

HONG KONG / JUDGMENT

LAML v. TCCY

COURT

Court of Appeal

DECIDED

13 September 2004

CASE / FILE NUMBER

CACV75/2004

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bjbj CACV 75/2004 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 75 OF 2004 (ON APPEAL FROM FCMC 4097 OF 2003) BETWEEN LAML Petitioner and TCCY Respondent Before : Hon Woo VP and Hon Cheung JA in Court Date of Hearing : 3 September 2004 Date of Judgment : 13 September 2004 J U D G M E N T Hon Cheung JA (giving judgment of the court) : The appeal The Petitioner wife (the wife) applied for maintenance pending suit for herself and the two children of the family against the Respondent husband (the husband). On 10 February 2004 H H Judge B. Chu dismissed the wife s own application but ordered the husband to provide each of the two children \$10,000 per month as maintenance. Prior to this order, there was a consent order dated 1 September 2003 in which the husband agreed to pay an interim maintenance pending suit for the wife and the two children at \$10,000 per month commencing from 1 September 2003. Pursuant to the leave granted by the judge, the husband now appeals.

Facts

The parties married in May 1983 in Toronto, Canada. After their marriage they lived in Canada until their return to Hong Kong in 1990 to 1991. The two children of the family are a daughter aged 15 and a son aged 13. Upon the parties return to Hong Kong, they lived in an accommodation provided by the husband s parents who also provided them with domestic helpers and cars for their transportation. In April 2003 the wife petitioned for divorce based on the unreasonable behaviour of the husband. She and the son moved out from the matrimonial home shortly thereafter and moved to a flat which the wife has to pay rent at \$12,000 per month. The husband cross-petitioned for divorce based on the wife s unreasonable behaviour. By agreement of the parties, the custody of the daughter was given to the wife. The daughter has since August 2003 left Hong Kong to study in Toronto, Canada. She now lives with her grandfather i.e. the father of the wife, in an accommodation which was the previous matrimonial home of the parties before they returned to Hong Kong. The finding The Husband Both parties are university graduates. The husband is employed by a computer company as an Assistant Sales Manager in the China Management Department. The judge found that the husband has an income of \$35,000 per month. His monthly expenditure was assessed to be \$14,350 per month. The wife The wife is

employed as a planning manager in the Operations Department of a company. The judge seemed to accept the wife's salary to be HK\$41,910 per month. Her monthly expenditure was assessed to be \$37,466. The daughter The judge assessed the monthly expenditure of daughter at \$12,320. This included accommodation, living costs, tutorial fees and extra-curricular activities and the apportioned fee of a yearly return air ticket. The son The son's monthly expenditure was assessed at \$12,200. This included accommodation and household expenses, meals and other expenses such as lunch fees and school expenses. The law The power to award maintenance pending suit to the wife is under section 3 of the Matrimonial Proceedings and Property Ordinance (the Ordinance , Cap. 192). Provisions for the children are under section 5(1) of the Ordinance. Section 7(1) and (2) In respect of maintenance pending suit for the spouse, the court may regard the conduct of the parties and the factors set out in section 7(1) of the Ordinance. Although these factors are expressed to arise when the court is deciding whether to exercise its power under section 4 (financial provision on divorce), section 6 (order for transfer and settlement of property on divorce) and section 6A (order for sale of property), in practice it will be unusual for the court on an application for maintenance pending suit to be in a position to make a finding of fact sufficient, for example, to deal with conduct : Rayden & Jackson on Divorce and Family Matters 17th Ed. Vol. 1 Para. 21.6 and also Yung v. Yung (Civil Appeal No. 201 of 1985). The factors set out in section 7(1) are : the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; the standard of living enjoyed by the family before the breakdown of the marriage; the age of each party to the marriage and the duration of the marriage; any physical or mental disability of either of the parties to the marriage; the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family; in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring. In respect of children, the relevant statutory factors to be considered are set out in section 7(2). They are the financial needs of the child; the income, earning capacity (if any), property and other financial resources of the child; any physical or mental disability of the child; the standard of living enjoyed by the family before the breakdown of the marriage; the manner in which he was being and in which the parties to the marriage expected him to be educated; The principle The Court has stated that in an application for maintenance pending suit the principles for the court to consider at this stage are : First, the reasonable needs of the spouse and the children of the family who ask for maintenance and the other spouse's ability to pay. Second, this being an interim provision, the court will not make a detailed investigation of the financial positions of the parties but will adopt a broad brush approach. See Wong Wai Chi Susanna v. Kim Min Sup Mark (CACV 263/98). Exercise of discretion In dealing with this appeal, this court also has to bear in mind that the judge was exercising a discretion. Unless she was plainly wrong, this Court will not interfere with her decision even if this Court may choose to exercise the discretion in another way if it was exercising it in the first place. Income of husband The first ground of appeal is that the judge was wrong to assess the income of the husband at \$35,000 per month. In

our view this is a complaint of substance. The basic monthly salary of the husband is \$24,090 which is confirmed by the employer. While in January 2003 he received a bonus of \$48,180, the amount he received in January 2004 was only \$24,090 or about \$2,000 per month. This added up to \$26,090 a month. Reimbursements It is not clear how exactly the judge arrived at the final figure of \$35,000 per month. However, it would appear that she had included the reimbursement of the entertainment expenses, domestic travelling, overseas trip expenses and telecommunication expenses which the husband received from his employer. As explained by the husband, his employer reimbursed him for those expenses which were incurred by him in the course of the business of the employer. The husband was a sales manager. If these sums were reimbursement for his own out of pocket expenses then they could not be treated as part of his income. Overtime and hardship expenses The husband will also receive \$800 per month if he has to work overtime in that month. He will also receive travel hardship allowance of \$50 per day when he is engaged in overseas business trips. He agreed that for the past two years he had been receiving such allowances although he did not give an exact figure. These two items are clearly items that can be taken into account. E-Tonex Company The husband is also the sole proprietor of a company called E-Tonex Company. The gross profits of this company for the year ended 31 March 2003 were \$40,596.99, the net profits were \$637.41. The evidence showed that there was deduction for entertainment, transportation and travels expenses from the income of this company. The evidence also shows this company does generate income. It has a sales figure in the sum of \$423,127 for the year ended 31 March 2003. The husband did not receive a salary from this company. If the entertainment, transportation and travel expenses were incurred to generate the income of the company, then as the matter now stands, they can hardly be treated as an additional income for the husband. At the very least, in the absence of detailed investigation, they cannot be wholly attributed to the husband as an additional source of income. Cantech Holdings Ltd. The husband and wife are the shareholders and directors of a company called Cantech Holdings Ltd. (Cantech). It is operated solely by the husband. The gross profits for the year ended 31 December 2002 were \$70,325 with a net loss of \$921. The judge seemed to have accepted the submission of the solicitor for the wife that, but for the depreciation on tangible fixed assets and the director s holiday passage, Cantech in fact could have made a profit of not less than HK\$22,580 for the year ended 31 December 2002. This would work out to about \$1,880 per month. The profit and loss account of Cantech showed that depreciation on tangible fixed assets was \$7,538 and Director s holiday passage was \$15,042. This company has a sales figure of \$271,440 for the year ended 31 December 2002. The claim for depreciation again can hardly be treated as an income for the husband. However, a different consideration may apply to the item of Director s holiday passage . On the face of it, this item is not in the nature of a reimbursement of expenses but rather in the nature of an allowance which the husband is entitled to deduct. This item is about \$1,250 per month. In our view this item can be regarded as an income of the husband. Error But even if this last item is to be taken as the income of the husband, the total income including salary, bonus, overtime and hardship allowance and other benefits still falls short of the \$35,000 assessed by the judge. This is a sum not supported by the evidence before the court. In our view the judge had erred. This requires us to exercise the discretion afresh. Re-assessment In our view a more realistic assessment of the husband s monthly income based on

Conclusion

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