

HONG KONG / JUDGMENT

NSK v. K, RW

[2020] HKFC 56**COURT**

Family Court

DECIDED

11 March 2020

CASE / FILE NUMBER

FCMC7594/2015

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bjbj FCMC 7594 / 2015

**[2020] HKFC 56 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO 7594 OF 2015**

BETWEEN NSK Petitioner and K, RW Respondent

Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to public) Dates of Hearing:
30 and 31 October 2019 Written closing arguments submitted: 31 October 2019, 26 November 2019
and 2 December 2019 Date of Judgment: 11 March 2020

J U D G M E N T (Variation of maintenance)

Introduction

AUTONUMOUT This is an application by a Respondent husband to reduce the periodical payments payable to the wife from HK\$100,000 to HK\$30,000 per month. The husband s summons to this effect, dated the 24 May 2019 states as follows: the Respondent shall pay the wife (the Petitioner) periodical payments in the sum of HK\$30,000.00 per month with effect from the 1 April 2019 until payment of the lump sums in paragraphs 2 and 3 above. In his closing submission the husband put forward a slightly modified proposal and suggested as follows: It is my suggestion, that you order the monthly maintenance payments to be reduced in line with my new income to HK\$30,000/month, whereas if my income increase to its full amount, the existing maintenance amount of HK\$100,000.- shall be paid whenever HH Ltd quarterly results are profitable I understand the difficulties you face making an order as flexible as that, therefore I

give you my undertaking that whenever my salary increases in line with the company's profitable quarterly results, that I will pay the original amount of money HK\$ 100,000.- to the petitioner. Since a Nasdaq listed company must publicly disclose its financial results every quarter, the event of a profitable result can easily be verified by the petitioner.

2. This application arose out of this court's judgment dated the 2 April 2019, which was in effect a delayed clean break order. I ordered that the husband do pay the wife HK\$100,000 per month pending the payment of two lump sums, namely the sum of HK\$3,282,910 to be paid upon the pronouncement of the decree absolute and a further sum as follows:
3. Upon pronouncement of the decree absolute and the sale of the Respondent's 614,067 shareholding, or any part thereof, in HH Ltd. the Respondent shall pay the Petitioner a lump sum representing a 50% share of the net proceeds of sale.
3. The judgment was crafted in this way so as to recognize the fact that the husband's shares were inextricably bound to his position as the CEO of a publicly listed company and selling the shares in question was likely to be difficult certainly before his retirement. It also recognized the fluctuating nature of the share price.
4. In so far as the maintenance was concerned I ordered as follows:
4. The Respondent shall pay the Petitioner periodical payments in the sum of HK\$100,000 per month with effect from the 1 April 2019 until payment of the lump sums in paragraphs 2) and 3) above.
5. The Respondent shall be released from the undertakings given by him in the court order dated the 28 February 2017.
5. Up until that point the husband had been paying for the wife's rental, utilities and other items by way of an undertaking, plus an allowance of HK\$30,000 per month. At paragraph 108 of the judgment I set out my reasoning as follows: How much maintenance should the husband pay for the wife going forward? How much maintenance should he pay for KE, if anything at all?
108. The husband has said on several occasions that it is important that he retains the ability to control HH's shareholding as that is the key to him maintaining his earning capacity going forward. He has offered to continue to pay the wife HK\$30,000 per month. It is not clear whether or not he was willing to continue to undertake to pay for her accommodation etc. On the premise that the husband will continue to earn approximately HK\$240,000 per month plus the pension and other dividend amounts, I shall order that he pay maintenance to the wife of HK\$100,000 per month. This will enable the wife to continue to enjoy the same standard of living in Hong Kong in the short to medium term. He shall be released from his previous undertakings as set out in the court order dated the 28 February 2017 to pay for the wife's rent, utilities and car and medical expenses in Hong Kong. The wife will therefore be responsible for all of her own expenses going forward. I will not order that the husband pay maintenance for KE. She is now an adult with her own financial resources and it is a matter

for her how she should fund her studies going forward. If the father continues to support her financially then this will be on a voluntary basis.

6. In considering the division of assets I also said as follows: Whether or not the sharing principle should be adopted? In the event that this is a sharing case how should the assets be notionally divided at this stage?
99. I accept that prima facie the sharing principle should be adopted, although as indicated above there are difficulties with assessing what is actually in the matrimonial pot . I also accept that on the face of it, it is not possible for the husband to immediately sell the shares. Consequently, I intend to make a notional capital division as follows: There shall be an immediate 50:50 split of all of the assets in the matrimonial pot , as identified above, save for the shares. The husband shall pay the wife maintenance whilst he is still employed and pending the sale of the shares. Upon the husband s retirement and the shares being sold, the net proceeds of sale of the shares shall be split 50:50.
100. There is approximately HK\$15,830,000 in the pot, if one does not include the shares or HK\$7,915,000 each. Of that the wife already holds 4,632,090. Thus on the face of it the husband needs at this stage to pay the wife an equalisation amount of HK\$3,282,910.
7. This was a difficult trial and reference should be made to the entire judgment dated the 2 April 2019 when considering this current judgment. For the avoidance of doubt I stand by all the findings and comments made in the original judgment. In particular there were issues with respect to the wife s litigation conduct, which I summarized at paragraph 110 of the judgment as follows:
110. Although the wife was successful in her s.17 application, it is clear that she has not been successful overall. Her litigation conduct has also been appalling. She refused to comply with court orders, she sought to rely on improperly obtained documents, she seemingly manufactured other documents, she filed affidavits without seeking leave and when leave had been given she did not faithfully reproduce the latest affidavit in the court bundle for trial. Consequently, much more time was spent on this litigation than was merited. In contrast I found the husband to be generally credible. The issues
8. The issue then is whether or not the maintenance payable to the wife should be reduced and if so to what amount. Alternatively should the husband s subsequent proposal be accepted? The law Variation of maintenance
9. The husband s application to vary is made pursuant to section 11 (7) of the Matrimonial Proceedings and Property Ordinance Cap. 192, which provides that:
- (7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates

10. It is accepted that in considering a change of circumstances, I may look at the case de novo. In other words, the court is not necessarily fettered by the existence of a previous order. I may look at the situation afresh and make an order based on the parties existing financial circumstances. (See Ch 3.131 Jackson s Matrimonial Finance and Taxation, 7th edition). It is also true that there would normally be a reason for the application to vary or what some might call a trigger .
11. The court has a very wide power, including a power to terminate payments and to backdate the variation ordered. The overall objective is to achieve a fair outcome (see M v M, FCMC 4070 of 1990, dated 12 May 2006, unreported). Discussion Should the maintenance payable to the wife be reduced and if so to what amount? Alternatively, should the husband s subsequent proposal be accepted?
12. The original basis for the husband s application is that his salary had been reduced by half to HK\$144,690 per month (inclusive of housing). This was because of the company s poor performance and is based on its quarterly results. The difficulty is that this payment may fluctuate and that if the company does better then the husband is likely to be paid his full salary of HK\$240,000 per month plus housing etc. It follows that he is also likely to be receiving dividend payments if the company is doing well. By the time that the matter came on for hearing the husband confirmed in the witness box that he would be receiving his full salary for the next three months. He had received the reduced salary previously.
13. The wife tried to show that this was a sham and that in any event the husband had far greater financial resources open to him than she did. For the avoidance of doubt I do not accept that the husband s original reduction in salary was a sham. I also accept the documents produced by him which confirmed the original reduction in salary.
14. Both parties produced up to date Form E s but unfortunately both were of limited value. The husband did not fully itemize his schedule of outgoings, but confirmed some of the general expenses in the witness box. He said his partner was responsible for taking care of the general expenses. In any event he said that he needed at least HK\$100,000 per month to cover his basic expenses and those of his son and partner. He also remains concerned about his ability to provide for his family longer term. It also seems from the schedule that he is continuing to support the elder daughter by this marriage, KE. His schedule of outgoings is then as follows: 2. Rental 26000 Car, gasoline, carpark, tolls, repairs 8000 Tutoring of son 10000 Holiday Trips 2x60k to Europe 10000 E [elder daughter s] mortgage, rates, management fees 8000 Food, facilities 8000 Tax 22000 Insurances 12000 Helper 5000 Personal spending for 2 persons for clothes, restaurants, etc 500 In total about HK\$114000-/month.
15. The wife for her part also did not fully itemize her expenses and it transpired later that the list of expenses set out in the Form E was not based on her current expenditure. The wife confirmed that she is not living permanently in Hong Kong and that she stays with a friend when she is visiting. She lives in Malaysia otherwise. From the bank and credit card

statements produced the husband was able to show that based on that evidence she appears to be currently spending just over HK\$30,000 per month. Consequently, she is saving the remainder of the maintenance payments. The wife also confirmed that she has no other income save for the maintenance received from the husband and she reiterated that she had no other bank accounts other than as produced. She confirmed that the list of expenses set out in her Form E was based on a lifestyle that she aspired to. Decision

16. I have considered the alternative proposal put forward by the husband, but it seems to me that the mechanism proposed may turn out to be quite complicated in practice and I am conscious of the continuing high level of conflict that continues to exist between the parties. The wife owns one property outright in Malaysia and she also owns two other apartments there jointly with the daughter. Consequently, I accept that she has somewhere to live in Malaysia and that she is now more likely than not to be basing herself there. The cost of living is lower in Malaysia and I accept that she has not been spending the maintenance that was originally ordered. I also accept that this has at times caused significant difficulty for the husband. In such circumstances I shall reduce the maintenance to HK\$40,000 per month. I shall not backdate it. The monies accumulated by the wife shall provide her with a further financial cushion. I also accept that she should be able to live very comfortably on this sum in Malaysia. In so far as the husband is concerned this is a little more than he says that he can afford when he is receiving a reduced salary. However, I am confident that he should be able to budget accordingly as his income fluctuates with the changing fortunes of the company. For the avoidance of doubt all other aspects of the original order shall remain in place. Order
17. Consequently I shall make an order as follows, order 4 contained in the court order dated the 2 April 2019 shall be varied in that the Respondent shall pay the Petitioner periodical payments in the sum of HK\$40,000 per month with effect from the 1 April 2020 until payment of the lump sum referred to in paragraphs 2 and 3 of the court order dated the 2 April 2019. There shall be no order as to costs. (Sharon D. MELLODY) District Judge The Petitioner and the Respondent both appeared in person 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 ukau gdq3 gdq3 gdq3 gdq3 gdq3 gdq3 gdq3 gdq3 gdq3 gdq3 gdq3 gdq3 gdq3 gdq3 ~w~wswwswokowgw gdq3 zmx_z gdq3 gd6= gd6= gdq3 gd6= h7^| gdq3 uof] hI+2 hI+2 h7^| gdq3 gdq3 gdq3 gdq3 &`#\$ gdq3 [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"/> \$Jf_ e79) &=@-v58

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