

HONG KONG / JUDGMENT

SEB v. ZX

[2020] HKFC 87

COURT

Family Court

DECIDED

29 April 2020

CASE / FILE NUMBER

FCMC14535/2005

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FCMC 14535 / 2005

[2019] HKFC 87

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES

NUMBER 14535 OF 2005

BETWEEN

SEB

Petitioner

and

ZX

Respondent

Coram : Deputy District Judge J. Chow in Chambers (Not Open to Public)

Date of Hearing : 11 December 2018 – 14 December 2018;

31 January 2019 & 21 March 2019

Date of Judgment : 29 April 2020

J U D G M E N T

(Variation of Maintenance &

leave to issue judgment summons for arrears more than 12 months)

Introduction

By way of notice of application for ancillary relief dated 5 February 2016, the petitioner (“the husband”) applied to vary the ancillary relief order made by HHJ Bruno Chan (as he then was) in his judgment dated 29 December 2008 (“the 2008 Order”). The petitioner’s notice was amended and re-amended on 27 July 2018 and 7 November 2018 respectively.

By way of a summons dated 28 July 2015, the respondent (“the wife”) applied to enforce arrears of maintenance arising from the 2008 Order from 5 January 2010 to 21 July 2014. The wife had issued judgment summons against the husband which has been adjourned sine die and to be restored after determination of the husband’s application.

Background

The husband and wife were married in 4 January 1993. On 20 December 2005, the husband filed a petition on ground of 2-year separation. On 29 March 2006, the Court granted decree nisi; and on 27 November 2007, decree absolute was obtained. They have two sons (“Child E and Child A”) who has turned 18 in February 2012 and December 2013; they have been living abroad since fall of 2012 and 2013. As an update, the husband remarried with his 2nd wife but had resulted in another divorce in 2016. The husband and the 2nd wife had a daughter.

The 2008 Order

The husband and wife had gone through two full trials heard by HHJ Melloy and HHJ Bruno Chan on children matters and ancillary relief. Judgements were handed down on 10 September 2007 and 29 December 2008 respectively (i.e. the 2008 Order). In HHJ Melloy’s judgment, the learned judge ordered sole custody of both children be granted to the husband and share care and control to both the husband and wife.

The background of the parties sufficiently appeared in HHJ Bruno Chan’s judgment:

“1.

This is the Respondent Wife’s application for ancillary relief against the Petitioner Husband upon the dissolution of their 10 odd years marriage. He is a 39 year old American lawyer originally from Palo Alto, California, while she is a 42 year old Chinese from Nanjing who used to play the piano in a hotel but now works as a casual piano teacher with little income. They came to Hong Kong in about 2002 on the Husband’s job together with their 2 children, both boys now aged 14

and 12 respectively, and whose sole custody has earlier been granted to the Husband after a bitterly contested 5-day trial before Judge Melloy, with shared care and control to both parties, the details of which it is not necessary to recite here, but basically the boys spend roughly about 2/3 of their time with their father and 1/3 with their mother during school days, with equal sharing by their parents of their school holidays.

2.

The Husband now works for the U.S. firm D at an average monthly income of \$462,150, and resides with his girlfriend (whom he has never named and just referred to as his partner in his evidence, while the social investigation report called her his fiancée, but for convenience purpose I will just refer to her as the girlfriend in this judgment), their 2-year old daughter, the boys, as well as 2 domestic helpers in 2 adjoining 1,300 sq. ft. apartments (total 2,600 sq. ft.) in Kennedy Road, Central, Hong Kong, with one rented by him while the other owned by the girlfriend.

3. The Wife on the other hand resides by herself in a 900 sq. ft. rented apartment in Conduit Road, Hong Kong but the tenancy of which is due to expire in end of February 2009. She has been living on a monthly sum of \$38,000 from the Husband under a maintenance pending suit order plus additional sums of \$4,000 per month for the boys' maintenance when they come to stay with her, and \$20,000 twice a year for their expenses when they go on holidays.

4.

The assets position of the parties is quite straightforward as although the Husband has a fairly high income, there seems to be no capital, savings or properties of any significance between the parties that would require the court's decision over their distribution, and as far as the Husband is concerned, this is primarily a "needs" case where it is all about the Wife's reasonable needs including her accommodation against his ability to meet those needs while taking into account of his own as well as his obligations towards his children and his other liabilities."

HHJ Bruno Chan (as he then was) ordered in paragraph 91 of the judgment,

The husband shall pay the wife periodical payment at the rate of HK\$60,000 per month for her maintenance dating back to 1 December 2008 with credit given to payment already made, and payable thereafter on the 1st day of each month until she dies or remarries, or until further order ("Paragraph 1 of the 2008 Order");

The husband shall within 6 month pay the wife a lump sum of HK\$50,000 for her dental treatment, and a further sum of \$50,000 for her new piano upon her completion of the university course ("Paragraph 2 of the 2008 Order");

The husband's offer to pay for the wife's 3-year degree course at HK\$30,000 per year for 3 years directly to the university is to be treated as his undertaking to the court ("Paragraph 3 of the 2008 Order");

The husband shall pay the wife HK\$7,500 per month as maintenance for each child commencing on 1 January 2009 and payable thereafter on the 1st day of each month until the age of 18 years or finish full-time education, such payment to be reviewed if and when each child leaves Hong Kong to study abroad ("Paragraph 4 of the 2008 Order");

The husband shall pay the wife HK\$30,000 per half year on 1 July and 1 December of each year for the children's holidays with the Respondent, commencing 1 July 2009, such payment to be reviewed if and when each child respectively leaves Hong Kong to study abroad ("Paragraph 5 of the 2008 Order").

All periodical payments are to be paid into the wife's designated bank account.

The husband's application

The husband is seeking variation against the 2008 Order on ancillary matters as follows:

Paragraph 1 of the 2008 Order be varied to the extent that the husband do pay the wife HK\$36,500 per month from January 2014; and HK\$10,000 per month from January 2015 or such sum the court thinks fit. All arrears of maintenance in respect of the monthly maintenance be discharged.

Paragraphs 2 and 3 be of the 2008 Order be discharged. The husband be released from his undertaking to the Court to pay the wife HK\$50,000 for the purchase of a new piano upon the wife's completion of the music university course.

Paragraph 4 of the 2008 Order be discharged. The husband is asking for arrears if any be remitted.

Paragraph 5 of the 2008 Order be discharged. The husband is asking for arrears if any be remitted.

Legal Principles

The powers to vary an order for periodic payments, including those for a child of a family, are conferred by section 11(7) of Matrimonial Proceedings and Property Ordinance (Cap. 192) ("MPPO").

"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 and, where the party against whom that order was made has died, the changed circumstances resulting from his or her death."

HHJ Ivan Wong has succinctly summarized the law on variation of maintenance as follows in *KKWZ v. CPW* (FCMC 14301 of 2013, [2019] HKFC 110):

"The Court of Appeal in AEM v. VFM [2008] 3 HKLRD 36, [2008] HKFLR 106 and HCTT v. TYYC [2008] HKFLR 286, [2008] 5 HKC 86 discussed the principles applicable to such an application. Based on these authorities, the principles can be summarized as follows,

1. The court has a wide power to deal with the orders that fall within the scope of s 11 of the MPPO. In an application under s 11, the court shall have regard to all the circumstances of the case and is entitled to look at the matter afresh. In doing so, the court is entitled to look at all the relevant matters set out in s 7 of the MPPO: *AEM v. VFM*, supra, at [4].
2. Any change in any of the matters to which the court was required to consider when making the original order is one of circumstances to be considered: *AEM v. VFM*, supra, at [5].
3. The original order is one of the matters that the court should consider. The court should pay due regard to the basis and intended effect of the original order and there should not be a radical departure from the approach taken by the parties. Ultimately, how much weight should be given to the original order must depend on the circumstances of the case. Lapse of time and whether there has been a material change in the circumstances are matters that the court need to consider. *AEM v. VFM*, supra, at [8]; and *HCTT v. TYCY*, supra, at [15].
4. Where a consent order is the subject of an application for variation, the application is not a venue for the parties to have second thoughts about their settlement. An application for variation should not be pursued when in substance the grounds advanced tantamount to re-argument of the issues. *HCTT v. TYCY*, supra, at [49].”

Leave to enforce arrears of maintenance over 12 months

The applicable law is section 12 of the MPPO where leave of Court is required. The starting point is that arrears exceeding 12 months will be enforced unless there are special circumstances. The rationale behind this rule is if an applicant could wait for one year bringing proceedings for enforcement then it was more likely than not that he or she did not need the money. (See: *CYM v YML*, CACV 14/2012 and *CSL v WWK*, CACV 278/2003)

Issues of both applications

There are altogether 6 issues agreed by both the husband and wife:

downward variation of periodic payments of the wife (Paragraph 1 of the 2008 Order);

the husband's undertaking to pay for the wife's university course and to purchase a piano (Paragraphs 2 and 3 of the 2008 Order);

children maintenance of HK\$7,500 per month payable by the husband to the wife (Paragraph 4 of the 2008 Order);

holiday allowance of HK\$60,000 per annum payable by the husband to the wife to spend time with both children (Paragraph 5 of the 2008 Order);

arrears of periodical payments/children maintenance from 5 January 2010 to 21 July 2014, whether there are special circumstances that leave should be granted to the wife to enforce arrears of maintenance over 12 months.

Paragraph 1 of the 2008 Order - downward variation of periodic payments

The husband's change of financial circumstances

The wife opposed to the downward variation of her maintenance from HK\$60,000 to HK\$36,500 or any sum less. She said the husband was unable to establish material change of circumstance since the 2008 Order. The husband's partnership only came to an end on 31 December 2014. The husband should have means to pay her maintenance prior to 2015. By reason of the substantial rise of the husband's monthly income from HK\$462,125 in 2008 to at least HK\$640,000 in 2014, there was no material and adverse change of financial circumstances.

The wife reiterated the husband's sound financial position. HHJ Bruno Chan ordered in his judgment that the monthly periodical maintenance of HK\$60,000 when the husband was "earning an average monthly income of HK\$462,150". The husband has a "good income of HK\$462,125 per month as a lawyer with a US law firm with an admittedly good prospect as his income has been on the rise over the past several years". Moving on to 2014, according to the US Tax Return filed by the husband, his annual income for 2014 was USD1,009,163, which equated to approximately HK\$7.9 million. In effect, for 2014, the husband had a monthly average income of at least HK\$650,000 per month.

The husband rebutted the wife's allegation. The husband said his income was not on the rise, on the contrary, he had encountered material change of circumstance since January 2015 onwards. The husband has not been fully employed since 2015 and therefore unable to meet payments of maintenance as ordered in the 2008 Order.

The husband testified, he had already indicated to the wife in 2013 that his employment in a solicitors firm beyond 2014 was uncertain. He could only earn at a lower level of income. He might have to opt for going bankrupt if he was unable to find a job. The husband has repeatedly sent emails on 4 January 2014, 22 April 2014 and 15 November 2014 to the wife. On 9 December 2014, the husband wrote again to the wife that he would be out of employment by the end of the month. Having said that, the husband said he was going to pay her December maintenance and second 2014 holiday allowance over the next 3 months of the same year.

The husband testified he has taken various steps to obtain gainful employment after 2015, he approached two dozens of law firms, funds and corporates. This led to interviews but no offer was made to him because he lacked a Hong Kong qualification. The husband kept in touch with contacts with headhunters, law firms and corporate contacts but none have yielded any jobs. Positions where the husband did have second or third interview did not materialize because the senior management preferred junior lawyer.

The husband extended his job search with previous clients. As a result of loss of his client base, his job search was unsuccessful. The husband explained his expertise was capital raising in the US which local firms have moved away from. The husband is unable to work in the Hong Kong Stock Exchange listing matters since (i) he is not Hong Kong qualified; (ii) he lacks a track record for these listings; and (iii) there are low fees/low compensation levels.

The husband further said there might be some prospects for him to obtain employment with an annual salary of HK\$1 million. He sees it unsatisfactory because this salary could not support himself, his daughter (born by his 2nd wife) and to pay off his debts. This is compounded by the high rate of US Federal Tax and significant legal fees the husband has incurred.

In 2016, the husband attempted sitting the bar exam in Hong Kong. He was unable achieve a qualification due to the volume of work, difficulty in the exam and his health conditions. He was diagnosed with type 2 diabetes; hypertension; hyperlipidemia; coronary artery disease; glomerulonephropathy; obesity; and depression. The husband was further diagnosed with recurrent major depressive disorder; unspecified anxiety disorder and PTSD.

The husband has no positive financial resources other than those stated in his Form E filed on 6 April 2018. He has a total of HK\$110,613 monetary interest in all bank accounts and together with a combined value of all his valuable personal items of HK\$185,000 making up a total of HK\$295,613. The husband's total value of his liabilities is HK\$11,071,500. As of July 2018, the husband owed over US\$1 million in US Federal tax.

The husband sold his Porsche on 8 June 2017 for HK\$850,000. He applied the sale proceeds of HK\$850,000 to pay part of his debts in sum of HK\$420,940.65. He admitted to have bought a motorcycle at HK\$270,000 for his own use. The rest was to pay for the maintenance of his daughter and HK\$152,212 paid to the wife. The husband denied he had ever owned a Mini Cooper, it was owned by his 2nd wife.

By 2016, the husband ended his marriage with his 2nd wife. Pursuant to the consent summons filed with the 2nd wife, the husband is responsible for half of his daughter's costs in her upbringing. This amount was set at HK\$23,000 per month. Not only the husband has almost spent all his savings, he had incurred over HK\$11 million debts. He was required to seek assistance from his 2nd wife.

As a result of the above, the husband is currently working as a business consultant in Thailand. He relocated to Thailand to cut his daily expenses.

The husband admitted he failed to pay children maintenance to the wife since 2013, holiday allowance to the wife since 2015 and periodic maintenance to the wife since August 2018.

The husband had paid the wife maintenance as follows:

in 2015, the husband had no income and no maintenance was paid in 2015 other than the payment in instalments in December 2014, January 2015 and February 2015 of the maintenance and holiday monies due December 2014;

in 2016, the husband received an income of HK\$277,752 of which HK\$46,544 was paid to the wife;
in 2017, the husband received an income HK\$973,489 of which HK\$152,212 was paid to the wife;
in 2018, the husband received an income of HK\$433,804 of which HK\$65,229 was paid to the wife;

I largely accept the husband's change of financial circumstance. The only aspect put the husband in embarrassment was his contribution of HK\$1 million to the 2nd wife to renovate her house in Kennedy Road. The sum was huge. The husband explained he intended to downsize the accommodation expenses when both Child A, Child E returned in town. I am not with the husband on this point because he had in fact contributed to the value of the 2nd wife's property. The amount should be accounted for as his assets.

The wife criticized the husband deliberately refused job offers with an annual income less than HK\$1 million. On careful understanding of the husband's evidence, he explained in his evidence the difficulty in accepting a job with remuneration less than HK\$1 million. There is no evidence that the husband has been offered with such a job. The husband has approached for job or business opportunities but was in vain.

The husband's change of financial circumstance was alerted to the wife prior to 2015. I accept the husband's loss of employment as a material change of circumstance, he may not be financially sound to meet the ancillary relief ordered in the 2008 Order. I also accept the husband has health issues which rendered him difficult to obtain higher qualifications.

The wife's needs

The extent of variation of the wife's maintenance should be decided upon the wife's needs. I am entitled to look at the wife's need afresh.

The wife's evidence was insufficient to establish her needs.

The wife's accommodation. The wife intended to reside in the jurisdiction but she was unable provide residential address. She was able to state a correspondence address in her last Form E filed on 6 April 2018. The wife's explained by reason of default of the husband's maintenance, she was forced to be homeless or to stay with her friends. She admitted in her evidence that she has returned to reside in mainland China with her mother. She was in town for less than 100 days with an extensive travel record outside the jurisdiction during 2017 and 2018.

The wife's daily expenses. The wife admitted having a habit of overspending. The wife's spending pattern defeated her claim as a "homeless" person. The husband summarized as follows:

He paid the wife HK\$20,000 maintenance in January 2015. The wife withdrew HK\$6,700 in cash, spent HK\$3,400 at Lane Crawford department store and had paid a HK\$9,000 credit card balance approximately.

He paid the wife HK\$26,500 in February 2015. The wife spent HK\$3,888 at the Apple store, HK\$6,300 at Lane Crawford department store, HK\$1,260 at Clinique and HK\$2,700 at ShoeSpace;

In March 2015, the wife withdrew HK\$6,700 in cash and spent HK\$2,800 at Lane Crawford department store;

In April to May 2015, the wife spent HK\$2,430 at Butterfly Hotel, HK\$6,440 at Zadig & Voltaire, HK\$6,500 at Gucci, HK\$5,080 at Lane Crawford department store and HK\$2,490 at Club Monaco;

In June 2015, the wife spent HK\$30,000 at Louis Vuitton.

The wife claimed she has incurred medical expenses because she has been suffering from depression. I failed to see she has concrete evidence to prove her needs.

The wife's income. The wife worked as an insurance agent from April 2016 to July 2016. Apparently she was unsuccessful in her career in this industry and resulted nil income. She has no assets. Be it the case, the wife has put herself in the insurance industry which was new to her. The wife, with sound qualification, she did not develop her career as a piano teacher. Be it I have no concrete evidence on the level of income of a private piano teacher (in fact it varies extensively). I expect the wife could be able to maintain a steady income if she has chosen to work as a piano teacher. Neither did the wife attempted to enrol herself in any music -related university course that could advance her career. I conclude it would be much easier for the wife to sustain herself as a piano teacher than joining the insurance industry. She has chosen a difficult path.

Albeit the wife has no promising career. She had received deposits in both local and foreign currency by way of cash and cheque. She explained she had no recollection of the nature of these payments and claimed they are mostly personal loans from her friends.

The wife's debts. The wife was unable to explain her debts stated in her Form E, some of them came from friends and some of them came from her sister.

The wife's health. The wife said her career was unsuccessful was largely due to her deteriorating health condition. She was stressful because the husband defaulted paying her maintenance. I see these are merely bare assertions in absence of proof of her health conditions. Notwithstanding this, the wife has withdrawn from psychological counselling without reason where such fees were to be paid by the husband on his undertaking.

The wife's evidence on her needs and income were incredible. I am not persuaded the wife had maintained the same living condition as when she had been at time when the issue on ancillary relief was tried before HHJ Bruno Chan (as he then was).

I agree with the husband's attempt to vary downward the wife's maintenance from January 2014 to December 2014 from HK\$60,000 to HK\$36,500; and from January 2015 onwards to HK\$10,000 is appropriate.

Paragraphs 2 and 3 of the 2008 Order: the husband's undertaking

The wife conceded this issue on 1st day of trial. The husband seeks costs on this issue on an indemnity basis which will be dealt with in the latter part of this judgment.

Paragraph 4 of the 2008 Order: children maintenance

In the 2008 Order, HHJ Bruno Chan (as he then was) ordered the husband to pay child maintenance HK\$7,500 per month until both children reach the age of 18 or finish full-time education; such payment to be reviewed if and when each child leaves Hong Kong to study abroad. The order required payment of children's maintenance when the children stayed with the mother (the wife).

The husband submitted both children are over 18, not in full time education and living abroad, the 2008 Order on child maintenance should be discharged.

Child A testified for his father (the husband). He gave an account on how the mother – son relationship has been since divorce. At time of trial, Child A was over 18 years old and has been working as an instructional assistant in the United States. He visited his mother (the wife) in January 2016. He made it clear that he has no plan to visit his mother (the wife) in 2018. Child A has no regular contact with his mother (the wife) for a long time already.

Child A recalled, in or about 2011 – 2013, whilst he was still studying in boarding school in Hong Kong, the mother (the wife) has access with him regularly on weekends. Child A went to school in the United States in 2014, access with the mother ceased. He described seeing his mother (the wife) was always “unplanned and spontaneous”. Child A did not return to Hong Kong since early 2016, though his mother (the wife) suggested to visit grandma in Shanghai.

Child E and his mother (the wife) has no access in September 2010. Child E had cut off his relation with his mother (the wife) in 2015 when he was 15 years old. Despite difficulties, the husband encouraged Child E to maintain his relationship with his mother (the wife). Child E tried to re-establish relationship with his mother (the wife) in 2015 and in 2018. Both attempts were unsuccessful.

In the 2008 Order, the husband was ordered to pay children's maintenance when both children "stayed with" the wife. The husband explained, Child A matriculated in a boarding school in Hong Kong in the fall of 2011 and was committed to maintaining a relationship with the wife. The husband continued to making his child maintenance payments to the wife during his first year. It cannot be achieved when Child E was admitted to a boarding school in Hong Kong in 2010, the school rules which did not allow students to spend nights or weekends away from campus. The wife well knew the boarding school did not allow the boys to spend time off campus with the wife and both Child E and Child A refused to stay with the wife when they could be off campus.

At that time, Child E had already refused to see his mother (the wife) or to take holidays with her, the husband decided to stop paying child maintenance to the wife.

At the beginning of 2011, Child E left the boarding school in Hong Kong and returned to living with the husband. The husband resumed the child maintenance payment so that Child E could rebuild his relationship with his mother (the wife). However, by the end of 2011, Child E made it clear he would not resume his relationship with his mother (the wife) which resulted in the husband discontinuing the payments again. Child E graduated high school in May 2012 and had left Hong Kong to study in Taiwan and then the US. He did not return to Hong Kong since then other than the summer holidays of 2013-2015 and has not visited the husband other than a few days in 2015 and 2018.

From fall 2012 to fall 2013, whilst Child A was turning 17 and Child E was about to turn 19, the husband saw it was an appropriate time to allow both children to manage their own money. The husband provided monthly child maintenance payments directly to both Child E and Child A. The husband specifically directed both children to see their mother (the wife).

The husband had shouldered the costs of tuition fees for both Child A and Child E abroad. He estimated it cost over USD130,000 per year including school fees, boarding and travelling every year.

The situation has been going on for some time already. The wife did not write to object to the above reductions until late 2012 or the beginning of 2013. The husband never stated that the child maintenance payments were "on the way" or "check was in the mail".

The wife, on the other hand, insisted on going after the husband on the arrears of children maintenance. It is clear in the evidence that both Child E and Child A did not maintain a relationship with their mother, the access (or occasional meet ups) were not done on a regular basis. Be it an order for children maintenance, I fail to see the outstanding payments of children maintenance could be spent towards the access of the wife and both children. The husband has good reason to withhold payment of child maintenance to the wife.

In as much as the fact that the wife was unable to have access with either or both children, children maintenance as ordered in the 2008 Order shall be discharged. I opted for an effective date of the discharge when both Child E and Child A ceased access with the wife. I see such discharge with retrospective effect on 1 January 2011.

Paragraph 5 of the 2008 Order: holiday allowance

It was clearly ordered in the 2008 Order that HK\$60,000 holiday allowance per year from 1 July 2009 is "to be reviewed when each child leaves Hong Kong to study abroad". The husband submitted that since both children are over 18, not in full time education and has been living abroad, such order shall be discharged.

Based on the husband's experience, the wife only took the children on one holiday per year to visit her family in Nanjing or Shanghai. As Child E had not attended these holidays since 2011, he did not spend any time with the wife in Hong Kong or on holidays since the age of 15, HK\$60,000 per year as holiday monies was far more than required for Child A to stay with family in mainland China once a year.

In summer 2013, Child E and Child A went to a graduation trip. The husband asked the wife to join but the wife then demanded a longer travel for her and her family. The husband paid HK\$30,000 due to the wife on June 2013 in addition to the travel around Europe for the children to see their maternal aunt and grandmother and the wife still chose not to travel to Europe.

In the evidence of both Child A and Child E, holiday since 2010 was arranged mainly for the purpose of visiting the wife's relatives in Shanghai. Child E said he had been to Shanghai with his mother (the wife) in 2015 and in 2018. The expenses were mostly covered by his maternal aunt (the wife's sister), not their mother (the wife).

The holiday allowance maintenance was meant to pay for the holiday expenses during access. Both children testified they did not have regular timely overseas trips with the wife at all. Owing to lack of interaction and access between the wife and both children, the annual holiday plans were mostly unable to put in action. I am with the husband that it should be discharged where both children do not have substantive connection with their mother (the wife). I order discharge with retrospective effect on 1 January 2011 as well.

The arrears of children's maintenance in arrears from 5 January 2010 to 21 July 2014

The wife complained husband defaulted payment of maintenance since January 2010. Despite repeated requests by herself and her legal representatives. The wife could not pay for her daily expenses and could not fund her trips with both children.

There are email exchanges between the husband and wife continuously. The wife wrote to the husband in 2013 that she would sought arrears back to September 2011. In an email in January 2013, the wife stated she was ready to litigate. Subsequently, the wife attempted to seek arrears back in 2008.

The wife sought assistance from the Legal Aid Department from early 2013 and she was told to mediate with the husband. On such advice, she attempted mediation with the husband in 2014. Mediation was unsuccessful. The wife claimed the Legal Aid Department did not further advise her on the 12 – month time limit to issue judgment summons. At that particular time, the wife explained she was in a state of distress after going through both custody and ancillary relief trial. She then issued judgment summons for arrears of maintenance for a period over 12 months. The wife took no action until 2015.

The husband opposed, the wife had waived her right to demand for arrears of child maintenance. From January 2010 till January 2013, the wife did not make any demands for arrears in for the periodical payments or the children's maintenance. In January 2013, the wife began seeking

arrears in children maintenance dating back to September 2011. In the husband's subsequent email dated 8 January 2013, the wife stated she was ready to litigate when the husband made his position clear in reducing child maintenance and holiday allowance. In February 2013, the wife extended her demand for arrears back to 2008. The husband reiterated his earlier position and offered to arbitrate the matter or mediate it through members of the church clergy. In March 2013, the husband agreed to mediate. Until June 2013, mediation failed. After the conclusion of the mediation in June 2013, the husband expected that the arrears would be litigated in 2013 but the wife took no action till the second half of 2015.

During early 2015, the husband and wife exchanged emails on outstanding maintenance. The husband had made himself clear that they should "settle or litigate". On 11 May 2015, the wife's previous solicitors wrote to demand arrears in payment. By that time, the husband was unemployed, both Child E and Child A being away at college, the wife insisted for maintenance without offer of settlement. It was only in a letter dated 1 July 2017, the wife made an offer to settle past claims in return for maintenance at the rate of HK\$60,000 per month for the years 2015-2017.

I accept the husband has made his position clear in reducing maintenance. Mediation is well regarded as a means to settle matrimonial disputes. Ignorance to legal requirements is not a valid ground. The wife has always been on legal aid or with handy legal advice. I see she should be well advised on the manner to seek to enforce the ancillary relief orders on a timely basis.

Be it there were email exchanges between herself and the husband, she had failed to take appropriate actions on enforcement. The issue of outstanding maintenance was in abeyance. The wife's explanation did not constitute good reason or give rise to special circumstance on her failure to take out application for enforce maintenance in arrears within a 12-month period. Given the wife has been on legal aid, I failed to see she has special circumstance which I shall grant leave to her to go after the husband on the maintenance in arrears for more than 12 months from her judgment summons filed on 28 July 2015.

The wife's application for leave to enforce her outstanding ancillary relief beyond 12-month prior to issuance of her judgment summons filed in 28 July 2015 shall be refused.

Set off payments by the husband to the wife

The husband seeks an order to offset maintenance payments paid by him to the wife during the period from 2010 – 2015. For reason I have refused leave to the wife to enforce her outstanding maintenance for a period beyond 12 months from 28 July 2015, the exact amount should be decided at hearing of the wife's judgments summons.

Both the husband and wife are directed to jointly compile a schedule on the amount overpaid by the husband with regard to wife's maintenance, children maintenance and holiday allowance over the period from the 2008 Order until the date of this judgment. The schedule shall be lodged with Court upon either party's application to restore the wife's judgment summons.

Costs

I see nothing that I shall depart from the usual costs order. The husband succeeded in both applications, the husband shall be entitled to costs.

The husband is seeking indemnity costs against the wife upon her concession of enforcing the husband's undertaking on tuition fees of university course and funds to purchase a piano. Costs is always a discretion of the Court. I see fit to make a party and party costs order on both applications.

Conclusion

I make the following order:

Paragraph 1 of the Order dated 29 December 2008 be varied as,

“(a) The husband (the petitioner) do pay the wife (the respondent) periodic payment in sum of HK\$36,500 per month from 1 January 2014 until 1 December 2014; and

- (b) the husband (the petitioner) do pay the wife (the respondent) periodic payment in sum of HK\$10,000 per month from 1 January 2015, the said periodical payments are to be paid during the joint lives of both parties or until the date of the remarriage of the wife (the respondent), whichever is the earlier.”

Paragraph 2 of the Order dated 29 December 2008 be discharged upon the date of this judgment. The husband be released from the undertaking to the Court to pay the wife (the respondent) HK\$50,000 for the purchase of a new piano upon the wife's completion of music university course.

Paragraph 3 of the Order dated 29 December 2008 be discharged with retrospective effect from 1 January 2011.

Paragraph 4 of the Order dated 29 December 2008 be discharged with retrospective effect from 1 January 2011.

The costs of the husband's (the petitioner's) Re-Amended Notice of Application for Ancillary Relief dated 5 November 2018 be paid by the wife (the respondent) to the husband (the petitioner), with certificate for counsel, to be taxed if not agreed.

The wife's (the respondent's) summons filed on 28 July 2015 be dismissed.

The costs of the wife's (the respondent's) summons filed on 28 July 2015 be paid by the wife (the respondent) to the husband (the petitioner), with certificate for counsel, to be taxed if not agreed.

The wife's (the respondent's) own costs be taxed in accordance with the Legal Aid Regulations.

(J. Chow)

Deputy District Judge

Mr Harprabdeep Singh instructed by Stevenson Wong & Co., appeared for the Petitioner

Mr Adrain Leung instructed by V. Hau & Chow, appeared for the Respondent

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