

HONG KONG / JUDGMENT

L v. L

COURT

Court of Appeal

DECIDED

7 December 2006

CASE / FILE NUMBER

CACV295/2005

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bjbj cacv 295 & 296/2005 in the high court of the hong kong special administrative region court of appeal civil appeal nos. 295 and 296 of 2005 (on appeal from fcdj NO. 580 of 1993) BETWEEN L Petitioner Respondent Before: Hon Rogers VP, Le Pichon JA and Sakhrani J in Court Date of Hearing: 7 December 2006 Date of Judgment: 7 December 2006 J U D G M E N T Hon Rogers VP: This is an appeal and a cross-appeal. On the appeal, the husband, who is the Appellant in this Court but the Respondent to the petition, seeks a reduction in the order for maintenance, both for wife and his son by what I shall term the first marriage Yim, who has appeared on behalf of the wife, who is the Petitioner, has helpfully informed the Court that, on instructions, he has been informed that the son, who is now 18 years old, has taken employment and, although he is not paid very much - it is \$6,000 a month which is slightly more than the order for payment of his maintenance he is prepared not to seek an order for payment of maintenance from the father. In those circumstances, the order for payment of maintenance of \$5,000 per month in respect of the younger child of the first marriage can be discharged as of 1 September this year. That leaves the order for maintenance in respect of the wife, the Petitioner, of \$10,000 per month. Having considered the Respondent's circumstances, it is clear that he owes considerable amounts of money to various banks and credit card companies and this entails a very large part of his salary every month having to be paid out in respect of those debts. The circumstances in which the Appellant has found himself are seemingly explicable but unfortunate. Nevertheless, the first wife is clearly entitled to some maintenance and they are both coming to the end of their working careers. The order for maintenance of \$10,000 per month appears to us to be something which should be maintained. We have given consideration as to whether new circumstances have arisen by reason of the fact that the Respondent's second marriage has regrettably, it seems, also fallen apart and proceedings for maintenance in respect of that by the wife of the second marriage, on her part and on the part of the child of that marriage, are due to take place in January next year. At one stage thought was given as to whether the judge hearing that case should be empowered to consider the circumstances of this case but, on reflection, we have come to the conclusion that this order for maintenance should be maintained and that the judge who will be hearing the maintenance application in respect of the second marriage in January will proceed upon the basis that this order for maintenance is in existence and come to his conclusion in respect of that accordingly. The other aspect of this case concerns the committal order that was made on 11

August 2005. The judge making the order came to the conclusion that he was not empowered to make an attachment order in respect of the Respondent's salary because of section 23 of the Crown Proceedings Ordinance Cap.

300. That is a matter to which I will come in a moment. In view of that, he considered that a suspended committal order should be made in the terms that the order should be for imprisonment for 1 month suspended on condition that the Respondent continues to pay the current maintenance at the rate of \$15,000 per month - that was \$10,000 for the Petitioner and \$5,000 for the younger son - and that the arrears of the then outstanding \$322,500 be attached to the lump sum pension of the Respondent. One matter which raised immediate concern is as to the effect if that order were to be put into effect. It would appear that it would be quite likely to have a devastating effect for all the parties concerned because the Respondent would then not only lose his salary for the month for which he was in prison but would very likely lose his job and this might even have repercussions on his entitlement to a pension. He would clearly be subject to disciplinary proceedings and what the outcome of those would be is not for this Court to determine. In those circumstances, it seems to me that, although the threat of committal to prison may in many circumstances be justified, the risk of that coming into effect and the consequences which would follow would be a matter which would dictate that such an order should not be made in the present case. I would therefore propose that that order be discharged. However, it would only be discharged to the effect of the committal order, but not in relation to the order whereby the arrears were to be attached to the lump sum pension. In that respect, the matter can be varied to bring that up to date to include not only the \$322,500 but also the arrears up to date in so far as they have increased from that sum. There then remains the question of the cross-appeal on behalf of the Petitioner. What is said is that the judge should have made an attachment order in respect of the Respondent's salary. To my mind, there is a very short answer to that, and that is that section 23 of the Crown Proceedings Ordinance prohibits that. Section 23(1) of that Ordinance reads: Where any money is payable by the Crown to some person who, under any order of any court, is liable to pay any money to any other person, and that other person would, if the money so payable by the Crown were money payable by a subject, be entitled under rules of court to obtain an order for the attachment thereof as a debt due or accruing due, or an order for the appointment of a sequestrator or receiver to receive the money on his behalf, the Supreme Court may, subject to the provisions of this Ordinance and in accordance with the rules of court, make an order restraining the first-mentioned person from receiving that money and directing payment thereof to that other person, or to the sequestrator or receiver. Provided that no such order shall be made in respect of -

- (a) any wages or salary payable to any officer of the Crown as such; Subsection
- (2) of that section applies the same provisions to the District Court. It was sought to be argued on behalf of the Petitioner that matters have been overtaken by the Matrimonial Proceedings and Property Ordinance, Cap. 192, which empowers attachments to be made in

respect of salaries. In fact, section 28(4) provides that subsection (1), which is the empowering section, applies despite section 66 of the Employment Ordinance, Cap. 57, and accordingly, nothing in that section shall be construed as precluding the making of an attachment order in respect of any wages of an employee. But as was pointed out by this Court in the course of argument, no such corresponding provision was made in respect of the Government and in respect of the provisions of section 23 of the Crown Proceedings Ordinance. The short point is that section 23 is an empowering section. Without it, no attachment order could be made in respect of any money sums due from the Government. But there is a proviso in that which prohibits - whether anachronistically or not, it matters not - any attachment order being made in respect of any wages or salary. Whether or not the provisions of section 23 should be reconsidered is not a matter open to this Court to consider. The fact of the matter is that the law is clear that no attachment order can be made in these circumstances and, therefore, the cross-appeal must be dismissed. So in those circumstances, the order which I propose should be made is that the order of 2 August 2005 be varied by discharging the order for payment of \$5,000 per month for the younger child as of 1 September 2006, and the order of committal of 11 August 2005 be discharged as far as the continuation of payment of current maintenance, but the order for the payment of arrears of \$322,500 together with the arrears up to date be attached to the lump sum pension of the Appellant. There should be a further order that the Director of Accounting Services, upon payment to the Appellant of his commuted lump sum pension, should pay to the Petitioner the arrears of \$322,500 together with the arrears up to 7 December 2006. If the parties can agree that sum, then that sum can be inserted in the order. Hon Le Pichon JA: I agree. Hon Sakhrani J: I also agree. (Anthony Rogers) Vice-President (Doreen Le Pichon) Justice of Appeal (Arjan H Sakhrani) Judge of the Court of First Instance Mr Eugene Yim, instructed by Messrs Philip K H Wong, Kennedy Y H Wong & Co., for the Petitioner/ Respondent The Respondent/Appellant, in person PAGE - A B C D E F G H 1udk 1udk 2QX[2QX[2QX[2QX[2QX[H; < jFen & 6" ABC-Final (fair)1.dot setup Microsoft Word 9.0 Judiciary Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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