

HONG KONG / JUDGMENT

CX v. FCM

[2019] HKFC 245

COURT

Family Court

DECIDED

19 September 2019

CASE / FILE NUMBER

FCMC6410/2007

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bjbj FCMC 6410/2007

[2019] HKFC 245 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MATRIMONIAL CAUSES NO 6410 OF 2007 BETWEEN CX Petitioner and FCM Respondent Before: Deputy District Judge R So in Chambers and in Court Date of Hearing: 18 September 2019 Date of Judgment: 19 September 2019 J U D G M E N T (LEAVE TO ENFORCE ARREARS) There are two matters for adjudication. First, whether leave should be granted to the Petitioner Wife to enforce maintenance payments against the Respondent Husband which are due more than 12 months before the date of commencement of the application for enforcement. Second, with the amount of HK\$332,720 already repaid by the Respondent for the arrears under the Judgment Summons, whether full payment had already been made to satisfy the arrears in full or whether there is still a short fall of HK\$5,785.

Background

The parties were married in the mainland in February 2001. There are 2 children of the family born in the wedlock, namely the elder daughter who is now 19 years old (Elder Daughter) and the younger daughter who is now 16 years old (Younger Daughter) (collectively Daughters). The Petitioner and her Daughters have been living in the mainland. The Elder Daughter is now studying year one at a university in Shanghai, while the Younger Daughter is now studying at a secondary school in Shanghai. The Respondent has been living in Hong Kong. The Petitioner petitioned for divorce in May 2007. After trial and by the Judgment dated 4 February 2009, it was ordered that joint custody of the Daughters be granted to the parties, with care and control granted to the Petitioner and reasonable access to the Respondent, including staying access to be conducted in Hong Kong or Shanghai for half of the long school holidays of the Daughters. Leave was also granted for the Daughters to remain outside the jurisdiction of Hong Kong. Parties entered into a full and final settlement for all the ancillary relief claims between them and the order was granted by consent on 9 December 2010 (Order). The relevant orders for this trial are as follows :- Under paragraph 3 of the Order, the Respondent shall pay the Petitioner periodical

payments in the sum of RMB12,000 per month for the Daughters. Upon the undertaking by the Respondent to the Court and to the Petitioner (ie. Undertaking (6) therein), the Respondent shall, on top of the periodical payments of RMB12,000 per month for the Daughters, pay (i) all the school fees of the Daughters when they fall due; and (ii) the expenses incurred by the Daughters during their stay in Hong Kong for access (including the air fares). Decree Absolute was granted on 16 April 2011. On 6 November 2017, the Petitioner took out 2 applications :- Application for judgment summons by way of Form 22, which was supported by an affirmation filed on the same date. Application for directions in relation to the property (Property) stated in Undertaking (4) of the Order, which was supported by an affirmation filed on the same date. The application for directions in relation to the property stated in Undertaking (4) of the Order was subsequently dismissed by the Court. As there was requisition raised by the Court in relation to the content of the Form 22 filed on 6 November 2017, another Form 22 was subsequently filed on 6 December 2017. Leave was granted by the Court for Judgment Summons to be issued and on 6 March 2018, the Petitioner took out 2 applications :- Judgment summons for arrears within 12 months (Judgment Summons). Inter parte summons for arrears of maintenance payments which are due more than 12 months before the date of commencement of the application for enforcement. On 11 September 2018, the Respondent paid a sum of HK\$332,720 to the Petitioner to satisfy the Judgment Summons. According to the Petitioner, HK\$338,505 should be paid. Therefore, there is still HK\$5,785 outstanding. The Respondent has confirmed with the Court that he now has the financial ability to continue paying maintenance and there is no need to apply for variation of maintenance. He has also confirmed that he is willing and has the financial ability to pay the amounts of arrears to be ruled by the Court, if any. Issues in dispute The 2 matters for adjudication are as follows :- Whether leave should be granted to the Petitioner Wife to enforce maintenance payments against the Respondent Husband which are due more than 12 months before the date of commencement of the application for enforcement (1st Issue). With the amount of HK\$332,720 already repaid by the Respondent for the arrears under the Judgment Summons, whether full payment had already been made to satisfy the arrears in full or whether there is a short fall of HK\$5,785 (2nd Issue). The legal principles Pursuant to section 12 of the Maintenance Proceedings and Property Ordinance, Cap. 192, leave of the Court is required to enforce maintenance payments which are due more than 12 months before the date of commencement of the application for enforcement. The starting point is that arrears exceeding 12 months will not be enforced unless there are special circumstances (CSL v WWK [2006] 3 HKFLR 518). The rationale behind this rule traditionally was that if an applicant could wait for a year before bringing proceedings for enforcement then it was more likely than not that she did not need the money or at least had managed well enough without it and the respondent might consider that he could disregard the liability. This was the historical basis on which the rule had become established. However, in modern times, more flexibility is shown because the applicant might have savings of her own which she might use for a period of time and she would be expected to seek reimbursement by a large single payment from the respondent later on. Nevertheless, the Court should still pay regard to the extent the applicant has taken to assert her rights. Analysis of evidence 1st Issue The Petitioner pursued for arrears which are due more than 12 months before the date of commencement of the application for enforcement, in the total sum

of RMB268,000 (Outstanding Sum), comprising of :- Outstanding monthly payment of 20 months of RMB12,000 each (February and May of 2015, and from July 2015 to December 2016), making it RMB240,000; and School fees for the Elder Daughter in the sum of RMB28,000. During the hearing, the Respondent indicated that he did not dispute the Outstanding Sum. The only dispute is whether leave should be granted for the Petitioner to enforce the Outstanding Sum as it was due more than 12 months. It is the Petitioner s case that leave should be granted to her, as she had been pursuing for the Outstanding Sum by different ways before, namely, sending e-mail, asking orally through the Daughters, going to the Respondent s home in Hong Kong and asking through her then solicitors. According to her, the sum of RMB12,000 per month is not sufficient and she has been using her means to support the Daughters all along. Especially in the months when there was default in maintenance payment, it has been difficult times for the Petitioner. The Petitioner further explains that as she lives and works in Shanghai, it takes time, effort and costs money for her to initiate proceedings for maintenance in arrears in the Court in Hong Kong. Therefore, she chose to ask for the Outstanding Sum in the 4 ways as stated above first, before taking out application in court. The Respondent opposes to leave being granted as he was in financial difficulties in about 2015. He is of the view that the Petitioner has been telling lies. The Petitioner has not taken steps to pursue the Outstanding Sum. His evidence is that for that occasion that the Petitioner went to his home in Hong Kong, she was asking for the Younger Daughter s passport, but not pursuing for the Outstanding Sum. According to him, he had asked his Elder Daughter why the Petitioner did not pursue for the Outstanding Sum and his Elder Daughter told him that she had asked the Petitioner not to pursue further. In about 2015, the Respondent was in financial difficulties. The Respondent points out that as the Petitioner had taken out application in relation to the Property (refer to paragraph 8(b) above), he believes that the Petitioner must be plotting a scheme and telling lies. The Respondent further explains that it is not fair to order him to pay for the Outstanding Sum which is dated, while there is no sanction for the Petitioner in causing difficulties to the Respondent about access to the Daughters and not providing the Respondent with sufficient information of the Daughters custody matters. I have considered the parties evidence and the documentary evidence before me. I have pointed out, during cross-examination of the Petitioner, that custody and access matters are not issues to this trial. But at the same time, I have reminded parties to be reasonable and considerate in Daughters matters. The criticism from the Respondent against the Petitioner about her plotting a scheme and telling lies are not substantiated. Having considered the evidence of the Petitioner, I notice that she answers questions directly without hesitation. Her evidence is not shaken under cross-examination and her oral evidence has been consistent with her written affirmation earlier filed. I accept the evidence from the Petitioner, in particular the fact that she had pursued for the Outstanding Sum as explained. The Respondent does not dispute having received the e-mail dated 22 October 2015 and the letters from the Petitioner s then solicitors pursuing for the Outstanding Sum. The said e-mail and the said letters has been provided and exhibited in the Petitioner s affirmation. In such circumstances and with the evidence before me, I accept that that the Petitioner had informed and had taken out reasonable steps against the Respondent to pursue for the Outstanding Sum and to assert her rights. I also accept that the Petitioner had not waived her right to seek repayment of the arrears. I notice that the delay in taking out the

application in Court is not long. The months the Petitioner pursued for are February 2015 and May 2015, and also July 2015 to December 2016. When the Petitioner first filed her Form 22, it was 6 November 2017. The delay is about 1 year. With the Petitioner and the Daughters living in Shanghai, and with her situation and financial circumstances explained, I accept her evidence of why she chose to try other ways first before coming to the Court in Hong Kong to take out formal applications. With justice and fairness in mind, and in consideration of all the evidence before me and submissions by the parties, I accept that there are special circumstances and I will give the Petitioner leave to enforce the arrears of maintenance that are over 12 months, in the total sum of RMB268,000. 2nd issue With the payment by the Respondent in the sum of HK\$332,720 on 11 September 2018, the amounts in arrear under the Judgment Summons have largely, if not fully, been settled. The only outstanding issue is, whether there is still a shortfall of HK\$5,785 as alleged by the Petitioner. It is not in dispute that the outstanding amount under the Judgment Summons is RMB296,000. It is the Petitioner's case that the exchange rate is 1.1436 on the date the payment was made. She has provided document exhibited in her affirmation about the exchange rate on that day, which the Respondent does not dispute. As a result, the amount of Hong Kong dollars to be deposited should be HK\$338,505 (ie. RMB 296,000 x 1.1436). As the Respondent only paid HK\$332,720, there is still a shortfall of HK\$5,785 (ie. 338,505 HK\$332,720). During the hearing, the Respondent has agreed that, as the Petitioner has provided the exchange rate for the date of payment, he shall repay the Petitioner the difference of HK\$5,785.

Orders

I make the following orders :- Leave be to the Petitioner to enforce maintenance payments against the Respondent which are due more than 12 months before the date of commencement of the application for enforcement in the sum of RMB268,000. The Respondent shall pay the Petitioner the sum of HK\$5,785 to satisfy the shortfall of repayment for the Judgment Summons within 14 days. Costs I see no reasons why costs should not follow the event. As the Petitioner is successful in the 2 issues for the Court's adjudication, costs should be awarded to the Petitioner. By consent, costs be reserved and will be dealt with separately. (Rita So) Deputy District Judge

The Petitioner acted in person The Respondent acted in person

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