree nisi was pronounced on the 28 January 2011 and the Financial Dispute Resolution hearing comes before me on the 27 May 2011. This is then a relationship, between a more mature couple, of some 7 years duration. It goes without saying that there are no children of the family. They have four dogs. AUTONUMOUT As I have said the main difficulty with the case is that there appears on the face of it to be a distinct lack of funds. There are no assets to speak of. There is a property owned jointly in the United States which is presently worth very little. There is no other real estate. The husband refers to liquidating his pension fund. Mr Peaker for the wife questions the way in which the husband has chosen to spend some of these funds, especially given the circumstances. In particular US\$10,000 was paid to American Express on the 28 March 2011, a further US\$25,908.41 to an unidentified recipient on the 31 March, a further US\$7,600 to American Express on the 1 April plus mortgage repayments in early April of US\$3,409.40 and US\$3,331.13 respectively. There is also reference to some stock options. The husband has no income at present and any other assets are really of very little worth. Unfortunately the same cannot be said of his debts which are significant, including over HK\$2 million owed to the IRD in the United States. When asked how, even had the parties not been in the process of a divorce, he had intended to maintain himself and possibly the wife longer term, I was told that he hoped to find new employment. This is of some concern given the fact that his earning capacity is likely to be somewhat compromised by his age going forward. AUTONUMOUT The wife is similarly placed. She has not been employed since 2007. She has no income and no assets apart from the jointly owned property referred to above. She has a very small mpf fund. She also has some health issues and was recently hospitalized for 6 days following a serious respiratory problem. Her doctor says that she cannot work at present. AUTONUMOUT Reference is made by both parties to a small limited company called U Ltd. The wife says that this company was to be their retirement, by which I assume that she means that this was a business that would generate some form of income for both of the parties going forward. It is described as an executive search and assessment business. It seems that the wife had been working in an unpaid capacity on setting this up since 2007. The husband says that he had lent the company over HK\$1.8 million since its inception to date. He says HK\$295,000 of that has been lent since the parties separation. The company is now apparently dormant. I will expect to receive more information concerning this company in due course. AUTONUMOUT Clearly then this is a case that should settle. Legal costs will only deplete the parties limited finances even further. The wife alludes to the possibility of financial non disclosure on the part of the husband and refers to the fact that the husband was previously in receipt of a large remuneration package of about HK\$5.6 million per annum. She refers to large sums of money going in and out of the husband's account which she says are presently unexplained. She has queried other payments received by the husband. Clearly these matters need to be dealt with in a satisfactory and cost effective manner prior to the FDR hearing. Maintenance pending suit AUTONUMOUT The Matrimonial Proceedings and Property Ordinance states that the only governing principle is that the court shall make such order, as it considers reasonable. (See s.3 Matrimonial Proceedings and Property Ordinance Cap. 192). Consequently applications such as these are approached on a broad-brush basis. A detailed examination of the parties means may be examined at a later date at a full ancillary relief hearing if there is no

agreement in the meantime. Mr Peaker referred me to a number of sections in Rayden including the following: what really matters is the immediate and reasonable requirements of the wife balanced against the ability of the husband to pay for them, assessed using a broad-brush approach. (See also paragraphs 16.17 of Rayden, 18th edition). Further In practice, as oral evidence is rarely given, it will be unusual for the court on an application for maintenance pending suit to be in a position to make findings of fact on issues in dispute sufficient, for example, to deal with conduct or allegations of non disclosure. However, if it is demonstrated that the paying party has not performed his duty to make full and frank disclosure of his financial resources, then the court can take a broad and robust view of his means, and it does not have to accept and proceed on the basis of the assertions of the paying party as to his means and an inability to pay. The court can look at the reality of the situation Any under provision or over provision in the order for maintenance pending suit can always be corrected when the account comes to be taken at the substantive hearing when there are every opportunity to do fairness by set off (Ref paragraphs 16.18 of Rayden, 18th edition). AUTONUMOUT Likewise the court may look to the assertions made by the wife and take a similar approach when looking at her means and alleged reasonable requirements. The court should look to the reality of the situation, in so far as it can, in relation to bare assertions made by either the husband or the wife.

AUTONUMOUT Further I was referred to paragraphs 16:36, 16:37 and 16:42. Of those 16:36 and 16:42 are of more relevance and are set out below: Income: wide meaning: actual and potential 16.36 Generally, all forms of income received by the spouses, including voluntary allowances and allowances or benefits received as an incidence of employment, are taken into account by the court in determining whether any and, if so, what amount of periodical payments should be ordered. In assessing the financial position of a spouse, the court is not bound to have regard only to his or her actual income and property but take into account the spouse s earning ability, mental and physical resources and faculties. It should not allow itself to be misled by appearances but should evaluate the reality of the spouse s circumstances. The fact that a spouse is currently unemployed and in receipt of social security benefits does not preclude the court from making an order where the reality of the situation is that the spouse has a potential earning capacity. Similarly, the court may properly have regard to a spouse s current expenditure and to the actual standard of living of a spouse as an indication of his or her real resources, rather than take notice only of his or her tangible current assets. The court may take into account: overdraft facilities, borrowing powers or abilities, and capital gains on existing assets, and where a spouse has unnecessary or unproductive assets, the court may attribute to that spouse a notional income in respect of those assets. While the court may properly take into account a spouse s unutilised capacity to produce income, it is wrong in principle to make an order larger than the case merits so as to bring pressure upon the spouse to do something he or she not unreasonably refuses to do. Earning capacity 16.42 The court is required to have regard to the earning capacity of both parties including any increase in earning capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire. The cases would appear to indicate that the critical word in this context is reasonable . The pre-1969 cases indicate that although the court must have regard to all the resources of a wife it does not follow that a husband is entitled to have the whole of her income or her capacity to earn income taken into

account in calculations which affect her right to periodical payments. In deciding whether and, if so, to what extent the court should take into account the earning capacity of a wife, the court will have regard to the facts of the particular case, including the wife's age, qualifications and role in the marriage, whether or not she is caring for children, any recent work experience and the availability of suitable jobs. It is often said that the cost of child care makes employment uneconomical for some mothers. Where a wife has not been gainfully employed during the marriage and has no particular skill, the court has generally regarded it as unjust to expect her to go out to work in order to reduce the former husband's liability to maintain her. If there is evidence that a husband could find employment or increase his earnings but he has unreasonably declined to take advantage of such opportunities the court can make an order based on what was reasonable for him to be earning, or reflect his conduct in the award. The Evidence AUTONUMOUT I must now turn to consider the issues, the law, and the parties evidence as set out in their Form E's and other affirmations filed together with the submissions made by their lawyers. Discussion How much should the husband now pay to the wife as maintenance pending suit? AUTONUMOUT In Mr Peaker's written submission he sought HK\$131,730 per month on behalf of the wife inclusive of her rental of HK\$42,000 per month plus HK\$20,000 per month as a contribution towards her legal costs. In a settlement letter dated the 14 April the wife said that she would be willing to accept HK\$117,000 per month inclusive of rent and legal costs. This was on the basis that a court hearing was vacated. AUTONUMOUT The husband's offer was for HK\$50,000 for the month of April and May only inclusive of rental plus an additional HK\$20,000 per month as a contribution towards the wife's legal costs. AUTONUMOUT The husband maintains that he has paid the wife HK\$345,000 since the parties separated in September 2010 plus the rental of HK\$42,000 per month. Infact the wife puts the figure slightly higher as follows: November 2010 HK\$77,000 December 2010 HK\$154,000 January 2011 HK\$40,000 April 2011 HK\$80,000 Plus the rental payments of HK\$42,000 per month. In either event it is clear that the wife has been maintained at a reasonable level since the parties separated. The difficulty now is that the husband says that the money has or is running out and that this level of support cannot be maintained going forward. His present offer is made on the premise that it will ensure that the parties can proceed to the FDR hearing whereupon he hopes that settlement can be achieved. AUTONUMOUT The parties have reached an agreement about legal costs. I had some concerns about this but I will not take that matter further for the time being. The wife will give the normal undertaking in that respect. The husband will pay the wife a contribution towards the wife's legal costs in the sum of HK\$20,000 per month for the months of April and May 2011, credit to be given for any funds already paid. Therefore only the amount for maintenance remains in dispute. AUTONUMOUT The husband says that he only has HK\$470,000 left and out of that he must maintain both himself and the wife until the matter is resolved and/or until he finds alternative employment. He says that he needs HK\$113,000 per month to cover certain fixed liabilities (such as the parties mortgage in the US). On that basis he says that HK\$50,000 per month is the very most that he can presently afford to pay. To that end I have noted the significant payments made by the husband for other things. Although hindsight is a wonderful thing, it does seem to me that it might have been more sensible in retrospect for some of these payments to have been more limited pending full agreement. AUTONUMOUT The

difficulty with the husband's argument is that it leaves the wife only HK\$8,000 per month on which to live once her rent is paid. There is no break clause in the lease until August and given that all of the parties furniture and belongings remain there, not to mention the four dogs, it seems unrealistic to contemplate an immediate move, although it may be that there is really no other option longer term but for both parties to down size considerably. AUTONUMOUT The wife made some amendments to her list of expenses during the hearing and finally conceded that she needs the following amounts: Item The Petitioner Amount (HK\$) General Rent 42,000.00 Utilities (electricity, gas, rates, telephone & water) 5,251.00 Food 7,500.00 Household expenses 6,000.00 Car expenses 5,000.00 Insurance premia 100.00 Domestic helper(s) 6,000.00 Others inc part time home nurse 5,760.00 Sub-total HK\$77,611.00 Personal Meals out of home 3,250.00 Transport 3,500.00 Clothing / Shoes 3,000.00 Personal grooming (including haircut and cosmetics) 3,500.00 Entertainment / presents 2,000.00 Holiday 3,000.00 Medical / Dental (not covered by Husband's insurance coverage) 4,000.00 Other (Legal Costs) (20,000.00) Total monthly personal expenses 22,250.00 TOTAL MONTHLY EXPENSES 99,861.00 AUTONUMOUT The husband estimates his own expenses in his latest affidavit as follows: Item Amount Rent 19,800.00 Mortgage instalment North Carolina 34,650.00 Care Taker North Carolina 2,310.00 Utilities (electricity, gas, rates, telephone & water) North Carolina 2,600.00 Utilities (electricity, gas, rates, telephone & water) Hong Kong 190.00 Management fees 2,310.00 Food 3,600.00 Household expenses 1,000.00 Car expenses Insurance Premia 5,800.00 Domestic helper(s) Other (specify) Miscellaneous 1,000.00 Credit card payment on outstanding balances (US\$2,500.00) 20,000.00 93,260.00 AUTONUMOUT On the face of it both sets of expenses do not appear overly excessive given the standard of living enjoyed by the parties previously. Prima facie if there were the funds available I would accept the level of expenditure. In the short term however economies will need to be made by both sides. I accept most of the husband's items save for the credit card repayment, which can surely be reduced pending agreement. Without the credit card repayment the husband needs approximately HK\$73,260 per month on which to live. Going forward consideration will need to be given to further reductions that can or should be made. I will allow him HK\$70,000 per month in the short term. I accept that this does not include any allowance for legal costs or payment of over due tax. AUTONUMOUT I will allow something similar for the wife as follows: General Rent 42,000.00 Utilities (electricity, gas, rates, telephone & water) 5,250.00 Food 3,600.00 Household expenses 1,000.00 Car expenses 5,000.00 Insurance premia 100.00 Domestic helper(s) 6,000.00 Sub-total 62,950.00 Personal Meals out of home Transport Clothing / Shoes Personal grooming (including haircut and cosmetics) 7,050.00 Entertainment / presents Holiday Medical / Dental (not covered by Husband's insurance coverage) Other (Legal Costs) (20,000.00) TOTAL MONTHLY EXPENSES ALLOWED HK\$70,000 AUTONUMOUT Thus in total the husband shall pay the wife maintenance pending suit in the sum of HK\$70,000 per month, inclusive of rental, for the months of April June 2011, plus HK\$20,000 per month for the wife's legal costs for April and May. This means that, if what the husband says is right, his means will be totally exhausted by June 2011. AUTONUMOUT Going forward, and in the event that there are no other assets, I can see no alternative but for both parties to seek reemployment as a matter of urgency. In saying this I accept that the wife also has certain health issues which need to be addressed. There seems however to be few other alternatives here. AUTONUMOUT Given that neither party can be said to

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