

HONG KONG / JUDGMENT

DX v. LN

COURT

Family Court

DECIDED

14 April 2016

CASE / FILE NUMBER

FCMC7870/2014

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bjbj FCMC No.7870 of 2014 IN THE DISTRICT COURT OF TH HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NO.7870 OF 2014

BETWEEN DX Petitioner and LN Respondent and LSC formerly known as KK 1st Intervener
KYMf 2nd Intervener

Before : HH Judge Bruno Chan in Chambers. Date of Hearing : 17th and 24th March 2016. Date of
Decision : 14th April 2016.

DECISION (DISCHARGE PROHIBITION ORDER)

On 21st September 2015 I handed down a judgment ordering the Respondent Husband to pay the Petitioner Wife HK\$100,000 per month as maintenance pending suit for her and the 2 children of the family retrospectively from 1st May 2015, plus contribution to her legal costs in the sum of HK\$1.2 million by 9 monthly instalments at HK\$133,333 each until full payment. After initially making some payments the Husband has since fallen into arrears with the maintenance pending suit order for more than HK\$1.4 million by 20th January 2016 for which the Wife has issued a judgment summons against him returnable on 9th May 2016. Shortly before issuing that judgment summons the Wife on 16th January 2016 on ex-parte basis also applied and obtained a prohibition order (The Prohibition Order) restraining the Husband from leaving the jurisdiction until the hearing of her judgment summons. The Prohibition Order has since been extended and re-applied with effect up to 14th April 2016. On 4th March 2016 the Husband took out a summons to discharge that Prohibition Order, which is the matter now before me, as he claimed to have to attend certain meeting(s) in Wuhan on behalf of his father s business, and that in any event the Prohibition Order should not have been granted by the Court for various reasons including certain jurisdictional challenge and that the Wife had failed to comply with certain procedural

requirements. His application was of course opposed by the Wife, but before proceeding to consider the Husband's application and the parties' arguments, it would be necessary to first set out some relevant background. The Background The detailed background of the parties' failed marriage and their subsequent litigations in these proceedings can be found in any of my 3 earlier judgments on their disputes over the care and control of their 2 children, the Wife's aforesaid application for maintenance pending suit, and an anti-suit injunction sought by her against both the Husband's father the 1st Intervener herein, all in the course of 2015 and hence I do not propose to recite them here in details save for those which I consider essential and relevant to the matter now before me. Both parties were born and raised in Wuhan, PRC but have come to settle in Hong Kong where they got married in 2006 and that both of their children were also born here, although the Husband, now aged 38, essentially split his time between Hong Kong and Wuhan where he was being groomed to take over his father's business in real estate and property development, while the Wife, now aged 31, was throughout the marriage a full-time homemaker and mother to their 2 children, both boys now aged 5 and 3 respectively. Initially the couple stayed in Wuhan after the marriage, but later relocated to Hong Kong in 2010 after the Wife became pregnant with the elder boy and made their matrimonial home in a 2,100 sq ft apartment at the Harbourfront, Hung Hum, Kowloon purchased under the sole name of the Husband. It is not disputed that it was all funded by the Husband's father of which the Wife believes to be a gift from him, but the case of both the Husband and his father is that it is held on trust by the former for the latter, as with several other properties in Wuhan also registered in the Husband's name and with total worth in excess of HK\$82 million. In about Christmas of 2012 when the Wife became suspicious that the Husband was having an affair with a woman in Wuhan, she suffered an emotional breakdown and sought support from her divorced mother in Wuhan during which she told the Husband's father of his son's affair. Eventually she returned to Hong Kong to attempt reconciliation with the Husband, but when it turned out unsuccessful, she withdrew some HK\$3 million from the joint bank account and moved out of the former matrimonial home in early 2014 with the elder boy into a serviced apartment in the same neighbourhood, and launched these proceedings for divorce, custody and ancillary relief against the Husband. As noted above the first of the parties' litigations started with their dispute over the care and control of their 2 children, which took place in early 2015 and after a 5-days trial I rejected the Husband's case that he would stay fulltime in Hong Kong working on his father's business only by telephone and internet, and with little travelling in order to take up full-time care of the children with the assistance of his mother and sister both of whom also gave evidence in his support, and made the order on 19th June 2015 in favour of the Wife and as a result both children have since been residing under her care in her rented serviced apartment. By then the Wife claimed to have exhausted all her means and in the absence of any regular financial support from the Husband other than the children's school fees being paid by him directly and an interim monthly sum of HK\$35,000 offered to her at that earlier trial, her application for maintenance pending suit plus legal costs contribution soon followed, in which she asked for HK\$142,000 per month for herself and the children and HK\$200,000 per month as contribution towards her legal costs in these proceedings, on the basis that the former sum represented the present urgent needs of both herself and the children commensurated with the high standard of living they used

to enjoy during the marriage, and that the Husband had ample means and financial resources to do so, including from the rental income which he had been receiving from those properties in Wuhan in the total amount of at least HK\$380,000 per month, and with unlimited funding and support from his parents in particularly his father who had been grooming his only son to take over his businesses. That application was opposed by the Husband who claimed to be earning a salary of only HK\$15,000 per month working for his father and that it was his parents who had all along provided him with various privileges and resources to meet his expenses and those of his family, but that since January 2013 after the Wife told his father about his extra-marital affair, his father had allegedly cut off all his financial assistances including his use of those rental income from the properties in Wuhan, and that he had as a result been relying on his mother and sister to pay for his various expenses including his children's school fees and the said interim maintenance of HK\$35,000 for the Wife, as well as his own legal costs which had by then reached HK\$3.4 million. I rejected this case of the Husband in my judgment of 21st September 2015, and it would be relevant to set out some of my findings and reasons in the context of the Husband's present application matter now before me as follows:

62. Given the Husband's close relationship with his parents and their apparent complete trust on him with their financial affairs to the extent that one day he is to take over the father's business, I can see why the Wife finds this allegation of the Husband that he has been cut off financially simply because of what she had told his father incredible, and that it would still be so even if he had never denied the extra-marital affair to his father, or that his father had chosen to believe his daughter-in-law over his own son.
63. Furthermore, it is relevant to note what the Husband's sister said in her affirmation on 22nd July 2015 in support of his case as to how the father later became upset by the Wife's action and decided not to help her anymore [A4/983 8]: the Petitioner also alleges that my father said to her that he would pay her back for what she has spent in that period. I was present at the time of the said conversation between the petitioner and my father and I heard what my father said our father said that he would agree to pay for the petitioner's expenses for taking care of the children provided if and only if the petitioner and the children stay in Hong Kong, the Petitioner must not divorce the respondent and must take care of the children. However, the petitioner did not do so she left Hong Kong and subsequently proceeded to divorce the Respondent. Our father is very angered by the Petitioner's actions. I believe that if the Petitioner had stayed in Hong Kong with the children and had not divorced the Respondent, then our father would have continued to financially support the petitioner and the children, and indeed he had done so all along in the past, which is how the Respondent and his family survived. Our father has decided that he will no longer financially support the petitioner and the children, and indeed has also cut-off the respondent as well.
64. If indeed the father subsequently became upset by the Wife's actions in bringing divorce proceedings, one may ask why did he continue to cut off his financial support for his only son? As a matter of fact, the sister in her said affirmation also mentioned another reason for the father's cutting off the husband, as told to her by her mother, that it was because the

Wife had also told the father in about December 2012 or January 2013 that the Husband had lost HK\$8 million gambling in Macau which made the father very angry, and that the Wife therefore asked the father to cut him off and stop letting him any access to money [A4/982 6].

65. Even leaving aside this evidence as told to the sister by the mother is clearly hearsay and so far not corroborated by either parents or even the husband himself, again this assertion that the father would take such drastic action against his own son solely on the basis of his daughter-in-law's words is highly questionable, all the more so when the sister also stated in the same paragraph that up to the time of her affirmation and more than 2 years since the wife's alleged conversation with the father, that she still did not know whether or not the Husband really did lose so much money in gambling as alleged, given the severity of the allegation and the amount of money involved as well as the sister's proclaimed closeness to her brother and her involvement in almost every detail of his family as evidenced by her support to him throughout his earlier custody trial and her alleged payment of more than HK\$3.4 million for his legal costs. It seems very odd to me for her not to have known by now whether or not the Husband did gamble away that kind of money.
66. It is in fact the Wife's case, Ms Yip submits, that the Husband's gambling habit has all along been well known to his family and that there is absolutely no sign of his parents being unhappy about it, as he has still gone about gambling in Macau as recently as early this year, when as noted above his credit card record revealed that he spent more than HK\$400,000 in the casinos there on 2 separate occasions in February and April 2015.
67. Above all, this allegation of him being financially cut-off by his father since January 2013 which if true would surely have been a serious blow to the Husband both as to his finance and his relationship with his parents, or at least something so significant that it would have been at the forefront of his mind when he gave instructions to his lawyers for the preparation of his Form E in May 2014, yet not a single word about it was mentioned in that document or any of his subsequent affirmations filed for the custody trial until the Wife's present application for maintenance pending suit, nor is there any sign of any such impact on his relationship with his parents when in fact both of them have shown full support to him in his earlier dispute with the Wife over their children.
71. The answer may well be found from the Husband's said 5th Affirmation in which he claimed that since January 2013 after being cut off by his father to have been relying on his mother and sister to pay for his expenses including more than HK\$3.4 million in legal costs, and that it was his sister who has been paying the interim maintenance of HK\$35,000 per month to the Wife on his behalf, but that since both the mother and sister are full-time housewives, which begs the obvious question of where did that kind of money, which must have accumulated very substantially over the past 2 years, come from if not from the father?
72. Furthermore, according to the Husband's said affirmation, it was the father who had subsequently repaid RMB500,000 to the sister on his behalf for his legal costs [A4/899 16], while all the expenses for his trips to Macau as well as his overseas holidays with the

children up to this year in 2015 were also paid directly by the father [A4/899 16], which seems to me a case of the father taking away his financial assistance with his right hand but giving it back with his left, and if the whole purpose of cutting off the Husband's finance was to punish him for his extra-marital affair and/or so that he could not continue with such affair, then why at the same time allow the mother or the sister to provide the same financial assistance to him over the past 2 years? None of these make any logical sense to me but rather to support the Wife's case that they were just part of the Husband's attempts to mislead the court about his financial resources. In the conclusion of that judgment and adopting a broad brush approach I made the order on the maintenance pending suit and costs contribution referred to in paragraph 1 above, of which the Husband has not taken any steps to appeal or vary but has so far paid, on his own admission, only 3 sums on separate occasions totalling HK\$290,000, leaving outstanding a total sum of HK\$1,439,431 at the time of the Wife's application for the issue of a judgement summons and the 1st prohibition order in January 2016, or close to HK\$1.9 million by the time of the Husband's present application taken out on 4th March 2016. This is of course not the only remaining battle between the parties. In fact far from it as shortly after the maintenance pending suit hearing, the Husband applied and obtained an order by consent for his parents to be joined as interveners for the court to determine by way of preliminary issue the beneficial ownership of the former matrimonial home in Hong Kong and those other properties in Wuhan all registered in his sole name but which he claims to belong beneficially to his parents. As a result that preliminary issue has since been fixed for hearing for 5 days in August 2016. However on 29th October 2015 the Wife brought an anti-suit injunction against the Husband's father the 1st Intervener to restrain him from continuing with certain PRC Action which he had earlier taken out in Wuhan against his son the Husband without any notice to the Wife for determination of the beneficial ownership of those properties in Wuhan and for those properties to be transferred to him. The Wife believed that it was the concerted efforts of father and son to pre-empt her case in the forthcoming trial of the preliminary issue in Hong Kong and accordingly sought the injunction. That application was opposed by the father and after hearing arguments from senior counsel for both sides this court on 30th November 2015 allowed the Wife's application only in part by restraining the father from dealing with or disposing any of those Wuhan properties in which the PRC action may find or conclude in his favour pending the determination of the preliminary issue by this court. It is against this background of the parties marriage and litigation that I now come to consider the Husband's present application which was made according to him for an urgent need to travel to Wuhan before the end of March 2016 to attend certain meeting with PRC government officials in relation to his father's business, and he offered an undertaking to the Court and to the Wife that he shall forthwith come to and enter into Hong Kong as soon as practicable should the Court order him to do so, and that the said Prohibition Order dated 15th January 2016, which has been extended or renewed up to 14th April 2016, should be discharged forthwith on the following grounds as set out in the Skeleton Submission of his counsel Mr Eugene Yim: that the Court ought not to have granted a prohibition order when the Husband was already out of jurisdiction; that there is no real risk that the Husband will

not return for a substantial period of time; that the Wife has failed to show that enforcement of the judgment will be impeded in the absence of the Husband; that the Wife failed to serve the Prohibition Order immediately or at all. In addition and in the event that the Court is not persuaded to discharge the Prohibition Order on these grounds, the Husband offers to pose a surety in satisfaction of the Prohibition Order through the father-in-law of his sister with an undertaking to satisfy whatever judgment sum that he may be ordered to pay under the Wife's judgment summons. Ms Anita Yip SC with Ms Lily Yu for the Wife however argue that the Husband's jurisdictional challenge is unfounded, that the Wife had properly satisfied the service requirement in respect of the Prohibition Order on the Husband, that in the exercise of its discretion in both the making of the Prohibition Order or the discharge thereof, the Court should take into account all the circumstances of the case, that in the context of the said maintenance pending suit judgment, such discretion should be guided by its nature of providing provisions for the Wife and the children's future ongoing reasonable needs, and that the Husband's proposed security or surety is neither appropriate nor fit to warrant a discharge in the circumstances. Given the various issues raised by the Husband's application including what seems to be jurisdictional challenges in some of his grounds, it would be relevant to first set out the applicable legal principles. Applicable Legal Principles The jurisdiction of the Family Court to make a prohibition order is derived from Section 52E of the District Court Ordinance, Cap. 336 which provides as follows: The Court shall have jurisdiction to make an order prohibiting a person from leaving Hong Kong (a prohibition order) to facilitate the enforcement, securing or pursuance of a judgment against that person for the payment of a specified sum of money; a judgment or order against that person for the payment of an amount to be assessed; or requiring him to deliver any property or perform any other act; or

- (c) a civil claim (other than a judgment) for the payment of money or damages; or for the delivery of any property or the performance of any other act. The Court shall not make an order under subsection (1)(b) unless it is satisfied that there is probable cause for believing that the person against whom the order is sought is about to leave Hong Kong; and by reason of (a), satisfaction of the judgment or order is likely to be obstructed or delayed. The Court shall not make an order under subsection (1)(c) unless it is satisfied that there is probable cause for believing that there is a good cause of action; the person against whom the order is sought incurred the alleged liability, which is the subject of the claim, in Hong Kong while he was present in Hong Kong; or carries on business in Hong Kong; or is ordinarily resident in Hong Kong; that person is about to leave Hong Kong; and by reason of paragraph (c), any judgment that may be given against that person is likely to be obstructed or delayed.
- (a) The Court may, on application, discharge a prohibition order, either absolutely or subject to such conditions as the Court thinks fit. The Court may make a prohibition order subject to such conditions as it thinks fit, including the condition that the order shall have no effect if the judgment debtor or person against whom the claim is made satisfies the judgment or the claim or provides such security as the Court may order.

- (a) An order under subsection (1) shall lapse on the expiry of one month but the Court may, on the application of the judgment creditor or claimant, extend or renew the order for a period which does not exceed, with the initial period of one month and any other period of extension or renewal, 3 months; and on the service upon the Director of Immigration and the filing with the registrar of a notice by the judgment creditor or claimant advising that the order is no longer required.
- (b) The judgment creditor or claimant shall serve and file the notice mentioned in paragraph (a) (ii) as soon as reasonably possible after the order is no longer required. A copy of an order under subsection (1) and any other order ancillary thereto shall be served on the Director of Immigration, the Commissioner of Police and, if he can be found, the judgment debtor or person against whom the claim is made. As for the exercise of the jurisdiction to make or discharge a prohibition order, it is a matter of discretion, of which HH Judge To, as he then was, had these to say in *Yue Wah Chuk Richard & Anor v Mckeon Bredan Hugh* (unreported), DCCJ 7088/2003, 24 August 2004 at paragraph 45: The exercise of that jurisdiction is a matter of discretion: see Order 44A rule 3(1) of the Rules of the District Court. As with the exercise of any discretion, the Court must be guided by legal principles. Two principles which apply to all exercises of judicial discretion are, firstly, that the Court will not act arbitrarily and, secondly, that the court will not exercise its discretion in vain. The purpose of section 52E is not to punish a judgment debtor for having attracted a judgment debt but to facilitate satisfaction of the judgment. Where judgment for a sum certain has been obtained, the Court is not prohibited from making the order if the judgment debtor is not about to leave Hong Kong. But the Court will not exercise that discretion arbitrarily or unnecessarily. Thus before the discretion is exercised, the Court will consider three questions: (1) whether there is a real likelihood that the judgment debtor will leave Hong Kong; (2) whether there is a real risk that he will not return for a substantial period of time and (3) whether as a result of his absence enforcement of the judgment would be obstructed or delayed. This statement of the Learned Judge has since been endorsed as the proper approach to exercising the Court's discretion in relation to the making of prohibition orders: see *Questnet Limited v Kurt Georg Rocco Rinck & Anor* (unreported), HCA 1475/2006, 22 February 2008. With these principles in mind, I shall now consider the Husband's grounds for the discharge of the Prohibition Order in the same order as in Mr Yim's Skeleton Submission. Prohibition Order Should Not Be Granted When Husband Was Already Out Of Jurisdiction Mr Yim submits that at the time when the application was initially made and subsequently extended for the first time, the Husband was already out of jurisdiction, of which the Wife was well aware, as evidenced by her 16th Affirmation filed on 3rd February 2016 when she stated in paragraph 11[B/49]: On 29th January 2016 (Friday), the Respondent did not show up as promised to pick up the children. After the weekend access, I was informed by the children that their father was not there for the whole of the weekend staying access. In view of that, I know that the Respondent has not come back to Hong Kong in the last weekend and has remained in Wuhan. Mr Yim therefore argues that since the law requires the Court to consider, inter alia, whether there is a real likelihood that the

judgment debtor will leave Hong Kong before the discretion to grant a prohibition order can be exercised, it therefore presupposes that the judgment debtor must be within Hong Kong at the time when the application for prohibition order is made, as otherwise there is no point requiring the Court to consider whether a person will leave Hong Kong if he/she has already done so. Since the Husband was already out of Hong Kong at the time when the Wife applied for the prohibition and when it was extended, Mr Yim submits that the Prohibition Order should not have been made and hence should now be discharged for wants of jurisdiction. Ms Yip for the Wife however argues that this jurisdictional challenge of the Husband is absolutely unfounded, as section 52E(1) clearly differentiates 3 categories of cases from (a) to (c) as noted above, the present case with the maintenance pending suit order for the Wife and children clearly falls within (a), i.e. post-judgment with a definite sum, and unlike the other 2 categories which impose a mandatory statutory requirement that the person against whom the prohibition order is sought is about to leave Hong Kong, there is no such requirement for the first category of cases which is the present case, as it was said in the Yue Wah Chuk case at paragraph 43: The section distinguishes between three categories of cases: a judgment for a specific sum of money, judgment on liability to be assessed or an order requiring certain acts to be performed and a civil claim other than a judgment. The limitation applicable to the second category of cases (i.e. sub-paragraph (1)(b)) is equally applicable to the third category but not to the first. For myself, I cannot see any justification for differential treatment between But that is the law on the statute book. Ms Yip therefore submits, for the first category of cases, i.e. post-judgment with a definite sum, of which the present is one, the exercise of the jurisdiction is entirely a matter of the Court's discretion, as the Learned Judge stated in Yue Wah Chuk at paragraph 45 above that the Court is not prohibited from making the order if the judgment debtor is not about to leave Hong Kong. It follows, Ms Yip submits, the requirement that there is a real likelihood that the judgment debtor will leave Hong Kong only comes under the consideration of the Court when exercising its discretion. As set out above, it is plain that whole purpose of the prohibition order is to facilitate the enforcement of the judgment properly obtained by the applicant, and hence when the application was made, if the judgment debtor was already out of Hong Kong for the entire period of the prohibition order, its purpose will inevitably be rendered nil and pointless, and will fall away by itself without the need to take any further action in respect of that order, hence I do not believe that it was the intention of the legislation to require the applicant to ensure that the judgment debtor must be in Hong Kong when making the application, as even in cases like the present one when the parties were former spouses may no longer have any access to information of each other's whereabouts and movement after the breakdown of their relationship, let alone those who may be wholly unrelated or were total strangers but for the legal issue between them, and at this day and age in Hong Kong where people can come and go on numerous occasions within the same day, it would simply be wholly impractical and too onerous a duty to be imposed on a person entitled to enforce a judgment properly obtained from the court. In my view what the applicant is required to do is to show on balance of probability and with good reason that there is a real likelihood that the judgment debtor will leave Hong Kong and not

return to Hong Kong for a substantial period, and as a result enforcement of the judgment would be obstructed or delayed. In the present case there is no dispute that the Husband spends substantial periods of time in PRC and there is no fixed pattern or practice on his part when he will enter or leave Hong Kong, and according to the Wife the only means for her to learn about his presence in Hong Kong is simply by anticipation of his exercising his weekly access to the children who would normally be brought to the former matrimonial home where the paternal grandmother resides for that purpose, and the evidence is that there have been occasions when the Husband did not return to Hong Kong at all for his access, of which the Wife would only learn about afterwards from the children. In the circumstances it was in my view simply impossible for her to ensure the Husband's presence in Hong Kong before making her application even if there was such a statutory requirement for her to do so, and which I have already found as above not to exist. No Real Risk of Husband Not Returning to Hong Kong Mr Yim submits for the Husband that it is clear from the authorities that the applicant for a prohibition order must be able to show upon cogent evidence that the alleged debtor will not return for a substantial period of time, but in the present case the Wife's evidence shows the opposite when she clearly stated in her 15th Affirmation that the Husband comes back to Hong Kong about once every 2 weeks, or even less, to have access to the children. As a matter of fact, Mr Yim argues, the Husband has been attending personally on the weekend access to the children save for only 3 occasions, hence the Wife's suggestion that he will not return to Hong Kong once he became aware of the enforcement proceedings against him is purely groundless speculation, as the Husband did come back to Hong Kong voluntarily on 15th February 2016 to exercise his access to the children despite knowing that the Wife had earlier already issued a judgment summons against him. Ms Yip on the other hand submits that the Husband's reliance upon the fact that he did come back to Hong Kong voluntarily on that day is pointless, as he well knew that the hearing of the judgment summons was only scheduled some 3 months away in May 2016 and hence there would be no consequence for him entering Hong Kong on that occasion, but there is clearly a real risk that he would not attend that hearing in May 2016 due to his high-handed handling of the case and his cruel attitude towards the Wife and the children as follows: Since the maintenance pending suit judgment, he had not only failed to pay the outstanding maintenance as ordered, he even failed to cause the derisory sum of HK\$35,000 to be paid on time each month; He even turned down the Wife's most reasonable proposal made in August 2015 that she and the children be allowed to move back to the former matrimonial home to enable her to save more than HK\$20,000 per month on renting her service apartment; His delaying tactics with his payments to the Wife for the sole purpose of putting pressure on her by exhausting all her means for legal representation in these proceedings including the trial of the preliminary issue in August 2016 all point to a real risk that he would be absent from Hong Kong so as to avoid the hearing of the judgment summons and to pay the maintenance pending suit and costs contribution to her which would render her without any legal representation at the trial of the preliminary issue; He has very limited connection with Hong Kong, as his family lives in Wuhan, as does his girlfriend, and so is his and his father's business, and as founded by this Court at the earlier

custody trial, he spent limited time only in Hong Kong; The only reason that he has given that there would be no risk of him not returning to Hong Kong is his weekly access to the children, but the evidence reveal that he had skipped such access in the past, while that his persistent refusal to pay the maintenance pending suit to meet the children s urgent needs just go to show how actually little they mean to him. For all these reasons, Ms Yip submits, the Court must be able to see through the Husband s tactic, i.e. by staying outside Hong Kong, he is beyond the reach of the jurisdiction and can as a result delay, defer and deny making any payments to the Wife and the children. As noted above in my maintenance pending suit judgment I found that the Husband had made various attempts to mislead the court of his financial means and that the Wife had good cause to suspect that his whole family had ganged up with him in these proceedings. Up to this date the Husband has yet to produce any further evidence to demonstrate that this court had unfairly or wrongly judged him as to his financial ability to pay the said maintenance pending suit or to throw any doubt thereon since that hearing, yet notwithstanding his alleged financial cut-off by his family, he has been able to somehow have all his own needs and expenses met without any difficulty, including incurring further legal costs in these proceedings to the tune of HK\$500,000 and by placing some HK\$400,000 on account with his solicitors while continuing to flout the said maintenance order. No doubt he would have been properly advised and is well aware that at the forthcoming judgment summons he will be subjected to serious examination under oath as to his means and may have to show cause why an order of commitment should not be made against him in the event of being found to have the means to pay the maintenance pending suit order: r 87(5)(c) of Matrimonial Causes Rules, Cap 179. In the premises the Wife has every reason to fear that he would not want to face those consequences and hence a real risk of him not returning to Hong Kong should he be allowed to leave. Failure to Show Enforcement Will Be Impeded In Husband s Absence For this ground Mr Yim submits that as the law requires an applicant for prohibition order to show that as a result of the intended absence of the judgment debtor, enforcement of the judgment will be impeded in order to justify such an draconian order which has the effect of restricting the freedom of a person guaranteed by the Basic Law. However, Mr Yim submits, the fact that the outstanding sum under the maintenance pending suit judgment sought to be enforced is only about HK\$1.4 million whereas according to the Wife s case the Husband has beneficial interest in, amongst other assets, the former matrimonial home worth more than HK\$35 million will in fact facilitate rather than impede her enforcement of the judgment, hence there is simply no justification for her to apply for the prohibition order in the first place or at all. On this point Mr Yim relies on the case of Munich Industrial Holding Ltd v Cheung Fai Ming T/A Hing Yip Industrial Co., HCA 7288 of 1996, 16 September 1996 (unrep.) where Keith J held at I share Master Jones view that the prohibition order should be discharged. The debt was not a particularly large one, and care should be taken to ensure that the drastic remedy of preventing a defendant from leaving Hong Kong should not be disproportionate to what it is intended to achieve. That, I think, is what Master Jones had in mind when he described the remedy as a stringent one. Moreover, the Defendant claimed that he has business interests in China. Indeed, he told Master Jones on 30th August that in

order to pay his debt to the Plaintiff he had to leave Hong Kong. There is no reason to doubt that. In those circumstances, to maintain the prohibition on the Defendant's departure from Hong Kong would only serve to make it more difficult to pay off the judgment debt. As Master Jones said, a prohibition order is justifiable only if it is efficacious. Likewise in *Shum Hing Wong T/A Ngan Bo Finance Co v Cheng Chung Ching*, DCCJ 16608/2000, 6 October 2003 (unrep), Mr Yim submits that it was also held by Master Yu at 27: The fact that the Defendant travel to and fro between Hong Kong and PRC could at the highest be interpreted as making execution more difficult for the Plaintiff (per Madam Justice Bokary in *AVCO Financial Services (Asia) Ltd v Topma Electronic Ltd & Ors.* [1999] 4 HKC 193, 195). There is no evidence from the Plaintiff that the enforcement of the judgment would be impeded in some significant way. Ms Yip on the other hand argues that the Husband's absence from Hong Kong would of course be of great significance to the Wife as it would directly lead to her inability to use the judgment summons procedure to compel payment which can be said to have been calculated to obstruct and delay the enforcement of the judgment, as it was so stated in *Mujani v Bank of India* [1989] 2 HKC 80 at 92G, and that apart from the judgment summons, there is no other meaningful enforcement measure against the Husband, given that he has no asset within the jurisdiction apart from the former matrimonial home. However, it is clear that the ownership of that property is under dispute and is the subject of the trial of the preliminary issue in August 2016, of which the Husband has insisted to have no beneficial interest as he is merely holding the property on trust for his father which is wholly aligned with the latter's case, thus rendering that property not readily available to be realised to fulfil the judgment at all, or at least not in the event of his absence from the judgment summons until the conclusion of the trial of the preliminary issue and only if it ends in favour of the Wife, a situation certainly falling well within those regarded as obstructed or delayed in the enforcement of judgment as laid down in the *Yue Wah Chuk's* case. Failure To Serve Prohibition Order Immediately As prohibition orders are normally granted on ex parte basis, and given its draconian nature, Mr Yim submits that the applicant for such an order is under a statutory duty to serve the same immediately, as held by the Court of Appeal in *Auto Treasure Ltd (t/a Albert Jewellery Creation) v Pyramid International (a firm) & Others*, CACV 24 of 1992, 22 May 1992 (unrep) when Kaplan J stated at p 6: A plaintiff who obtains a prohibition order is in my judgment under a duty to take reasonable step to serve it immediately. If he decides for whatever reason, that he does not wish to serve it immediately then he is under obligation to return to the ex-parte judge and inform him and explain why service is not to be effected immediately. This will entail giving the judge further information as to what has happened since he made the order and will assist him in deciding whether he is of the opinion that the order should stand or be discharged. The notion of a plaintiff keeping such a drastic order of this nature up his sleeve for some four days is quite unacceptable. In the present case, Mr Yim submits, the Wife for some reasons best known to her chose not to serve the Prohibition Order of 15th January 2016 and extended on 5th February 2016 until 19th February 2016. In other words, it was not served at all with the initial order, and only 14 days later with the extended order, of which he argues as wholly unacceptable. Similarly, Mr Yim submits, after the Wife obtained the order further

extended on 10th March 2016, again she chose not to serve it until 4 days later on 14th March 2016, and only after the Husband's solicitors specifically and repeatedly asked about it. Furthermore, Mr Yim argues, it must be borne in mind that whilst the Husband was out of Hong Kong, he had all along been legally represented by his solicitors on whom the order could be easily served as there is no requirement for it to be personally served, and as with any application made on ex parte basis, the Wife owed a duty to serve the order immediately on any affected party, and hence there can be no excuse on her part for not serving the order on the Husband but instead chose to conceal it from him. On this ground alone, Mr Yim submits that the Prohibition Order and the two subsequent ones should be discharged forthwith. Worse still, Mr Yim submits, the non-service of the Prohibition Order was never brought to the attention of the Court when the Wife applied for its extension on 5th February 2016, and not until her most recent affirmation of 7th March 2016 when she only briefly mentioned it in paragraph 5 without drawing any attention to the Court of such legal requirement as to service. Ms Yip however argues that the alleged non-service of the initial prohibition order does not reflect the merits of the existing prohibition order freshly imposed and extended nor the merits of the Husband's present discharge application, nor is there any non-disclosure as to the service of the initial prohibition order, as when the Wife applied for extension of the initial order, she clearly mentioned at paragraph 5 of her 16th Affirmation that she had not served the prohibition order or the judgment summons on the Husband. As for the alleged late service of the prohibition order extended by the Court on 10th March 2016 which was a Thursday, the Wife's solicitors did not receive the notice from the Court until the following Monday on 14th March 2016 when it was then sealed and served on the Husband right after, hence there was no deliberate delay on her part that can be criticised. On this point Ms Yip refers to the case of *Bunker Holdings Ltd v Asia Pacific Seafood Management Ltd & Ors* [2005] 2 HKC 62 where the person against whom the prohibition order was made could not be found, Deputy High Court Judge Saunders, as he then was, held that it may not be necessary to serve at all when he said:

19. The second basis on which discharge of the Order was sought was the non-service of the order. The Ordinance does not require personal service of the order and it would have been open to the sequestrators to have served the order by post. Miss Tong makes the point that if Mr Meerovitsch were absent from Hong Kong, and postal service was effected on his home, he may be informed of its existence and avoid returning to Hong Kong. There is merit in the argument, and the fact that the Ordinance requires service of the order only if the subject of the order can be found leads me to the view that if the subject cannot be found in Hong Kong there is no need to adopt some other form of service which might thereby warn him of the order and defeat its purpose.
20. Mr Chua argued that where a prohibition order is obtained Mr Meerovitsch was under a duty to take steps to serve it immediately. In support of the submission he relied upon dicta from Kaplan J in *Auto-Treasure Ltd (t/a Albert Jewellery Creation) v Pyramid International (a firm) & Ors* (CACV 24/1992, 22 May 1992, unreported) in the following terms: (see above) That is undoubtedly right, but it is a statement made in circumstances far removed from the

present case. In Auto-Treasure, Kaplan J was dealing with a situation where, after the order had been made, the applicant for the order held negotiations with the subject of the order. The applicant did not immediately effect service of the order, keeping it up his sleeve while he attempted to negotiate a resolution of the dispute. There was no suggestion that the subject could not be found. On failing to resolve the matter, he served the order. In an application by the subject to discharge the order, both the judge hearing the application and the Court of Appeal were concerned at this course of action. In the present case however a proper attempt to personally serve the order had been made immediately, and the sequestrators process server was told that it was not known when Mr Meerovitsch would return to Hong Kong. As soon as the sequestrators learned that Mr Meerovitsch had returned to Hong Kong and instructed solicitors they sought, through those solicitors, arrangements to effect service. Mr Meerovitsch did not disclose his whereabouts and refused to cooperate in service. In those circumstances, the sequestrators were not, as in Auto-Treasure, keeping the order up their sleeve, but had done all they could to effect personal service.

22. It can hardly lie in the mouth of Mr Meerovitsch to seek to discharge an order for want of service in these circumstances. It is not acceptable to argue that service has not been effected when a person travels widely out of Hong Kong and then declines to instruct solicitors to accept service on his behalf, and conceals that fact from the court. I accept now, that after I raised this matter in the course of the hearing on 13 August 2004, Mr Meerovitsch, no doubt following sensible advice from counsel, has given instructions to his solicitors, and service of both the Order and the notice of motion for committal have now been effected by service on the solicitors.
23. Four factors lead one to conclude that the fact that the order was not served personally immediately following it being made, is not a basis upon which I should discharge the Order. They are, first the absence of Mr Meerovitsch from Hong Kong, second, the lack of knowledge on the part of the sequestrators as to when he might return, third, Mr Meerovitsch's refusal to instruct solicitors to accept service on his behalf, and fourth, that as soon as they knew he was in Hong Kong, the sequestrators took immediate steps to effect service. Ms Yip submits that clearly the statement in Auto-Treasure should be read against the facts of each case, and that it does not set down a stubborn principle, rather it is a comment from the court unique to the facts in that case. Whereas in the present case, Ms Yip submits that: the Wife's solicitors obviously wanted to serve personally on the Husband of the prohibition order on 15th January 2016 upon the grant of the prohibition order when he was supposed to access the children but was absent, and was also absent on his next access until 15th February 2016 when he finally showed up for access that he could be served; as he does not normally reside in Hong Kong, it was therefore not possible for the Wife's solicitors to attempt personal service on him except during his access to the children on weekends; any service on his solicitors when the Husband was out of Hong Kong would defeat the purpose of the prohibition order; this is exactly the case when the Husband could not be found and thus any service on him was not required. I agree that the Wife had done

what was required of her to serve the order on the Husband as soon as practicable and reasonable under the circumstances. The Ordinance does not require personal service or that service be effected within any stipulated days or period, and what is practical or reasonable depend on the particular facts of each case, and the circumstances of the present case are certainly very much different from the case of Auto-Treasure Ltd where that statement of Kaplan J was made in a situation that the applicant withheld service during negotiation with the subject of the order. There is no evidence of that sort of situation or any other situation in the present case to suggest that the Wife was deliberately keeping the order up her sleeve other than to ensure that the Husband could be properly served while within the jurisdiction, which is the whole purpose of prohibition order. I agree with Ms Yip that one cannot emphasize enough that the exercise of the court's power whether or not to discharge a prohibition order is plainly and entirely a matter of discretion, and that unlike the general civil cases relied on by the Husband, and with no disrespect to the importance or value of the judgment sums which the applicants in those civil cases tried to enforce by means of prohibition order, as pointed out by Ms Yip, the judgment in the present case is a maintenance pending suit judgment which means life and death for the Wife and her children, as they had all along been wholly dependent on the Husband without any other resources and must rely on the judgment to obtain payment from him to pay for food, housing and daily needs and expenses, and the fact that it was for the period pending the conclusion of the proceedings has the clear implication that it is urgent, while the legal costs contribution is intended not only for the Wife to continue to have proper legal representation in these proceedings which have been mostly driven by the Husband in practically every step of the litigation, but also to maintain for her a level playing field in no doubt more serious and costly battles to come. There can be no argument that prohibition orders are draconian orders as they have the effect of restricting the freedom of movement of the person subject to the order from leaving Hong Kong, which is a freedom guaranteed by our Basic Law, but in the exercise of the court's discretion in balancing the restriction of that freedom of the Husband as against the Wife's right and entitlement to enforce a judgment which the Husband has not taken any steps to appeal or vary, as well as the paramount interests of the children to be properly maintained by their parents including a roof over their head and food on the table, the court should not be distracted by any superfluous arguments on technicalities. In the premises and for the reasons given above, I am satisfied that the restriction of the Husband's movement is necessary and proportionate, and I therefore decline to discharge the Prohibition Order on those grounds of the Husband. I shall now turn to consider whether it should be discharged on his proposed security or surety. . Husband's Proposed Security/Surety Since the initial hearing of his application on 17th March 2016, the Husband has provided a surety to satisfy paragraph 2(ii) of the prohibition Order which states that the prohibition shall have no effect if the Husband makes payment of a total sum of HK\$1,438,331 as security or provides bail in that sum by a surety or sureties . It comes in the form of an undertaking by a Mr Y set out in his affirmation filed on 21st March 2016. He is the father-in-law of the Husband's sister and is in essence offering to pay the sum of HK\$1,438,331 as specified in that Prohibition Order to

court within 21 days when called upon by the court to do so, and to be forfeited by the court for use as the court may direct in the event of the Husband failing to return to Hong Kong when called upon by the court to do so but his surety is limited only up to 9th May 2016 which is the date of the judgment summons. In his affirmation Mr Y however gave no details of his occupation or financial means save for his interests as joint tenants with his wife in 2 properties in Hong Kong with copies of their land search record attached and his estimated value of HK\$30 million for each. This is not acceptable to the Wife as she is concerned about the time and costs involved in the realization process of the surety given the limited information on Mr Y and the fact that those 2 properties are co-owned by his wife and may be affected by hidden encumbrances. In all she does not believe that Mr Y is a sufficient or appropriate surety and should not be accepted by the court. For a person to be accepted by the court as appropriate surety he or she must of course first be properly screened essentially as to his/her financial ability to pay the judgment debt if and when called upon to do so. I agree that with the limited information provided by Mr Y of his means there is a risk that the Wife may have to put through unnecessary time and costs which she simply cannot afford. Above all, given the Husband's undoubted importance to his father's business and the wealth of his parents, I believe he is well capable of providing much better security or surety than Mr Y's undertaking for the discharge of the Prohibition Order. As such I find his proposed surety not acceptable in the premises. Which brings me back to the Husband's alleged urgent need to leave Hong Kong to attend certain business meeting in Wuhan, of which the Wife has criticised, rightly in my view, as flimsy, un-particularized and without justification. The Husband at the subsequent hearing further clarified that the meeting(s) was to be with PRC government officials in relation to certain proposal to introduce community medical and elderly services in Wuhan with no exact date fixed but definitely within March 2016. By now this point may well be moot but as already indicated to the Husband at the hearing, given the nature and purpose of the meeting as disclosed, I find the need of his attending such meeting is far outweighed by the necessity to ensure his attendance for the judgment summons and the risks of him not returning to Hong Kong after the meeting and the resultant obstruction and/or delay to the enforcement of the judgment.

Conclusion

In conclusion and for all the reasons discussed above, the Husband's Application to discharge the Prohibition Order is refused and dismissed, with costs to follow the event to the Wife to be taxed if not agreed and with certificate for counsel, which is an order nisi to be made absolute at the expiration of 14 days. At the hearing of his application I did indicate to the Husband that while his proposed surety through Mr Y was not acceptable to the Wife, and now also not by this court, there was nothing to prevent him from making further proposals with improved terms and conditions as security or surety for the discharge of the prohibition order, in particularly in view of his parents wealth and his purported importance to his father's business. I still stand by that view. Lastly, it remains my gratitude to counsel for both sides for their most valuable assistance

(as usual) rendered to this court throughout the hearing. (Bruno Chan) District Judge Ms Anita Yip SC and Ms Lily Yu instructed by M/S Chaine Chow and Barbara Hung for the Petitioner. Mr Eugene Yim instructed by M/S Wat & C 1udk 1udk hUD_ h&St he=Q he=Q he=Q he=Q he=Q gd-u gdS< he=Q he=Q he=Q he=Q h&St gd!u9 h<\d h<\d htcz h?#\$ hrFO h<\d he=Q he=Q he=Q h?#\$ h?#\$ h?#\$ htcz hJ?% hP0@ htcz h?#\$ hJ?% hP0@ h_8i hJ?% hJ?% h?<V h-_ h?<V hFAz hFAz hFAz h?<V h?<V h-_ xsxoxexsasasWs h\N# h\N# h\N# h\N# h ,Y h3m h3m h3m h3m h2F* hrfx hrfx hrfx hrfx hkig h 3] h 3] h 3] gd9eL gd C: gd C: gdkig qlhlc_c_c hkig hj2F hkig hkig h C: rnrnr h C: h+M~ h+M~ h+M~ h+M~ h+M~ hSbJ h9eL h9eL h C: h C: gd C: gd9eL hFxFW hDi5 hDi5 h9eL hu:[hu: [hL<^ hL<^ hX#& h:rb hFxFW hFxFW hx7~ hx7~ h C: h C: h C: h C: h C: k_k_k h C: h C: h C: h C: gdhEH h^dV h^dV h^dV h^dV hg.n hg.n hhEH hg.n hy" h C: h C: h^dV gd C: h C: h C: ymqmqmqmqm he=Q he=Q he=Q he=Q he=Q he=Q he=Q h C: &`#\$ he=Q he=Q he=Q V [Content\_Types].xml Iw}, \$yi} \_rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/ theme1.xml w toc'v )I`n 3Vq%`#q x}r :TZaG I u3 L+M2 e\O\* \$\*c? )6-r IqbJ#x ,AGm T[XF64 E)`# R>QD =(K& =al- 4vfa 0%M0 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"/> {Mk>X m[]W0R YaXDI R:Wc" m[]W {Mk> R:Wc & 6" CACV Judiciary English.dot Judiciary Microsoft Office Word Judiciary CACV Title Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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Prepared on 26 October 2026 · Esheria