

HONG KONG / JUDGMENT

K v. C

COURT

Family Court

DECIDED

5 July 2007

CASE / FILE NUMBER

FCMC5508/2005

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bjbj IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
MATRIMONIAL CAUSES SUIT NO. 5508 OF 2005

BETWEEN K Petitioner and C Respondent

Coram : H.H. Judge Bruno Chan in Chambers Date of Hearing : 25 June 2007 Date of Judgment : 5 July 2007

J U D G M E N T

1. There are two matters before me, both by way of inter-parte summons issued by the Petitioner Wife, the first in time of 15th March 2007 is for an order for the Respondent Husband to file and serve his answer to her request for specific discovery, which can be easily disposed of by an order adjourning it sine die with liberty to restore as the particulars requested for had just been provided by the Husband shortly before the hearing, but which those representing the Wife would need time to consider, hence an adjournment would not just be appropriate but also necessary, with the question of costs to be reserved.
2. The second matter, which took up the bulk of the allotted time to properly thrash out is the variation of a maintenance pending suit order made earlier by consent by Deputy Judge Lo on 1st December 2005, in which the Husband was to pay \$25,000 per month for the Wife, now to be increased by an amount of \$190,000 to \$215,000 per month, essentially to cover her legal costs of her ancillary relief application upon the dissolution of what was essentially a short 3 years childless marriage, which has now been set down for trial in November this year. In effect, she is asking the Husband to fund her litigation.

3. There is no dispute of the court's jurisdiction to award a costs allowance in an order for maintenance pending suit, where the English Court of Appeal in the latest case of *Currey v Currey* [2006] EWCA Civ 1338, [2007] FLR gave a very helpful review of the development of the recent case-law, which started in *A v A* (Maintenance Pending Suit : Payment of Legal Fees) (2001) 1 FLR 377, and endorsed by *G v G* (Maintenance Pending Suit : Costs) [2002] EWHC 306 (Fam), [2003] 2 FLR 71, where it was said that the power to include provision for legal fees within maintenance pending suit is a discretionary one which has to be exercised with a view to promoting fairness between husband and wife, and that fairness is a two-way street and therefore has to be exercised having regard to the positions of both the husband and the wife, and thus to the possibility that such an order could or would be unfair to the paying party as well as to the advantages and disadvantages to the other party that would flow from making or refusal of the order.
4. In *Moses-Taiga v Taiga* [2005] EWCA Civ 1013, (2006) 1 FLR 1074 the issue of legal costs forming an element of maintenance pending suit first came into full consideration by the English Court of Appeal where Thorpe LJ in the leading judgment identified three criteria which would mean that there was no source of funding other than to approach the court for maintenance pending suit including a substantial element to fund the costs of litigation : that the applicant had no assets, could give no security for borrowings, and could not guarantee an outcome that would enable her to enter into a Sears Tooth agreement under which certain rights of the applicant are assigned to the solicitors. His Lordship then concluded that, in such exceptional cases, the statute could be construed to extend to maintenance pending suit including an element to fund legal costs, while cautioning that in all these cases the dominant safeguard against injustice is the trial judge's discretion, as it would only be in cases that are demonstrated to be exceptional that the court would consider exercising its jurisdiction.
5. Then came the case of *TL v ML and Others* (Ancillary Relief : Claim Against Assets of Extended Family) (2005) EWHC 2860 (Fam), (2006) 1 FLR 1263, where Nicholas Mostyn QC sitting as a deputy High Court Judge referred to the exceptional circumstances raised by Thorpe LJ in *Moses-Taiga* and indicated that he would be surprised if Thorpe LJ intended to impose any need to demonstrate anything beyond the three criteria referred to above, and that the inability to raise a litigation loan could be dealt with by way of the production of correspondence between the applicant's solicitors and two banks eliciting a negative response.
6. The exceptional test developed in *TL v ML* was looked at again in *C v C* (Maintenance Pending Suit : Legal Costs) (2006) 2 FLR 1207, where the wife applied to vary an order for maintenance pending suit made by consent to increase the amount to include a further significant sum to enable her to maintain her legal representation, when it was argued on behalf of the husband that it would be wrong in principle for the husband to have to underwrite the wife's costs because she could raise money on the security of her half-share in the matrimonial home, which share was worth more than 500,000. For the wife it was

argued that it was wrong that she should be required to fund her costs by mortgaging the family home when she had no assurance that it would become hers in the end.

7. Hedley J agreed with the wife that the three criteria establishing exceptional were illustrative only and not definitive on the part of Thorpe LJ, and that he regarded the facts before him of a 15-year marriage with two minor children and the bulk of the assets under the control of one party, and the need for investigation of them as making the case exceptional and permitting the court to add a costs component to maintenance pending suit, notwithstanding the fact that the wife did have available security and had already raised some money towards her costs from a bank.
8. In *Re B (Maintenance Pending Suit)* (2006) EWHC 1834 (Fam), (2007) FLR, on hearing cross-appeals from an order for maintenance pending suit including a costs allowance, Munby J accepted the wife's submission that equality of arms required that the husband made at least some contribution to her ongoing costs, and rejected the husband's argument that the wife should continue to mortgage the former matrimonial home in which she and the children were still living until there was nothing left or until such time as no lender was prepared to advance any more.
9. And so I come to the latest decision of the Court of Appeal in *Currey*, where the leading judgment was given by Wilson LJ who considered that the word exceptional used by Thorpe LJ in *Moses-Taiga* was obstructing the proper exercise of the jurisdiction to include a costs allowance when he said: - I consider that the word exceptional is obstructing the proper exercise of the jurisdiction to include a costs allowance; and I am convinced that Thorpe LJ never intended that it should do so. To that extent I agree with Mr Mostyn. There is a recognised syndrome in which, in order to illumine his exposition of the proper approach, a judge uses a word; and then, to his astonishment, finds that the word of intended illumination is mistaken for the proper approach itself. But I would go further than Mr Mostyn, just as Hedley J has gone in *C*. For it is clear that the reference by Thorpe LJ to an applicant's need to demonstrate that she has no assets [and] can give no security for borrowings should not be taken literally. Mrs C did have assets and could give security for borrowings; the point was, however, that it was unreasonable to expect her to do so.
10. He then went on to refine the fairly stringent conditions for costs allowances to be provided in maintenance pending suit or periodical payments when he said: - In my view the initial, overarching enquiry is into whether the applicant for a costs allowance can demonstrate that she cannot reasonably procure legal advice and representation by any other means. Thus, to the extent that she has assets, the applicant has to demonstrate that they cannot reasonably be deployed, whether directly or as the means of raising a loan, in funding legal services. Furthermore, not to forget the third of Thorpe LJ's three features, she has also to demonstrate that she cannot reasonably procure legal services by the offer of a charge upon ultimate capital recovery. I would add, fourthly, that the court needs also to be satisfied that there is no such public funding available to the applicant as would furnish her with legal advice and representation at a level of expertise apt to the proceedings, i.e. that the

applicant does indeed in that regard fall within the unserved constituency referred to by Thorpe LJ in the statement quoted at [1] above. Although in making a costs allowance the court has a discretion, I cannot imagine that it would be reasonable to exercise it unless the applicant had thus duly demonstrated that she could not reasonably procure legal advice and representation by any other means. That, I venture to suggest, is, in effect and as a matter of common sense, a necessary condition of making an allowance. But I certainly do not consider that it will always be a sufficient condition; and insofar as in the passage in TL which I have quoted at [17] above Mr Mostyn implied otherwise, I respectfully disagree with him. No doubt the applicant's due demonstration will incline, often very strongly, towards the making of an allowance. But at this stage other factors may well come into play which will no doubt on occasions lead the court to decline to make it notwithstanding the demonstration. The subject-matter of the proceedings will surely always be relevant; and, insofar as it can safely be assessed at so early a juncture, the reasonableness of the applicant's stance in the proceedings will also be relevant. So also will a variety of other features, including of the type which exist in the present case, in particular the arresting fact that the husband already owes 46,000 to the wife in respect of costs.

11. From the above, it seems that the conditions can be conveniently categorized as follows : -
 - (1) That the applicant has no assets, or none that can reasonably be deployed.
 - (2) That she can provide no security for borrowing, or none which can reasonably be offered.
 - (3) That she cannot reasonably obtain legal services by offering a charge on the outcome of the litigation.
 - (4) That she cannot secure publicly funded legal help at a level of expertise appropriate to the proceedings.
12. In the present case the Wife's evidence is set out in her 3rd Affidavit filed on 27th March 2007, but before dealing with its details, it will be relevant to refer briefly into the background.
13. The parties married each other on 21st September 1997 in Las Vegas, Nevada, USA after first met in 1985 when they were A-level students in London and shortly thereafter started a relationship. While it may well be an issue in the ancillary relief hearing whether that relationship had subsequently developed into a long cohabitation up to marriage, as it appears to be the Wife's case, or that it was just a long courtship and there had never been any prior cohabitation as according to the Husband, it is suffice for the purpose of the present application to say that the parties separated less than 3 years after their marriage in April 2000, upon which the decree nisi of divorce was subsequently granted on 7th February 2006 with the section 18 declaration that there are no children of the family, but the Wife has not taken any steps to obtain the decree absolute, presumably because of the outstanding ancillary relief application.

14. The Wife is now aged 42 and lives with her parents in Malaysia where she originated. In her Financial Statement of August 2005, she described to be working as a part-time lecturer in a school of music in Kuala Lumpur earning only the equivalent of slightly over HK\$3,300 per month on average, and has been relying mainly on dividends from a shares investment account as well as the said maintenance pending suit of HK\$25,000 from the Husband to meet her expenditure of slightly over HK\$31,000 per month.
15. In the same Financial Statement the Wife disclosed no real property, a little savings, and apart from some life insurance policies and mandatory provident fund of insignificant current value, there is no dispute that, for the purpose of this application, the only valuable asset that the Wife has that may satisfy the first condition referred to above is her Bursa Malaysia shares portfolio account of mainly blue chips stocks worth close to HK\$2 million at the time of the hearing.
16. The reason I said this is that while in her said Affidavit the Wife disclosed that the further costs for a trial on the ancillary relief was estimated by her solicitors in the region of HK\$2 million on the basis that the trial would require 8 days and to be set down within the next 12 months, hence the calculation of the increase to her monthly maintenance pending suit. But at the hearing Mr Egerton for the Wife conceded that 5 days may now be sufficient for the trial and revised the estimated costs to \$1.7 million, which can therefore be met by her asset in her shares portfolio.
17. In her Affidavit the Wife also disclosed that she had tried but failed to obtain a loan of HK\$1.68 million from as many as 8 banks as she did not have any asset such as fixed deposit account or property as security for the loan, while she was told that her share portfolio could only be used as collateral for share margin financing on the Kuala Lumpur Stock Exchange and not for any other purpose.
18. However, there is no dispute that her share portfolio can be easily liquidated, but Mr Egerton argues that it would not be fair or reasonable for the Wife to have to exhaust all of what is essentially her only asset, in particularly one that is generating income to maintain her, to fund her application which has been unnecessarily protracted and complicated by the Husband's failure to make full and frank disclosure of his means, as his Financial Statement of 16th August 2005 stated his net assets at HK\$38 million, but it later became apparent by further disclosure by him, as a result of the Wife's various questionnaires and requests for further and better particulars, that his net assets could be as much as HK\$73 million.
19. Mr Egerton therefore raises the question of why, in these days of post-White equality, provision of a costs allowance may only be made in exceptional circumstances as mentioned in those cases above, and he relies on an article by David Burrows in May [2007] Fam Law Interim Costs Provision Out of Costs Allowances in which the same question was asked : - It is difficult to see why the same sentiments relating to equality of treatment by the courts should not inform a judge's considerations when he or she hears an application by

the non-earning, non-owning spouse for costs allowance or legal expenses provision, whether it be as periodical payments or interim lump sum under s. 23 (3) of the Matrimonial Causes Act 1973. As Lord Nicholls observes, it may be either one or other party who earns the bread as against looking after the children. It may be an accident of private arrangement, it may be deliberate, it matters not which, that all the liquid assets from which costs can be paid are in one or other name; or that borrowing ability rests with one party only as against the other. Equality should connote also equality of opportunity as to employment of legal advisers equality of arms, even as between parties in the same way as there is intended to be fairness in final distribution .

20. While agreeing that the court has clear powers to make interim order for provision of funding of costs either by way of maintenance pending suit as referred to above, or interim lump sums order for liabilities and expenses reasonably incurred , Mr Burrows believes that there should also be complete equality in approach to the judgment seat when he wrote in the same article : - Perhaps the last word on equality can be given to Scarman LJ (as he then was) in *Calderbank v Calderbank* (1975) FLR Rep 113. In that case Scarman LJ was concerned with a wife who had introduced all the capital into a 17-year marriage and her objection that it was not for her to provide for her former husband's needs. In the course of his judgment 25 years before *White* Scarman LJ said the following : speaking for myself, I rejoice that it should be made abundantly plain that husbands and wives come to the judgment seat in matters of money and property upon a basis of complete equality. That complete equality may, and often will, have to give way to the particular circumstances of their married life. It does not follow that, because they come to the judgment seat on the basis of complete equality, justice requires an equal division of the assets. The proportion of the division is dependent upon circumstances. The assets have to be divided or financial provision made according to the guidelines set out in s. 25. Every case will be different and no case may be decided except upon its particular facts . It would be a beneficent irony if the new costs rules, which broadly exclude from ancillary relief proceedings the costs principles in *Calderbank*, served to promote another of the central tenets of that case : namely a search for fairness between the parties in the obtaining of legal assistance and representation in preparation for trial. Scarman LJ spoke, not of equal division of assets (as does *White*) that is upon disposal of the case but of equality as the couple come to the judgment seat . Most will want to come to the judgment seat with the assistance of comparable legal assistance on both sides paid for from the family's assets. Equality of choice of representation, regardless of gender or relative wealth, cannot be beyond the ability of our family law system to achieve .

21. Mr Egerton therefore argues that although the Wife may have an asset with which to fund the litigation, in view of her limited means, she has been as cautious as possible both in the frugality of her life style and the build up of her legal costs, that although she had hoped that settlement would be reached, it is now clear that this case is to be fought and the manner of the Husband's disclosure has and will without doubt disproportionately increase the legal costs to be incurred by the Wife in her claim for ancillary relief.
22. Echoing Mr Burrows, Mr Egerton argues that the purpose of litigation costs is to put both parties on a level playing field in the litigation, but this cannot be achieved unless the Wife has sufficient funds to litigate on an equal basis as the Husband, not only in terms of actual question of resources but also proportion of resources, and the resources that the Wife has are insufficient to fund both her outstanding costs and the estimated costs of the litigation, whereas the disclosed assets of the Husband are such that his financial circumstances will not be significantly affected by the relief sought by the Wife.
23. Ms Yip for the Husband agrees that the underlying theme of a claim for legal costs is to avoid putting one party, normally the wife, in a disadvantageous position in the course of litigation, but in seeking an advanced payment of such a generous nature, while allowing the Wife to retain her share portfolio, will simply provide a fertile soil for litigation, as she seems determined to fight this case by blaming it on the Husband non-disclosure, which Ms Yip argues may be the products of oversight, inadvertence or an over-zealous attitude of the pursuer, as can be demonstrated by one point taken by the Wife of the Husband non-disclosure of his 0.12% interest in his father's company D International Ltd through 0.24% interest in D Holdings Ltd (a 50% shareholder of D International Ltd), a company held in the majority by his father together with 7 other siblings each with very minor interests compared with the father, that it is highly debatable whether such behaviour of the Husband should be described as culpable or at all.
24. On the other hand, Ms Yip argues, the way the Wife has egregiously insisted that this was a lengthy marriage of at least 15 years actual cohabitation as opposed to only 31 months between the registration of the marriage and the parties separation, has unnecessarily produced some exceptionally lengthy affirmations about the parties tempestuous courtship and taken up the bulk of the papers filed in this case, for which the Wife is to be blamed, and hence such a most frivolous application for an astronomical figure based on questionable assumptions and unsound propositions should be curtailed by the court with appropriate order as to costs.
25. Ms Yip further argues that although the Wife had put her monthly expenditure at \$31,500 in her Financial Statement of August 2005, there has been no complaint about the Husband's monthly contribution of \$25,000 by way of the maintenance pending suit towards her living expenses, it follows that there must have been no change to her monthly expenditure and that she must be content with such arrangement, therefore the suggestion that she had to practice frugality must be rejected for lack of evidence, as otherwise she would have applied long time ago to vary the order.

26. Ms Yip therefore proposes on behalf of the Husband to pay the Wife increased maintenance of \$35,000 per month which is in excess of her stated expenditure, thus ensuring that she would not have to pay a penny for her living expenses, and that furthermore she would not be subject to any worries of having to work within a tight monthly budget which might affect the way of her conduct of these proceedings, and whatever she is able to earn by way of piano lessons will be all for her to keep, thereby freeing up her share portfolio to meet her legal costs without any worry or concern.
27. While I agree fairness requires that one party should not be placed in a disadvantageous position in terms of funding his / her litigation, and the judgment of the Court of Appeal in Currey has not only placed beyond any doubt the jurisdiction to make a costs allowance order within maintenance pending suit, but also clarified the basis upon which the discretionary jurisdiction should be exercised. It is however going too far, in my view, to suggest that both parties should be put on equal basis in terms of resources to fund their litigation. It is not practical nor necessary and is certainly not how I understood of those decisions referred to above. In that respect the Wife has in my view failed to fulfil the first condition for a costs allowance to be made in her favour : that she does have an asset that can reasonably be deployed, in particularly in view of the Husband s proposal to increase the maintenance pending suit to more than sufficient to meet her stated expenses, in which case I fail to see now she can argue that her share portfolio cannot reasonably be deployed.
28. Unlike the situation in those cases mentioned above, the Wife s asset is as liquid as cash and can be easily sold without affecting her future needs or involving any other element such as sentimentality or problem as to replacement. The Husband s proposal for her application to be adjourned so that she can always come back to review the situation should alleviate any further concern of the Wife. I am satisfied that this is the most appropriate arrangement. I therefore allow the Wife s application to vary the maintenance pending order to only \$35,000 per month commencing 1st July 2007 and thereafter on the 1st day of each month until further order, with credit to be given for any payment already made. As the application is to be adjourned as suggested by the Husband to which I agree, the costs should be reserved. (Bruno Chan) District Judge Mr. Robin Egerton instructed by Stevenson, Wong & Co for the Petitioner. Ms Anita Yip instructed by Chainé Chow & Barbara Hung for the Respondent. PAGE - PAGE - &`#\$~!P] ,f@- sy \$ he~"Td c(#\$ 0kJ\$\$ @P\$\$ :L- E{k' XW(\$ s `(-3*\$ 43*\$:p . kM.2 {^2\ (\$p2\$ 4g3\$ 4QQ4 0b50p M|;\$ wzO?p= H#@ \$ 3i@\$ nSDH lEFE kxL\$ TKxMv. / eNH S\$O\$ c;R\$ G%9UT C:~W x% X\$ x8Y\$ L}YH (Yq[*n\T #b2^\$ Q^f Y6xc\$ e>tD ?Dep= ZJg\$ hx;r N)/h vCip= TCn\ gsTu\$ 4xv\$ Pg;wp xDs\ *y\$ __z4w C? } R\$ ~\$ f!\$- C:~W N)/h E{k' 4QQ4 lEFE C? } wzO? gsTu x% X (\$p2 0kJ\$ #b2^ Y6xc R\$ ~ he~" G%9U (Yq[:p . s ` (TKxM Pg;w kM.2 @\\Hc-oa-ws-656\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \\Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wff B]gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wff B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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