

HONG KONG / JUDGMENT

KWKM nee WKM v. KSW

COURT

Court of Appeal

DECIDED

15 June 2007

CASE / FILE NUMBER

CACV432/2006

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CACV 432/2006

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 432 OF 2006

(ON APPEAL FROM FCMC 785 OF 2005)

BETWEEN:

KWKM nee WKM Petitioner

(Appellant)

and

KSW Respondent

(Respondent)

Before: Hon. Yuen JA and Hon Chu J in Court

Date of hearing: 12 June 2007

Date of Judgment: 15 June 2007

JUDGMENT

Hon. Yuen JA: This is an appeal from a costs order made by Deputy Judge Kot on 11 September 2006 after an application for maintenance pending suit. The judge refused leave to appeal but leave was granted by Cheung JA on 18 December 2006.

Background

The Petitioner and the Respondent were married in 1979. The Petitioner is a full-time housewife. The Respondent is a businessman. They are the parents of four children. Three of the children have reached the age of majority but one is still at university in the United States. The youngest child KK is now 13 years old. He is at school in Hong Kong and in the care of the Petitioner.

Petition A petition for divorce was presented in January 2005. Both parties were and are legally represented. Until late November 2005 there had been informal arrangements for KK's maintenance which was paid by the Respondent. Application for interim maintenance for KK In December 2005 when the Respondent did not pay KK's expenses, the Petitioner made an application for interim maintenance for him. The Petitioner sought a sum of \$6,000 - \$6,200 a month (subsequently revised downwards during the last hearing to \$4,265 a month). In January 2006 the Respondent paid a sum of \$3,000 into a bank account and gave KK an ATM card so that he could access it. The Petitioner was not given access to this bank account. Interim order - February 2006 On 8 February 2006 Deputy Judge Jenkins ordered (amongst other things) that the Respondent should pay the Petitioner direct a monthly sum of \$3,000 as interim maintenance for KK until further order and adjourned the hearing of the application. Hearings In due course the hearing was scheduled before Deputy Judge Kot. The hearing was first held on 18 July 2006 but as an accountant's report for the Respondent's company had only just been provided, the hearing had to be adjourned to enable the Petitioner's lawyer to consider it. The hearing resumed on 30 August 2006. By 4:30 pm the Petitioner's lawyer had finished his submission except on the question of whether the Petitioner could still claim for KK's food expenses as that had been covered by an order made by Deputy Judge Jenkins on 21 November 2005 (the Petitioner had changed lawyers subsequently). Deputy Judge Kot then adjourned the hearing to another date to enable the Petitioner's lawyer to read the transcript of the hearing in November 2005. In any event it would have been too late in the day for the Respondent's lawyer to make his submissions, which would be followed of course by the Petitioner's lawyer's reply. Order The resumed hearing took place on 11 September 2006. The judge ordered that the Respondent pay interim maintenance for KK in the sum of \$3,380 a month. However she ordered the Petitioner to bear the Respondent's costs of the application. These costs have come to about \$200,000 after taxation. It is this costs order from which the Petitioner is appealing. Principles on appeal from exercise of discretion An order of costs is of course at the discretion of the judge and it is well-established that an appellate court should not lightly interfere with the exercise of a judge's discretion unless it is satisfied that the judge has erred in law or in principle, or if she has taken into account some matter which she should not have taken into account, or has left out of account some matter which she should have taken into account, or if the decision was so plainly wrong that it must have been reached by a faulty assessment of the weights of the different factors which have to be taken into account. Judge's reasons for costs order The judge's reasons for the costs order given on 11 September 2006 can be seen from the transcript (regrettably the judge did not reduce her judgment to writing). The judge said that although generally costs should follow the event, and on the face of it, the Petitioner had succeeded in the application, in effect she had failed because first, it was only at the hearing that she ascertained that her claim for \$1,800 a month for food for

KK was barred by Deputy Judge Jenkins November 2005 order, and secondly, the eventual order of \$3,380 was some way away from the sum claimed. When at the Petitioner's application for leave to appeal, the Petitioner referred to the Respondent's lack of a Calderbank offer, the judge said that that was only one factor to be taken into account and she emphasized that the Respondent had throughout been willing to pay \$3,000 a month.

Issues

As I see it, there are three issues before us: first, as a matter of fact, had the Respondent offered to pay interim maintenance for KK and if so, at what rate? Secondly, even if he had offered to pay \$3,000 a month, since the judge's order of \$3,380 a month topped that offer, who was the successful litigant? Thirdly, if the Petitioner was the successful litigant, was the judge wrong in the exercise of her discretion to order the Petitioner (the successful litigant) to pay the costs of the Respondent (the unsuccessful litigant) in light of the principles set out in *In re Elgindata Ltd* (No.2) [1992] 1 WLR 1207?

- (1) Respondent offered to pay \$3,000 a month In my view, there was no valid or real offer by the Respondent to pay \$3,000 a month for KK's interim maintenance from December 2005 until shortly before the first hearing before Deputy Judge Kot on 18 July 2006. As I have noted above, in January 2006 the Respondent had paid \$3,000 into a bank account but this was an account which only KK could access, not the Petitioner. As KK was not even 13 at the time, this was clearly not a proper arrangement for payment of interim maintenance. In the Respondent's 3rd affirmation filed on 6 February 2006, he stated that he had always provided for KK and would continue to do so (para. 23) but this was followed by the statement I am prepared to pay into the account a sum of \$3,000 per month for KK's monthly expenses. In other words, the Respondent's offer to pay \$3,000 a month for KK's interim maintenance was predicated upon the continuation of that improper arrangement. Not surprisingly, Deputy Judge Jenkins ordered on 8 February 2006 that the sum should be paid to the Petitioner direct. (The Respondent's 4th affirmation did not contain any revised proposals for payment of KK's interim maintenance, so I need say no more about it). It was not until the Respondent's skeleton submission was filed on 17 July 2006 (for the hearing the next day) that he indicated it can be satisfactorily safe to conclude that the present interim payment of \$3,000 per month for the child by the Respondent is appropriate. Counsel for the Petitioner Mrs Dora Chan (who did not appear below) has argued that as this position of the Respondent was only embedded in his lawyer's skeleton submission, it was not sufficiently made known to the Petitioner or her lawyers until after her application for leave to appeal the deputy judge's order. I have to say that this is not an attractive submission. I am prepared to accept that the skeleton was only served on the Petitioner's lawyer on the day of the hearing of 18 July 2006 and so the costs of that day would in any event have been incurred, but there was no reason for the Petitioner's lawyers to have failed to notice it when preparing for the resumed hearings thereafter. In view of the position stated in the skeleton of 17 July 2006, the fact that a Calderbank letter was not sent by the Respondent, whether on his own initiative or in response to the Petitioner's, is neither here or there. Accordingly it is

clear that on 18 July 2006 the Respondent had indicated to the Petitioner that he considered \$3,000 a month to be the right order. Counsel for the Respondent Miss Josephine Tjia (who did not appear below) argued that the Respondent had offered to increase that sum subsequently. She referred to passages in the Transcript of 11 September 2006 (p.70G and p.70Q, Transcript Bundle) in which the Respondent's lawyer indicated that he thought he could agree to \$3,130. That the Respondent was prepared to agree to that figure was also referred to by the judge when on 9 November 2006 she refused leave to appeal: (p.105L, Transcript Bundle). However that does not appear to have been the judge's understanding at the time of the decision on 11 September 2006 as she referred to the Respondent's lawyer's submission that while \$3,130 was a reasonable sum, the Respondent simply could not afford more than \$3,000 a month (p.89I-K, Transcript Bundle). Be that as it may, I do not think it matters in the present context whether the Respondent had agreed to increase the sum to \$3,130 because even on his own case, that indication only came during the last hearing of 11 September 2006 even though the increase in tuition fees had been deposed to in the Petitioner's affirmation in June 2006, before the first hearing. In other words, the Petitioner would still have had to incur the costs of the hearings after 18 July 2006 to get anything more than \$3,000.

- (2) Petitioner was the successful litigant More importantly, the fact remains that the order was for payment of \$3,380 a month, which was more than the \$3,000 which the Respondent offered to pay in July 2006. Did that not make the Petitioner the successful litigant? As I have said, there was no offer from the Respondent matching the eventual order of \$3,380. It is true that the difference is \$380 which in another case may be regarded as a trivial sum, but in this case both parties were alleging that he/she was operating on a shoestring and that every dollar counted. It is true that the Petitioner was aiming for a richer target and she failed, but she still succeeded in obtaining a consolation prize that was about 13% more than what was offered and that cannot be said to be de minimis. The Petitioner should therefore be considered the successful litigant. With respect to the judge, when she said that she considered that the Petitioner was not the successful litigant, it seems she focussed on the Petitioner's target rather than the order she obtained - but the point is that the sum ordered was never offered by the Respondent, and the Petitioner would not have got it had she not incurred the costs of the application.
- (3) Elgindata principles The identity of the successful litigant is of course relevant to the application of the Elgindata principles to which both parties have referred us. The Elgindata principles which govern a judge's exercise of discretion in awarding costs are (p.1214): "(i) Costs are in the discretion of the court [Order 62 r.2(4) RHC]; (ii) They should follow the event, except where it appears to the court that in the circumstances of the case some other order should be made [Order 62 rule 3(2) RHC]; (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs; (iv) Where the successful party raises issues or makes allegations improperly or unreasonably [in Hong Kong, improperly or

unnecessarily], the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs [Order 62 rule 7(1) RHC]". The Petitioner has argued that as she was the successful party, the costs should follow the event and she should have the costs. The Respondent has argued (albeit without having served a Respondent's Notice) that even if the judge was wrong in holding that the Petitioner was not the successful party, Elgindata principles (iv) or (iii) applied. In fact the judge had been specifically referred to these principles at the application for leave to appeal, but she did not undertake the exercise of considering whether those principles would apply on the assumption that she was wrong in her determination of who was the successful litigant. The Respondent has submitted that the Petitioner had raised improper or unnecessary allegations in three respects, viz. the Respondent's assets, KK's food expenses and an attempt to vary Deputy Judge Jenkins maintenance order, so she should be ordered to pay the costs of these issues under principle (iv), or at least be deprived of the costs of these issues under principle (iii). First I do not see how the issue of the Respondent's assets can be said to be improperly or unnecessarily raised when the Respondent had put his own financial resources in issue. The Respondent was not only saying that the Petitioner's claimed expenses for KK's maintenance were unreasonably high, he was also saying that he could not afford to pay them. I do not see how either principle (iv) or (iii) applies. As for the issues of KK's food expenses and the consequential attempt to vary the earlier maintenance order, the judge appeared to be a little critical of the fact that the Petitioner's lawyers had to have an adjournment to ascertain that the issue had been covered by a previous order (p.91H, Transcript Bundle). However the resumed hearing on 11 September 2006 was not brought about solely by that. It would appear that in any event by 4:30 pm on 30 August 2006 the Respondent's lawyer had not made his submissions and of course there would have to be submissions in reply from the Petitioner's lawyer. I do not consider the raising of the issues to be so egregious as to warrant the application of principle (iv) but in light of the judge's remarks, I consider that the Petitioner should be deprived of her costs on these issues under principle (iii). Mrs Chan has suggested that 45 minutes had been taken for the issues of KK's food expenses and the consequential attempt to vary the earlier maintenance order. Miss Tjia's solicitors were not ready to confirm or deny that even though the application of Elgindata principles (iii) and (iv) are for the Respondent's benefit. That is regrettable as an adjournment of the appeal would increase costs unnecessarily. Doing the best I can, I would order that the Petitioner be deprived of 1/3 of the costs of the hearing on 11 September 2006. Order Accordingly, I would allow the appeal, set aside the judge's order on costs and replace that with an order that the Respondent should pay the Petitioner's costs (to be taxed, if not agreed, on a party and party basis) save that there should be no order for costs for 1/3 of the hearing on 11 September 2006. The parties having agreed that the costs of the appeal should follow the event, I would also order that the Respondent pay the Petitioner's costs of the appeal, also to be taxed, if not agreed, on a party and party basis. Hon. Chu J: I agree. (MARIA YUEN) (CARLYE CHU) Justice of Appeal Judge of the Court of First Instance Mrs Dora Chan instructed by Tang Lai & Leung for the Appellant (Petitioner) Miss Josephine Tjia instructed by Eric Chan & Co for the Respondent (Respondent) - PAGE - - PAGE - - PAGE - -

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