

HONG KONG / JUDGMENT

CSF v. HYC

[2024] HKFC 46**COURT**

Family Court

DECIDED

20 March 2024

CASE / FILE NUMBER

FCMC12661/2014

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bjbj FCMC 12661 / 2014

**[2024] HKFC 46 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO. 12661 OF 2014**

BETWEEN CSF Petitioner and HYC Respondent

Coram: Deputy District Judge F. Li in Chambers (By paper disposal) Date of the Respondent s
Submissions: 15 December 2023 Date of the Petitioner s Submissions: 2 January 2024 Date of
Decision: 20 March 2024

D E C I S I O N (Leave to Appeal)

Introduction

On 24 November 2023 this Court handed down a Judgment on the issue of Variation of Child Maintenance / Backdating after a 2-day trial which took place on 6 and 7 February 2023 (

Judgment

). I shall adopt the terms defined in the Judgment in this Decision. For reasons set out in the Judgment, I made the following orders under paragraph 78 of the Judgment :- The Father do pay to the Mother a monthly periodical sum of HK\$7,550, representing 50% of child maintenance of P commencing on the 1st December 2023 and thereafter on the first day of each calendar month until P attains 18 or commence full-time tertiary education, whichever is the later; In the event P does commence tertiary education, the Father do pay to the Mother a monthly periodical sum of

HK\$13,565, representing 50% of the child maintenance of P until P completes full-time tertiary education; The Mother do provide documentary proof to the Father on P's university offer of acceptance and commencement date (if any); The Father do pay or cause to be paid the entire amount of the education funds (in the sum of US\$18,656.97 as at 9 August 2022) to P directly upon P attaining 18 years old on 7 August 2024; Backdating claims by the Mother, including any claims for tax payments, be dismissed. By her Summons filed on 15 December 2023 (Summons) the Mother now seeks leave from this Court to appeal the Judgment. She continues to act in person. A document titled Draft Grounds of Appeal was attached to the Summons, running some 22 pages with contents therein containing a mixture of (i) a total of 5 grounds of appeal; (ii) submission points; as well as (iii) attempts to rely on evidence that was not adduced at trial. A separate 5-page document titled Written Statement/Skeleton Submission was also attached to the Mother's Summons, seemingly in observing the adopted practice under the New Arrangement for Application for Leave to Appeal in the Family Court dated 13 August 2018. As regards the draft Grounds of Appeal, I repeat them here as they are stated, using the Mother's wordings (collectively referred to as Grounds) :-

- 1) Denial of Back Payment.
- 2) Amount of accepted monthly expenses.
- 3) Shared Contribution of 50/50
- 4) Medical expenses.
- 5) CPI adjustments over time. The Summons is opposed by the Father; he has filed a 4-page statement in opposition to the Mother's Summons, with references made to each of the Grounds above. Applicable Legal Principles It is trite that section 63A(2) of the District Court Ordinance (Cap. 336) provides that leave to appeal shall not be granted unless the court is satisfied that (a) the appeal has a reasonable prospect of success, or (b) there is some other reason in the interests of justice that the appeal should be heard. The relevant test of whether an appeal has a reasonable prospect of success is whether the applicant for leave can show that he has an arguable case with reasonable chances of success on appeal. A reasonable prospect of success therefore means an appeal with prospects that are more than fanciful but which do not need to be shown to be probable : *KNM v HTF* (unrep, HCMP 288/2011, [2011] HKEC 1210) at 9 and *Hong Kong Civil Procedures 2024*, p.1258, RHC 59/2A/4. RHC 59/2A/4 further provides that: - Where the intended appeal is an appeal against the exercise of discretion of the judge below, the applicant would have to show that he has an arguable case with reasonable chances of success that the relevant decision exceeds the generous ambit within which reasonable disagreement is possible, and is in fact plainly wrong, and not merely the appellate court would prefer a solution which the judge had not chosen (*RK v YS* (HCMP 1969/2012, [2012] HKEC 1501) (CA)). It has to be noted that whilst the Court would not grant any leave to appeal without a reasonable prospect of success being demonstrated, the converse is not true. Even if the Court takes the view that there is a reasonable prospect of success, it still retains a discretion as to whether to grant leave,

although the fact that there is, ex hypothesi, a reasonable prospect of success would heavily influence the Court's exercise of discretion: *Ho Yuen Ki Winnie v Ho Hung Sun Stanley* (HCA 391/2006, [2009] HKEC 885) (Cheung J)... For the some other reason ground for granting leave to appeal, it is impossible to give an exhaustive list of the circumstances that the Court of Appeal would find that there is some other reason in the interest of justice that an appeal should be heard. The Court of Appeal may grant leave if the question is one of general principle, decided for the first time, or a question of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage: RHC 59/2A/4. Primary findings of fact/evaluations of facts based on credibility, inferences and/or exercise of discretion in matrimonial proceedings, in general, would not be lightly disturbed on appeal unless they are plainly wrong or falling outside of the parameters of reasonable disagreement between different judges. The court is not required to consider each and every point raised during a trial. It is not incumbent on the judge to elaborate or extend judgments by making findings on every area or every issue, and it is open to a judge to confine him or herself to those matters which he or she selects as significant and necessary: *Re F (Shared Residence Order)* [2003] EWCA Civ 592 per Thorpe LJ As to adducing new evidence post trial and for the purpose of appeal, if and when a formal application is made, the law is well established in *Ladd v Marshall* [1954] 1 WLR 1489. I shall be guided by the above principles in the analysis below.

Analysis

It is noted from the Grounds advanced by the Mother that she now seeks to appeal the orders under paragraph 78 (i), (ii), and (v) above. I must make clear at this juncture that for any information relied upon by the parties and/or documents they have attached to their documents filed which were not in the evidence at trial would be disregarded by this Court. Ground 1 Denial of Back payment The Mother in her skeleton framed this as her Ground 2a and Ground 2b, contradicting to the order she has presented in her Draft Grounds of Appeal. I shall adopt the sequence in accordance with her Grounds above and I have in any event given full consideration to her skeleton as a whole, where materials are related to the respective grounds notwithstanding they may not be organised as such. In gist, under Ground 1 here, she says ever since P moved to live with her and the Father having stopped payment, she had actively asked the Father to pay, demonstrating her continuous effort in enforcing the relevant terms in the Settlement Agreement and the 2015 Consent Order until her application to the Court in August 2020. For the purpose of the Summons, the Mother now says that by her application (a Notice of Application for Ancillary Relief filed on 11 August 2020), this was the legal path that I took to enforce the 2015 Settlement Agreement. Furthermore, the Mother seems to be putting the blame on the Court, in saying that by the manner the Court has dealt with her application, namely by conducting a FDR, followed by a trial (with interim maintenance to be paid by the Father in between), she takes that to mean the Court lead both the Father and me to a path away from any enforcement proceedings. Consequently, the [Judgment] effectively ignores and is in direct contradiction to the Court's own actions from August 11, 2020 until November 24, 2023. (the Mother's skeleton) I

think the Mother's points above are in relation to paragraph 72 of the Judgment where I took into account the fact that the Mother had never seen fit to take out any enforcement applications against the Father on the strength of the relevant terms of undertaking entered into on the part of the Father. In that same paragraph I have also made clear that her then application before the Court was not enforcement proceedings. I appreciate the Mother was acting in person at all times, and putting her stance to the highest she may have understood the term enforcement proceedings in a different manner from legal practitioners. That said, it is indeed her responsibility to seek legal advice at all material times especially considering the period and amount of backdating she wanted to claim. This is a mother who now resides with her current husband in a rental abode costing rent of some HK\$100,000 per month. This alone, albeit subsidised by housing allowance of her husband, is indicative of the current standard of living of the Mother. I believe she is fully capable to seek independent legal advice at all times, if she so chooses. The Court is not tasked to educate litigants in person on the law, and on this occasion, what enforcement proceedings mean in the present context. In the interest of justice, nor should any favours be given to litigants in person in this respect. In exercising my discretion to reject her backdating claim, I have fully considered all relevant circumstances over the material period in question, including but not limited to the more pertinent points : (i) the Mother has been found guilty of material non-disclosure on her income, over that same material period of time she seeks backdating on; and (ii) my findings against the loan agreement between the Mother and her current husband. I agree with the Father that the Mother is merely re-litigating this point without pinpointing to any part of my analysis where she claims I may have fallen into error. For the above reasons, it is my view that Ground 1 has no reasonable prospect of success. Ground (2) Amount of accepted monthly expenses Under this ground, the Mother challenges my decision to have included the item of utilities (P's share) in the HK\$100,000 housing allowance of her current husband. To be precise, the effect of this ground, even if for the sake of discussion that it is successful, concerns a monthly figure of HK\$1,125 per month to be added back to the equation. Even assuming further, again for discussion's sake, her other ground (Ground 3 below) on 50/50 sharing is also successful, the Mother is now asking such item (or part of) to be paid by the Father until P reaches 18, which is in August 2024, i.e. in a few months time. The fact that P was already 17 years old at the time of trial and that he would cease secondary education in the summer of 2024 has already been clearly recognised throughout trial, as well as in the Judgment (paragraph 30 therein). There and then, I have already decided to focus on the more substantial items instead. This is also due to the Mother's own case where she advocates strongly that P would be studying overseas for tertiary education upon completion of secondary education. The Mother had gone as far as putting out various potential tertiary education plans for P, all overseas based. The above means that, in the Mother's case, any current utility items would in any event cease in the summer of 2024. It is therefore disappointing to say the least that the Mother has chosen to take issue with what I would describe as a relatively insignificant item in the circumstances, not to mention if she is to bear 50% of the same, the amount in discussion here is some HK\$560 per month, for a period of a few months. Again, I say this with reference to the Mother's current standard of living. Further, it is in reliance of this ground that the Mother has sought to include in her filed documents new materials, purportedly to show the housing

allowance does not include utility costs. The Mother has admitted in her submissions that these are new evidence : In my earlier Court documents, I did not include this evidence because my husband and I assumed that including utilities in the rental allowance was not a standard practice . No formal applications were made in relation to adducing new evidence, not to mention the Father s opposition in this respect. For clarity, even if a formal application was made by the Mother to adduce new evidence here, I would have no hesitation to dismiss the same. As such, I place no weight on these post trial evidence and shall disregard the same in my consideration. In my view, this ground has no reasonable prospect of success. Ground (3) Shared contribution of 50/50 The Mother s reasoning for this ground seem to be confusing, as she stated that she believed the Father ought to be responsible for about 80-90% of P s expenses (83.33% to 90.09% as stated in her submission), but at the same the Mother stated she wishes the Father to pay these percentages only up to the summer of 2022, the time when a pair of twins were born by the Father and his current wife. Thereafter, the Mother only stated that a percentage adjustment ought to be made in the future, without details. Doing the best I can here, I believe the Mother under this ground is essentially making submissions in relation to her backdating claim under Ground 1. For clarity, I have already considered these submissions in reaching my conclusion under Ground 1. To be precise, I understand Ground 3 concerns the orders made under paragraph 78 (i) and (ii) of the Judgment, which are child maintenance in going forward. To this, the Mother has not indicated what she considers to be a fair percentage. I have already made my findings on the parties respective income, earning capacities, as well as expenses in the Judgment and shall not repeat. I have also considered the contribution of the education funds from the Father in going forward, as reflected under paragraph 78(iv) of the Judgment, which indirectly can be seen as additional contribution to P s future expenses on the part of the Father. By the above analysis, I fail to see how Ground 3 would have a reasonable prospect of success in this intended appeal. Ground (4) Medical expenses It is believed that the Mother here is not challenging any specific term of the orders I have made, but by this ground she wishes to bring out the practical difficulties she foresees that may hinder P s use of the Father s medical coverages under HKU. There is no dispute that the Father would continue to allow P, and P would be entitled, to use his medical allowances as long as the Father remains employed by HKU. In other words, the Mother challenges this Court for not having resolved practical difficulties she or P may face in this respect. Further she also challenges this Court for having failed to address the level of medical care to be covered by the Father. Still further, she challenges this Court for having failed to address P s special needs (ADHD) which may require extra care once P goes to live in a new environment. It is trite that any court orders made in relation to child maintenance would not be based on the premise that the parents could, or would, cease any and all communications with one another on prevailing child issues. With respect, it would be wrong for parties to expect this Court to iron out a medical care plan for a child with precision. Suffice to note in this matter that the parties had agreed to joint custody back in 2022, having taken out variation applications on child matters back then. This was addressed under paragraph 74 of the Judgment. Thus, I do not accept when the complaints here concern what level of medical care, or, practical concerns when father-and-son communication is unsatisfactory, it would lend support to the Mother s challenge to the Judgment which concerns child maintenance. As to the

Mother s concerns on P s special needs, I keep reminding myself that it is the Mother s case that P would be studying overseas for university and she supports the same, i.e. P will be put in a new environment; on the other hand it has always been the Father s case that P may or may not enter university and thus, upon reaching 18 in the summer of 2024, there is a possibility that maintenance for P would cease. In my view, Gound 4 has no reasonable prospect of success by the above. Ground (5) CPI adjustment over time The Mother contends that the Judgment fails to address yearly adjustments of Consumer Price Index (CPI). I would say that for this particular case, when P is reaching 18 in a few months time and that his future expenses are uncertain to say the least, it is not appropriate to consider CPI adjustments in the circumstances. This ground also does not, in my view, have any reasonable prospect of success. Some other Reason Although the Mother did not state in the Summons she relies on the some other reason ground, for the sake of completeness I have considered the same and find that there are no factors in this matter to trigger this ground. Order For all the matters set out above, it is my view that Mother has failed to show on the strength of the Grounds that she has a reasonable prospect of success, or that there is some other reason in the interests of justice that the appeal should be heard. I hereby order that the Mother s Summons be dismissed. Given both parties are acting in person, I order that there be no order as to costs to this Summons. (F. Li) Deputy District Judg 1udk A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V hjI] hjI] hjI] hjI] hjI] hjI] gdjI] gdjI] gdjI] gdjI] gdjI] gdjI] gd.\$ gdjI] gd.\$ gdjI] gdjI] gdjI] vmcY hjI] hjI] hjI] hjI] hjI] hjI] hjI] hjI] gdjI] gdjI] xhXhx h<c_ ha"(ha"({IYF7 ha"(h<%a zk\J9\ ha"(ha"(gda"(ha"(ho}j eVeJeJeJeV h<c_ hUId h<{s hUId h<{s gd<c_ gdUId m[mLmL h<c_ h<c_ gd\$T gd\$T gdg;< hg;< hg;< h] ^ h] ^ h] ^ gdSP h] ^ h] ^ h] ^ hU9F h83E hU9F h] ^ gdWB hUId |md[U[d hUId uiai &`#\$ hkQ( ph` ^\ mH <sH <f ph` ^\ [Content\_Types].xml \_rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q\_ jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .}x E /EE} theme/theme/_rels/themeManager.xml.rels 5 6? \$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> RqX; wRqX; & 6" CACV Judiciary English.dot Windows User Microsoft Office Word Judiciary CACV Title <?xml version="1.0" encoding="UTF-8" standalone="no"?><b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{6D7BB80A-72B4-4774-9644-B8778F2C6DEB}" 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

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