

HONG KONG / JUDGMENT

LCH v. WPSN

[2025] HKCA 376**COURT**

Court of Appeal

DECIDED

25 April 2025

CASE / FILE NUMBER

CACV327/2024

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CACV 327/2024, [2025] HKCA 376 On Appeal From [2023] HKFC 254 and

[2023] HKFC 257 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 327 OF 2024 (ON APPEAL FROM FCMC NO. 1936 OF 2020) BETWEEN LCH Petitioner and WPSN Respondent Before : Hon Chu VP, Cheung and Au JJA in Court Date of Hearing : 8 April 2025 Date of Judgment : 8 April 2025 Date of Reasons for Judgment : 25 April 2025 Reasons for Judgment Hon Cheung JA (giving the Reasons for Judgment of the Court) : I. The appeal This is an appeal by the petitioner husband ('the husband'), pursuant to leave granted by this Court, against the judgment of H H Judge G Own dated 22 December 2023 by which he ordered the husband to be committed for contempt of court for breach of his undertaking in a Consent Order dated 30 November 2020 ('the Children Finance Order') pursuant to the terms reached between the husband and the respondent wife ('the wife') relating to the financial arrangement of the two children of the family, namely, A and B, in which the husband agreed, inter alia, 'to pay or caused to be paid' the school fees and other school related fees of A, the elder child of the family ('the fees'). The Judge imposed on the husband a sentence of eight weeks' imprisonment suspended on the condition that he paid up by 29 December 2023 the arrears of the fees from 26 September 2022 to 29 December 2023. We dismiss the appeal at the conclusion of the hearing of the appeal and these are our reasons for the dismissal. II.

Background

Apart from the Children Finance Order, by another Consent Order of the same date relating to the children ('the Custody Order'), the husband and the wife were granted joint custody and share care of A and B on alternate week basis. There is no dispute that the undertaking by the husband was contained in Recital C of the Children Finance Order. It provided that the husband's undertaking is 'regardless of which school [A and B] will attend (and it is envisaged both children will attend the [ESF School] in the fullness of time)'. Paragraph 1 of that order further provided that the husband is to pay or caused to be paid maintenance for each of A and B at \$15,000 per

month (\$30,000 in total) until they are 18 years old or cease full time tertiary education (first degree). At the time of the Children Finance Order, the younger daughter B was already studying at the ESF School. A, on the other hand, was studying at a local school. On 26 September 2022, she was admitted to study at the ESF School as well. The husband refused to pay the fees of A ever since. On 17 February 2023, the wife lodged her application for leave to institute contempt proceedings against the husband by way of a statement issued pursuant to Order 52, rule 2 of the Rules of the High Court ('RHC'). The arrears of payment of the school fees were \$111,757. The monthly school fees alone was \$11,910. Leave was granted on 28 July 2023. The wife then issued her summons for committal on 3 August 2023. The husband then on 14 September 2023 issued a summons for discharge of his undertaking in Recital C to E of the Children Finance Order and to seek a variation of the maintenance order to no more than \$20,900 per month ('the variation application'). The husband filed his 9th Affirmation in support of the variation application. He explained that it was his mother ('the Mother') who had agreed to fund his undertaking to pay the fees when he reached agreement on the Children Finance Order with the wife. The circumstances had changed since the order because the Mother had decided not to fund him anymore. He was earning \$22,000 per month in the employ of the business of his family. Because he has joint care of the children, it was unlikely he could find an alternative employment with a higher income. His accommodation and living expenses are provided for by the Mother. He was willing to use his income to pay for the maintenance of the children. The Mother in her affirmation explained why she decided to stop to fund the husband was because she was displeased with the wife. The husband did not file or give evidence in the contempt proceedings. He did not rely on the reason for his nonpayment contained in his 9th Affirmation and the Mother's affirmation as evidence for opposing the committal application. III. The Judge's decision

The Judge held that the wife has established beyond reasonable doubt that the husband was in contempt. He held that the ambit of the husband's undertaking in Recital C is clear, namely, he will pay or caused to be paid the fees of A. The phrase 'caused to be paid' does not absolve the husband from payment. The responsibility to pay remains with the husband. That the husband may need the assistance of a third party to fulfil the undertaking is an arrangement between the husband and the third party and does not concern the wife. The husband has failed to pay the agreed fee. As to his intention, the Judge held that he was fully advised by his legal advisers when he agreed to the Children Finance Order, and he knew the wording of Recital C clearly envisaged that both children will attend the ESF School in due course. This is envisaged by the wording of Recital C. With this knowledge and state of mind, if the husband does not comply with the undertaking, this will constitute the necessary intention for contempt of court. Despite the submission of the husband, the Judge, however, refused to deal with the variation application by the husband before the wife's committal application. He was aware of the practice and authority of family disputes that where there is a judgment summons and an application to vary the judgment which is the subject matter of the judgment summons, the Court should deal with the application to vary first. However, he held that in respect of an enforcement on 'liability for breach', there is a distinction between a breach of an undertaking and a breach of an order for payment. The former is by way of committal proceedings and the latter by way of a judgment summons. Since the present case involves a committal summons, the Court is not obliged to deal

with the variation application first. IV. Grounds of appeal The husband advanced three grounds of appeal : 1) The Judge has erred in law for failing to hear the husband's application for variation of children maintenance and discharge of undertakings filed on 14 September 2023 before the committal application in accordance with *YBL v LWC* [2017] 1 HKLRD 823. 2) The Judge has erred in law for finding that a breach of undertakings which concern payment of money should be enforced by committal proceedings and not judgment summons. 3) The Judge has erred in law for suspending the term of imprisonment on the condition that the husband shall pay to the wife all outstanding debts up to the date of 29 December 2023. V. Our view We will deal with the second ground of appeal first. 1) Ground 2: Judgment summons or committal summons? The thrust of the submission of Mr Li and Ms Huang for the husband is that by reason of this Court's judgment in *YBL* the wife should proceed by way of judgment summons and not by committal proceedings against the husband for his noncompliance with his undertaking under Recital C. Mr Li referred to the UK Law Commission Consultation Paper No.370: Enforcement of Family Financial Orders (2016) at Chapters 1, 2, 7 and 12 that discussed the historical background of judgment summons, the nature of what the Commission calls a 'family financial order', namely a financial order made between family members, as well as, judgment summons as an exclusive method only available in family proceedings for enforcing a family financial order breached by a nonpayer, and the different considerations between family law and civil enforcements. He further referred to the United Kingdom position on enforcement in family proceedings. Under Part 33 of the Family Procedure Rules 2010 ('FPR 2010'), which is supplemented by Practice Direction 33A – Enforcement of Undertakings, the enforcement of undertaking to do or abstain from doing any act other than the payment of money is specifically distinguished from that of undertaking for the payment of money; the former is primarily done by way of contempt applications under the provisions of Part 37 of the FPR 2010, whereas for the latter, it is provided that '[any] undertaking for the payment of money that has effect as if it was an order made under Part 2 of the Matrimonial Causes Act 1973 may be enforced as if it was an order and Part 33 and Part 37 apply accordingly'. He submitted that although there are currently no equivalent provisions in Hong Kong, from the Review of Family Procedure Rules Interim Report and Consultative Paper (February 2014); Review of Family Procedure Rules Final Report (May 2015); and Consultation Document for Draft Family Procedure Bill on Procedural Reforms for the Family Justice System (February 2022), our Court has reviewed and endorsed the procedure and practice of the United Kingdom, and recommended the same to be formally adopted in by way of a new legislation. Hence, it is clear that enforcement of financial undertakings by judgment summons is recognised in Hong Kong. Mr Li also submitted that the wife's application, although by way of committal, was in essence a judgment summons application and in so doing the wife has deliberately circumvented the examination or stage of the judgment summons. We disagree. In our view, the wife has the choice to deal with the husband's noncompliance of his undertaking either by way of judgment summons or committal proceedings. In *YBL v. LWC* [2017] 1 HKLRD 823, this Court discussed the judgment summons procedure under Rule 87 of the Matrimonial Causes Rules (Cap. 179A, Sub. Leg) that judgment creditors in family proceedings may rely upon to enforce judgments. This procedure involves an investigation into the judgment debtors' financial means and also the making of a committal order against the defaulting judgment

debtors. Under Order 87(2), the judgment debtor is to be orally examined on the debts of the judgment debtor and whether he has property or means to satisfy the order. He may be required to produce books or documents in his possession relevant to the examination. Rule 87(5) provides that the Court may, inter alia, 1) make a new order for payment due under the original order either at a specified time or by instalments and 2) impose an order for committal on the judgment debtor if he fails to show cause why a committal order should not be made against him. This Court held that in this way, the true nature of a hearing of a judgment summons is that of contempt proceedings where the Court must be satisfied beyond a reasonable doubt before making an order for committal. This procedure has features which are incompatible with a fair trial under the provisions of the Hong Kong Bill of Rights, namely, Article 10 (equality before courts and right to fair and public hearing) and Article 11 (rights of persons charged with or convicted of criminal offence). As a remedial measure, this Court held that if a judgment summons is deployed for the purpose of committal, it should be divided into two stages. The first being the examination stage and the second being the committal stage. After the first stage is completed, a statement containing the full charge for committal should be laid before the Court when dealing with the second stage of committal. Following the decision of YBL, a Practice Direction (PD SL10.2) was issued on 18 February 2019, which provides that : ‘

103. In the interpretation section of Rule 87(1), to segregate the examination process from the committal application, the definition of “judgment summons” should be read as meaning “a summons issued under an order made under R.H.C. Order 48, rule 1(1) requiring a judgment debtor to appear and be examined on oath as to his means (“Examination Summons”); or a summons for committal issued under R.H.C. Order 52 (“Committal Summons”)”. We can only apply the law as it is. The recommendations contained in the Review of Family Procedure Rules Final Report have not been implemented by way of legislation. Neither YBL nor PD SL10.2 requires a party to choose the judgment summons procedure to deal with the judgment debtor’s noncompliance of a court order or undertaking. Mr Li further accepted that he could find no authority that would compel the wife to resort only to the judgment summons procedure. The choice depends on what the applying party wishes to achieve. According to YBL and PD SL10.2, if the party who proceeds with the judgment summons route wishes to seek a committal order, then a committal summons should be issued. But there is nothing to prevent a party from going to the committal route directly pursuant to Order 52, rule 2 of the RHC. This is precisely what had happened in this case by the wife commencing the committal proceedings under this order. There is no requirement that if a party does not pursue the judgment summons route, the Court still has to go through an ‘examination process’ prescribed by YBL and PD SL10.2 before it could commit the defaulting party for contempt. The burden is on the applying party to satisfy the Court beyond reasonable doubt that contempt is established. We disagree with Mr Li that the wife’s application was in essence one of judgment summons in nature. The fact that the wife had particularised the arrears, repeatedly demanded the husband to pay and pleaded that the husband had the means to pay does not change the nature of her application, namely, to commit the husband for contempt. That was the only remedy sought

in her summons. With respect, Mr Li's submission that the wife had circumvented under the judgment summons stage 1 examination is way off the mark because the reality is that the wife had not adopted the judgment summons procedure at all. In respect to Mr Li's argument that the wife should proceed with the judgment summons route, the Judge drew a distinction between an undertaking to pay and an order to pay. He held that in respect of the former, the enforcement for breach should be by way of a judgment summons and the latter by way of a committal application. We disagree with the Judge. The authorities are clear that undertakings are enforceable as effectively as direct orders : *Livesey (Formerly Jenkins) v Jenkins* [1985] FLR 813 at 829. Applying this principle, since the undertakings to pay by the husband are embodied in the Children Finance Order, it is appropriate to treat the undertakings to pay the fees as an order for their payment : *Gandolfo v Gandolfo* [1980] 1 All ER 833, *PD v KWW* (unreported) FCMC 11277/2009, 6 December 2010 and *NWC v LLKA* (unreported) FCMC 1099/2009, 11 June 2014. Further, as said earlier, the mode of application is not dependent on the subject matter of the breach but rather on the nature of the remedy that a party wishes to pursue. 2) Ground 1: Variation application Was the Judge wrong not to deal with the husband's variation application first? In YBL it was held : ' 27. Further, as a matter of procedural consideration, it has been held that application for committal should not be heard together with other applications and in general an application for variation should be heard before the judgment summons: *L v L*; *C v C*, *C v H*.' Ultimately, the issue here is whether the husband has received a fair hearing by not having his variation application heard first. The meaning of the intention for contempt becomes relevant. YBL held : ' 19. In *Kao Lee & Yip v Koo Hoi Yan* (2009) 12 HKCFAR 830, the Court of Final Appeal decided that though liability for civil contempt does not depend on a contumacious intent, the exemption for "unintentional" conduct in the Stancomb principle exonerates a judgment debtor who had no means to comply with the order, see [48] citing *Concorde Construction Co Ltd v Colgan Co Ltd* [1984] HKC 253 and [56].... ' (emphasis added) The Stancomb principle mentioned in this passage refers to the judgment of Warrington J in *Stancomb v Trowbridge Urban District Council* [1910] 2 Ch 190, 194, who held that 'casual or accidental and unintentional acts' in not complying with a Court order are not contempt conducts. As observed by Lord Wilberforce in *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15 at 109, ' ...The view of Warrington J has thus acquired high authority. It is also the reasonable view, because the party in whose favour an order has been made is entitled to have it enforced, and also the effective administration of justice normally requires some penalty for disobedience to an order of a court if the disobedience is more than casual or accidental and unintentional.' Millett J (as he then was) elaborated in *Spectravest Inc v Aperknit Ltd* [1998] FSR 161, 173174, ' To establish a contempt of court, it is sufficient to prove that the defendant's conduct was intentional and that he knew of all the facts which made it a breach of the order. It is not necessary to prove that he appreciated that it breach the order....' Does the husband's failure to comply with his undertaking come within the 'casual, accidental and unintentional' category? The answer is plainly no. All that the husband is able to show by his and the Mother's affirmations is that the Mother stopped funding him but there is no evidence that he has no means to comply

with his undertaking to pay the fees, for example, there is no evidence that he could not borrow money to fulfil his obligation. In other words, even if the husband is able to establish that the Mother decided not to fund his undertaking, he is not able to come within the exception of 'unintentional' conduct which would exonerate him from his undertaking. This is more so when the undertaking includes the words that the husband 'caused to be paid' the children maintenance. Hence, even if the Judge should consider the variation application first, this would not have made the slightest difference to his finding that the husband was in contempt. This is sufficient to dispose of the argument that the variation application should be dealt with first. In any event, the husband, who was initially legally represented in the contempt proceedings and should have the benefit of legal advice, had made a conscious decision not to rely on the matter of the Mother not funding him as the reason for not complying with the undertaking, by not giving evidence or adducing evidence on the committal application. We see no good reason why he could not rely on this matter if that was his explanation for not complying with his undertakings. 3) Ground 3: The sentence The Judge suspended the eight week imprisonment on condition that the husband paid up the arrears up to 29 December 2023. Mr Li argued that by ordering the husband to pay up to date amounts to a 'revolving charge' that the husband had to face and this is contrary to YBL at [58] which criticised the 'revolving charge' approach : ' 58. Ms Yip brought our attention to the practice in the Family Court in reliance on that provision to order payment of all arrears accrued up to the date of order (as opposed to the arrears up to the date of the judgment summons). The practice is apparently adopted to dispense with multiple judgment summonses being issued for ongoing arrears. If an order of committal is made, the payment of this amount is set as the sum the judgment debtor must pay to have a committal suspended. In our judgment, whilst we can see the utility of the practice in terms of the new order for payment in the examination process, as a matter of principle, there is a serious problem if this is adopted as well for the committal process. The practice means that throughout the committal process, the charge is evolving. To establish a case of default up to the date of the judgment summons, the judgment creditor needs to establish the means of the judgment debtor during the defaulting period. However, if further arrears were added in the course of the committal proceedings, it effectively means that the judgment creditor can commit the judgment debtor on his means after the judgment summons. Thus, the charge is being constantly expanded and the judgment creditor can succeed even though he fails to establish the means of the judgment debtor for the pre-judgment summons period so long as he manages to establish the latter's means for the post-judgment summons period. This is a breach of Article 11(2)(a) and (b).' We disagree with Mr Li. By resorting to the committal procedure under Order 52, rule 2, the wife has to obtain leave first. In the statement, the wife had specified that the basis of her application for committal was the failure by the husband to pay the specific arrears ('the specific arrears') up to the time of her statement. This was the basis for finding the husband to be in contempt by not complying with his undertaking. We do not see any reason why the Judge could not, as a condition to suspend the imprisonment, require the further sums that had fallen due after the specific arrears to be paid as well. This does not in any way offend the requirement that the charge for

committal should be clear and particularized. The payment of these additional sums is merely a condition for suspending the imprisonment imposed by reason of the contempt of the husband not paying the specific arrears. 4) Contempt purged? Mr Li informed the Court that the husband had purged his contempt by complying with the order of the Judge by paying the wife the sums as ordered. The wife is however critical of the husband's conduct. Whilst she accepted that the husband had paid \$206,807 to her, she stated that the husband has since been deducting '\$5,000 from the children's monthly maintenance. The children maintenance went from \$30,000 and unilaterally deducted to \$2,650 per month for both children' and she has been 'the one paying his debt to repay [herself]' ever since the sentence imposed by the Judge. Mr Li did not dispute that the husband has not been paying the full amount of children maintenance under the Children Finance Order, but submitted that the circumstances and reasons for it were matters in dispute. We had therefore pointed out to the wife that the issue of unpaid or unilateral deduction of children maintenance by the husband had to be resolved in the Family Court. We note also that she had already issued a judgment summons in this regard. VI.

Conclusion

For the above reasons, we have dismissed the appeal with costs to the wife. Since this is a contempt proceeding, the costs are to be paid on an indemnity basis. We will assess the wife's costs summarily when the parties lodge the statement of costs and objections as directed. (Carlye Chu) (Peter Cheung) (Thomas Au) Vice-President Justice of Appeal Justice of Appeal Mr Felix Li and Ms Bridget Huang instructed by Tonys Lawyers, for the Petitioner The Respondent, unrepresented, appearing in person

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