

HONG KONG / JUDGMENT

H v. W**[2024] HKFC 135****COURT**

Family Court

DECIDED

5 July 2024

CASE / FILE NUMBER

FCMC8332/2017

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bjbj FCMC 8332 / 2017

**[2024] HKFC 135 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NUMBER 8332 OF 2017**

BETWEEN H Petitioner and W Respondent

Coram : Deputy District Judge S. Allison in Chambers (By Paper disposal) Date of Petitioner s
Written Submissions: 10 May 2024 Date of Petitioner s Written Submissions: 27 May 2024 Date of
Judgment: 5 July 2024

J U D G M E N T (Leave to appeal MPS order)

The Petitioner seeks leave to appeal against my judgment on maintenance pending suit and interim maintenance () handed down on 15 April 2024 (MPS judgment). The Petitioner filed his Summons for leave on 10 May 2024. I shall refer to the parties as Husband and Wife. Legal Principles Under section 63A(2) of the District Court Ordinance (Cap.336), no leave to appeal shall be granted unless the Court is satisfied that the intended appeal has reasonable prospect of success or that there is some other reason in the interests of justice that the appeal should be heard. The applicant for leave needs to show that he has an arguable case with reasonable chances of success on appeal. A reasonable prospect of success means an appeal with prospects that are more than fanciful but which do not need to be shown to be probable (SMSE v KL [2009] 4 HKLRD 125; KNM v HTF, HCMP 288/2011). In S v C [2021] HKCA 1372 (unreported, CAMP 243/2021, 21 September 2021) Hon G Lam JA affirmed the proper approach to be taken by the appellate court in considering an appeal against an MPS order: [6] it should be noted that the

determination of an application for MPS is an exercise with a high discretionary content. The proper approach of the appellate court in an appeal from an order for MPS is well established by the authorities, as summarised by Judge A Tse in *ALDL v FTFC*

[2020] HKFC 180 as follows: The granting of maintenance pending suit is a discretionary remedy. On appeal, the Court of Appeal will not exercise the discretion afresh. Instead, it will only interfere with the decision when the discretion was wrongly exercised, such as being contrary to the principle or the primary judge had wrongly taken into account irrelevant matters or ignored relevant matters [see *MWY v HWM HCMP 120/2017*, 16 May 2017; *WW v LLN*

[2019] HKCA 1278 17.]

6. In *CHWA v LNLAI* [2019] HKCA 1017 at 3.1, the Court of Appeal, in refusing leave to appeal, stressed the interim nature of [maintenance pending suit] which generally requires the Court to adopt a broad brush approach in deciding the amount to be awarded. It is also for a limited duration until the final resolution of the issue of financial relief of the parties. Inevitably there will be adjustment to the final order to be made in the event of overpayment or underpayment of [maintenance pending suit].
7. The threshold for appealing against an order for maintenance pending suit is a high one. The court is inclined to leave factual questions of expenses and income for determination at the ancillary relief hearing. The Court of appeal also stated that appeals against maintenance pending suit orders are rare and the powers of interference [of an appeal court] are strictly limited *K v K*

[2011] 1 HKC 66 at 1, 3; Hewitt, *Family Law and Practice in Hong Kong* (3rd ed. 2018), 6.076. [7] It is important to note that MPS is an interim measure, intended to be temporary, and subject to adjustments in the final orders to be made in the determination of ancillary relief. Overall fairness can be achieved at that point by giving credit and set off if there is found to have been any overpayment or underpayment in the interim. In other words, an order for MPS does not finally determine the rights and obligations of the parties, and since it involves simply the payment of money, its effects may in general be redressed by monetary relief at the end. This explains why in relation to MPS the courts take a broad view of the parties finances rather than engage in any detailed investigation, adopt a broad brush approach, and seek to arrive at rough and ready conclusions (see *Rayden and Jackson on Relationship Breakdown, Finances and Children* 11.78; *HJFG v KCY*

[2012] 1 HKLRD 95, 32-38). Appeals should be rare and the parties should be encouraged instead to focus on, and bring about as early as practicable, the final resolution of their dispute. As has been said in *Wong Kar Gee Mimi v Severn Villa Ltd*

[2012] 1 HKLRD 887 at 30 (albeit not specifically with regard to MPS), even if the threshold of reasonable prospects is met, the court may nonetheless in its discretion refuse leave to appeal in the interests of procedural economy and proportionality. For my part, I consider

that leave to appeal from MPS orders should generally not be granted unless there is some special reason why the matter cannot or should not be left to the ancillary relief stage such as serious hardship caused by the order to a party. I can see none here based on the admissible materials, and on this ground alone I would dismiss the application. (emphasis added)

Background

The history leading up to the MPS Judgment is set out at paragraphs 4 to 9 of the MPS Judgment. I will adopt the abbreviations used in the MPS Judgment. In brief, the MPS Judgment related to the Husband's downward variation Summons dated 3 March 2023. This Summons sought to vary the previous MPS Order dated 24 October 2018. Pursuant to the MPS Order, the Husband was to pay the Wife \$14,000 per month as maintenance pending suit plus interim maintenance of HK\$38,500 for B, the only child of the family. The MPS Order also included the Husband's undertakings to continue to pay B's school fees, B's ECAs up to a maximum of HK\$2,000 per month as well as the Wife's and B's medical / dental insurance. In his downward variation application, Husband wished to cease contributing 50% towards the Wife's general expenses. The Husband further wished to be discharged of his undertaking to pay the Wife's medical and dental insurance and he also wanted the Wife to contribute towards half of B's expenses. In the MPS Judgment, I made an order to vary MPS such that the Husband was to pay the Wife HK\$10,000 per month for MPS, and HK\$39,000 for B in interim maintenance. The variation was backdated to 1 September 2023 being one month after the Wife had commenced working. The Husband's undertakings to pay B's school fees, ECAs capped at HK\$2,000 per month as well as the costs of the Wife's and B's medical / dental insurance remained unchanged. Grounds of Appeal I have gleaned from the Husband's leave to appeal submissions that he advances the following grounds of appeal against the MPS Judgment, that I erred in: taking into account and assuming that the Husband could continue to borrow funds to meet the MPS Judgment. ordering the Husband to cover the Wife's shortfall of HK\$10,000 per month. In addition, I erred in ordering that the Husband to continue to pay for the Wife's dental / medical insurance. In doing so, I had failed to assess the Wife's personal expenses, even when the Husband himself did not challenge the Wife's personal expenses. not taking into account the presence of alternative financial resources available to the Wife, and that the MPS Judgment placed upon the Husband the sole responsibility of addressing the Wife's financial deficits and insurance costs. not adequately assessing the reasonableness of certain general expenses claimed by the Wife. Ground 1

11. This ground lacks merit and has no reasonable chance of success.
12. The Husband submits firstly, that I had assumed because he was only making minimum payments on his credit cards that he could borrow further.
13. I accepted the Husband's evidence regarding the repayment of his credit cards. This was stated in paragraph 30 of the MPS Judgment,

30. In terms of the Husband's ability to borrow, it is apparent from the credit card statements that the Husband's credit cards are not repaid in full every month. He has however, managed to negotiate with many of his creditors, changes in the repayment terms and interests due on his personal loans to the extent that the figures in Part 4.2 of the Husband's Form E relating to loan repayments and interest payments are not actual monthly expenditure made by the Husband. The fact that many of the Husband's loans are personal loans given by family or friends, with flexible repayment terms, leads me to believe that he does have the ability to borrow further to meet his maintenance obligations.
14. There was no subsequent conclusion drawn that because of the Husband could only make the minimum payments for the credit cards that he had the further ability to borrow.
15. Rather, it was the Husband's own evidence at the MPS hearing regarding his other loans that lead me to conclude he had the ability to borrow to meet his maintenance obligations. The Husband's evidence was that he obtained loans from his company to meet the MPS obligations. The Husband's evidence was that these loans are categorised as loans to directors in the company's audited accounts. These loans are personal loan given by the company to the Husband as a director. There was no evidence from the Husband at the MPS hearing that the company would no longer provide him with further loans to meet his ongoing maintenance payments. As such, it was perfectly reasonable for me to conclude that the Husband does have a continuing ability to borrow to meet maintenance obligations. Grounds 2, 3 and 4
16. I will consider these three Grounds together because they are concerned mostly with the reasonableness of the Wife's expenses and why the Husband is expected to continue contributing towards the Wife's expenses.
17. The Husband disputes (i) the Wife's rental expenses because he submits the Wife voluntarily upgraded but he was now being held responsible; (ii) the costs of the Wife's utilities and (iii) that the Wife's household expenses should be HK\$1,000 as opposed to HK\$3,000 in the MPS Judgment.
18. The Husband has raised the issue of the Wife's rental costs on various occasions. However, the Husband has failed to demonstrate in any way, that the Wife's current rental amount for her and B is unreasonable or excessive. As to the Husband's submission that I should have scrutinised more closely the definition of what is deemed reasonable and the threshold at which reasonable expenses necessitate verification, it is clear the detailed investigation which the Husband is seeking goes against the principle of assessing MPS and interim maintenance on a broadbrush basis.

19. The Husband submitted at the MPS hearing that he wished for the variation downwards to reflect a cessation of his 50% contribution towards the Wife's general expenses. In light of the Husband's stated position, it was reasonable for me on a broadbrush basis when analysing the reasonableness of the Wife's expenses going forward to confine myself in the main to analysing the Wife's general expenses.
20. This is particularly so, when I had taken into account the fact that the Wife had her own financial resources to meet her personal expenses and I had held that the Wife would be responsible for some of B's personal expenses, amounting to HK\$9,000 per month. Given the Wife's income of HK\$66,000, I found that the Wife's contribution towards her own general expenses, personal expenses and B's expenses to be fair and proportionate in the circumstances.
21. In assessing on a broadbrush basis what the reasonable amount of MPS and interim maintenance should be, I took into account not just that the Wife had financial resources, but also the difference in the parties' earning capacities and that the Husband has significantly greater earning capacity than the Wife.
22. Furthermore, in addition to his ability to borrow, I observed at paragraph 31 of the MPS Judgment, the Husband could make adjustments to his expenditure. Therefore, it was well within the exercise of my discretion in the MPS Judgment to find that the Husband's contribution towards the Wife's general expenses of HK\$10,000 to be fair and proportionate in the circumstances.
23. Additionally, in respect of B's expenses, he seeks to challenge (i) the amount of B's school bus and general transport fees and asks for a HK\$400 reduction in this item (ii) the sum of \$2,500 per month for B's clothing as excessive and (iii) HK\$1,000 for the excess of medical and dental is disputed by the Husband.
24. There is nothing in the Husband's leave application which shows that I have erred in the exercise of my discretion. I stand by the calculations for B's expense which is set out in paragraph 46 of the MPS Judgment. I note that the MPS Judgment has varied B's maintenance upwards by HK\$500 since the time of the first MPS Order of 24 October 2018. This variation is, therefore, not unreasonable given all of the circumstances of this case.
25. As for upholding the Husband's original undertaking to meet the Wife's dental and medical insurance costs, it was the Husband's evidence at the MPS hearing that he spends the sum of HK\$10,400 every month for the Wife's and B's dental and medical insurance. I accepted the Wife's evidence that her employment only provided the most basis of medical insurance, and that she could not afford to purchase her own medical insurance in the meantime. Given that the payment of medical and dental insurance has always been provided by the Husband during the course of the marriage, and he continued to do so following the parties' separation, it was reasonable for me to conclude on a broadbrush basis that the Husband should continue to pay for both the Wife's and B's medical and dental insurance on an ongoing interim basis. The Husband is at liberty to dispute any overpayment on this item at

the ancillary relief stage should he think it appropriate to do so.

26. Accordingly, I am not satisfied that Grounds 2, 3 and 4 have a reasonable prospect of success.

Conclusion

27. For the above reasons, I find that all the grounds of the Husband leave to appeal lack merit and have no reasonable ground of success. There being no other reasons in the interest of justice that leave should be granted, I refuse to grant leave to appeal and dismiss his Summons for leave dated 10 May 2024 accordingly.
28. Finally, I wish to note, that the Husband set out in his draft notice of appeal three complaints that firstly, I had pre-judged him due to his family's wealth, secondly, that during the MPS hearing, I had suggested the Husband pay to the Wife more and thirdly, I had accused him several times of financially pressuring the Wife. I totally reject these complaints / submissions by the Husband. These matters were never raised or discussed during the MPS variation hearing before me and I find that the Husband's submissions on these points to be unjustified. Costs
29. The cost of this leave to appeal application shall follow the event in the normal way. The Husband shall pay the Wife the costs of and arising out of his Leave to Appeal application. (Sasha ALLISON) Deputy District Judge The Petitioner (father) acting in person The Respondent (mother) acting in person See paragraph 2 of the MPS Judgment See paragraphs 35 and 47 of the MPS Judgment respectively. See paragraphs 24 and 27 of the MPS Judgment. 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 hXt4 h"un h"un hXt4 hXt4 gd"un gd"un gd"un gd"un gd"un gd"un gd"un gd"un gd"un h"un h"un h"un h"un h"un h"un h"un h"un h"un yXyP hE2X hE2X hE2X hE2X hE2X gd ! gd^/ gdE2X gdE2X hE2X hE2X hE2X hE2X hE2X hE2X hE2X hE2X hE2X gd{F gd,, gdSw gd,, gdP`P gd,4 gd{F gd{F oyoe hP`P gdgP gde' hP`P h)EF hqRm hTX} hP`P vrj_UQI vmdvmdv &`#\$ [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"/>R+ CB+ *FX4 #}:y| ! yp(0 T2uT ydgv *FX4 CB+ %282+ hZK" @6g g<Ap & 6" CACV Judiciary English.dot Windows User Microsoft Office Word Judiciary CACV CACV Title <?xml version="1.0" encoding="UTF-8" standalone="no"?><b:Sources xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http://

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