

HONG KONG / JUDGMENT

L v. D

COURT

Family Court

DECIDED

17 May 2007

CASE / FILE NUMBER

FCMC3654/1994

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bjbj P0zD FCDJ 3654 / 1994 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MATRIMONIAL CAUSES DIVORCE JURISDICTION NUMBER 3654 OF 1994

BETWEEN L Petitioner and D Respondent

Coram : Deputy District Judge T Chan in Chambers (Not Open to Public) Date of Hearing : 31st January 2007 Date of Closing Submissions by Petitioner: 18 April 2007 Date of Closing Submissions by Respondent: 16 April 2007 Date of Handing Down of Judgment : 17 May 2007

J U D G M E N T

1. This is the Petitioner wife s application for enforcement of arrears of maintenance by way of a Judgment Summons. The Respondent shall be referred to as and the Petitioner in this judgment. History of Marriage and Proceedings
2. I have set out the history of marriage between parties and the background of these proceedings in my earlier judgment dated 28th January 2007 on an application by H to vary a maintenance order dating back in 1994 (My Judgment dated 28th January 2007). Relevant paragraphs are as follows :
2. The parties were married in 1990 and have a daughter now 16 (the Child). The Child has since divorce and is now residing in the U.K. with W. She is still undergoing full time study.

3. On 27th May 1994, W petitioned for a divorce relying on the fact that parties have lived apart for a continuous period of at least two years immediately preceding the presentation of her petition and H consented to a decree being granted. In September 1994, W was granted a decree nisi of divorce, which was eventually made absolute in November same year.
4. On 14th September 1994, there was an order made by consent of the parties (the Consent Order) whereby :
 - (i) W and H be granted joint custody of the Child with care and control to W and reasonable access to H to include staying and holiday access in the particular but not limited to access each alternate Christmas from December 1996 and during school holidays such access time to be agreed between the parties. (ii) W be granted leave to permanently remove the said child of the family from the jurisdiction of Hong Kong upon filing an undertaking to return the Child to the jurisdiction of Hong Kong when called upon to do so by the court. (iii) H do pay or cause to be paid to W periodical payments for the benefit of the Child in the sum of US\$ 975.00 per month payable on the first day of each calendar month from 1st October 1994 until she attains the age of 17 years or ceases full-time education whichever shall be later or until further order and for so long as the W and the Child shall permanently live in the United States of America such sum to be increased on the 1st day of January each year in line with inflation with reference to the U.S.A. Retail Price Index such increase to commence on 1st January 1996.
5. Arrangements made by the parties concerning the Child have remained smooth since divorce except H had once in May 2002 taken out a summons asking for defined access to the Child.
6. In or about June 2006 W started to complain that H had not been complying with the Consent Order and there have been arrears of maintenance. Application for issuing a Judgment Summons was made by W on 14th June 2006. W alleged that there were arrears amounting to US\$7,982.38 since May 2005.
7. A Judgment Summons was eventually issued by W on 30th June 2006. W by her affirmation dated 24th June 2006 in support says that since the divorce they have moved to the UK instead of the US. H paid the peri are to be adjusted on the 1st day of January 2008 and same date in each year thereafter in line with inflation / deflation with reference to the consumer price index in the UK and are to continue until the Child attains the age of 17 or ceases full-time education whichever shall be later or until further order. (ii) Such payments are to be paid to W direct through her bank account. H do pay all charges or fees for remittance of such payments due from the payer and bank charges on the side of payee, if any, be borne by W. (iii) order nisi for W to pay costs for H for his application.
4. Parties attended court again on 31st January 2007 for directions on the hearing of the Judgment Summons. Ms. Irving of counsel appearing for H informed me that H would adopt the same evidence given in his application for variation and Mrs Heathfield representing W informed me that there would not be further cross-examination on H by her for and on

behalf of W. In other words, parties would rely on the evidence already put before me to advance their case in the Judgment Summons. Parties then sought time to make written final submissions for and on behalf of their respective clients. Matters to be dealt with in this Judgment

5. In their written submissions parties ask me to determine the matters set out below :
 - i) W s application for enforcement of the arrears by way of Judgment Summons; ii) W s application for leave to enforce the arrears in excess of 12 months; iii) Costs Orders nisi made
 - a) against W in respect of H s application for variation of the maintenance order;
 - b) against H in respect of W s application for a Prohibition Order;
 - c) against H in respect of H s application for leave to appeal from my decision on variation. The Judgment Summons and related matters Leave to enforce arrears in excess of 12 months
6. W applies for leave to enforce arrears in excess of 12 months. By a Judgment Summons taken out on 30th June 2006, W claims arrears commencing on 1st June 2005. The excessive period was just about 1 month. I adopt the principle in granting leave for such application as set out in paragraph 28.9 of Rayden and Jackson on Divorce and Family Matters : The Court will in general decline to grant leave to enforce arrears of maintenance and lump sum which accrued more than twelve months before the application to enforce was commenced, and will remit such arrears, unless there are special circumstances .
7. Johnson J in B v C (Enforcement : Arrears) [1995] 1 FLR 467 also stated that the starting-point is that arrears over one year old are not enforced unless there are special circumstances .
8. W stated in her Form E dated 27th July 2007 that she had suffered a nervous breakdown for 3 months in November 2005, then due to her absence from work, she had to go through a disciplinary proceedings with her employer and eventually she resigned from her job in June 2006.
9. I find her Answer to a question asked of her why she chose to resign in June 2006 almost immediately before she initiated the Judgment Summons (pp75-76 of Bundle B) relevant to the issue of whether there are special circumstances for me to exercise my discretion to allow enforcement of arrears in excess of 12 months. In the Answer she said that she first contacted Boase Cohen & Collins with regard to H s unilateral reduction in the maintenance for the Child in June / July 2005. She however did not follow up due to the costs of taking proceedings and her poor health. Once she had recovered from her illness and that her brother had offered to help her she decided to proceed. The timing for the application became urgent as she learned from the Child on 27th May 2006 that H was to move over to Thailand and stay there permanently.

10. Having considered the illness of W at the material time, the disciplinary action she had to face, that she had to take out proceedings outside the Jurisdiction of UK, and that she had strongly indicated to H her objection to the reduction in July and August 2005 and another letter written to H by brother of W on 11th May 2006 (which H denied having ever received), I find there are special circumstances for me to exercise my discretion to allow W to seek to enforce the part of arrears which is beyond 12 months time, i.e. as from 1st June to 29th June 2005. The Arrears
11. The amount for the arrears is disputed. Evidence shows that H had been paying m H without taking into account the sum H paid to the Child direct. Ms Irving on behalf of H drew my attention to the Judgment summons and W s affirmation in support in which the arrears was calculated on the basis of US\$1,326 as the monthly payment due. It was submitted on behalf of H that W could not get more than she has claimed.
13. No application has been taken out by W to amend the Judgment Summons since and I agree that W should not be claiming more than what she has asked for in her Judgment Summ ther he had the fund to pay at the time of default. It has been my finding of fact as stated in my judgment on H s application for leave to appeal My Judgment dated 28th January 2007 that he did have the fund at the time of default, I gave my reasons for the finding as follows in the said judgment :
12. The evidence of the Applicant [H] on his financial situation at the time of June 2005 is that it was bad, but it was not that he could not afford to pay the Child the amount he had been paying but he was trying to cut down his expenditure to save the company. Evidence shows that he had savings of HK\$343,570 in June 2005 which were increased to HK\$545,981 in June 2006 and that he was still having some trips abroad with or without the Child. Even if I agree that these trips were planned, they only show that he could still carry out plans or commitments made by him. Even if I accept that the increase in savings was due to rearrangement of funds and that there were liabilities, I am of the view that the maintenance to the Child should be his prioritized commitment. Moreover, there was a birthday present at the worth of HK\$60,000 bought by the Applicant [H] for the Child in about August 2006, a time he says that his financial situation had gone from bad to worse .
15. I note however H s saying throughout that parties had not been complying with the underlying order from the very initial stage of the divorce because and the Child had never moved to live in the USA as planned and that the underlying order was drawn up on the basis that they would be living in the USA. I am of the view that it is different from the situation where there has never been any court order or that the order has been rescinded unequivocally. In fact, W had reminded him of his obligation under the order when default took place. He was asked to seek a court order to vary the underlying order as she refused to give her consent to the proposed deduction. And in any event, H s own application to vary was made on the basis of the underlying order. It is obvious that he himself relies on the order when it deems fit for him. I do not see how this submission could avail H when I consider whether he has been in contempt.

16. I am satisfied beyond reasonable doubt with evidence before me that he did have the means to pay during the time of default and it is undisputed fact that there was default. I note however that H said that W had acquiesced the reduction. On the one hand I do not accept that W had acquiesced the reduction, she had not taken prompt action due to the difficulties she was having at the time, I would not repeat myself here as I have set out my reasons in paragraphs 8-9 above. On the other hand however, I could not rule out the possibilities that H might have thought that W had acquiesced the reduction by proposing to pay an additional m of \$85,000 is now being held by H s solicitor, I order that part of the said sum be released to satisfy the arrears mentioned in paragraph 13 herein above. Costs in respect of W s application for a Prohibition Order
17. W obtained a court order on 30th June 2006 by way of ex parte application prohibiting H from leaving Hong Kong (the Prohibition Order) as she learned that H was to leaving Hong Kong for Thailand permanently on 5th July 2007. The Prohibition Order was discharged by consent on 7th July 2007 upon H having paid to his solicitors a sum of \$85,000 to be held until determination of W s Judgment Summons application. Costs of and incidental to this application was adjourned to the hearing of the Judgment Summons.
18. Ms Irving in her written submissions said that the application was wholly unwarranted. Her reasons included that H had been paying for the Child for the last 15 years and it was only when he had difficulties in his business he reduced his payment; although he was leaving Hong Kong, at that time he still had his business in Hong Kong and that there had been a firm plan for the Child to meet him in Hong Kong. She said further that these crucial facts had not been disclosed to the court at the time of application.
19. Mrs Heathfield in her written submissions said that the evidence they had at the time of application included what W was told by the Child and the maid in the house of H that H was moving to Thailand for good. Mrs Heathfield submitted that this turned out to be true although H denied this in his first affirmation. H has no registered interest in any property in Hong Kong. The law
20. The application of W was made under O.44A r3 of the High Court Rules which refers to section 21B of the High Court Ordinance for making a prohibition order. Section 21 B of the High Court Ordinance provides that :
 - (1) The Court shall have jurisdiction to make an order prohibiting a person from leaving Hong Kong (a prohibition order) to facilitate the enforcement, securing or pursuance o f-
 - (a) a judgment against that person for the payment of a specified sum of money;
 - (b) judgment or order against that person -
 - (i) for the payment of an amount to be assessed; or (ii) requiring him to deliver any property or perform any other act; or
 - (c) --

- (2) 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.
21. Taking into consideration that there were arrears of maintenance I do not think that W had been overreacting by taking out the application. Experience tells that even H was travelling with the Child it did not necessarily mean that he would pay what he had been paying for the Child. Further, I could not agree with Ms Irving that there has been non-disclosure of material facts. The communication between H and the Child had never been concealed. The travel plan of the Child had been disclosed by W s exhibiting the emails between H and the Child (p143-146 / LCH2) in her ex parte application. The fact that H would return to Hong Kong shortly after his departure has been disclosed in paragraph 7 of Mrs Heathfield s affirmation dated 23th June 2006 (p38 of Bundle B).
22. In my view, it was not a situation where W jumped for an application without trying to find out from H. She wrote to H on 7th and 9th June 2006, there was no concrete reply. She called him on 19th June 2006 but H could not be reached. Through her lawyers, letters were sent to H s then lawyer, no concrete reply but said that they would not be able to revert until 28th June 2006. By then, it was a few days prior to H s leaving Hong Kong.
23. The fact that H would be coming back to Hong Kong shortly after leaving for Bangkok would not have solved the problem for W in case of enforcement as the information she got was that H was moving his base to Thailand. His brief return to Hong Kong with the Child could not relieve the fear of W for not being able to enforce the arrears and further maintenance. H s business here was also neither here nor there in terms of enforcement. H had been taking pain to tell W that the business was facing great difficulties.
24. Having considered all the circumstances, I find that W had not been unreasonable in taking out the ex parte summons for a Prohibition Order against H. I find that H s leaving Hong Kong have caused W to fear that her enforcement of the underlying order might be obstructed or delayed. I hereby order that the costs order nisi for H to pay the costs of and incidental to W s application for the Prohibition Order do become absolute. Costs Order nisi in respect of H s application for leave to appeal from My Judgment dated 28th January 2007
25. Upon refusing H s application for leave to appeal from My Judgment dated 28th January 2007, I made an order nisi for costs against H. Ms. Irving for H submitted that H should not bear the costs of W because the application for leave to appeal was made ex parte. She said that as W chose to appear without receiving a summons, H was not liable for W s costs in his application even he had eventually lost in the application.

26. What happened at the hearing was this. Initially there was an argument on whether the hearing should be *ex parte* or *inter partes*. Ms Irving withdrew her objection for Mrs Heathfield's attendance after the matter was stood down for her to read the authorities supplied to her by the court. Then there was a brief argument on whether Mrs Heathfield appearing for W should be heard. Then parties agreed that Mrs. Heathfield was to be heard and that Ms. Irving should have the last word. Mrs Heathfield was heard in reply to Ms Erving's submission. In my judgment dated 27th February 2007, I dismissed the application of H and made an order nisi that H should pay W costs in his application for leave to appeal.
27. Ms Irving has been referred to the judgment of Deputy District Judge Kwok, as he then was, in *The First International Bank of Israel Limited v D.R.A. Trading Limited Amir Gad* (unreported) DCCJ 2116 / 2003 when she contended that the application should be *ex parte* following the High Court Rules. She raised this again in her written submissions asking me not to make the costs order nisi absolute and to vary such order to no order as to costs for H's application
28. I fully understand that the judgment is not binding on me, I however agree with Deputy District Judge Kwok's view in this regard. The following paragraphs in his judgement is relevant.
24. In my judgment, whether or not an *inter partes* summons has to be taken out can only be resolved by reference to the basic principle of law as well as the particular rules applicable in the District Court
25. To start with the basic principle of law, the principle of natural justice, which is the fundamental and indispensable cornerstone in the administration of justice, requires that anybody whose right or interest is or may be affected by any judicial relief must be given adequate notice of the application for that judicial relief as well as an opportunity to be heard concerning the merits of such relief: *Hopkins v Smethwick Local Board of Health* (1890) 24 Q.B.D. 712. The rule of *audi alteram partem* requires that the person who has to decide shall hear both sides, and shall give each side an opportunity of hearing what is urged against him, and that no man should be condemned unheard or without having had an opportunity of being heard: *Re Brook and Delcomyn* (1864) 16 C.B. (N.S.) 403; *The Bentley's Case* (1723) 1 Str. 557.
26. An application for leave to appeal is undoubtedly an application for a judicial relief that, if granted, affects the right and interest of the intended respondent to the appeal. To say the least, if leave is granted, the respondent has to engage in further legal proceedings in a higher court, incur more legal expenses, and face uncertainties created by the possibilities that the judgment that he has already obtained may be set aside, and he may have to withhold execution of the judgment, or proceed with it at his own peril.

27. In *Cooper v The Board of Works for the Wandsworth District* (1863) 32 L.J.C.P. 185, Byles J. stated as follows : - There are numerous cases, coming down to the most recent times, to the effect that when powers are conferred by the legislature which are to be judicially exercised, the person against whom they are to be exercised has a right to be heard; and that if this right be not expressly conferred by the statute, the common law will supply that omission .
28. While the issue under consideration in the *Cooper s* case was not on the practice of a court, what Byles J. had said must be of universal application because his ruling was the obvious and inevitable consequence of the application of the principle of natural justice. According to the learned judge, if the statute does not expressly state that the person affected has a right to be heard, the common law will supply that omission. Hence, if the statute providing for the judicial relief is silent on the mode of its application, an application for such judicial relief must be taken out on an inter partes basis so that the person to be affected will have due notice of the application and an opportunity to be heard on its merits, and that the tribunal to decide shall hear from both sides before making its determination .
29. Deputy District Judge Kwok then went on to say that however such principle of law may be displaced under the following principles. The two principles referred to by him is first, urgent applications like those applications asking for Mareva injunctions and Anton Pillar and secondly when the basic principle is overridden by statute as in the case of Order 59 rule 14 (2) of the High Court Rules.
30. In her written submission, Ms. Irving acknowledged that there was no statutory supporting the contention that a leave application is to be heard inter partes. I agree. In the circumstances, the basic principle applies. In fact at the hearing, Ms Irving argued that the Rules of the High Court shall apply in the matrimonial proceedings. Matrimonial Causes Rules r3 provides that : Subject to the provisions of these rules and of any enactment, the Rules of the High Court (Cap 4 sub. leg.) shall apply with the necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceedings pending in the Court of First Instance or in the District Court .
31. The provision is subject to the provisions of these rules and of any enactment. In this I find O.1 r.2 and O.58 r. 2 of District Court Rules relevant : Rule 2. Application (O. 1, r. 2)
 - (1) Subject to this rule, these Rules shall have effect in relation to all proceedings in the Court.
 - (2) -- (2A) These Rules shall not have effect in relation to
 - (a) proceedings under Part III of the Landlord and Tenant (Consolidation) Ordinance (Cap 7);
 - (b) matrimonial proceedings (except for an appeal against any judgment, order or determination of a judge to which Order 58 shall apply);
32. Order 58 r. 2 of the District Court Rules provides that an appeal shall lie to the Court of Appeal and only with leave of the Court or the Court of Appeal. Nowhere it has provided that the application for leave should be inter partes or ex parte. Applying the principles set out by

Deputy District Judge Kwok, it is my view that W has the right to be heard in H s application concerning her interest. As H lost the application, he should bear the costs of W and I hereby order that the order nisi become absolute. Costs Order nisi in respect of H s application to vary the maintenance order and the costs of the Judgment Summons

33. I have made an order nisi in My Judgment dated 28th January 2007 that W do pay costs for H s application. Now the Judgment Summons has been decided, I have yet made any order on costs for the Judgment Summons. I find it appropriate to have the costs of the two applications considered together. As a starting point, W having succeeded in her Judgment Summons should be awarded costs in her application while H should be awarded costs in his application proportion to the extent of his success in his application.
34. I have read the submissions of Mrs Heathfield. I agree with her saying that part of the preparation for H s application for variation was in relation to W s Judgment Summons. The affirmation of means and Form E filed by the parties were for dual purposes. In fact it was on the first day of hearing that the legal representatives of parties conceded that the two summonses had to be proceeded separately per judgment of Ma JA in C and CA CACV No. 272 / 2002, i.e. H s summons be heard in chambers whilst W s be dealt with in open court.
35. Further, the evidence collected at the hearing of H s application had been adopted by parties for the Judgment Summons and therefore no hearing of evidence was necessary. I also consider that the two applications were instigated by H s default and H s application has not been fully successful in the sense that the variation took effect from date of summons not from date of default. In all of the circumstances, there should be no order as to costs for H s application including the two-day hearing which took place on 1st and 18th December 2006. H, on the other hand, should pay costs of W s Judgement Summons because although I do not find him in contempt, I do find that he did have the fund to pay at the time of default and I make the order that the such arrears be paid out of the money now being held by his lawyer. I note that W did not get US\$7982.38 as claimed from my judgment, but this is not material in terms of costs as it was H s case that she should not be entitled to any differences because of her acquiescence to the reduction, not that she should be entitled to the amount now awarded by the court. As the preparation and the hearing of the two summonses could not be practically distinguished, I therefore take an overall view that H sed by H s lawyer and paid to W through her solicitors to satisfy the arrears due to W as found in paragraph 13 above; (ii) H do pay costs of W in his application for leave to appeal; (iii) H do pay costs of W in her application for a prohibition order against H; and (iv) H do pay half the costs of W in the two summonses
- (v) All such costs are to be taxed if not agreed. (Tracy Chan) Deputy District Judge Mrs. Heathfield of Messrs Boase Cohen & Collins for Petitioner Ms Frances Irving instructed by Messrs Hampton, Winter and Glynn for Respondent PAGE - PAGE - &`#\$ ~!P] j% Td #-p 6<z% ,f@- sy \$ he~"Td c(#\$ 0kJ\$\$ @P\$\$ vRs&r 1 #' :L- E{k' XW(\$ s ` ()H/0 -3*\$ 43*\$ c7*+ :p . {^2\ (\$p2\$ 4g3\$ 4QQ4 4lp4 0b50p M;`6 M|;\$ wzO?p= H#@ \$ 3i@\$ nSDH lEFE 5)GTd HHZbr kxL\$ /eNH S\$O\$ y<0O vuWOTd c;R\$ Y CR G%9UT Zk\_UR z`Uf RW!W C:~W x% X\$ x8Y\$ L}YH

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