

HONG KONG / JUDGMENT

CWYJ v. LTYE**[2019] HKFC 164****COURT**

Family Court

DECIDED

28 June 2019

CASE / FILE NUMBER

FCMC1135/2016

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bjbj FCMC 1135 of 2016

**[2019] HKFC 164 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NUMBER 1135 of 2016**

BETWEEN CWYJ Petitioner and LTYE Respondent

Coram: Deputy District Judge M Lam in Chambers Date of Hearing: 22-23, 28 May 2019 Date of
Handing Down Decision : 28 June 2019

DECISION (Variation of Maintenance)

The application By two notices of application dated 4 April 2018 and 2 May 2018 respectively, the respondent seeks to vary the Consent Order granted by Deputy District Judge D Cheung on 27 January 2017. The said order was amended on 9 July 2018 and re-amended on 30 July 2018 (Consent Order). For ease of reference, I will refer to the petitioner and the respondent as wife and husband. The Consent Order The parties were married in October 2007. Two children were born of the marriage. The first child was born in 2008 and the second one in 2010. The wife petitioned for divorce in January 2016. The decree absolute was granted on 17 March 2017. During a mediation meeting, the parties reached a settlement on the issue of custody as well as financial arrangement with the assistance of their respective solicitors. The settlement was reduced into the Minutes of Consent Order dated 26 July 2016 (the Minutes) which was subsequently made an order of the court, the Consent Order. The Consent Order contained a number of undertakings given by the husband in addition to the terms of the order. The terms and undertakings which are relevant to the present application are that the parties were to share

joint custody of the children with care and control to the wife, that the husband was to procure and secure the former matrimonial home for the sole use and occupation of the wife and the children rent free, that he was to pay or procure payments to be made for almost all of the expenses relating to the children and the former matrimonial home. As to the payments for the wife herself, he was required, under his undertakings as well as the terms of the Consent Order, to pay, :-

- (a) periodical payment of HKD35,000 per month until her death or remarriage, whichever is earlier (PP Payment). The first payment to be made on 1 August 2016; and
- (b) a sum of HKD4 million (Lump Sum) (by 8 installments, HKD500,000 for each installment for every six months. The first installment to be made on 1 January 2017 and the last one on 1 July 2020). (LS Payment) (Collectively as Maintenance Terms) Notwithstanding that the LS Payment was worded as repayment of loan to the wife in the Consent Order, the parties take no issue on the nature of such payment and they regard it as lump sum payment having the meaning of section 4 of the Matrimonial Proceedings and Property Ordinance, Cap. 192 (MPPO). So far, the husband has only made two payments of HKD10,000 each in August and September 2016, a total of HKD20,000. The wife therefore took out a judgment summons on 17 August 2017. The husband thereafter made the present application. It is from the Maintenance Terms the husband now seeks to vary to the extent that :-
 - (a) the PP Payment be varied to monthly payment of HKD1, commencing from the date of decree absolute; and
 - (b) the LS Payment be varied from semi-annual installment of HKD500,000 to monthly installment of HKD5,000, commencing from the date of decree absolute. The grounds of application The husband confirms unequivocally in Court that: - he does not challenge the validity of the Minutes, the Consent Order or the liability to pay the Lump Sum. He only seeks to vary the amount and frequency of the installment of the Lump Sum but not the Lump Sum itself. his only ground of application is a change in circumstances of both parties after the divorce. The husband says that after the divorce, there has been material change in circumstances on both parties. The wife has changed from a full-time housewife to a business woman, having her own business and a steady boyfriend. She has increase in cash and stock investment, enjoying a high standard of lifestyle. On his part, even though his assets and earnings are on the increase and the liabilities are on the decline, he actually has no means to pay for the wife s maintenance. The wife s issuing of a statutory demand (Statutory Demand) against him for the outstanding maintenance payment in August 2018 has an adverse impact on him. The wife resists the application. She contends that the variation as sought will take the husband 800 months (66.6 years) to repay the Lump Sum and the monthly periodical payment of HKD1 is effectively no payment at all. She argues that the application is in effect a wholesale abandonment of the Consent Order which should not be allowed. She denies any change in circumstances which justifies a variation of the Consent Order as sought. The law The power of the Court to vary a periodical payment order and the repayment schedule of a lump sum payment order is provided for by section 11(1) of

MPPO :-

- (1) Where the court has made an order to which this section applies, then, subject to the provisions of this section, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended. The power is to be exercised in accordance with section 11(7) of MPPO: -
- (7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates and, where the party against whom that order was made has died, the changed circumstances resulting from his or her death. The legal principles governing variation of a consent order can be summarized as follows: - The statutory power to vary is wide and the court is to consider all the circumstances of the case. while the court is not required to proceed from the starting point of the original order but look at the matter afresh, the basis and intended effect of the original order are relevant factors to which the Court should pay regard and there should not be a radical departure from the approach taken by the parties themselves when they had entered into an agreement embodied in a consent order. See *AEM v VFM* [2008] 3 HKLRD 36 the existence of a prior agreement was an important aspect which should be looked at having regard to the conduct of the two parties, both leading up to the agreement and subsequent thereto, and the Court should bear in mind that formal agreements, properly and fairly arrived at with competent legal advice, should be given effect to unless good and substantial grounds were shown for concluding that injustice would be done by holding the parties to the terms of the agreement. See *AEM v VFM* The court must be astute to guard against unmeritorious applications for variation by litigants who seek to undo a settlement, or have second thoughts about settlements they have knowingly reached on their own volition. See *HCCT v TYYC* [2008] HKFLR 286 when parties who are sui juris freely enter upon a bargain for the division of matrimonial assets then, absent (a) unfair or unconscionable factors attaching to the circumstances in which that agreement came to be concluded and absent (b) material and drastic unforeseen circumstances arising after the conclusion of the agreement such as to cause manifest prejudice to one of the parties, the courts will hold the parties to their bargain. The burden is on the party seeking to achieve a different term to show good and substantial cause why the agreement should not be respected. See *L v C* [2007] 3 HKLRD 819 if an application consequent on an order is brought very soon after that order has been made, the Court, in normal circumstances, is likely to attach more weight to the earlier order than if it had been made some years previously. See *HCCT v TYYC* disparity in value of assets distributed, unless it is evidence to support unconscionable circumstances, is not a matter that carries weight. *L v C* orders for lump sum payments by installments could not be readily or easily varied on change of circumstances. The public policy of finality in litigation, so that orders, and especially consent orders, providing for a clean break, are not set aside unless there is a compelling reason to do so. See *CH v MEH* [2012] 1 HKLRD 752 With these principles in mind, I now turn to consider the arguments between the parties. The husband The background of the

parties can be briefly stated as follows. The husband was born in 1971 and graduated from University with a degree in Engineering. He has been working in the finance industry since the mid-90s. In around 2007, he became a responsible officer under the Securities and Futures Ordinance (Cap.571). He came from a wealthy family. His parents (the Parents) are considered to be high net worth individuals. His father is a senior lawyer in a law firm in Hong Kong. His mother is the sole shareholder of a limited company in Hong Kong(Company The Company holds a number of valuable landed properties in Hong Kong, including the former matrimonial home. Since the purchase of the former matrimonial home in around 2009, the parties had lived there rent free. In around 2015, the husband moved out from it and lived with his parents until around January 2018. From then on, he started to cohabit with his girlfriend in a flat rented by him. He has been holding some shares of several overseas companies before and after the breakdown of marriage. The business of those companies have either been suspended or yet been commenced. The parties take no issue on the value of those businesses. The wife The wife was born in 1971. After marriage, she became a full-time housewife as agreed between the parties. In or around 2015, disputes over the husband s investment in overseas business and the suspected extramarital affair of the husband arose. The wife filed a petition for divorce in January 2016. In or around December 2016, she managed to find employment with a Hong Kong company through a friend. She was laid off in November 2017. Since then, she has remained unemployed. She has all along been living with the children in the former matrimonial home. The Minutes It is against these backgrounds that this Court is invited to consider whether there was a change in circumstances which justifies a variation of the Consent Order. I should start from the circumstances under which the Minutes was signed. The Minutes was stated to be for full and final settlement of all claims that the parties might have against each other. It was signed by both parties together with their legal representatives. Not only that his understanding of his legal rights and the legal effects of the Minutes was recorded in the Minutes, the husband admitted in Court that before signing the Minutes, he had received proper legal advice and well understood the terms and obligations under the Minutes. He confessed that he was in fact warned by his solicitor to give serious consideration to the monetary obligations under the Minutes and, in particular, to make sure he had sufficient means to discharge the payment obligations before he signed the Minutes. He nevertheless accepted and signed the Minutes despite his monthly salary was only around HKD38,500 by then. He said by that time he was emotional and in the hope that he would be able to generate some more income by closing some sales deals. On his confirmation of his understanding of the Minutes with the benefit of proper legal advice and sufficient time for consideration and acceptance of the Minutes, it is clear to me that he could not now seek support from his emotion and his hope at the time of his signing of the Minutes to justify his present application. Indeed, there is simply no evidence to suggest that by the time of the signing of the Minutes he had some actual sales deals which would have enabled him to meet the payment obligations under the Minutes have subsequently aborted that frustrated his ability to pay. Change in circumstances of the husband Earnings and earning capacity As revealed in the husband s three Form E (s Form E) filed on 12 April

2016, 17 November 2017 and 22 January 2019 respectively and his admission in court, his earnings and assets were on the increase whereas his liabilities were on the decline. His salary rose from HKD38,500 in April 2016 to HKD90,458 by January 2019. I am not convinced that the issuing of the Statutory Demand constituted a material change in circumstances which justifies the present application. There is no solid evidence to show that the Statutory Demand has prevented the husband from continuing his current employment. The fact is that he only resigned in April 2019, many months after the issuing of the Statutory Demand. As expressed in his resignation letter which was verified by him in Court, his last working day would be 5 July 2019 and the reason of resignation was company restructure of the employer and departure of many senior managements. According to him, a few months before his resignation, he had already secured an employment in Singapore with a monthly salary of SGD7,000 (approximately HKD41,000). The new employment would commence in July 2019. In Court, he said that the remuneration package for the new employment had yet been finalized and he would have in addition to his salary of SGD7,000, commission and bonus. In any event, the basic salary of SGD7,000 is indeed higher than his earnings upon entering into the Minutes. Regardless of the issuing of the Statutory Demand, he managed to secure a job a few months before his resignation (said to be 6 months before this hearing). In cross-examination, he revealed his true motive of his plan to work in Singapore was in fact for better quality of life and retirement. In light of his employment arrangement aforesaid, it is difficult to see as to how the husband might end up in disqualification of responsible officer or bankruptcy because of the Statutory Demand would, in reality, cause significant adverse impact on him financially. In any event, for the reasons I would elaborate further below, the chance of disqualification of responsible officer or bankruptcy because of the Statutory Demand is flimsy. I should add that the husband's reliance on the serving of the Statutory Demand as a ground of the present application is indeed putting the cart before the horse. He is in effect seeking to vary the Consent Order by reason of his non-compliance of the order. This is something the court would be slow to allow. He accepted in live evidence that there was in fact no substantial change in his earning capacity. He is a university graduate with over 25 years of working experience. The increment of his income in the past few years marked his earning capacity which could land him a well-paid job. I accept Mr. Lam's submission that the wife should not be penalized by the husband's own choice of life. Assets and liabilities As accepted by the husband and demonstrated in his Form Es, his assets enjoyed a gradual increase over the past few years (from HKD1,365,001 to HKD1,600,178) whilst his liabilities were in decline. With regard to his liabilities, the majority of them were stated to be the LS Payment and the money owed to the Parents. In the 2016 Form E, the husband logged HKD1 million loan owed to the Parents. In the 2017 Form E, his loan owed to the Parents were increased to HKD3 million due to their payment for the husband's credit card debt of HKD2 million in or around July/ August 2017. In the 2019 Form E, the HKD3 million owed to the Parents no longer existed as a liability. At any rate, there is no suggestion that the Parents have ever taken any serious steps to recover payment from him. As to the other debts, the husband admitted that most of them were incurred over the years of marriage which continues after divorce. In the premises, there

has been no material change of circumstances in the aspect of the husband's assets and liabilities which justifies the present application. Standard of living The husband's case is not premised on any compromise of standard of living on his part. In fact, the H's Form E together with his credit card statements reveals, in reality, he has continued to enjoy a high standard of living over the years. He continues to enjoy the membership of three private clubs. For the period between October 2016 and November 2018, he made 33 overseas trips and only 15 of them were paid by his employer or clients. His credit card statements suggest that his overseas trip expenses were more than his reported expenses. As to his general and personal expenses as reported in his Form E, a substantial part of them were related to the children and the former matrimonial home. In court, both parties admitted that the expenses relating to the children were in fact funded by the Parents which should be removed from their respective Form E. Other than that, a sizable portion of the husband's expenses were for dining, holiday, entertainment and car, and since January 2018, rental. Two months after the present application was made, the husband elected to cease living with his parents rent free and rented an apartment at the monthly rate of HK\$25,000 with a deposit payment of HK\$50,000. His election of moving out of his parents home and renting of a flat instead of paying off the long-standing debts owed to the wife cannot constitute a valid reason for the present application. For the reasons aforesaid, I do not find any change in circumstances of the husband which justifies the present application. Financial support from H's parents On the husband's argument on his insufficient earnings for payment to the wife. I am not convinced. The evidence shows that the Parents have been supportive of the husband before the divorce, and since then, indeed all along, they have continued generously to support him. The agreed or unchallenged facts are : -

- (a) the Parents have provided the former matrimonial home for the parties and their children to reside since the purchase of it, in or around 2009.
- (b) during the marriage, the wife was full time housewife with no income. The parties did not have a habit of saving. They however enjoyed a high standard of living : fine dining, good food, wine, private club memberships and the wife was showered with luxurious gifts, jewelry, car, beauty treatments and overseas trips. Their expenditures have been constantly far beyond the husband's earnings and their savings over the years. Their overspendings were met by the Parents from time to time.
- (c) after the divorce, the Parents have discharged most of the obligations under the Consent Order for the husband. They continue to provide the former matrimonial home for the wife and the children to live in as well as to fund almost all of the expenses of the children.
- (d) the Parents paid for the pleasure trip to Bangkok for the wife in August 2017.
- (e) the Parents paid off the husband's credit card debts (mostly for his personal over-spending) to the tune of HKD2 million in or around July or August 2017. There is ample evidence pointing to one single fact that the Parents have always been generous to the husband and ready, willing and able to financially support him. They supported the costly lifestyle of the

parties in the past. After the parties separation, they continued to support the husband and did so even more generously as they had done previously by not only funding almost everything for the 2 children but also paid off the debts for the husband to the extent of HKD2 million. The flexibility of the financial assistance is wide. Payments can be made on monthly basis (such as the children s maintenance) or to the extent of millions (such as payment for the husband s credit card debt). In the circumstances, there is compelling evidence to suggest that the financial support from the Parents will continue in the years to come. There is no reason why they would not financially support the husband in discharging his obligations under the Maintenance Terms if the husband is called upon to do so seriously. The indication that the father is unwilling to make any payment to the wife because of his poor relationship with her will unlikely stop him from financially support the husband in discharging his obligations, so as to save the husband from any serious consequences resulting from non-compliance with the Consent Order. I also accept the wife s evidence that the continuous support of the parents was the reason why the husband was willing to accept the Minutes despite his limited earnings. The fact that the former matrimonial home was the Parents property and the payment obligations under the Minutes actually exceeded the husband s earnings upon the signing of the Minutes do lend support to the wife s argument. In looking at the reality of the husband s finances, I should take into account not only what he actually has, but also what might reasonably be made available to him if a request for assistance were to be made. See KEWS v NCHC [2013] 2 HKLRD 314 Having considered the extent of the financial assistance from his parents in the past and at present and the high likelihood of continuous assistance in the foreseeable future, the husband s contention that he does not have sufficient means to comply with the Maintenance Terms does not stand. Change in circumstances of the wife I now turn to consider the circumstances of the wife. The husband describes the wife s present lifestyle as luxurious and is well better than her lifestyle during the marriage. I however am not persuaded that her financial situation has been improved to an extent that justifies a reduction of her maintenance payment. Earnings and earning capacity The husband seeks to argue that the wife has changed from a full-time housewife to a business woman. His first argument rests on her employment in a Hong Kong company. The said employment was however a short-lived one which lasted for less than one year. She was employed through the introduction of a friend but was laid off shortly. In reality, she has been unemployed since the marriage except the said short-lived employment. Coupled with the fact that she has the care and control of the two children and is their primary carer, I am not impressed that her employability has in any way improved. The husband s second argument is premised on the wife s recent business adventure. The wife gave an account of placing HKD300,000 for her 10% shareholdings in a limited company which runs a bar in Central. The bar had its soft opening in or around October 2018 and obtained a liquor license in or around April 2019. The business is break-even and she has yet received any profit-sharing. The husband has not mounted any sustained challenge to such evidence. Absent any evidence showing any new source of solid income of the wife, I have no reason not to believe her evidence that the husband s default of maintenance payment and her legal costs incurred in the enforcement

proceedings have rendered her living off her own savings and investments. Assets and liabilities On the fluctuation of the value of her investments and cash in hand as indicated in her Form E, filed on 29 April 2016, 20 November 2017 and 24 April 2019 (Wife s Form E), I accept her explanation that it was due to the fluctuation of the face value of the securities which formed a considerable part of her investments. She explained that the acquisitions of most of those securities were funded by low-interest loans from banks and at some stage, the face value of those securities reached a high level. She however missed the best chance to sell them and ultimately sold them at less favorable prices with little profits, at the time when the stock market was stagnant because of the international trade dispute. Those profits were used for her personal expenses. Her explanation is not countered with any serious argument from the husband. In any event, as revealed in her Form E, her investment has never been a big venture that attracts life-changing income. It is disclosed that the lion share of her assets of around HKD5 million lies in the form of receivables from the husband under the Consent Order (the outstanding LS Payment of HKD4 million and the PP Payment of over HKD1 million). In the absence of any real challenge to the wife s disclosure of incomes and assets, I find her assets and incomes are in no way more substantial than before divorce. Standard of living I also do not find the wife s standard of living after the divorce lends support to the husband s application. On the husband s own admission, during the marriage, both of the parties enjoyed a lifestyle which offered them with frequent dining out at fancy restaurants, overseas travel and purchase of luxury items for the wife. The evidence shows the wife has, after divorce, just enjoyed a lifestyle more or less as the same as that during the marriage, but not significantly better. The lifestyle was mainly supported by her boyfriend and friends by paying for her dining, parties, overseas trips as well as granting her small loans. There is no evidence to suggest that those generous offers will become a consistent or guaranteed source of funding for the wife s lifestyle. Instead, it is the wife s unchallenged evidence that she was treated to free dining and entertainment because of her friends kindness in offering her support in the transition and such support would not last for long. Further, the disputes between the wife and her boyfriend from time to time further cast doubt on his continuous support of the wife s overseas trips and entertainment. For the valuable jewelries, a close study of the W s Form W will find that there is only an addition of one diamond ring to the wife s collection (purchase value of HK\$60,000 and estimate value of HK\$10,000) since the divorce. It was a gift from her boyfriend which could hardly give any impact on the present application. For the 2 wine fridges, the wife said that one of them was bought together with the husband during marriage and the other one was a used fridge which was bought at a big discount to keep the wine mostly purchased during marriage. That was to save the monthly storage charges. Her evidence was unchallenged. On the inquiry into the source of her legal fees, the wife answered that she herself had paid for all of them, making reference to her bank statements. In Court, the husband did not pursue this matter any further. In all, the wife s assets and earnings have not materially increased since the Minutes. Nor has her lifestyle enhanced dramatically over the years. Time-wise, the default of payments was immediately after the signing of the Minutes. For the first and second payments the husband was

required to pay under the undertakings of the Minutes, he only paid HKD10,000 each in August and September 2016. Since then, no further payment has been made. Absent any material change of circumstances, his default payment in part and in full since the first periodical payment raises doubt on his intention to discharge his payment obligation. His offer to negotiate other payment arrangement with the wife but insistence on the presence of the wife's former solicitors raises further doubt on his intention to pay.

Conclusion

Having considered all the evidence and submissions of both parties as well as all the circumstances in this case, I am not satisfied there is any valid grounds which justify a variation of the Consent Order. I order that the husband's two applications be dismissed. Costs follow the event. I make an order nisi that the husband do pay the costs of the present application to the wife, including costs previously reserved, to be taxed if not agreed, with certificate for counsel. The above costs order nisi shall become absolute after 14 days from the date of this decision unless application to vary the order nisi by Summons is filed within this 14-day period. (M LAM) Deputy District Judge Mr Benjamin Lam, instructed by Messrs Chong & Yen, for the Petitioner The Respondent acting in person PAGE - PAGE - 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 {sle_lOl{sHD@ gdYj smgV gdYj gdYj gdy3 gdy3 gdy3 ph!!! ph!!! ph!!! gdYj gdYj rdrVP gdO* gdaQ gdYj gdYj oaSaEaoa hPku hkq1 h?H| hkq1 hPku gdYj gdYj gdYj hSnK gdYj _I7I7 hSnK &`#\$ th`hQ hx D hx D &`#\$ hx D hx D [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"/> __dLO Ct82J & 6" CACV Judiciary English.dot Windows User Microsoft Office Word b@+ Judiciary CACV Title Microsoft Word 97-2003 Document MSWordDoc Word.Document.8

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Prepared on 29 October 2026 · Esheria