

HONG KONG / JUDGMENT

S v. C

[2021] HKCA 1372

COURT

Court of Appeal

DECIDED

21 September 2021

CASE / FILE NUMBER

CAMP243/2021

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CAMP 243/2021

[2021] HKCA 1372

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

MISCELLANEOUS PROCEEDINGS NO 243 OF 2021

(ON AN INTENDED APPEAL FROM FCMC NO 15393 OF 2018)

BETWEEN

S

Petitioner

and

C

Respondent

Before: Hon Cheung and G Lam JJA in Chambers

Dates of Written Submissions:

6 and 19 July and 25 August 2021

Date of Decision:

21 September 2021

D E C I S I O N

Hon Cheung JA:

I agree with the decision of G Lam JA and the costs order he proposes to make.

Hon G Lam JA:

This is an application for leave to appeal from the decision of Deputy District Judge Thelma Kwan (“the judge”) dated 23 March 2021 (“Decision”) ordering the respondent (whom I shall refer to as “H”) to pay maintenance pending suit (“MPS”) and legal costs contribution to the petitioner (whom I shall refer to as “W”). The judge herself refused leave to appeal in a decision dated 22 June 2021 (“Leave Decision”). If leave is granted by this court, H also seeks a stay of execution of the judge’s order pending appeal.

The background may be briefly stated. H and W were married in 2007 and have two children of tender age. H is a barrister. W was a flight attendant but her employment was terminated by the employer on 21 October 2020. H and W separated in October 2016. The children, who are in their joint custody, live at the matrimonial home with H, who has become their primary carer, with the help of a domestic helper. W filed her petition on 5 December 2018. Forms E were exchanged on 15 February 2019. A decree nisi was pronounced on 27 November 2020.

W took out a summons for MPS on 31 August 2020. She sought \$30,000 per month in MPS and \$30,000 per month for legal costs contribution. H opposed the application. In the end the judge ordered H to pay W MPS of \$28,500 per month, and legal costs contribution of \$20,000 per month, both backdated to 1 September 2020.

There is an irregularity in H’s application for leave in that the draft notice of appeal for his summons in this court is not the same as the draft notice of appeal placed before the judge. The grounds have in part been changed and the numbering has also changed. This has made it difficult for this court to refer to the views of the judge in the Leave Decision. More importantly, to the extent that the new draft contains, as it does, grounds not stated in the draft before the judge, those grounds are being raised for the first time in this court. No basis has been identified for allowing H, in effect in relation to those grounds, to circumvent the requirement that an application for leave to appeal should first be made to the judge below before it is made to this court (see Order 59 rules 2B and 14(4) of the Rules of the High Court (Cap 4A)). Accordingly, I shall confine my consideration to the grounds raised before the judge, using the numbering in that draft notice of appeal.

H has advanced 9 grounds (with numerous subparagraphs) in the draft notice of appeal. Before dealing with these grounds, it should be noted that the determination of an application for MPS is an exercise with a high discretionary content. The proper approach of the appellate court in an appeal from an order for MPS is well established by the authorities, as summarised by Judge A Tse in *ALDL v FTFC* [2020] HKFC 180 as follows:

“

5.

The granting of maintenance pending suit is a discretionary remedy. On appeal, the Court of Appeal will not exercise the discretion afresh. Instead, it will only interfere with the decision when the discretion was wrongly exercised, such as being contrary to the principle or the primary judge had wrongly taken into account irrelevant matters or ignored relevant matters [see *MWY v HWM* HCMP 120/2017, 16 May 2017; *WW v LLN* [2019] HKCA 1278 at §§ 1517.]

6.

In *CHWA v LNLAI* [2019] HKCA 1017 at § 3.1, the Court of Appeal, in refusing leave to appeal, stressed ‘the interim nature of [maintenance pending suit] which generally requires the Court to adopt a broad brush approach in deciding the amount to be awarded. It is also for a limited duration until the final resolution of the issue of financial relief of the parties. Inevitably there will be adjustment to the final order to be made in the event of overpayment or underpayment of [maintenance pending suit].’

7.

The threshold for appealing against an order for maintenance pending suit is a high one. The court is inclined to leave factual questions of expenses and income for determination at the ancillary relief hearing. The Court of appeal also stated that appeals against maintenance pending suit orders are ‘rare’ and the ‘powers of interference [of an appeal court] are strictly limited’: *K v K* [2011] 1 HKC 66 at §§ 1, 3; Hewitt, *Family Law and Practice in Hong Kong* (3rd ed. 2018), § 6.076.”

It is important to note that MPS is an interim measure, intended to be temporary, and subject to adjustments in the final orders to be made in the determination of ancillary relief. Overall fairness can be achieved at that point by giving credit and setoff if there is found to have been any overpayment or underpayment in the interim. In other words, an order for MPS does not finally determine the rights and obligations of the parties, and since it involves simply the payment of money, its effects may in general be redressed by monetary relief at the end. This explains why in relation to MPS the courts “take a broad view” of the parties’ finances rather than engage in any detailed investigation, adopt a “broad brush” approach, and seek to arrive at “rough and ready” conclusions (see Rayden and Jackson on Relationship Breakdown, Finances and Children at §11.78; *HJFG v KCY* [2012] 1 HKLRD 95, §§32-38). Appeals should be rare and the parties should be encouraged instead to focus on, and bring about as early as practicable, the final resolution of their dispute. As has been said in *Wong Kar Gee Mimi v Severn Villa Ltd* [2012] 1 HKLRD 887 at

§30 (albeit not specifically with regard to MPS), even if the threshold of reasonable prospects is met, the court may nonetheless in its discretion refuse leave to appeal in the interests of procedural economy and proportionality. For my part, I consider that leave to appeal from MPS orders should generally not be granted unless there is some special reason why the matter cannot or should not be left to the ancillary relief stage such as serious hardship caused by the order to a party. I can see none here based on the admissible materials, and on this ground alone I would dismiss the application.

I turn nevertheless to the grounds advanced in the present case. By Grounds 1 and 2, H contends that there was no evidence of W's actual reasonable requirements for or H's ability to pay MPS, and that the judge elided the court's power to take a "broad brush" view where jurisdiction has been established and W's obligation to establish jurisdiction, and failed in this case to analyse what were W's actual needs.

There is in my view no reasonable prospect of success on these grounds. The judge was well aware of the principles governing the exercise of the power to order MPS under section 3 of the Matrimonial Proceedings and Property Ordinance (Cap 192). She referred to passages in Rayden and Jackson which emphasised the "actual needs of the parties"; she highlighted the "immediate and reasonable needs" and the criterion of "reasonableness" in the paragraphs quoted from *HJFG v KCY* [2012] 1 HKLRD 95. It is not correct to say that there was no evidential basis for W's needs. W's affirmation and Form E are evidence to which the judge may have regard: *WW v LLN* formerly known as *LSM* [2019] HKCA 1278, §17. The judge set out W's needs on the evidence at §§33-37 of the Decision. She considered the evidence and made her assessment in §§52-53. She noted that W had no regular income after her employment as a flight attendant ceased: §60. She also had regard to H's finances, taking the view that he had possibly double-counted his expenses and that he had more disposable income than he had stated. She considered that she could not make a full analysis of the numbers as H had not produced supporting information and had not responded to the second questionnaire: §§46-50 of the Decision. It is incorrect to say that there was no evidence or no analysis of W's reasonable needs or H's ability to pay. The judge was entitled to take a broad view of the parties' finances. There is no error of principle in the judge's approach.

Ground 3 lists 12 matters which, it is said, the judge failed to take into account. The judge said they were relevant matters that she had taken into consideration. H has identified no basis for suggesting that the judge had failed to take them into account. Further, some of them are contentious matters to which W had responded in her 2nd affirmation, and cannot be simply taken as facts. In addition, in relation to H's reference to the financial assistance that W had received from a third party between June 2017 and August 2019, the judge added that there was no evidence that W had any financial assistance from any third party at the time of her decision (March 2021). It seems to me this ground has no prospect of success.

Ground 4 sets out 6 matters which, it is said, support H's case that W's needs had not been substantiated. These matters, as the judge noted, were repetitive of what are already set out in Ground 3: see Grounds 3(3), (4), (5) & (7). Simply repeating these points which had already been made in the original hearing does not show any reviewable error in the Decision to support an appeal.

Grounds 5 and 6 complain that the judge wrongly failed to draw adverse inferences against W from her failure to adduce evidence, and that this was unfair in contrast to the judge's treatment of H. H has not, however, specified under these grounds what evidence in particular W should have but did not adduce and what inferences should have been drawn by the court. As the judge said, it was incorrect to allege, as H did, that W "had not filed any evidence at all of her savings, assets or expenditures". The judge also noted that W had at all times been in compliance with all disclosures required of her and that H had not raised any questionnaire on W's finances. In contrast, the judge noted that H filed his answer to W's first questionnaire late and had failed to comply with an order to answer W's second questionnaire by 12 October 2020. As a further development, W has pointed out that on 13 July 2021, an order was made, with a penal notice, for H to file his answer within 21 days. I do not see any prospects in these grounds.

Ground 7 complains that the judge adopted double standards in considering H's and W's requirements respectively. I do not think this ground has any reasonable prospects of success. The judge took the approach that she should err in favour of the payee, because she found that there might have been doublecounting of the expenses H declared, and also because she found that H had failed to make full disclosure. This is consistent with the following principle set out in *TL v ML and Others (Ancillary Relief: Claim against Assets of Extended Family)* [2006] 1 FLR 1263 at 1289 and endorsed by the Court of Appeal in *HJFG v KCY* at §37:

“

Where the affidavit or form E disclosure by the player is obviously deficient, the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere sayso 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.”

Whilst H complains that W did not provide supporting evidence for her expenses, the judge noted that H did not provide any either (except for one receipt for rental expense). The complaint that the judge disregarded information attached to H's submissions is unfounded, as it was not evidence filed in the case and W did not have an opportunity to respond to it. There is no error of principle in the judge's approach.

Grounds 8 and 9 complain that the judge failed to apply the principles and preconditions in *Currey v Currey* [2006] EWCA Civ 1338 in making the order for H to pay legal costs contribution to W. In particular, it is said that the judge failed to require W to show that she could not reasonably procure legal advice and representation by any other means, or use her Shenzhen property to raise a loan, or obtain legal aid.

The judge correctly directed herself to the question whether W had demonstrated that she could not reasonably procure legal advice and representation by any other means. There was evidence from W that she had only limited funds in her bank account in Hong Kong and no other means to obtain funding to support the litigation and no sufficient liquid assets to pay for her legal expenses.

As to the Shenzhen property, the judge explained that W had already disclosed it in her Form E in February 2019 but declared that she did not have any beneficial ownership in it. H raised no queries on this until his affirmation in opposition to the MPS application in October 2020. The judge noted that there is an issue on the beneficial ownership of that property which needs to be decided. In any event she could not see how W could, in her unemployment status, raise any loan or service any loan raised on that property. I do not think that in these circumstances the judge can be faulted for not proceeding on the basis that W could raise financing from that property or otherwise.

As to legal aid, the judge thought that W was unlikely to be eligible, with the legal title of the Shenzhen property to her name. She also took the view that as there are available resources in family funds, public funding should not be resorted to: *KGL v CKY* [2003] 2 HKLRD 301, §21.

I do not see that H has demonstrated any error of principle in the judge's decision or any reasonable prospect of success in these grounds.

For the foregoing reasons, H's application for leave to appeal is dismissed. Since it is in my opinion wholly without merit, I would order pursuant to RHC Order 59 rule 2A(8) that no party may request reconsideration of this determination at an oral hearing.

It follows that H's application for stay of execution falls away. His 6th affirmation, which was filed for that application (see Leave Decision at §9), need not be considered.

I would make an order nisi that H do pay W the costs of and occasioned by his summons, summarily assessed in the sum of \$56,620.

(Peter Cheung)

Justice of Appeal

(Godfrey Lam)

Justice of Appeal

Written Submissions by Mr Ken S H Chan, instructed by Chiu, Szeto & Cheng, for the Petitioner

Written Submissions by the Respondent, acting in person

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