

HONG KONG / JUDGMENT

LM v. FW**[2024] HKFC 150****COURT**

Family Court

DECIDED

16 August 2024

CASE / FILE NUMBER

FCMC7076/2022

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bjbj FCMC 7076/2022

**[2024] HKFC 150 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO.7076 OF 2022**

BETWEEN LM Petitioner and FW Respondent

Coram: Deputy District Judge W.Y. Ho in Chambers (Not open to Public) Date of Summons for
Leave to Appeal: 5 April 2024 Date of written submissions of the Respondent: 5 April 2024 Date of
written submissions of the Petitioner: 17 May 2024 Date of Handing Down Judgment: 16 August
2024

Judgment

(Leave to Appeal paper disposal)

This is the Respondent s application for leave to appeal against my decision handed down on 22
March 2024 (the Decision).

BACKGROUND

The background of this case has been set out in the Decision at paragraphs 3 and 4. I shall not
repeat the same. I shall adopt the same abbreviations used in the Decision. THE LAW Section
63A(2) of the District Court Ordinance provides that leave to appeal shall not be granted unless
the intended appeal has a reasonable prospect of success or that there is some other reason in
the interests of justice that the appeal should be heard. The relevant test of whether an appeal

has a reasonable prospect of success is whether the applicant for leave can show that he has an arguable case with reasonable chances of success on appeal. In *Ho Yuen Ki Winnie and anor v Ho Hung Sun Stanley and anor*, HCMP 1009/2009, (unrep), Le Pichon JA (as she then was) stated at paragraph 16 of the judgment: - For leave to be granted, this court must be satisfied that the appeal has reasonable prospects of success . Merely showing that the appeal is arguable and not fanciful would not be sufficient. In my view, reasonable prospects requires something more and, in that regard, some assistance may be derived from the test applied when setting aside a default judgment. In *KNM v HTF*, HCMP 288/2011, (unrep), Fok JA (as he then was) stated at paragraph 9: - The relevant test of whether an appeal has a reasonable prospect of success under section 63A is whether the applicant for leave can show that he has an arguable case with reasonable chances of success on appeal. A reasonable prospect of success therefore means an appeal with prospects that are more than fanciful but which do not need to be shown to be probable . (See also the case of *SMSE v KL* [2009] 4 HKLRD 125) INTENDED GROUNDS OF APPEAL The Respondent raises five intended grounds of appeal in his draft notice of appeal (the draft Notice). Having read the intended grounds of appeal, I do not intend to deal with all the submissions/arguments/points raised in the draft Notice. Suffice to say I have considered the matters contained in the draft Notice and shall only deal with the salient matters raised. Ground 1: Payment of Maintenance Pending Suit The Respondent makes four arguments under this intended ground of appeal. I succinctly summarize those arguments as follows: The Respondent argues the court had insufficient regard to: the Petitioner s own financial resources and assets included those not disclosed and those disclosed under the Pre-Nuptial Agreement; the short duration of marriage, the age of the Petitioner and the high earning capacity of the Petitioner; and the effect of the Pre-Nuptial Agreement. In so far as the Respondent argues I have not considered the Petitioner s financial resources, the Petitioner s assets (including those set out in the Pre-Nuptial Agreement), and the Petitioner s earning capacity, I have addressed the same in paragraphs 56 64 of my Decision. I shall not repeat the same. I therefore find no merits in the Respondent s argument on the same. In respect of the Respondent s arguments relating to my approach on how and whether the Pre-Nuptial Agreement should be considered in the present case, I have already set out my reasoning at paragraphs 15 22, and 65

67. I do not accept the Respondent s submissions on why the approach I adopted is erroneous. Nevertheless, I accept there is no appellate authority deciding how pre-nuptial agreements should be considered in a maintenance pending suit application when there is a pending Crossley Application to be heard and to be decided. Counsel for the Petitioner, Ms. Rattigan SC, argues that seeking guidance from the Court of Appeal on how pre-nuptial agreements affect maintenance pending suit applications cannot justifying granting leave to appeal. Although I agree in principle that leave to appeal should not be granted merely for the purposes of seeking guidance on the application of law, I am of the view the legal issue raised in this case impacts the future conduct of the present case as well as raising an issue of general importance. As conceded by the parties, there is no appellate authority on how and whether a pending Crossley Application is to affect the court s discretion in granting maintenance pending suit. The Court of Appeal s decision on the said issue would help

clarify the extent of the court's discretion and/or the proper approach in granting maintenance pending suit and/or interim maintenance applications when there is a pending Crossley Application. In so far as this case is concerned, guidance from the Court of Appeal is important to pre-empt the case being further inundated with arguments relating to the effect of the Pre-nuptial Agreement on future interim financial applications to be made by the parties before the Crossley Application is decided. I therefore agree that in the interests of justice, leave to appeal should be granted on the following question: Whether and how should the court consider a pre-nuptial agreement in a maintenance pending suit and/or interim maintenance application when there is a pending decision and/or hearing on the validity of the pre-nuptial agreement? Ground 2 5: Backdating, Quantum and Costs I have set out the reasons why I allowed the Petitioner's application for maintenance pending suit in paragraphs 56 68 of my Decision. In summary, I accepted the Petitioner had substantial assets but such assets could not be easily liquidated to meet her immediate financial needs. I accepted that since marriage, the Petitioner was financially dependent on the Respondent to meet her daily expenses. On the Respondent's own case, he has been making voluntary payments of interim maintenance for the child in the sum of \$300,000 per month. He has not paid any maintenance to the Petitioner. This voluntary payment is clearly insufficient to meet the reasonable financial needs of the Petitioner and Child. As per the Decision, the Petitioner and Child require a monthly sum of \$638,000 (exclusive of all direct payment settled directly by the Respondent, such as rent and school fees) to meet their reasonable financial needs. I therefore see no merit in the Respondent's ground of appeal relating to my decision to backdate the interim maintenance payments and maintenance pending suit payments to the date of the Petitioner's MPS summons. I have already given extensive reasons for my findings on quantum at paragraphs 23 - 55. I shall not repeat the same. The Respondent's present counsel, Mr. Yim, seeks to re-argue the quantum of various expenses. Regarding the argument of double counting food and meals out of home expenses, I have set out my reasoning on these two items clearly in paragraphs 34 - 41. I am of the view Mr. Yim's submissions on quantum and double counting are unmeritorious and misconceived. In so far as Mr. Yim argues the court has no power to order the Respondent to settle various payments directly, I am unclear as to what relief the Respondent seeks in respect of the orders I made at paragraph 75(2) of the Decision. Upon reading Mr. Yim's submissions, it seems he is aware that his predecessor, Mr. Scott SC, conceded and agreed (upon instructions) to make the payments as ordered in paragraph 75(2) of the Decision. It was upon Mr. Scott SC's confirmation of the Respondent's willingness to settle the said payments directly that those items of expenditure were not argued at the hearing. More properly understood, the parties consented to the order made under paragraph 75(2) of the Decision. If the Respondent believes that matters set out in paragraph 75(2) should more properly be set out in the pre-amble as an undertaking, appropriate applications can be made to vary the order. If the Respondent seeks to set aside those orders, I am of the view it is not proper to do so by way of an appeal. I therefore find Mr. Yim's submissions on the direct payments to be misconceived. As for my decision on costs, the costs order was made an order nisi. The Respondent has filed a summons to vary the same. I am of the view this ground of appeal is

pre-mature. I therefore am of the view intended Grounds 2 to 5 have no reasonable prospects of success and there is no other reason in the interests of justice why leave to appeal should be granted on these grounds. Stay of execution Mr. Yim raised for the first time, in his submissions for leave to appeal, the request for a stay of execution of the maintenance pending suit and interim maintenance orders made in the Decision. There has not been any summons filed for a stay of execution, nor has it been set out in the draft Notice. Needless to say, Ms. Rattigan SC takes strong objection to the Respondent's submission relating to stay of execution. I shall deal with this point briefly. I agree with Ms. Rattigan's submissions that it is improper to make a request for a stay of execution by way of submissions. Moreover, I agree it would be unfair to the Petitioner if the matter were to be considered without allowing parties to file proper evidence to address the court on the same. In any event, I fail to see any grounds advanced which would warrant the court to order, on its own motion, a stay of execution in the present circumstances. In absence of a proper application made by the Respondent, I decline to grant a stay of execution of the orders made in the Decision. SUMMARY By reason of the matters set out above, I only grant leave to appeal on the question as set out at paragraph 15 above. I make a costs order nisi that the costs of the Respondent's application for leave to appeal be in the cause of the appeal hearing, to be determined by the Court of Appeal. Unless any party applies to vary the costs order nisi within 14 days hereof, the costs order shall become an order absolute. Wai Yang Ho Deputy District Judge Ms Mairead Rattigan S.C. and Mr Cristian Tsang instructed by Messrs Haldanes for the Petitioner Mr Eugene Yim and Ms Bonnie Cheng instructed by Messrs Chaine Chow & Barbara Hung for the Respondent PAGE PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V h k A ^ h k A ^ h k A ^ h k A ^ h k A ^ (#p# (#p# yo`O` hMzj h[/F hy{} hMzj hy hy{} hy{} h[/F h_ ^8 h_ ^8 h_ ^8 h_ ^8 h[/F &`#\$ &`#\$ [Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q_ jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .}x E /,EE{} theme/theme/_rels/themeManager.xml.rels 5 6? \$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> :i#z *\mT zo/< xC&1 ({m8 P0} W~7gb W~7g xC&1 ({m8 8sJR dKHD6 CACV Windows User Blank Form for Judgment.dotx Windows User Microsoft Office Word V)20 Judiciary CACV Title Microsoft Word 97-2003 Document MSWordDoc Word.Document.8

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