

HONG KONG / JUDGMENT

HTL v. CWWM also known as CW

[2018] HKFC 56

COURT

Family Court

DECIDED

23 April 2018

CASE / FILE NUMBER

FCMC2445/2016

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FCMC 2445/2016

[2018] HKFC 56

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES

NUMBER 2445 OF 2016

BETWEEN

HTL

Petitioner

and

CWWM also known as CW

Respondent

Coram : Deputy District Judge D. Cheung in Chambers (not open to public)

Date of hearing : 26th March 2018

Date of handing down Ruling : 23rd April 2018

RULING ON COSTS

Introduction

This is the hearing of the Petitioner wife's (hereinafter called "W") application for summary assessment of costs of interlocutory applications under O.62, r.9A of the Rules of the District Court (Cap.336H) against the Respondent husband (hereinafter called "H").

W seeks to claim for costs in the total sum of HK\$78,125.00 in respect of the interlocutory applications for :

The Ex-parte Prohibition Order dated 18th October 2017;

The Extension of Prohibition Order dated 16th November 2017;

The Extension of Prohibition Order dated 13th December 2017; and

The Prohibition Order dated 23rd January 2018 (collectively called "the Prohibition order").

Background

W, 43, is a part time Yoga instructor. H, 41, is currently unemployed. The parties were married in April 2010 and they have two children, namely a boy born on 28th November 2012 (hereinafter called "the son") and a girl born on 2nd March 2014 (hereinafter called "the daughter").

The said children are at present living with W in Hong Kong. The divorce petition was issued by W on 7th March 2016 on the grounds that H has behaved in such a way that W cannot reasonably be expected to live with him.

By the divorce petition, W prayed for the custody of the said children, an order for maintenance pending suit (hereinafter called "MPS"), a periodical payments; a secured periodical payments; a lump sum payment order; settlement or transfer of property namely the matrimonial home, variation of a settlement; and cost.

The decree nisi was granted on 4th October 2016.

A consent order dated 21st March 2016 was made and ordered that H shall pay W MPS for the total sum of HK\$24,000 of which HK\$15,500 shall be used for monthly mortgage repayments, and also MPS which should be interim order in the sum of HK\$7,000 for each child until the date of the decree absolute or further order and together with undertaking imposed on H to pay monthly mortgage repayments of the matrimonial home (hereinafter called "the Consent Order").

By consent, an order dated 16th March 2017 was also made and ordered that H and W shall have the joint custody of the children with sole care and control of the children be granted to W and defined access be granted to H.

Parties had also exchanged their Form E and both parties were legally represented until 14th September 2017, when H elected to act in person.

Prior to H became legally unrepresented, an order by consent was made on 21st August 2017 that the 1st appointment be adjourned to a date not before 22nd October 2017 for the parties to negotiate for settlement on ancillary matters, and the 1st appointment was adjourned to 26th January 2018 as a result.

On 3rd October 2017, W pursuant to Order 44A Rule 2 of the Rules of District Court and s 28 of the Matrimonial Proceedings and Property Ordinance and r2A, 3C and 13 of the Attachment of Income Order Rules made an ex parte application to the Family Court for an order that :

an Attachment of Income Order in respect of H's salary from his employer;

an order that H is prohibited from leaving Hong Kong.

In support of the said application, W filed her 2nd Affirmation on 3rd October 2017, and an order to prohibit H from leaving Hong Kong was granted and shall lapse after the expiry of one month.

As to the application for attachment of Income Order in respect of H, W did not proceed any further after the court had raised some requisitions to her for her to deal with.

On 26th January 2018, both W and H attended the hearing for 1st appointment and H asked for the uplift of the Prohibition order dated 23rd January 2018. W asked for costs of the Prohibition order which was contested by H.

Legal principles on costs of interlocutory applications

The court has a wide discretion as to costs. The relevant provisions in the Rules of the District Court governing the exercise of discretion as to costs of interlocutory applications are Order 62rr. 3(2A) & 5 that contain amendments introduced as a result of the Civil Justice Reform ("CJR")

The effect of Order 62 r.3(2A) was as explained in *Melvin Waxman & Another v. Li Fei Yu & Another* [2013] 6 HKC 424 that the "rule" that costs normally follow the event is no longer the usual order in an interlocutory application, but remains an option.

In considering the appropriate order the court must have regard to the underlying objectives of CJR: Order 62 r.5 (10(aa)). One of these objectives is the discouragement of unnecessary or unmeritorious applications : see White Book at 62/3/3B.

When dealing with costs orders, under 62 r.5(1)(e) the court may take into account the conduct of the parties. Rule 5(2) provides that conduct for this purpose includes (a) whether it is reasonable for a party to raise, pursue or contest a particular allegation or issue; (b) the manner in which a party has pursued or defended his case or a particular allegation or issue; (c) whether a claimant who has succeeded in his claim, in whole or in part, exaggerates his claim; and (d) conduct before, as well as during, the proceedings.

Under Order 62 r.5(1)(f), the court may take into account whether a party has succeeded on part of his case, even if he has not been wholly successful.

Discussion

The District Court's jurisdiction to make a prohibition order is provided by s.52E of the District Court Ordinance Cap.336 (herein after called "DCO"). Under subsection 1, the District Court shall have jurisdiction to make a prohibition order to facilitate the enforcement, securing or pursuance of (a) a judgment against that person for the payment of a specified sum of money; (b) a judgment or order against that person (i) 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) (i) for the payment of money or damages; or (ii) for the delivery of any property or the performance or any other act.

W had pursued her application on the basis that by reason of the matters referred to in paragraphs 8 to 27 in her 2nd Affirmation, she believed that there is a real risk that H will leave the jurisdiction to evade his responsibility under the Consent Order for the payment of MPS.

Ms. Yang who represented W during the hearing confirmed that W's application is made under subsection 1(b) & (c) of s.52E of DCO.

S.52E(2) of the DCO provides that the court shall not make an order under subsection 1(b) unless it is satisfied that there is probable cause for believing that : (a) the person against whom the order is sought is about to leave Hong Kong; and (b) by reason of paragraph (a), satisfaction of the judgment or order is likely to be obstructed or delayed.

S.52E(3) of the DCO provides that the court shall not make an order under subsection 1(c) unless it is satisfied that there is probable cause for believing that : (a) there is a good cause of action; (b) the person against whom the order is sought (i) 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; (c), an judgment that may be given against that person is likely to be obstructed or delayed.

Under both subsection 1(b) & (c) of s.52E of DCO, W is required to satisfy the court that there is probable cause for believing that H is about to leave Hong Kong.

In her 2nd Affirmation, W stated that on 1st September 2017, H defaulted on payment of MPF without giving any reasons. She had called H on his mobile phone in the morning of 4th September 2017 but H had turned his phone off.

W stated that she noticed that his profile picture was absent and her messages did not go through, meaning that H had blocked her on whatsapp. She called his office but could not reach him.

W also stated that she sent a group whatsapp to H's family in Vancouver and San Francisco, including his father, brother and sister to ask for their help to look for H, and tried to call them directly but they did not answer her calls or reply to her messages.

W further stated that she sent whatsapp messages and emails to three of H's aunt in Hong Kong, one uncle in Toronto and one uncle in Singapore, none of them replied to her.

On 8th September 2017, W also asked her sister to call H at his office and she was informed and verily believed that the receptionist informed her sister that H should be in the office but on other floors and would not answer calls without caller display.

W said that H also did not show up for his weekly access to the children.

W was later informed that H's solicitors had ceased to act for H and a Notice to Act in person by H dated 14th September 2017 was filed. She noted that H stated his address for service in Shaukeiwan, and this was the first time she became aware that his address was now in Shaukeiwan but she had no idea whether this was his actual residential address.

W relied on what H had told her and stated that H had many times expressed his dislike of Hong Kong and that he might leave for Canada. W further stated that H was educated abroad and held a Canadian passport, and his parents are in Canada and H had no roots in Hong Kong but for the family they had built in Hong Kong.

W also stated that H wanted to sell the matrimonial home and split the proceeds between them after repaying the outstanding mortgage and alleged loans from his parents.

At paragraph 27 of her 2nd Affirmation, she stated that it is apparent that H had without reasonable excuse failed to make any payment which he was required to make by MPS and there were reasonable grounds to believe that H will not make full and punctual payment in compliance with payment of MPS, and there is any income capable of being attached payable to H, and there is a real risk that H dissipate his assets including deliberately causing the foreclosure of the matrimonial home, and to leave the jurisdiction to evade his responsibility to pay MPS, she therefore prayed on an urgent basis to grant her ex parte application.

In Ms. Yang's submission, she stated that in *CY v WTW* (FCMC 15393/2014), the court held that the party making an ex-parte interlocutory application for prohibition order is required to satisfy the court that there is a probable cause for believing that the other party is about to leave Hong Kong for the ex-parte application to be meritorious.

Ms. Yang further submitted in her written submission that H had in effect absconded by leaving Hong Kong, avoiding all contact with W and even forfeiting his visiting rights to the said children and that prior to making the said interlocutory applications, W had exhausted all available means to contact H and his relatives.

Ms. Yang argued that the urgency and severity of the situation, especially in regards to the welfare of the said children, necessitated that said interlocutory applications.

My view is that based on what W had said in her affirmation, her belief that there was a real risk that H was about to leave Hong Kong was fanciful and speculative. While at the time of her ex-parte application, she believed that there was income payable to H which was capable of being attached and H was still working in Hong Kong, and the matrimonial home had not yet been sold by either party, I cannot see that there is evidence to support that H departure was imminent at the material time of her ex parte application.

W can only show that she was not able to reach H and H defaulted payment pursuant to the Consent Order but in order to satisfy the requirement that H is “about to leave Hong Kong”, there should be evidence to show that his departure should be imminent, although not necessarily permanent. The evidence adduced by W falls short of what is required (see White book at 44A/2/5).

The fact that H had left his employer since 1st September 2017 is neither here or there to support that H’s departure would be imminent. I would therefore regard that W’s ex-parte application by her 2nd Affirmation is unmeritorious.

H in his submission stated that he was currently living with his girlfriend in her apartment in Shenzhen, China because he cannot afford to rent a place in Hong Kong or live in Hong Kong, and have nowhere else to go.

H also stated that he did resign from his job and paid the full amount of the monthly mortgage payments until August 2017. H also stated that even if he was with the previous employer, his finances were already strained and he was not capable of continuing to pay pursuant to the Consent Order.

There is no dispute that H defaulted the payment and also not complying with the undertaking pursuant to the Consent Order. H did not inform W the reason why he failed to comply with the Consent Order and chose to avoid W.

I remind myself of the provisions of Order 62 rules 3(2A) and 5 of the Rules of the District Court and caution myself of the need to consider the overall justice of the situation and examine all the relevant factors and circumstance.

As the payment and the undertaking in the Consent Order related to interim measure and MPS which should be dealt with and disposed of in the trial of ancillary relief, and the purpose of taking out the said ex-parte application is to secure these interim order and MPS, I regard that it is reasonable and just to make that all costs of the ex-parte application and the subsequent extension order including all reserved costs to be costs in the cause of the ancillary relief, to be taxed if not agreed.

Accordingly, I will make the following order, namely the costs of the application of :

the Ex-parte Prohibition Order dated 18th October 2017;

the Extension of Prohibition Order dated 16th November 2017;

the Extension of Prohibition Order dated 13th December 2017;
the Prohibition Order dated 23rd January 2018; and
the hearing of argument on costs on 26th March 2018
including all reserved costs to be costs in the cause of the ancillary relief, to be taxed if not
agreed.

David C. W. Cheung

Deputy District Judge

Representation:

Ms. Elizabeth Yang of Messrs. Samuel L.C Yang & Co. for the Petitioner (W)

The Respondent (H) appeared in person

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