

HONG KONG / JUDGMENT

LCTD v. CKMC

[2024] HKFC 31**COURT**

Family Court

DECIDED

16 February 2024

CASE / FILE NUMBER

FCMC6340/2018

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bjbj FCMC 6340/2018

**[2024] HKFC 31 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO. 6340 OF 2018**BETWEEN LCTD Petitioner and CKMC and CCSS Respondent 1st Intervener CKY CCLRD CCLRE
2nd Intervener 3rd Intervener 4th IntervenerCoram: HH Judge C.K. Chan in Chambers (Not Open to Public) Date of Hearing: 13 December
2023 Date of Handing Down Judgment: 16 February 2024**J U D G M E N T** (Maintenance Pending Suit)

This is a hearing of the Petitioner husband (s application for maintenance pending suit (), including legal costs provision () against the Respondent wife (). In his summons for MPS, H asked for: W do pay HK\$100,000 per month as MPS from the date of summons to the final ancillary relief judgment; W do pay the sum of HK\$10,719,300, or alternatively HK\$535,965 per month as LCP; and Pending the determination of the summons, paragraph 1 of the Order of HH Judge Ivan Wong dated 22 July 2022 (1st MPS Order) do continue, namely W do continue to pay H LCP in the sum of HK\$202,500 per month. W opposed the said application. She made no offer and asked for H s application to be dismissed. After due consideration being given to counsel submissions and all the circumstances of the case, this court makes the following orders on MPS and LCP: W shall pay a monthly sum of HK\$100,000 as MPS to H on the 1st day of every month starting 1 March 2024 until the AR Judgment or further order of the court; and W shall pay a monthly sum of HK\$500,000 as LCP to H on the 1st day of every month starting 1 March 2024 for a

period of 4 months up to 1 June 2024. For the avoidance of doubt, this LCP order is to replace the LCP at the monthly rate of HK\$202,500 being ordered on 4 September 2023. My reasons are as follows. Brief Background H is now aged 54, and W is aged 55. They were married in 2001 and within wedlock, 2 children were born. The elder son is aged 21 and the younger son aged 17. Both of them are now studying in the UK. The parties separated in March 2017. On 23 May 2018, H issued the present petition for divorce based in 1-year separation with consent. A decree nisi of divorce was granted on 19 June 2019. By an order dated 11 May 2021, the court granted a joint custody order in respect of the younger son, with care and control to W and reasonable access to H, including staying access. On 29 December 2021, H issued an inter-parte summons asking for MPS, including LCP (the 1st MPS Application) asking for MPS in the sum of HK\$132,500 per month, with LCP in the sum of HK\$2,581,900, or alternatively HK\$215,200 per month. After a contested hearing, His Honour Judge Ivan Wong assessed the reasonable needs of H at HK\$130,000 per month (64 of Judge Wong s Judgment dated 22 July 2022 (1st MPS Judgment)). But the court was also satisfied that at the time he was holding liquid assets of at least HK\$2.674 million, which would be enough to cover his needs for about 20 months and for this reason alone, H s application for MPS for his daily needs was refused (67 of the 1st MPS Judgment). Despite such ruling, Judge Wong has also put in a caveat (at 69 of the 1st MPS Judgment) that:

69. The MPS issue may have to be re-visited as and when appropriate if there is a change in the circumstances, especially if he husband s financial situation deteriorates. On LCP, Judge Wong was satisfied that H would incur a sum of HK\$2,156,600 for his legal costs up to FDR. Taking into account his remaining assets, the Judge was satisfied that H would need a sum of HK\$1,822,600 to cover his legal costs up to FDR. Assuming that the FDR would take place in 9 months time, this sum was divided by 9 and so the monthly payment of LCP was set at HK\$202,500. A Mediator-assisted FDR was held on 13 June 2023 but was unsuccessful. On 28 August 2023, H issued his second summons for MPS. As the parties failed to reach any agreement at call-over, this application was adjourned to today for argument. The Law on MPS The Court s power to grant a MPS order in favour of a spouse is governed by s.3 of the Matrimonial Proceedings and Property Ordinance, Cap 192 (MPPO):
3. Maintenance pending suit in case of divorce, etc. .. the court may order either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the presentation of the petition or making of the application and ending on the date of the determination of the suit, as the court may think reasonable. In *HJFG v KCY* , Hartmann JA (as he then was), at paragraphs 37 and 38 of the judgment, gave a succinct summary of the law in this area by referring to the judgment of Mostyn QC, sitting then as a Deputy Judge of the High Court in England, in *TL v ML* [2006] 1 FLR 1263, 1289:
37. The principles that have been emerged over time to guide judges in matters of interim maintenance have been fashioned in the main to ensure fairness. This is well illustrated in the judgment of Nicholas Mostyn QC, sitting then as a Deputy Judge, in *TL v ML* [2006] 1 FLR 1263, 1289, in which, having looked at earlier authorities, he derived the following principles

that speak specifically to fairness or are based on the need to ensure it. For present purposes, it is sufficient to cite the relevant principles without citing the Judge's reference to the source of those principles: The sole criterion to be applied in determining the application is reasonableness, which is synonymous with fairness. A very important factor in determining fairness is the marital standard of living. This is not to say that the exercise is merely to replicate that standard. In every maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long-term expenditure, more aptly to be considered on a final hearing. That budget should be examined critically in every case to exclude forensic exaggeration. Where the affidavit or Form E disclosure by the payer is obviously deficient, the court should not hesitate to make robust assumption about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources. In such a situation, the court should err in favour of the payee.

38. Finally, it is to be noted that in application for interim maintenance, when the amount to be paid is for a limited period only and not all the evidence is necessarily before the court, it is not appropriate, nor indeed in most cases possible, for the court to conduct a detailed investigation into the finances of the parties. While, in order to determine what is or is not reasonable, some analysis is always required, that analysis can be conducted on a broad-brush basis. Therefore, the overriding considerations for such applications are reasonableness and fairness. In order to achieve these objectives, the Court has to balance the reasonable needs of the applicant and the ability to pay of the respondent on an interim basis: *LJ v LWHH* [2003] 3 HKC 455 at 461D. In undertaking this balancing exercise, the Court will adopt a broad brush approach, and not a detailed investigation of the financial positions of the parties. LCP There is no dispute that under appropriate circumstances, the court could grant LCP as part of the MPS Order, provided that the test in *Currey v Currey* are met (see *R, ER v H*, IF at 11): the conditions for a costs allowance are as follows: That the applicant spouse has no assets, or none that can be reasonably be deployed (at para [19], [20]). That she can provide no security for borrowing, or none which can reasonably be offered (at para [19], [20]). That she cannot reasonably obtain legal services by offering a charge on the outcome of the litigation (at para [20] and see *Sears Tooth*, per Wilson J). That she cannot secure publicly funded legal help at a level of expertise apt to the proceedings (at para [20]).
18. I do not think that the above general principles are in dispute. H's case
19. In H's supporting affirmation (10th Affirmation), he was basically saying that since the decision of Judge Wong in the 1st MPS Order on 22 July 2022, his financial circumstances have deteriorated significantly. He said his monthly expenses still stood at around HK\$130,000 which was found to be reasonable by Judge Wong. He is an engineer and currently earning a monthly income of HK\$30,000 and so his monthly deficit is about HK\$100,000 per month. The deficit has eaten into his capital and he now only has liquid assets of HK\$811,186.79. That is why he asked for a monthly MPS at the rate of HK\$100,000.

20. As far as LCP is concerned, H's position is that since the failure of the MFDR held in June 2023, a full-blown trial on ancillary relief, including the determination of the beneficial ownership of certain companies has become necessary. In order to have equality of arms, he needs to instruct another legal team with Mr. Bernard Man SC leading Ms. Theresa Chow as his junior to represent him. He set out the costs estimation at HK\$10,719,300 (1/17-20, 33-35). Assuming that the trial could take place in 20 months time, the average monthly LCP would be in the sum of HK\$535,965. He said that his instruction of a legal team including SC has already been considered by Judge Wong, who accepted that such instruction was reasonable. Objections by W
21. W was represented by Mr. Eugene Yim of counsel, who submitted that a MPS application is an exercise of discretion taking into account all relevant factors at the time of the application. These factors might change over time. In other words, the court is not bound by the decision of Judge Wong in His Honour's 1st MPS Judgment. Instead, this court should exercise its own discretion according to the prevailing financial situation of the parties.
22. Mr. Yim also submitted that there are 2 salient features in the case that need the court's careful consideration. First, one of the most contentious issue is the beneficial ownership of CIL (which in turn holds 100% ownership of CI(SZ)L) () and CL (), which has already been set down for a preliminary issue trial in June this year. It is very clear that W's interest therein (whether 35% interest in CEC as contended by H or just 7% interest as contended by W) came from a source outside the marriage viz W's father and therefore bear a strong element of non-matrimonial nature. Looking at the total value of the parties' assets, it is fair to say that a big portion of them are non-matrimonial, which will likely result in a significant departure from equal sharing.
23. Second, there are 2 consent summonses dated 23 May 2018 and 14 November 2018, whereby parties agreed not to claim against each other for ancillary relief. I was referred to *BN v MA* in which Mostyn J said at 33 that in a MPS application, a prenuptial agreement should be applied as closely and as practically as possible, unless party can demonstrate to a convincing standard that it would not be upheld. It was submitted that the 2 consent summonses represented, in essence, a post-nuptial agreement between the parties and should be applied as closely as possible.
24. As submitted by Mr. Yim, this is not a case that H will surely get one half of the assets, and the ancillary relief that he would get at the end of the day may not be sufficient to offset against any overprovision of MPS. Therefore, the court should adopt an ultra-cautious approach in dealing with this MPS application. Discussion Reasonable needs of H
25. I agree with Mr. Yim's submission that this court is not necessarily bound by Judge Wong's previous decision on MPS and has a duty to exercise its own independent judgment on the available evidence. But that does not mean that reference could not be made to decisions made in previous hearings, if relevant.

26. In explaining the reasonableness of his claims, H repeated the breakdown of expenses he put forward in his 7th Affirmation (1/98-99): General Expenses Item Amount Rent HK\$29,000 Utilities HK\$4,000 Food HK\$9,000 Household expenses HK\$5,000 Car expenses HK\$13,000 Domestic helper HK\$6,000 Other (specify)

Total monthly household expenses HK\$66,000 Personal Expenses Item Amount Meals out of home HK\$15,000 Clothing / Shoes HK\$4,000 Personal grooming HK\$1,000 Entertainment / presents HK\$11,500 Holiday HK\$29,000 Medical / Dental HK\$800 Insurance premia (AIA healthcare) HK\$350 Contribution to parents (cash) HK\$3,000 Education (incl. continuous education in construction industry and license exam fees) HK\$1,800 Total monthly personal expenses HK\$66,450

27. The 2 sums add up to HK\$132,450 (HK\$66,000 + HK\$66,450 = HK\$132,450). It is noted that the monthly sum of HK\$130,000 was accepted by Judge Wong as the reasonable needs of H in his 1st MPS Judgment at 64 (1/205). As H is currently earning a monthly income of HK\$30,000 and so he made his claim for MPS at HK\$100,000.
28. H's claim was challenged on the ground that the bank statements of the 3 bank accounts only showed a total monthly withdrawal of HK\$63,210.71 in July 2023, which was only half of what H was now claiming. But I accept H's explanation that it was only a snapshot of 1 month's bank statement. According to him, his total assets dropped from HK\$2,470,000 to about HK\$ 811,000 over a period of 15 months, indicating his monthly outgoings were at a monthly rate of HK\$138,200.
29. In my view, whether H's current expenses of HK\$130,000 are reasonable depends very much on the family's past living standard. In this regard, Judge Wong had this to say at 50-51 of his 1st MPS Judgment (1/ 201-2):
50. While the parties agree that the family enjoyed a very comfortable standard of living, each has his/her own interpretation as to what that means. I agree with Ms Remedios that this is largely a matter of semantics. On the materials before me, I am satisfied that the wife tried to tone down the standard of living during the marriage. The objective fact is the family had the use of 3 cars including a Ferrari. This is telling as to the standard of living enjoyed by the family during the relationship. The wife's current monthly expenses as reported in her Form E of January 2021 are as much as \$861,520. She is driving a Lamborghini, claimed to be a gift from her father, and a Mercedes Benz.
51. On the materials before me, I have no doubt that the husband's version of the parties' standard of living is closer to the truth.
30. I am satisfied that by reference to the family's past living standard, H's monthly expenses at HK\$130,000 cannot be regarded as unreasonable.

31. The next issue to be discussed is H's earning capacity. It is W's claim that H must have a higher earning capacity, probably in the region of about HK\$100,000 to HK\$150,000 per month, and therefore, he should not be allowed any MPS.
32. According to H, he is now working for a construction company with a monthly income of HK\$30,000 only. I think it is indisputable that H had worked for the W's family companies for decades and he only resumed his employment in the construction industry quite recently. There is simply no evidence to suggest that he is having a monthly earning capacity of HK\$100,000 HK\$150,000. I accept that he is only earning HK\$30,000 per month. Therefore, the short fall in his monthly budget is about HK\$100,000.
33. As to Mr. Yim's submissions on the 2 consent summonses, I note that they were prepared by a firm of solicitors allegedly instructed by H. This was of course disputed by him. At this interlocutory stage, I would say that the circumstances of the 2 consent summonses are rather dubious and I would not place much emphasis on them at this MPS application.
34. As far as H's remaining assets are concerned, I accept that they are in the region of about HK\$811,186.79. Legal Costs Provision
35. H's claim for LCP is more controversial.
36. In his 1st MPS Judgment, Judge Wong was satisfied that H's reasonable legal costs budget from the 1st MPS hearing to FDR was HK\$2,156,600. After deducting HK\$334,000 from his own resources, H would need another HK\$1,822,600 to cover his legal costs up to FDR, which was expected to be conducted in about 9 months time. That was why His Honour granted a monthly sum of LCP at HK\$202,500 ($\text{HK}1,822,600/9 = \text{HK}202,511$).
37. At his 2nd MPS application, H is now claiming LCP in the sum of HK\$10,719,300, or HK\$535,965 per month based on the assumption that the AR trial would take place in 20 months time. Ms. Chow submitted that in view of the complexity of the case and the fact that H had to face 5 opponents, he was entitled to engage the service of a Senior Counsel. As a matter of fact, Judge Wong had already ruled that H's engagement of a Senior Counsel was reasonable. Therefore, H is now proposing to engage Mr. Bernard Man SC to act for him for the rest of the case.
38. In justifying the quantum of HK\$10,719,300 in LCP, H has set out his calculation in a table at 33-35 of his 10th Affirmation (1/17-20). From the said table, the estimated counsel fee was HK\$5,360,000 (with Mr. Bernard Man SC leading Ms. Theresa Chow) and solicitors costs at HK\$4,855,600. I note that the calculation was done up to the end of the AR trial.
39. In my view, 2 of the most important issues are the beneficial ownership and the value of W's shareholdings in 2 private companies, namely CEC and CL. W is a registered shareholder of 35% in CEC and 20% in CL. However, she said that she only held those shareholdings on behalf of herself and 4 other siblings, i.e. Interveners 1 to 4. In other words, her beneficial ownership in those 2 companies are only 7% and 4% respectively. According to the latest SJE report, her shareholdings (7% and 4%) only have a combined value of HK\$18,078,310.30,

and not the HK\$90,931,551.50 as contended by H. I note that the trial on the beneficial ownership of the 2 companies has already been fixed in June for 8 days (3-7 & 11-13 June 2024) and upon its determination, there will be a clearer picture on the probable size of the family pot. Therefore, I am minded to continue with the LCP to cover at least the June hearing.

40. Unfortunately, there was no separate calculation of H's estimated legal costs up to the June hearing only. Doing the best as I could, I will allow H 30% of the amount he asked for, i.e. HK\$3,000,000 to cover all costs from the failed MFDR up to the June hearing. On 4 September 2023, W has already been ordered to continue the LCP payment at the rate of HK\$202,500 per month from 1 October 2023. In other words, up to February 2024, W should have paid another HK\$1,012,500 as LCP. I would deduct that sum from HK\$3,000,000 and so the balance would be HK\$1,987,500 (HK\$3,000,000 - HK\$1,012,500 = HK\$1,987,500). From now to June, there are only 4 months to go and so the LCP will be payable by 4 equal monthly instalments of HK\$496,875 each, to be rounded up to HK\$500,000 payable on 1st day of each month starting from 1 March 2024 to 1 June 2024. With this amount, I am not sure if it is sufficient to engage a counsel (whether Senior Counsel or not) of H's choice, but if it is not, then I am afraid he has to look for other counsel who is willing to take up the June hearing within that budget. After all, when Judge Wong expressed his view on H's engagement of Senior Counsel, the SJE report was not yet available. We now have the benefit of the SJE report giving a valuation much lower than what H anticipated. I think it is high time for him to exercise more restraints in budgeting his legal costs. W's ability to pay
41. According to Mr. Yim, W's financial positions have also deteriorated. She has very limited liquid assets, which are definitely insufficient to pay the staggering amount of LCP at HK\$10,719,300 as claimed by H.
42. Despite those submissions, I note that W is still a person of substantial means. The combined worth of her 35% shareholdings in CEC and 20% in CL is HK\$90,391,551.50. I note that it is her and the other Interveners' case that W only holds 7% and 4% beneficially, but whether this is really the case is yet to be determined at the June 2024 hearing. Even if her case is accepted at the end of the day, the value of her shareholdings is still HK\$18,078,310.30, which is not a small amount.
43. W also owns 2 other properties in Hong Kong with a total value of HK\$11,910,666.66 and other liquid assets at HK\$2,782,509.47. In other words, if she holds 35% in CEC and 20% in CL beneficially, her total assets are HK\$105,084,727.63. But if she only holds 7% in CEC and 4% in CL beneficially, her total assets are still HK\$32,771,486.43, which cannot be regarded as insubstantial.
44. Mr. Yim submitted that W's liquid assets are limited resulting in her cash flow problem. But as pointed out by Ms. Chow, it is indisputable that during the marriage, the family relied substantially upon drawings from the family companies in supporting W's monthly expenses of HK\$861,520 and H's monthly expenses of HK\$154,490. Plainly, W's ability to

draw funds from the companies are a resource that this court could take into account. As to W's claim that the companies are not doing well, there are no up-dated audited accounts to prove the same and such claim is not to be accepted by this court for the purpose of this MPS hearing.

45. W also claims that she has to take out loans from her brother-in-law in the sum of HK\$2.34 million, but there is no written evidence to support such a loan arrangement. There is no evidence on the interest charged, nor on the repayment date. There is also no evidence that the brother-in-law has chased for its repayment. I agree that these are features of a typical soft loan without any serious expectation of repayment.
46. W says that she has to reduce her monthly expenses to HK\$277,300 in view of the deterioration of her financial circumstances. But she still sees fit to retain her Lamborghini and spends HK\$90,000 per month on its related expenses. She says she has already moved out from the rented Harmony apartment and has to stay at Shenzhen most of the time. But the fact is: the lease of the Harmony apartment was just taken over by her father and the children continue to reside there when they stay in Hong Kong. I agree that W has merely shifted her housing expenses to her father and this is a clear example of financial assistance rendered by her maiden family.
47. After considering the above facts, I have come to the conclusion that W has the ability to pay the immediate reasonable needs of H at the rate of HK\$100,000 per month as MPS and HK\$500,000 per month for 4 months up to June 2024 as LCP. Conclusions and Orders
48. Based on the above discussion, I hereby order that: W shall pay a monthly sum of HK\$100,000 as MPS to H on the 1st day of every month starting 1 March 2024 until the AR Judgment or further order of the court; and W shall pay a monthly sum of HK\$500,000 as LCP to H on the 1st day of every month starting 1 March 2024 for a period of 4 months up to 1 June 2024. For the avoidance of doubt, this LCP order is to replace the LCP at the monthly rate of HK\$202,500 being ordered on 4 September 2023. Costs
49. As to costs, H has to come to court before he could get the above orders and therefore, prima facie, he should also get the costs of this application. Although the final MPS orders are not in exact terms as he has requested, I am of the view that he should still be regarded as the winner of the application. Therefore, H should be given the costs of the MPS application, including all costs reserved with certificate for counsel. This will be in the form of a costs order nisi to be made absolute after the expiry of 14 days from the handing down of this judgment. After the costs order being made absolute, H should lodge and serve a statement of costs (restricted to 2 pages of A4 size paper, double line spacing, and in font 14) within 7 days for the court's summary assessment. W is entitled to lodge and serve a list of objections, if any (restricted to 2 pages of A4 size paper, double line spacing, and in font 14) within 7 days thereafter for the court's consideration. C. K. Chan District Judge
Representation: Ms. Theresa Chow, Barrister-at-law, instructed by Messrs. Ip & Heathfield, solicitors for the Petitioner Mr. Eugene Yim, Barrister-at-law, instructed by Messrs. K.L.

Chan & Co., solicitors for the Respondent

[2012] 1 HKLRD 95

[2006] EWCA Civ 1338

[2018] HKFC 229

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