

HONG KONG / JUDGMENT

JWH v. TSM

[2023] HKCA 12

COURT

Court of Appeal

DECIDED

10 January 2023

CASE / FILE NUMBER

CAMP138/2022

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CAMP 138/2022

[2023] HKCA 12

in the high court of the

hong kong special administrative region

court of appeal

MISCELLANEOUS PROCEEDINGS no 138 of 2022

(on AN INTENDED APPEAL from FCMC NO 10176 of 2017)

BETWEEN

JWH

Petitioner

and

TSM

Respondent

Before: Hon Kwan VP and Cheung JA in Court

Dates of Written Submissions: 30 May 2022 and 6 September 2022

Date of Judgment: 10 January 2023

J U D G M E N T

Hon Kwan VP (giving the Judgment of the Court):

This is an application for leave to appeal out of time against an order made by Her Honour Judge Melloy on 27 July 2021 under the Domestic and Cohabitation Relationships Violence Ordinance, Cap 189 (“Injunction Judgment”). Leave to appeal against the Injunction Judgment was refused by the judge in a ruling handed down on 13 January 2022 (“Leave Decision”).

In this judgment, we will refer to the petitioner husband as “the husband” and the respondent wife as “the wife”. The present application is brought by the wife. Both are acting in person in this application.

The background

The relevant background matters may be related as follows.

The parties were married in 2007 and the husband filed a petition for divorce in 2017. A decree nisi was made on 22 August 2018. There is one child of the family, a girl named C (“C”), born in 2009.

By a consent order dated 6 November 2018, the parties were given joint custody and shared care and control of C. Each party was also granted staying access.

On 21 October 2019, the wife was arrested for an offence of assault against C on 3 October 2019. When C was in her care and custody, she hit C on both sides of the forehead with a remote control in a fit of anger. On 23 October 2020, she was convicted by a magistrate after a two-day trial in which C and the husband gave evidence and was sentenced to two months’ imprisonment suspended for 18 months.

On 1 June 2020, a consent order was made granting sole custody and sole care and control of C to the husband, while access to C was granted to the wife.

According to the husband, the wife has been relentlessly harassing and abusing him and C for some time, which led to the deterioration of C’s relationship with the wife and C has spent time with the wife on only a handful of occasions since the husband was granted sole custody, care and control. The parties live in separate dwellings on Cheung Chau Island. In breach of her undertakings to the court, the wife went to the husband’s home unannounced on quite a number of occasions and was arrested for property damage in one incident. She sent a total of 917 emails and 1463 WhatsApp messages to the husband between October 2018 and July 2019 and sent insulting and defamatory messages about him to C’s teachers. C’s school decided not to allow the wife to attend the school premises without prior consent or invitation from the school because of her violation of the Parent Code of Conduct.

On 18 November 2020, the husband filed an ex parte summons on notice for a non-molestation and exclusion order under Cap 189. The orders sought include prohibiting the wife from residing or being present on Cheung Chau Island and from travelling on the ferries that run to and from Cheung Chau, without the husband’s prior written consent and to be so prohibited for 24 months or until further order.

The application was heard by Judge Melloy on 20 November 2020. Both parties were represented by counsel. The judge made a standard non-molestation order, suspended all access between the wife and C pending further order, and made an order prohibiting the wife from entering a 200m radius of where the husband and C reside or within a 1 km radius of C's school on Hong Kong Island or the husband's office in Kowloon. As to the husband's application to prohibit the wife from residing and remaining on Cheung Chau and from travelling on the island's ferries, the judge decided to adjourn this for further argument, in light of the draconian nature of the orders sought.

The Injunction Judgment

The adjourned application was heard by Judge Melloy on 11 May 2021, with written closing submissions on 24 May 2021. Both parties appeared in person on that occasion and the judge had the opportunity of hearing from both in the witness box. The Injunction Judgment was handed down on 27 July 2021.

The judge expressed the view that she had a better understanding of the negative effect the wife's behaviour had and continued to have on both the husband and C, having heard from the husband in person giving an update of further incidences since the court order on 20 November 2020.

The judge referred to section 3(2) of Cap 189, which provides that in exercising the power to grant an injunction containing a provision mentioned in section 3(1), the District Court shall have regard to "the conduct of the parties, both in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any specified minor and to all the circumstances of the case."

The issue for the judge was whether the wife acted in a manner that would justify the making of the further injunction orders sought. She considered the wife's conduct and found the continued harassment in person and on line gave her "pause for thought" about the wife's state of mind. She expressed "considerable concern" in light of the findings of the government clinical psychologist in a report dated 6 May 2021. She considered the financial position of the parties (which was very tight) and the probable difficulty for the wife to find alternative accommodation outside Cheung Chau. She accepted that the situation was "close to untenable for C" and C should be allowed to enjoy her childhood without living in fear of her mother's unpredictable behaviour.

Notwithstanding all the difficulties identified above, the judge decided to give a last chance to the wife before banning her from Cheung Chau, given the very draconian nature of the relief sought. She considered the best way forward was to adjourn the application for those further orders sine die with liberty to restore on an urgent basis. She impressed on the wife that the court would have no hesitation of granting the relief unless the wife complies strictly with the court's order, including the suspension of access to C and that the wife should stay away from the husband and C even if they are in a public place. The judge also amended the earlier order of 20 November 2020 to include six further addresses that the wife would be prohibited from entering or remaining within a 1 km radius. The judge further directed that the wife should immediately

attend a programme approved by the Director of Social Welfare aimed at changing the attitude and behaviour that led to the granting and continuation of the injunction order.

The order made by the judge on 20 November 2020 as varied on 27 July 2021 was for 24 months and has expired on 19 November 2022, unless extended by the Family Court.

The Leave Decision

Under section 63A of the District Court Ordinance, Cap 336, leave to appeal will only be granted if the applicant satisfies the court that the intended appeal has a reasonable prospect of success, or there is some other reason in the interest of justice that the appeal should be heard.

On 6 August 2021, the wife applied for leave to appeal against the Injunction Judgment. As this was not in the proper format, Judge  Melloy gave leave to the wife to withdraw her original summons and file a proper application, which the wife did on 18 October 2021. This was considered by the judge on paper on the basis of the new summons, the draft grounds of appeal and written submissions. The husband was represented by counsel and the wife acted in person.

The judge noted that the wife produced pages and pages of documentation without seeking permission to adduce further evidence on appeal in compliance with the established principles in *Ladd v Marshall* [1954] 1 WLR 1489. She did not grant leave to the wife to produce new evidence and ignored such evidence for the purpose of the leave application.

Having considered the draft grounds of appeal, the judge decided that none of the grounds appear to have a reasonable prospect of success on appeal, nor is there any other reason in the interests of justice why the intended appeal should be heard. The judge therefore dismissed the application by the Leave Decision handed down on 13 January 2022 and ordered the wife to pay the husband's costs of this application, assessed summarily at \$35,000, to be paid by her following the handing down of the judgment on ancillary relief.

The present application

Pursuant to Order 59 rule 2B(3) of the Rules of the High Court, Cap 4A, a renewed application to the Court of Appeal for leave to appeal should be made within 14 days from the date of the refusal of leave by the judge.

The wife did not file her renewed application within 14 days of 13 January 2022. She issued the present summons on 4 May 2022 and was substantially out of time. Her explanation for the delay was as follows.

She claimed that she did not know she has the right to apply to the Court of Appeal for leave to appeal and only found out when she was informed by Deputy District Judge Peter Barnes at a hearing on a separate matter on 4 March 2022. She then made inquiry with the High  Court Registry and was asked to contact the office of Legal Advice Scheme for Unrepresented Litigants. The Registry was closed from 8  March 2022 due to the pandemic. After the General Adjourned Period expired, she went to the Family Court to seek advice on procedure on 20  April 2022.

Eventually, she filed a summons on 4 May 2022 for leave to appeal against the Leave Decision.

In light of the decision of *Tang Chai On v Tang Sing Ki* [2016] 5 HKLRD 104 at §§3 to 8, we shall treat this summons as a renewed application for leave to appeal out of time against the Injunction Judgment of 27 July 2021.

Both parties are acting in person in the present application.

On 30 May 2022, the wife filed her amended affidavit to explain her delay, and lodged an amended written statement in support of her application with amended draft grounds of appeal. She also lodged three bundles as the application bundles.

As in the application for leave to appeal before Judge Melloy, the wife sought to produce further documents without permission and without complying with the *Ladd v Marshall* principles. We decline to consider the further documents not placed before the judge at the hearings in November 2020 and May 2021.

The husband was outside Hong Kong with C for the most part of summer and obtained leave to file an affidavit in opposition out of time. He did so on 6 September 2022 and also lodged a statement in opposition the same day.

Having considered the papers and submissions of the parties, we think it is appropriate to determine the present summons on paper without an oral hearing, pursuant to our power under Order 59 rule 2A(5)(a) of the Rules of the High Court.

The grounds of appeal

The grounds stated in the amended draft grounds of appeal are substantially different from the grounds submitted by the wife to Judge Melloy. They may be summarised as follows:

The wife brought up the issue concerning the husband's violation of court order by stopping C from coming back to the wife but the judge did not address the issue in court. The judge also did not reprimand the husband's violation of the court order in interfering with the wife's access to C. (Ground 1)

The husband lied under oath by making unfair accusations of stalking and harassment. However, the judge "played favourites". She judged the wife based on her poor presentation and decided that the wife is a perpetrator. (Ground 2)

The judge wrote in the Leave Decision that all access was suspended on 2 November 2020 but the judge actually suspended access on 20 November 2020. (Ground 3)

In saying that the wife attempted to muddy the waters by producing pages of documentation, the judge did not consider the fact that the husband was legally represented while the wife acted in person, having run out of funds and has no legal experience. (Ground 4)

Similar grounds concerning the husband's lies and violation of court order were raised in the previous leave application made to the judge.

The delay

In considering whether to extend time for leave to appeal, the court will take into account: (1) the length of delay; (2) the reasons for the delay; (3) the prospect of success of the intended appeal; and (4) the prejudice to the other party if an extension of time were granted.

The wife should have issued her summons in the Court of Appeal by 28 January 2022. Even allowing for the closure of the Registry from 8 March 2022 to 12 April 2022, there were still gaps from 28 January to 7 March 2022 and 13 April to 3 May 2022. We consider the delay substantial. The wife's ignorance of the Rules of the High Court is not a justifiable reason for the non-compliance of the time limit for filing this summons and the substantial delay. In these circumstances, she must show a real prospect of success on the merits for the court to grant leave to appeal out of time (*Secretary for Justice v Hong Kong & Yaumati Ferry Co Ltd* [2001] 1 HKC 125 at 1291).

The approach in considering merits

As mentioned by the judge in the Leave Decision, the intended appeal against the Injunction Judgment is an appeal against the exercise of a judicial discretion, and, we would add, a discretion that involves in part the welfare of a minor. For the Court of Appeal to intervene, it must be shown that the judge's decision exceeds the generous ambit within which reasonable disagreement is possible, and is in fact plainly wrong. Alternatively, it must be shown that the judge was wrong in law or had failed to take into account relevant matters or was wrong to take into account irrelevant matters.

It must also be borne in mind that the judge had heard from the parties in the witness box, an advantage not enjoyed by the appeal court. The appeal court should be slow in interfering with her findings of fact and assessment of evidence unless they are shown to be plainly wrong.

We would adopt the above approach in considering the grounds of appeal to determine whether any of them would have real prospect of success.

Ground 1

As correctly identified by the judge, the core issue was whether the wife had acted in a manner that would justify the making of the injunction order sought by the husband. There is nothing wrong for the judge to focus on this in the judgment. The wife's complaints about the husband's violation of court order in interfering with her access to C became much less relevant, especially when the judge found that the wife's psychological well-being is a matter of considerable concern.

Ground 1 is without merit.

Ground 2

The judge's decision was well founded and was not based on the wife's poor presentation. For instance, the judge noted that the government clinical psychological report commented that the wife had a tendency to be opportunistic, manipulative and there was a lack of concern about other's opinions and feelings, making her more at a risk of law-breaking behaviour. While the wife contended that the husband made unfair accusations of stalking and harassment, it is undeniable that the wife had been convicted of assault on 23 October 2020 for hitting C. The judge also accepted the husband's evidence in his affirmation and in the witness box.

The wife contended that the judge played favourites. Contrary to her complaint, the judge expressly stated she has no wish to ban the wife from Cheung Chau and accepted that this would be very difficult for the wife. The judge decided to give the wife a last chance despite her finding that the situation is close to untenable for C and did not grant the draconian parts of the relief sought by the husband. These clearly showed that the judge's decision is fair and well grounded.

Ground 3

The "mistake" stated under this ground is plainly a clerical error as to the date mentioned in §6(ii) of the Leave Decision, which has nothing to do with the correctness and fairness of the Injunction Judgment. In particular, the judge was clearly aware that the access previously granted to the wife was suspended since 20 November 2020, as mentioned in §2 of the Injunction Judgment. This ground is bound to fail.

Ground 4

The judge's comment in §3 of the Leave Decision is concerned about the new evidence lodged by the wife without applying for leave, and explains why the new evidence should be ignored in the leave application. The wife failed to show that the judge's comment is wrong. In any event, this comment was directed to the new documents submitted by the wife in the leave application and has nothing to do with the correctness and fairness of the Injunction Judgment. This ground is bound to fail.

For the above reasons, none of the grounds of appeal are of merit and have no real prospect of success. We decline to exercise our discretion to extend time for the wife to renew her application for leave to appeal and dismiss her summons filed on 4 May 2022.

As this application is entirely without merit, we make a further order under Order 59 rule 2A(8) of the Rules of the High Court that no party may under rule 2A(7) request the application be reconsidered at an oral hearing *inter partes*.

Costs

The husband seeks costs of \$48,000 on the basis of work done of 240 hours at \$200 per hour, in dealing with the present summons, going through the documents lodged by the wife, and preparing his affidavit and statement in opposition. He further seeks an order that the wife should pay the costs awarded to him within 30 days.

There is no reason why costs of this application should not follow the event. We order the wife to pay the husband's costs of this application, to be paid following the handing down of the judgment of the Family Court on ancillary relief.

We will allow 80 hours as reasonable time spent and assess the costs that should be paid by the wife to the husband at \$16,000.

The costs order and summary assessment are orders nisi. They will be made absolute if there is no application for variation within 14 days of the handing down of this judgment.

Postscript

The wife submitted her submissions on 30 May 2022 and the husband submitted his on 6 September 2022. The papers were referred to the Court of Appeal for determination of the wife's application for leave to appeal the Injunction Judgment out of time. This court took longer than it would otherwise have done in dealing with the application on paper. Before the handing down of this judgment, the wife issued a summons in these proceedings on 30 December 2022 seeking to adduce new evidence to support her application. The new evidence consists of a document purporting to be her affidavit, bearing the date of 30 December 2022 and exhibiting a lever arch file of 202 pages of documents.

This application is misconceived. It does not satisfy the *Ladd v Marshall* requirements for the admission of new evidence in the intended appeal. The subject matter of the present application is leave to appeal against the Injunction Judgment made on 27 July 2021, not the subsequent orders made in the Family Court or in the court in Switzerland. Nor is this court concerned with the correctness or otherwise of any of the subsequent orders in the Family Court. The matters sought to be relied on by the wife could hardly have any relevance or influence on the outcome of the intended appeal.

We dismiss the wife's summons issued on 30 December 2022. As we do not expect the husband to respond, we make no order as to the costs of this summons.

(Susan Kwan)

Vice President

(Peter Cheung)

Justice of Appeal

The Petitioner (Respondent), acting in person

The Respondent (Applicant), acting in person

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