

HONG KONG / JUDGMENT

DB v. DMA

[2023] HKFC 178

COURT

Family Court

DECIDED

7 September 2023

CASE / FILE NUMBER

FCMC1006/2021

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FCMC 1006/2021

[2023] HKFC 178

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES

No. 1006 OF 2021

BETWEEN

DB

Petitioner

and

DMA

Respondent

Coram: Deputy District Judge S. Allison in Chambers (Paper Disposal)

Date of Respondent's written submission: 17 August 2023

Date of Petitioner's written submission : 23 August 2023

Date of decision : 7 September 2023

DECISION

(Leave to Appeal)

Introduction

This is the Respondent Husband's application for leave to appeal against the judgment I handed down on 21 July 2023 after a two-day trial. The trial was in respect of the Petitioner Wife's application for ancillary relief for the four children of the family, and herself. For convenience, I will refer to the parties as Husband and Wife.

The parties married in March 2005 and the Wife filed her divorce petition in February 2021 on the grounds of unreasonable behaviour. The Decree Nisi was pronounced on 28 January 2022. There are four children born to the Wife and Husband from the marriage, twin boys A1 and A2, and two daughters, H and M. One of the twin boys, A1 was diagnosed to have autism and "severe grade intellectual disability". M also has been diagnosed with autism, significant global development delay, severe language impairment. A1 and A2 are 16 years old, H is 11 years old and M is 6 years old respectively.

During the marriage the Wife's role has been that of stay at home mother, housewife and homemaker. The Husband was, therefore, the only breadwinner for the family. At the time of the trial, the parties were still living together with the children in a rental apartment in Kowloon.

By his summons filed on 1 August 2023, the Husband seeks leave to appeal the orders made in the Judgment.

The Judgment

In the judgment, I made the following findings and reached the following conclusions:

I rejected the Husband's submission that there was to be a clean break between the parties given:

that there were no assets available for distribution between the parties,

the needs of all the members of the family and the fact that the Husband has been the sole financial provider for the family, and

the contribution which the Wife had made towards the welfare of the family by way of looking after the home and caring for the family.

I further assessed that the Wife did not have an earning capacity as asserted by the Husband and as such, I made an order that was to be ongoing spousal maintenance payable to the Wife, which took into account her housing and living needs. I assessed that periodical payments for the benefit of the Wife was HK\$5,400 per month.

In addition, I assessed that the maintenance for the children's benefit should be HK\$5,600 per month per child or HK\$22,400 in total. The calculation of the children's expenses included a component for their housing and general expenses which both the Husband and the Wife had omitted in their open proposals.

There was material non-disclosure on the part of the Husband to the extent that it was appropriate for me to draw adverse inferences regarding the Husband's income and to reject the existence of the loans the Husband's alleged existed.

Proposed Grounds of Appeal

In his handwritten draft Notice of Appeal, the Husband sets out his reasons for the appeal, which reads as follows:

"1. The judge confuses the health condition of the family children to that of the wife which led to erroneous judgment;

2. The judge confuses the health situation of the family children among them and reaches an erroneous decision;
3. The judgment disregarded significant facts about the financial situation of the husband and imposes a financial burden based on potential ability rather actual evidence or ability.
4. The judgment is based on assumptions on inconsistent criteria and unequal standards in assessing the evidence presented.
5. Please see more details in "grounds of appeal" of five pages attached."

The "grounds of appeal" which the Husband appended to his draft Notice of Appeal, can be categorised as follows:

I erred in fact by considering the Wife had the same medical condition as the children. ("Ground 1");

I erred in fact by overstating the seriousness of the medical condition of the four children. ("Ground 2");

I erred in fact in concluding that the Wife had never worked outside the home, took care of the needs of the home and the children and as such, did not have an earning capacity. ("Ground 3");

I erred in fact by concluding that the Husband was guilty of material non-disclosure. ("Ground 4").

Applicable legal principles

Section 63A of the District Court Ordinance empowers the Court to grant leave to appeal against a judgment or an order, with or without conditions. In deciding if leave to appeal should be granted, Section 63A(2) of the District Court Ordinance provides that leave to appeal should not be granted unless the intended appeal has a reasonable prospect of success or that 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 or she has an arguable case with reasonable chances of success on appeal. A reasonable prospect of success means an appeal has prospects that are more than “fanciful” but which do not need to be shown to be “probable” (See: *SMSE v KL* [2009] 4 HKLRD 125; *KNM v HTF*, HCMP 288/2011).

It is generally accepted that there needs to be an arguable case in respect of an intended appeal. That means, the application for leave to appeal should have a reasonable chance of succeeding. The Court of Appeal is unlikely to interfere with the exercise of the Court’s discretion unless it can be shown that it has clearly exercised that discretion incorrectly. Alternatively, it will be necessary to show that the Judge was wrong on the law or in relation to a certain legal principle.

I note that the Husband’s grounds of appeal relate to errors in facts, as opposed to error in law.

Grounds 1 and 2

I shall deal with these two grounds together, because they concern the Husband’s criticism that my findings involved errors on the Wife’s and the children’s medical conditions and consequently, in reliance of these errors I reached an incorrect conclusion.

Amendments to the judgment was handed down as Corrigendum on 21 July 2023. It was made clear that the Wife was not the one who had been assessed with significant global development delay, language impairments or diagnosed with autism. The youngest daughter M has however, received this diagnosis. The Corrigendum also there had been a mislabelling in the judgment of A1 as the younger son when he was in fact the older son.

The Corrigendum was made pursuant to Order 20 rule 11 of the Rules of the High Court pursuant to the “slip rule”:

“Amendment of judgment and orders (O. 20, r. 11)

Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court on summons without an appeal.”

The slip rule permits the court to correct clerical errors and accidental slips or omissions in a judgment or court order, in order to properly convey the manifest intention of the court. The rule obviously does not allow the court to correct a mistake of substance, in which case an aggrieved party can apply to set aside or appeal the court order.

This principle was recently reiterated by the Court of Appeal in the case of *The Yin Nin Savings Mortgage Loan & Land Investment Co Ltd v Occupiers of Premises* [2022] HKCA 613 when considering the principles and application of “slip rule”:

“Relevant legal principles

The starting point is to consider the relevant principles relating to the application of the slip rule and the rule on separate representation of co-plaintiffs. It does not appear from the submissions that there is disagreement among counsel as to the applicable principles.

It is trite that the slip rule jurisdiction under Order 20 rule 11 of the RHC can only be invoked to correct errors in expressing the manifest intention of the Court: *Hong Kong Civil Procedure* 2022, volume 1, at 20/11/1). The purpose is to enable the Court to amend a formal order which through accident or error does not reflect the actual decision of the Court.

The power under Order 20 rule 11 does not extend to correcting an error or mistake of the Court. Hence, even where the court is satisfied that it has made a mistake in making the order, it cannot invoke Order 20 rule 11 to correct it: *Lo Yuen Chong v IWS Environmental Technologies Limited* (formerly known as *Fook Woo Environmental Technologies Limited*) [2021] HKCA 89 at [18] & [19]; and *Li Tze Cho v Ching Hua Co (H.K.) Ltd (No.3)* [1961] HKLR 201 at 205. The slip rule cannot be used by the Court to reconsider a final and regular decision once it has been perfected, even if it had been obtained by fraud: *R v Cripps, ex p Muldoon* [1984] QB 686 at 695A-F; and *HKSAR v Law Chun Man (No.2)* [2013] 1 HKLRD 555 at [11] and [12].”

Under Ground 1, the Husband claims that there is unfairness in the judgment if the Court took into account the Wife’s “conditions”, which warrants a reconsideration of the judgment and that the custody of the children should not be with the Wife. The Husband does not provide any examples from the judgment in his “grounds of appeal” where the Court had given weight to the Wife’s condition as a factor in assessing her needs and it appears that the Husband has conflated the issue of custody with finances.

In a full reading of the judgment, it is clear that in assessing the financial provision required for the children, the Court took into account that only one of the twin sons was diagnosed with severe autism and the daughter M, although diagnosed, her autism was not as severe as that of her older brother. The Wife’s medical condition was not a factor in assessing her needs or her ability to seek paid employment.

Under Ground 2, the Husband says that the Court erred in taking into account two points. The first point was in respect that all four children have been diagnosed with sickle cell anaemia and the second point related to the definition of the two sons in the judgment. It is clear from the reading of the judgment, that the Husband’s complaints are misplaced.

On the first point, the Husband takes issue with paragraph 6 of the judgment, namely:

“6.

Unfortunately, all four of the children have medical issues. All of them have been diagnosed to have sickle cell anemia at birth, which requires medical treatment depending on the severity of their condition.”

In his Grounds of Appeal, the Husband repeated his evidence that sickle cell anaemia was a common condition prevalent in West Africa and complained that I had made it “dramatic” in the judgment. Paragraph 6 contains the only statement and reference to the children’s sickle cell anaemia in the judgment. The evidence for the children’s condition was obtained from the Social Welfare Report dated 11 August 2021 and the Husband’s own Affirmation dated 15 December 2021 that H and A1 requiring treatment in hospital from time to time.

The Court did not conclude that sickle cell anaemia caused the children to require constant care as claimed by the Husband in his Grounds of Appeal, or that this medical condition was a factor taken into account when assessing the children’s financial needs.

In respect of the second point, the Husband complains that the definition of “Older Son” and “Younger Son” was mistakenly attributed to the wrong twin. The Court has made the necessary correction under the slip rule. The fact that only one of the sons, had been diagnosed with autism is clear and consistent throughout the judgment.

Inexplicably, the Husband repeats that this mislabelling “may have influenced the disposition of the custody of the children in an unjust manner”. This is not correct.

As stated at paragraph 76 of the judgment the care arrangements had already been resolved by way of a Consent Order dated 25 July 2022:

“76.

By consent, the parties’ agreed arrangements on the children’s care was encompassed in the Order dated 25 July 2022 (“Children’s Order”). The Wife and Husband had joint custody while sole care and control of the children vested with the Wife. The Husband was to have reasonable access to the children while the family still lived together in the same house. This was the living situation at the time of trial.”

At the beginning of the trial, the Court had made it clear to the Husband that the trial was only in respect of financial claims made by the Wife and the issues regarding the children care arrangements were not before the court for consideration. This was clearly stated at paragraph 78 of the judgment:

“78. At the commencement of the ancillary relief trial the Husband initially sought to challenge Children’s Order. This was despite there not being any application before the court. Thus, the Husband’s initial stance at the ancillary relief trial was that he would continue to meet the children’s financial needs so long as they lived with him and for the Wife had to move out without the children. This proposal meant that the children would be cared for by a domestic helper when the Husband was at work. The children’s care arrangements had already been agreed and the Husband’s proposal was on the face of it, not in the children’s best interest. It was a mistake for the Husband to conflate the financial issues with the children’s care arrangements. As such, any changes to their care was not was not

accepted by the court to be a relevant issue to be dealt with at the ancillary relief hearing.”

I find that the Husband has not made out his case in respect of Grounds 1 and 2.

Ground 3

Under this ground, the Husband complains that the Court held that the Wife did not have an earning capacity and her role during the marriage was for the care for the children. The Husband submits that:

The finding that the Wife never worked outside the home during the marriage and devoted herself to the family and taking care of the needs of the children led to and supported the unfair order. The Husband claimed that he had employed a domestic helper to help take care of the children and manage the household.

Due to financial constraints, the helper was let go and the Husband claimed that the Wife did not fulfil his expectation to look after the children, and I had failed to consider these significant facts.

It was the family’s standard of living during the marriage that the Wife had the assistance of a domestic helper from the time the twin sons were born until 2019. The Court was mindful of this. The Husband provided no evidence that the Wife did not fulfil her role as a mother and wife because she had the assistance of a helper in the care of four children. The Court found that the Wife requiring the assistance of a domestic helper was not unreasonable since two of the four children had special needs. This was clearly expressed at paragraph 68 of the Judgment:

“68.

As stated above, the Wife does not work outside the home. It is anticipated that the Wife will continue in her role as a stay at home mother, since the Younger Daughter is currently only 6 years old, with a disability that requires care when she is not at school. The Husband tried to criticize the Wife’s involvement in caring for the children when there was a domestic helper claiming that she was never at home but left the care to the helper. At the same time, the Husband admitted that he worked long hours and was rarely at home. It seems unlikely that the Husband would have been aware or involved in the daily care of the children when he was at the GDL office. Furthermore, with four children, two of whom have special needs, it is not at all unreasonable for the Wife to require the assistance of a helper. The Husband’s expectation that the Wife be on call for the children is both unreasonable and unrealistic.” (emphasis added)

The Husband’s grounds of appeal on the Wife’s earning capacity are an attempt to reargue his case even though he made the conscious decision to not challenge the Wife on this issue of her earning capacity during the trial. The Wife’s capacity to work outside the home was analysed at paragraphs 68 – 70 of the judgment.

In addition, both parties failed to include a component for the housing and cost of utilities for the Wife and the children when they moved out of the current rental accommodation. This was an important factor that the Court took into account in this assessment and the calculation of the Wife's and the children's respective financial needs.

There was no flaw in the analysis and the conclusion reached, and I also find that this ground fails.

Ground 4

The Husband complains the Court erred in its finding on his material disclosure and financial ability. In particular the Husband states that there is an unreasonable expectation on his financial capacity, the judgment failed to take into account his actual earnings and this was unfair to him.

The Husband says that there has been an inconsistency regarding the household spending exceeding his income but that the Court disregarded his loans. The judgment is clear that the existence of the loans is based on the Husbands mere say so, and that there is a lack of any supporting documentary evidence as to the existence or the amounts of the loans. The Court's analysis of the Husband's purported loans is set out at paragraphs 40 – 53 of the judgment as well as the reasons for rejecting the Husband's case.

The Husband further complains that paragraph 44 – 45 of the judgment are contradictory. It is apparent from his Grounds of Appeal that he had not read or understood each paragraph in its entirety and he has quoted the sentences out of context. Contrary to the Husband's challenge, the Court had considered all of the Husband's evidence and found it to be lacking.

As part of his complaint, the Husband raised the issue that the Court did not consider that that Wife could not account for the CSSA funds she received. On this very point, during the trial I had asked the Husband whether he had any proof that the Wife had hidden accounts and he answered that he did not. Secondly, the Husband did not quantify how much he thought the Wife had not disclosed. In fact, the Court did bear in mind that the Wife had received CSSA and it was specifically mentioned as a reason for refusing the Wife's request for back payment at paragraph 103 of the judgment:

"103. ... Since he has over paid the sum of HK\$12,000 over that period, I find that the Husband should be given credit for this overpayment. I also find that between the CSSA allowance previously received and the overpayment by the Husband the Wife would have had funds to meet the Older Son's tuition costs and accordingly, I will not permit the back payment on this occasion."

Conclusion on the Husband's application for leave appeal

Having given the Husband's "grounds of appeal" careful consideration, and for the reasons stated above, none of the points raised by the Husband has merit. I conclude that there is no reasonable prospect of success in any of the grounds of the intended appeal of the husband. He has not proven that there is some other reason in the interests of justice that the appeal should be heard. Hence, I refuse to grant leave to the Husband's summons for leave to appeal and dismiss his application.

Application for Stay

The power to order a stay pending appeal is given under Order 59 rule 13 of the Rules of the High Court. The principles governing the exercise of this power were addressed by Ma J (as he then was) in *Star Play Development Ltd v Bess Fashion Management Co Ltd* [2007] 5 HKC 84. Good reasons must exist for a stay to be granted.

The Husband has not given any reason why a stay should be granted. In my view, none of the Husband's proposed Grounds of Appeal have merit and there is insufficient cause to suggest that the refusal of stay would render any further application for leave to appeal, or if leave is granted, the appeal itself, to be nugatory. In the circumstances, it follows that the Husband's application for a stay of the judgment does not arise and is similarly, dismissed.

Costs

It is clear that the Wife has been successful in defending the Husband's application for leave to appeal. Costs should follow the event. The Husband should bear the costs of the Wife for this application. The Wife's own costs to be taxed in accordance with Legal Aid Regulations.

(Sasha Allison)

Deputy District Judge

Ms Tina Li of Liu, Chan & Lam for the Petitioner

The Respondent acts in person

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