

HONG KONG / JUDGMENT

NCKP v. CMY

[2024] HKFC 222

COURT

Family Court

DECIDED

12 December 2024

CASE / FILE NUMBER

FCMC14399/2008

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bjbj FCMC 14399/2008

[2024] HKFC 222 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO. 14399 OF 2008

BETWEEN NCKP Petitioner and CMY Respondent

Coram: HH Judge C.K. Chan in Chambers (Not Open to Public) Date of Hearing: 22 March 2024
Date of Judgment: 12 December 2024

J U D G M E N T (Master s Appeal: Repayment of Maintenance upon Remarriage)

Appeal This is a hearing of the Respondent (s appeal against the order of Master June Cheung made on 15 December 2023, in which the learned Master ordered W to repay a sum of HK\$5,600,000 to the Petitioner () within 3 months pursuant to section 23 of the Matrimonial Proceedings and Property Ordinance, Cap. 192 (MPPO). In her Notice of Appeal, W asked for:

- (1) the order of Master June Cheung dated 15 December 2023 be set aside;
- (2) H s summons for repayment dated 12 December 2022 be adjourned, and continued as if the application had been begun by writ;
- (3) parties be directed to agree on consequential [directions] on further conduct of the summons within 14 days thereafter, failing which either party shall be at liberty to take out summons for case management directions;

- (4) W's costs of and incidental to the hearing before Master June Cheung and this appeal be borne by H; and
- (5) The costs of H's summons be in the cause.

Background

3. As one could see from the case number, this case has a long history dating back to the year of 2008.
4. H is now aged 72 and W aged 67. They were married in 1977 and within wedlock, 2 sons were born: Elder son () is now aged 43; and Younger son () is now aged 38. Both sons are now adult and living independently. M is married with his wife ().
5. In 2008, H petitioned for divorce. Pursuant to the parties agreement, a consent order was granted on 12 February 2009 (the AR Order), paragraph 1 of which reads as follow:
 1. [H] do pay [W] a sum of HK\$40,000.00 per month as maintenance pending suit for [W] commencing on the date of divorce nisi and subsequent payments to be paid on the 1st day of each succeeding month until the making of Decree Absolute and thereafter to continue to pay at the same rate as periodical payment during joint lives of the parties or until [W] shall remarry whichever is the shorter or further order of the Court. (underline added)
6. It is clear from the wordings of the AR Order that the H's liability to pay monthly maintenance of HK\$40,000 ends on one or more of the following conditions: the decease of either party; W remarries; or any further order of the Court.
7. There is no dispute that W remarried on 13 October 2010 in USA, i.e. 20 months after the granting of the AR Order. In W's 1st Affirmation, she said that she remarried in order to get an address in USA for medical treatment, and claimed that genuine love and affection with her new husband did develop at a later time.
8. According to H, he was not aware of W's remarriage and so he continued to make payment of maintenance until 15 June 2022, when he finally learned of W's such remarriage from M. H had overpaid 140 months maintenance at a sum of HK\$5,600,000 (HK\$40,000 x 140 = HK\$5,600,000). Therefore, H took out a summons on 12 December 2022 to ask for repayment of the said sum from W.
9. H's summons came before Deputy Judge June Cheung on 15 February 2023 for call-over. After hearing counsel for H and solicitor for W, the Deputy Judge gave case management directions for the filing of affirmations and adjourned the summons to 23 June 2023 for argument, with half day reserved. Time extension for the filing of affirmations were later sought and granted, and the argument date was refixed to 15 December 2023. At the refixed hearing, Master June Cheung (who no longer sits as a Deputy Judge) considered the parties affidavit evidence and after hearing submissions from counsel, ruled in favour of H and ordered W to repay HK\$5,600,000 within 3 months with costs.

10. W issued the present Notice of Appeal against Master s Decision on 8 January 2024. She also took out another summons on 7 February 2024 asking for a stay of execution pending determination of the appeal.
11. The appeal was heard by this court on 22 March 2024. Judgment was reserved and to be handed down, which I now do. Master s Appeal
12. Master s appeal before a Judge is by way of re-hearing, and the Judge treats the matter as though it came before him for the first time: O.58 r.1 The Rules of the District Court, Cap. 336H and Hong Kong Civil Procedure 2024 58/1/2. The Parties Evidence H s evidence
13. In his supporting affirmation dated 24 November 2022, H said that he had continued to pay the monthly maintenance of HK\$40,000 up to 15 June 2022, and only stopped after he was informed by his son M that: W had in fact remarried in 2010; W emigrated to USA to reside with her new husband in around 2010 or 2011; In around 2015, W made an application to help M and HN to emigrate to USA as well; W s new husband passed away a few years ago and W returned to reside in Hong Kong; M did not tell H about W s remarriage on W s instructions; and M did not feel it being right in keeping H in the dark and so he decided to tell H in about June 2022.
14. H believed that W deliberately concealed the fact of her remarriage in order not to lose her monthly maintenance. Upon receiving legal advice, H decided to claim back such overp o W by her banker. In the agreement, there were inter alia provisions for transfer of properties and company shares, and also purchase of medical insurance for the benefit of W. For maintenance, there was a term for the monthly payment of HK\$40,000 by H to W, but without saying that such payment would end upon W s remarriage.
16. After divorce proceedings were issued by H in about December 2008, Mr. Chu asked W to sign a consent summons in English, saying that there was no need for her to seek independent legal advice. So W signed without knowing that the maintenance payment would end upon her remarriage, which was never a term in the maintenance agreement.
17. W said she went to USA for medical treatment in 2010. As she had to stay for extended period for medical scanning and surgeries, a relative called Uncle Sam (being the widower of W s aunt) and W entered into marriage on 13 October 2010 in order to give W a residential address in USA. W said she told A (the wife of M) about this and since M was H s son and close business partner, W expected H would have learned about her remarriage too. W said it was beyond belief that it would take M 12 years before he would tell H about her remarriage. Despite such likely knowledge by H of W s remarriage, the maintenance payment continued. Therefore, W said it would be unjust for the court to order repayment and she asked H s application to be dismissed. M and A s evidence
18. In order to rebut W s evidence, H arranged his son M and M s wife A to file their respective affirmation. Both of them basically said the same thing, namely that they were told of W s remarriage in around 2011. Since then, W had repeatedly told M, A and another son HN that

they could not tell H about her remarriage, or otherwise, she would lose her monthly maintenance of HK\$40,000. M said that he dared not tell H but had always troubled by the loyalty conflicts between W and H. M said he was later upset and hurt by W's transfer of a property to HN in breach of her previous promise of giving the property to M. As he was outraged and upset, M decided to tell H about W's remarriage. HN's evidence

19. The younger son HN was also arranged by W to file his affirmation in which he denied that W had repeatedly told him not to tell H, nor did he hear W giving such instruction to M and A. HN said W was very open about her remarriage with Uncle Sam and they had met with Uncle Sam from time to time. W's Submissions
20. W was represented by Mr. Leo Wong of counsel, who submitted that the primary case of W's appeal against the order of the learned Master is that the matter should not have been determined without a trial. It was submitted that H's repayment application is based on section 23 of the Matrimonial Proceeding and Property Ordinance, Cap.192 (MPPO), the relevant provisions of which are repeated hereunder for the ease of reference:
 23. Orders for repayment in certain cases of sums paid after cessation of order by reason of remarriage (1)
 - (1) Where
 - (a) an order to which this section applies has ceased to have effect by reason of the remarriage of the person entitled to payments under the order, and
 - (b) the person liable to make payments under the order or his or her personal representatives made payments in accordance with it in respect of a period after the date of such remarriage in the mistaken belief that the order was still subsisting, no proceedings in respect of a cause of action arising out of the circumstances mentioned in paragraphs (a) and (b) shall be maintainable by the person so liable or his or her personal representatives against the person so entitled or her or his personal representatives; but on an application made under this section the court may exercise the powers conferred on it by subsection (2). The court may order the respondent to an application made under this section to pay to the applicant a sum equal to the amount of the payments made in respect of the period mentioned in subsection (1)(b) or, if it appears to the court that it would be unjust to make that order, it may either order the respondent to pay to the applicant such lesser sum as it thinks fit or dismiss the application.
21. It was submitted that the purpose of section 23 is to empower the court to control over the recovery claim, instead of easing the claimant's burden to show his entitlement, or providing any shortcut for making the claim. The court has to decide whether it would be unjust to require the recipient to repay the full sum, or a lesser sum, or at all. This would require the case to proceed as an ordinary civil case in which the substantive rights and interests of the parties are to be determined. Further analogy was drawn to dispute on ownership in matrimonial properties with third parties that formal pleadings should be

ordered and the case should not be determined on affidavit evidence alone. The Deputy Judge (as Master June Cheung then was) should not have ordered H's application to be adjourned for argument based on affidavit evidence and oral submissions, but without requiring the parties to give oral evidence and to be cross examined, if necessary. It was submitted that the subsequent decision of Master June Cheung on 15 December 2023 should be set aside under such circumstances. My views I will first deal with W's primary case that H's application should not have been decided on affidavit evidence alone. If one should read section 23 of MPPO, one would realise that it is a rather short section with only 5 paragraphs. The more relevant parts are paragraphs (1) and (2) which basically say the followings:

- (i) upon cessation of the maintenance order by reason of the receiving party's remarriage (paragraph (1) (a)) and the paying party who was under a mistaken belief that the order was still subsisting continued to pay (paragraph (1) (b)), the paying party may claim for repayment (paragraph 1(b)). (ii) the paying party can only make such a claim under section 23, and he is expressly disallowed to make claims based on any other independent causes of action (paragraph 1 (b)). (iii) the court may order the receiving party to repay the whole sum, or reduce it to a less sum, or dismiss the application all together, if it is unjust to make a full repayment order (paragraph (2)). There are no other provisions governing the procedures for such a claim. In my view, such a simple and straight forward provision was meant for the matter to be dealt with in a rather summary manner, instead of through an elaborate set of procedures, including the filing of pleadings and going through all those interlocutory steps as in an ordinary civil proceeding. After all, only 3 important issues are really involved: firstly, whether the paying party's liability to pay maintenance has ceased due to the receiving party's remarriage, which is usually non-controversial; secondly, whether the paying party was under a mistaken belief in continuing with the payments; and thirdly, whether it is unjust to order full repayment or any repayment at all. In exercising her case management powers, the Deputy Judge (as Master June Cheung then was at the call-over hearing) had wide discretion in deciding how the parties' disputes are to be adjudicated by the court. She had powers to direct the parties to file their evidence by way of affidavits. Of course, she also had powers to order the parties to attend court and to be cross examined on their affirmations. But whether the Deputy Judge would give such directions is really within her wide discretion which would not be disturbed very lightly. In the present case, the call-over hearing was conducted before the Deputy Judge on 15 February 2023. I was not informed whether the solicitor then acting for W did raise objection to the matter being argued on affidavit evidence alone. But the undeniable fact is that after such case management directions were given, there was no attempt to apply for variation of those directions, even after the parties' affidavit evidence having been filed and the disputed issues for adjudication having been crystallised. No such application was made at the date of argument either. Equally, there was no attempt to seek leave to appeal against the Deputy Judge's case management orders. Those orders were made on 15 February 2023, and leave to appeal had to be sought within 14 days, i.e. on or before 1 March 2023. Any application for

leave to appeal against those case management orders is now way out of time. Based on the above considerations, I am not convinced that W is having any merits in her primary case of arguing that H's summons should have been proceeded with as a writ and that the learned Master should not have adjudicated on the dispute just relying on the parties' affidavit evidence and counsel submissions. Rehearing of H's Application I now proceed to rehear H's application for repayment. As stated in paragraph 24 above, there are really 3 main issues for the court's determination:

- (1) Whether H's liability to pay maintenance ceased upon W's remarriage in 2010.
- (2) Whether H was under a mistaken belief (i.e. he was unaware of his liability to pay maintenance has already ceased due to W's remarriage) to continue with the payment.
- (3) Whether it is unjust to order repayment. Issue (1): Cessation of H's Liability to Pay Maintenance The maximum term for the payment of maintenance is governed by section 9 (1) and (2)(a) of MPPO:
 9. Duration of certain orders made in favour of party to marriage and effect of remarriage
 - (1) The term to be specified in any order made by virtue of section 4(1)(a) or (b) or section 8(6) (a) or (b) shall be such term, being a term beginning not earlier than the date of the making of an application for the order in question and lasting not longer than the maximum term, as the court thinks fit.
 - (2) In subsection (1) the maximum term is made, whichever is the shorter; The conditions for cessation of maintenance payment as contained in the consent summons and later in the AR Order (i.e. maintenance payment during joint lives of parties and ending with the remarriage of the receiving party) were just a reiteration of the statutory provisions of section 9 of MPPO. I do not think that W is trying to argue otherwise. There is no dispute that W remarried in October 2010, i.e. 20 months after the AR Order. Therefore, by virtue of section 9 (1) and (2) (a) of MPPO, and by virtue of the terms of the AR Order as well, H's liability to pay maintenance ended and the maintenance order ceased to have effect upon W's remarriage. Issue (2): Was H under mistaken belief to continue with payment? In H's supporting affirmation, H stated that he was not aware of W's remarriage until he was told by his son M in June 2022. In other words, the cessation of his liability to pay maintenance due to W's remarriage was not known to him before that date. H's evidence was supported by M and A who said that they were expressly told by W not to inform H as that would affect the maintenance payment by H. On the other hand, if one searches through the affidavit evidence of W, there is no direct evidence pointing to H's knowledge of her remarriage. W only vaguely suggests that due to the closeness between H and M, there was no way that H would not have known about her remarriage from M. Even in the affirmation of W's younger son HN, who only said that W was open about her remarriage and he has never heard W telling M not to disclose the fact of W's remarriage to H. But there is still no evidence from HN that he has actually informed H or there is anything to suggest that H was well aware of W's remarriage. In other words, there is no evidence at all that H was aware of W's

remarriage before June 2022. Furthermore, one may also ask a more objective question: if H really knew about W's remarriage all along but yet decided to continue with the maintenance payment, why did he suddenly change his mind in 2022? I do not see any plausible explanation for H to suddenly change his mind to claim back what he had voluntarily paid out to W over the past 12 years. After considering the above evidence, I am satisfied that H was not aware of W's remarriage until he was told by M in June 2022. I am further satisfied that his continuation to pay maintenance after October 2010 up to June 2022 must be under a mistaken belief that his liability to pay maintenance under the AR Order was still subsisting. Issue (3): Is it unjust to order repayment by W? Upon satisfying that the AR Order has ceased to have effect; and H's continuation of making maintenance payment was under a mistaken belief, the court may order repayment by W unless it appears to the court that it is unjust to do so: section 23 (2) of MPPO. H now applies for repayment, and so *prima facie*, he is entitled to such a repayment order. The more pertinent issue now is whether it is unjust in all the circumstances of the case to make such a repayment order. W has filed a total of 3 affirmations, all of which centred on her case that H should be aware of her remarriage but yet decided to continue with the maintenance payment. However, her case was already rejected by this court which, on balance, accepted that H was not aware of W's remarriage before he was told by M in June 2022. This court also accepted that H continued with the maintenance payment on a mistaken belief that the AR Order was still subsisting. After considering all the circumstances of the case, I am not convinced that it would be unjust to order a full repayment of HK\$5,600,000 by W based on the following reasons:

- (1) Not only that the court is satisfied H being not aware of W's remarriage between 2010 and 2022, there is evidence to say that W did expressly conceal such fact from H. It was the evidence of both M and A that W had expressly told them not to let H know in order not to lose her maintenance. I see no good reason why M and A should lie about this. Of course, I am aware that according to HN, W had never told HN not to tell H, but HN was in no position to say that W had never told M and A to withhold such information.
- (2) Under the maintenance agreement, W was given a residential unit in Tuen Mun with certain car parking spaces. According to the land search record, W is still the registered owner of the Tuen Mun property and a car parking space, the value of which was estimated at HK\$10,000,000 (Hearing Bundle p.205). But in November 2022, i.e. 4 months after H had confronted her with the overpayment but yet to take out formal proceeding, W suddenly took a reverse mortgage on the property and car parking space to obtain a lump sum of HK\$1,820,000 and a monthly sum of HK\$22,509.24. There is no credible explanation on why such a reverse mortgage was suddenly needed 4 months after H's discovery of his overpayment. Equally, there is no evidence as to where this HK\$1.8 million has gone. The court is entitled to draw a reasonable inference that this must be an attempt to defeat H's claim for repayment. A party seeking indulgence ought to come with clean hands. In view of W's attempt to conceal her remarriage and subsequent steps taken to frustrate H's application for recovery, I am not satisfied that it would be just to exercise the court's

discretion to disallow or reduce any repayment to H. It was part of Mr. Wong's submission that there should not be an order for the repayment to be made within 3 months. If W does not need time to pay, there is no objection in principle for the repayment to be made forthwith. Stay of Execution The last issue is about W's application for stay of execution pending this Masters appeal. After the conclusion of this appeal, such a stay of execution is no longer relevant and I make no order in respect of W's summons.

Orders

After rehearing H's summons dated 12 December 2022 for repayment, I hereby order W to repay a sum of HK\$5,600,000 to H forthwith. I make no order as to W's summons dated 7 February 2024 for stay of execution. Costs Costs to follow event. W's appeal against Master's Decision fails and should pay H costs of the appeal including all costs reserved with certificate for counsel. There shall be no order as to costs in respect of W's stay of execution summons. This will be in the form of order nisi to be made absolute upon expiry of 14 days from the handing down of this judgment. Upon the costs order being made

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