

HONG KONG / JUDGMENT

SM also known as HMS v. HDG

[2020] HKFC 139

COURT

Family Court

DECIDED

10 July 2020

CASE / FILE NUMBER

FCMC3929/2016

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bjbj dls FCMC 3929 / 2016

[2020] HKFC 139 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NUMBER 3929 OF 2016

BETWEEN SM also known as Petitioner HMS and HDG Respondent

Coram: District Judge S LO in Chambers (Not open to public) Date of Hearing: 3 July 2020 Date of
Judgment: 10 July 2020

J U D G M E N T (maintenance pending suit)

This is an application by the petitioner (Wife) for maintenance pending suit under the Matrimonial Proceedings and Property Ordinance (MPPO) for herself and the child of the family, namely a girl aged 8. The Law Under Section 3 (maintenance pending suit) and section 5 (provision for child) of the MPPO, the Court may make orders requiring one party in a marriage to pay maintenance for the other party from the date of the presentation of the petition for divorce and for the other for the benefit of children of the marriage. The main governing principle is that the court will make such order as it considers reasonable based on the reasonable needs of the Wife (together with the child) and the ability of the respondent (Husband) to pay. In view of such application being interim in nature, the court will not conduct detailed investigation of the financial position of the parties, but approach on a broad brush basis. Regarding the principles that underpin such an application, paragraph 16.17 of Rayden, 18th edition states as follows: The court has an unfettered discretion to award such sum as it thinks reasonable. There is no hard and fast rule, and no fixed proportion: each case depends on

its own facts. It has been said that the approach to maintenance pending suit should be empirical, and that in the ordinary sort of case the district judges who deal with these applications will have to take a broad view of means on the one hand and income on the other and come to a rough and ready conclusion, or to take a broad brush approach . The overall consideration is the actual needs of the parties pending suit . The court will also be looking at whether the Wife has an immediate need for financial support. Paragraph 16.18 of Rayden, 18th edition states as follows: what really matters is the immediate and reasonable requirements of the wife balanced against the ability of the husband to pay for them, assessed using a broad-brush approach.

Background

The parties started living together in 2004 and got married in 2006. The child was born in 2012. The parties together with the child were residing in a unit in Happy Valley (Wing On Lodge unit), which is owned by a limited company set up by the parties. The parties through this company also own another property in Happy Valley (Winfield property) which is currently rented out at the sum of \$66,000 per month. After the birth of the child, the Wife left her position as a recruiter in a company and are not working since then. She focuses on looking after the child who was diagnosed with a chronic medical condition. The Husband is the primary financial provider and breadwinner of the family in addition to the rental income of the Winfield property. The Husband moved out from the Wing On Lodge unit in March 2015. The Wife and the child continue to live in the unit up to now. The Wife commenced the divorce on the ground of unreasonable behaviour in April 2016 and decree nisi was pronounced on 10 August 2016. By consent, joint custody of the child was granted to the parties and care and control to the Wife with reasonable access to the Husband. Standard of living Prior to the separation, the parties were living in the Wing On Lodge unit of about 1150 sq ft, having a car, domestic helper and holidays 3 to 4 times a year within the region and abroad. The child is now studying in an international school. I consider that the standard of living of the parties before separation is comfortable and can be regarded as middle class level. Husband s ability to pay He is now 48 years old and used to work as a consultant earning basic salary of \$70,000 per month with commission but he claims that his previous employer did not renewed the contract with him in June 2020. As a result, he recently launches his own business of boat hiring with his friends. He said that he has to rely on his own savings which is about \$212,000. However, he provides no documentary proof of non-renewal of the contract from his previous employer. Regarding his monthly expenses, he claims to share an apartment of about 695 sq ft with a friend paying his share of rent for \$14,5000 per month. He hires a part-time helper and has a second car but said that it is for his new business. He belongs to a yacht club with entrance fee of \$80,000 and monthly fee of about \$2,500. In his Form E filed 18 November 2019, he claims to have about \$114,000 monthly expenses consisting of mortgage contribution, school fees and the child s other outgoings. He admits that he and his sister were left an inheritance after passing away of his mother in 2003 and his father in 2006. He also owns a number of companies (eg Secure 64 Software Corporation etc) according to his Form E filed 18 November 2019. Nonetheless, no or no

updated audited report or bank statement of these companies was provided by him. Hence, it is unknown as to whether these companies are profitable or can generate some income for him. In *HJFC v KCY*

[2012] HKFLR 27, Hartman JA said at 37: The principles that have emerged over time to guide judges in matters of interim maintenance have been fashioned in the main to ensure fairness. This is well illustrated in the judgment of Nicholas Mostyn QC, sitting then as a deputy High Court judge, in *TL v ML and Others (Ancillary Relief: Claim against Assets of Extended Family)* [2006] 1 FLR 1263, at 1289, in which, having looked at earlier authorities, he derived the following principles that speak specifically to fairness or are based on the need to ensure it. For present purposes, it is sufficient to cite the relevant principles without citing the judge's reference to the source of those principles:

- i. The sole criterion to be applied in determining the application is reasonableness, which is synonymous with fairness.
- ii. A very important factor in determining fairness is the marital standard of living. This is not to say that the exercise is merely to replicate that standard.
- iii. In every maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long-term expenditure, more aptly to be considered on a final hearing. That budget should be examined critically in every case to exclude forensic exaggeration.
- iv. Where the affidavit or form E disclosure by the payer 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 say-so 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.
- v. Where the paying party has historically been supported through the bounty of an outsider, and where the payer is asserting that the bounty had been curtailed but where the position of the outsider is ambiguous or unclear, then the court is justified in assuming that the third party will continue to supply the bounty, at least until final trial (emphasis added). In my view, as the Husband's Form E is obviously deficient, I should make robust assumption about his ability to pay. Further, I consider that he has a very high earning capacity and that he should be able to find a new job very soon even though his previous employer did not renew the contract with him. I would not be confined to the mere say-so of the Husband and should err in favour of the Wife. In the Husband's submission, he proposed to sell either the Winfield property or the Wing On Lodge unit in order to alleviate the parties' financial difficulties. However, he also understood at the hearing that the court has no jurisdiction to make an order for sale for the purpose of this application. The immediate needs of the Wife and the child. In the Wife's affirmation, she claims that her and the child's needs are about \$180,000 per month. The major expenses are the mortgage instalments for the Winfield property and the Wing On Lodge unit, the child's school fees and wages for domestic helper etc. After deducting the rent of the Winfield property at \$66,000 received by her, their needs are claimed around \$113,000 per month. In my view, the Wife has to try her best to trim down a lot of her and the child's expenses since after separation, the expenses of two households must be higher than one when the parties were living together. It is unrealistic

Conclusion

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Prepared on 27 October 2026 · Esheria