

HONG KONG / JUDGMENT

T v. A

[2022] HKCFI 2631

COURT

Court of First Instance

DECIDED

29 August 2022

CASE / FILE NUMBER

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HCMP 1948/2019

[2022] HKCFI 2631

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 1948 OF 2019

IN THE MATTER of AAR, a girl, born [in] October 2007 (the “Minor”) and IN THE MATTER OF SECTION 26 OF GUARDIANSHIP OF MINORS ORDINANCE (CAP 13) and IN THE MATTER OF ORDER 90 OF THE RULES OF THE HIGH COURT and IN THE MATTER OF SECTION 3 OF THE GUARDIANSHIP OF MINORS ORDINANCE (CAP 13) AND IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ORDINANCE (CAP 512)

BETWEEN

T

Plaintiff

and

A

Defendant

Before: Hon B Chu J in Chambers (Not Open to Public) by Paper Disposal

Date of Hearing: 13 July 2022

Date of Plaintiff's Supplemental Submissions: 27 July 2022

Date of Defendant's Reply Submissions: 12 August 2022

Date of Judgment: 29 August 2022

JUDGMENT

Introduction

The father of the ward AAR ("P") has issued a summons in these wardship proceedings ("Leave Summons"), for leave to issue a writ of sequestration against all the real and personal property of AAR's mother ("D") for her failure to comply with an order to return AAR to the jurisdiction of Hong Kong ("Return Order").

The preliminary issue raised by this Court is whether the Return Order imposes a mandatory obligation on D to return AAR to Hong Kong within the stipulated deadline ("Preliminary Issue"). In considering the Preliminary Issue, the Court will also examine its jurisdiction in using sequestration as a tool to secure the return of a ward or a child, wrongfully removed.

The Leave Summons was originally fixed for a substantive hearing before this Court on 13 July 2022 ("Hearing"). D has been legally unrepresented throughout these proceedings in Hong Kong and she attended the Hearing through VCF in Crimea. At the Hearing, in light of the Preliminary Issue, the Leave Summons was adjourned for the parties to lodge further written submissions for the Court to consider the issue on papers.

Background

P was born in the United Kingdom, and D was born in Russia. D later moved with her parents to Crimea. P moved to Hong Kong in 1993 and the parties met here in 2004. They were married in Hong Kong in July 2005 and AAR was born in Hong Kong in October 2007. AAR will be 15 in about two months' time. AAR was habitually resident in Hong Kong and attending school here until summer 2018.

The marriage fell into difficulties in 2016 and P moved out of the matrimonial home. The parties entered into a Deed of Separation on 17 March 2017. In May 2017, the parties entered into a consent summons in relation to ancillary relief and custody and P issued divorce proceedings in Hong Kong.

The former matrimonial home was sold pursuant to the Deed of Separation and as part of the agreed terms, P bought a flat in Discovery Bay for D and AAR to reside in and the flat was registered in D's sole name ("Property"). The parties' agreement in relation to ancillary relief and custody were embodied in a consent order dated 12 October 2017 ("Consent Order") and thereafter, the decree absolute of divorce was granted to P on 18 December 2017.

Pursuant to the Consent Order, the parents are to have joint custody of AAR, with D having her care and control and P having reasonable access including staying access. The Consent Order contains a usual restriction that AAR is not to be removed from Hong Kong without leave of court, unless with written consent of the other parent, by either parent having given a general undertaking to return AAR to Hong Kong when called up to do so.

Under the arrangement of P and D, from August 2017 to June 2018, AAR was living with her father and under his care during weekdays and only stayed with her mother during the weekends. According to P, this was to facilitate AAR's schooling due to the close proximity of her then school to P's residence. On 30 June 2018, AAR moved to stay with D and on 1 July 2018, D and AAR went to Russia for their annual summer holidays. They were due to return to Hong Kong on 14 August 2018, the day before AAR was to commence attending a new school. On 2 July 2018 P was informed by D that she would not be returning to Hong Kong with AAR.

Immediately on 3 July 2018, P filed papers with the Hong Kong Central Authority for assistance in commencing return proceedings under the 1980 Hague Convention on International Child Abduction ("Convention"). However, an issue arose as to whether Russia or Ukraine was the proper "contracting state" under the Convention given that since 2014, the political status of Crimea has been disputed by Ukraine and Russia. Eventually on 22 August 2018, P was told by the Hong Kong Central Authority that it was not able to assist. P then sought the assistance from the British Consulate in Hong Kong and obtained advice to contact a charity called ReUnite in UK and through ReUnite, P was recommended a Russian lawyer who has since been assisting him in return proceedings under the Convention in Russia and all related proceedings thereafter.

On 25 April 2019, the Russian Court made an order for the return of AAR to Hong Kong. D appealed in May 2019 but on 24 June 2019, the Court of Appeal in Russia upheld the return order. In August 2019, an order for enforcement was issued by the Russian Court, and the bailiff went to retrieve AAR from D's apartment in Crimea, and according to P, he went with his Russian lawyer to D's apartment in Crimea to observe the bailiff's attempt to retrieve AAR. The attempt was however unsuccessful. D then obtained a temporary order on 2 September 2019 against the Russian bailiff and in October 2021, D issued court proceedings against the bailiff.

In the meantime, P issued the present wardship proceedings on 28 October 2019 and on the same day P obtained the Return Order from this Court.

On 14 November 2019, D's new proceedings against the bailiff were dismissed by the Russian Court.

P's Russian lawyer then received notice from the bailiff on 24 September 2020 that D had moved her place of residence from Crimea to an address in Sochi, Krasnoyarsk in Russia.

P had attempted mediation with D in May and June 2021 but all mediation attempts failed. Then on 26 July 2021, P's solicitors in Hong Kong received a letter from a firm of solicitors said to be acting for D and indicating that they had instructions on behalf of D to deal with the Property and demanding P to vacate his registration of the Consent Order against the Property.

P then issued the Leave Summons and obtained an order for service out of jurisdiction on D at her address in Sochi and also at her last known address in Crimea. Subsequent thereto, D provided firstly the address of the Property and then another address on Castle Peak Road in Kowloon for all documents to be mailed to her. An order was made for service of the Leave Summons at these additional addresses. As D had attended the Hearing (through VCF), she had clearly received the Leave Summons. Further, at the Hearing, it was clear that D had received the Return Order and fully aware of its contents. Thus, the Court ordered that personal service of the Return Order to be dispensed with under Order 45 rule 7(7) of the RHC.

The Court's jurisdiction in granting leave to issue a writ of sequestration

The relevant statutory provisions

First of all, Order 45 rule 5 of RHC states that:

“5.

Enforcement of judgment to do or abstain from doing any act (O 45, r 5)

(1)

Where—

(a)

a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5, or

(b)

a person disobeys a judgment or order requiring him to abstain from doing an act,

then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say—

with the leave of the Court, a writ of sequestration against the property of that person;

where that person is a body corporate, with the leave of the Court, a writ of sequestration against the property of any director or other officer of the body;

(iii)

an order of committal against that person or, where that person is a body corporate, against any such officer.

(2)

Where a judgment or order requires a person to do an act within a time therein specified and an order is subsequently made under rule 6 requiring the act to be done within some other time, references in paragraph (1) of this rule to a judgment or order shall be construed as references to the order made under rule 6.

(3)

Where under any judgment or order requiring the delivery of any goods the person liable to execution has the alternative of paying the assessed value of the goods, the judgment or order shall not be enforceable by order of committal under paragraph (1), but the Court may, on the application of the person entitled to enforce the judgment or order, make an order requiring the first mentioned person to deliver the goods to the applicant within a time specified in the order, and that order may be so enforced.”

(emphasis added)

Thus, where a person “refuses or neglects” to do an act within the time specified by the judgment or order or where he “disobeys” a judgment or order requiring him to abstain from doing an act, one of the remedies for enforcement of the judgment or order under Order 45 rule 5(1)(b) is by way of a writ of sequestration. As stated in 45/5/5 of the HKCP, such refusal, neglect or disobedience must be of a character or quality to constitute a contempt of Court.

Not only positive judgments or orders may be enforced by sequestration, negative orders are also enforceable by sequestration by virtue of the express provision of Order 45 rule 5(1)(b). Further, as set out in 46/5/3 of HKCP, although Order 45 rule 5 refers to the power of the Court to grant leave to issue a writ of sequestration where a party refuses or neglects to comply with or disobeys a coercive order of the Court, the Court has inherent power to ensure that its orders are carried out in the interest of justice. Therefore, as cited, in case of a declaratory order in *Webster v Southwark LBC* [1983] QB 698, in a situation where a party knowingly adopts and continues a policy of refusing, neglecting or disobeying to comply with its terms, the Court has power under its inherent jurisdiction to grant leave to issue a writ of sequestration.

It is further set out in 46/5/1 of HKCP that Order 46 rule 5 recognises the writ of sequestration is the most drastic method of enforcing a judgment or order, and therefore the writ of sequestration shall not be issued except (1) with the leave of the Court and (2) that such leave must be obtained by motion to a judge. In an application for sequestration, the question for the Court is whether a contempt has been committed.

In relation to civil contempt, it has been set out in 52/1/16 of the HKCP that the proper approach to committal for civil contempt by reason of breach of a court order is a three stage test, namely, it is necessary to:

construe the relevant court order to ascertain its meaning and operation, then determine whether the defendant has in fact complied with the order as so construed, and finally consider whether any failure to comply was accompanied by a state of mind necessary to establish punishable contempt.

(“Three Stage Test”)

As further stated in 52/1/17, to succeed, the applicant must prove to the criminal standard, ie beyond reasonable doubt, both the act claimed to constitute the contempt and the alleged contemnor’s requisite state of mind, and there is no difference between civil and criminal contempts in this regard.

To summarise, in order for the court to grant leave to issue a writ of sequestration, the applicant has to prove to the court beyond reasonable doubt that the respondent is guilty of contempt by way of the Three Stage Test.

The relevant authorities in England concerning sequestration in wardship/children proceedings

Mr Marwah has referred the Court to 4 cases in England in relation to a writ of sequestration being issued in wardship proceedings or proceedings concerning a child being removed from jurisdiction, for the purpose of enforcing the return of the child to jurisdiction.

The earliest was *In re Liddell’s Settlement Trusts* [1936] 1 Ch 365. Mr and Mrs Liddell had four infant children all being British subjects and all were domiciled and resident in Great Britain until Mrs Liddell took them to the United States. A mandatory injunction was granted restraining Mrs Liddell from keeping the children out of the jurisdiction. Subsequently, an order was made by Greaves-Lord J ordering Mrs Liddell to bring or cause to be brought the infant children within jurisdiction on or before a stipulated deadline. The order was served on Mrs Liddell but was not complied with. Subsequently, a writ was issued against Mrs Liddell’s messuages, goods and chattels which were to be kept under sequestration until she should, by bringing the infant children within the jurisdiction, clear her contempt. Mrs Liddell made an application to discharge the injunction order and to set aside the writ of sequestration. This was refused and Mrs Liddell appealed.

The issue on her appeal was essentially whether the Court had the jurisdiction to make an order requiring a person resident abroad to do an act there, and it was held that the Court had the jurisdiction to make the order, inasmuch as Mrs Liddell having been properly served, being ordinarily resident with the jurisdiction, was brought within the reach of the Court and was thus in the same position as if she were in the country and that the making of the order was for the benefit of the infants, who were wards of Court.

In *Romilly v Romilly* [1964] P 22, a husband committed a contempt of court in failing to comply with an order of the court that he was to return to the jurisdiction two children of the family whom he had taken abroad. The wife was granted leave to issue a writ of sequestration in respect of that contempt with the result that certain of the husband's funds came into the hands of the sequestrators. The issue before the court was whether those funds sequestered as a result of an earlier contempt could be used to pay arrears of alimony pending suit under another order of which the husband was subsequently also in contempt. The court held that it had the jurisdiction to so order.

In *Richardson v Richardson* [1989] Fam 95, after a long history of contested litigation between the parents, Scott Baker J made an order designed to settle the future of the two wards in which a programme of access to the father was laid out, and the order was endorsed with a penal notice. The access never took place and the mother departed with the children to the Republic of Ireland and had not returned. Scott Baker J made an order restraining the mother from either dealing with or removing her assets from the jurisdiction. The mother and the wards remained in the Republic of Ireland, and the father subsequently sought and obtained leave to issue a writ of sequestration.

The father then further applied for leave for the sequestrators to (1) enter and take possession of the mother's house; (2) to take possession of the personal property situated in the house; (3) to hold the house and personal property until the mother obeyed the orders of the court; (4) to sell the house and personal property in order to fund proceedings in the Republic of Ireland to secure the return of the wards and, in the alternative (5) to sell the house and property or to let the house and/or raise money by way of loan on the security of the property.

In his judgment, Scott Baker J had said:

"The question is the extent of the court's jurisdiction. Sequestration is an ancient and drastic remedy that the court is prepared to use to secure enforcement of its orders in serious and clear cases. The writ of sequestration binds real and personal property from the date of issue: see Halsbury's Laws of England, 4th ed, vol 9 (1974), p 62, para 102.

In the present case what is sought to be achieved is the return of these children to the jurisdiction of this court in order that they may enjoy a continuing relationship with their father. The way in which sequestration might help to achieve this is by the provision of funds from the mother's resources to enable an application to be made in the Irish courts which, if successful, would result in an order for the children's return, ie an order enforceable in the Irish courts."

Scott Baker J had cited the Liddell case and that it was his judgment that the Liddell case established that it was appropriate in principle for a writ of sequestration to issue in the case before him.

Scott Baker J also cited the Romilly case and had quoted from the judgment of Scarman J at page 23:

“..... A distinction was, however, drawn between sequestration to enforce payment of a sum of money and sequestration as punishment for some default other than in the payment of money. In the former the court would, upon application, order the sequestrators, if they had the funds, to satisfy the demand, whereas in the latter the property sequestered would only be held in medio until the contempt was purged: see Anderson, Law of Execution (1889), p 537 and Daniell’s Chancery Practice, p 790.”

As pointed out by Scott Baker J, the Romilly case drew attention to a problem namely the distinction between sequestrations to enforce orders for the payment of money or fines, and those to enforce other orders of the court eg injunctive relief. Scott Baker J had said that the old practice was that in the former, the sequestrators simply held the assets until the order was complied with, whereas in the latter, the sequestrators were permitted to utilize the assets to meet the due payment and that Scarman J in the Romilly case had felt able to permit the use of the funds sequestered in respect of the first contempt to be used to meet the money due in respect of the second contempt.

Scott Baker J then referred to another case *Con-Mech (engineers) Ltd v Amalgated Union of Engineering Workers (Engineering Section) (No 3)* [1974] I.C.R. 464 where Sir John Donaldson had also touched upon the same distinction:

“..... The distinction between these two processes – seizing property to coerce the contemnor into complying with the court’s order and using the assets so seized to satisfy a judgment – has never been of importance in the jurisdiction of the High Court. They are, however, distinct processes. The court can, if it considers it appropriate, seize and hold without applying the property in satisfaction of the judgment. Indeed, it must do so if the judgment is not of a nature which can be satisfied out of the assets, eg an injunctive order.”

Having considered the above, Scott Baker J posed the question as to whether he was bound to follow the old practice, pointing out that the observations of Scarman J and Sir John Donaldson both tended to suggest that the old practice still prevailed although he also noted that the point did not arise for decision in either case.

However, Scott Baker J then went on to say:

“..... If the old practice does prevail it produces both an unjust and unsatisfactory result. The sequestration will be rendered nugatory or almost nugatory. The sequestrators have possession of the mother’s house but can do nothing with it that will assist in securing the return of the children to the jurisdiction, except to retain it. The mother has no intention of returning to this country. Stalemate is reached.

Were the court to fine the mother, when she failed to pay the fine, that would be a further contempt and, on the authority of *Romilly v Romilly* [1964] P.22, the fine could be met either from rents from the house or possibly by raising money against it. But, on the evidence, this would go no further towards achieving the return of the children.

The citation from Daniell's Cancery Practice, 8th ed (1914), vol 1, p 780 in the judgment of Scarman J suggests that the practice of applying the money received by sequestrators in satisfaction of a sum decree to be paid was itself an adaptation of the original practice that sequestration was used merely as a means of coercing the defendant by keeping him out of possession of his property.

Sequestration is an ancient tool of the law used as a last resort for enforcing orders of the court. Ancient tools need, if possible, to be adapted for use in modern conditions. In my judgment, where otherwise the whole purpose of the sequestration would be defeated, the court is not constrained by ancient practice from using the seized assets in satisfaction of the order.”

In the end, Scott Baker J was satisfied that there was power for him to enable the sequestrators to raise money against the security of the property. He then went on to consider the question whether it was appropriate to use sequestered funds to finance litigation in a foreign jurisdiction, as he pointed out, the litigation could not be guaranteed to secure the return of the children. He came to the conclusion it was.

MIR v MIR and others [1992] Fam 79, was another case in which Scott Baker J was the wardship judge. In the MIR case, the mother of a ward who had been removed from the jurisdiction by his father in contravention of an order made in wardship proceedings applied for the father to be committed to prison for contempt of court and for a writ of sequestration in respect of his property. The father was committed to a suspended prison sentence of 6 months and further a writ of sequestration was granted for the sequestrators to take possession of the former matrimonial home, and let it or use it as security for a loan in order that the mother might finance litigation in Pakistan directed to seeking the return of the ward to the jurisdiction. As the father failed to return the ward to jurisdiction, the mother applied for the sequestrators to be granted leave to sell the property.

As stated by Scott Baker J, in the Richardson case it was left open as to whether there was power of the court to make an order for the sequestered property to be sold. It was then pointed out by Scott Baker J it appeared that the underlying reason why the courts in earlier times would not make an order for sale of freehold property as the absence of any procedure whereby good title could be given to the purchaser, but then Scott Baker J went on to say that difficulty no longer existed today and that the remedy was to grant an order for the father to transfer his title to the sequestrators and if he failed to do so, then section 39 of the then Supreme Court Act 1981 could be invoked. Scott Baker J duly granted the application as sought by the mother.

What is clear from the above 4 cases in England is that although as said by Scott Baker J, sequestration is an ancient tool of the law used as a last resort for enforcing orders of the court, such an ancient tool has in fact now been adapted for use in modern conditions, and that it can in principle be used to secure compliance with an order to return a child, wrongfully removed, to the jurisdiction of this Court.

The procedure for the leave application

The procedure for an application for leave to issue a writ of sequestration is now provided by Order 46 rule 5 of RHC:

“5.

Application for leave to issue writ of sequestration (O 46, r 5)

(1)

Notwithstanding anything in rules 2 and 4, an application for leave to issue a writ of sequestration must be made to a judge by summons.

(2)

Subject to paragraph (3), the summons, stating the grounds of the application and accompanied by a copy of the affidavit in support of the application, must be served personally on the person against whose property it is sought to issue the writ.

(3)

Without prejudice to its powers under Order 65, rule 4, the Court may dispense with service under this rule if it thinks it just to do so.

(4)

The judge hearing an application for leave to issue a writ of sequestration may sit in private in any case in which, if the application were for an order of committal, he would be entitled to do so by virtue of Order 52, rule 6, but, except in such a case, the application shall be heard in open court.”

I note that the commentaries in 46/5/1 and 46/5/2 of the HKCP have referred to the application for leave to issue a writ of sequestration is by motion. There seems to be an inconsistency as Order 46 rule 5(1) of RHC states that the application is by summons. In any event, no authorities have been drawn to my attention that the procedure adopted in the present proceedings, namely by way of an inter-partes summons, is incorrect.

As the present application arises out of wardship proceedings, under Order 46 rule 5(4), and Order 52 rule 6(1)(a), this Court may sit in private which the Court intends to do, but will give leave for an anonymized of this judgment be released for publication.

THE PRELIMINARY ISSUE

The relevant legal principles on construction of relevant orders

The 1st stage of the Three Stage Test concerns the construction of the relevant court order to ascertain its meaning and operation.

Mr Marwah has summarised the relevant legal principles as follows:

An order must be construed to ascertain its meaning and operation: *Kao, Lee & Yip v Koo* (2009) 12 HKCFAR 830, per Brennan NPJ at paragraph 21;

At the contempt stage, orders should be construed strictly and should not be ambiguous in any material respect. However, an ambiguous order is different from an order to do a specific act which leaves it to the party to decide the manner of complying: HKCP 52/1/17, *Kao, Lee & Yip* at paragraph 23;

An order must be construed reasonably and in light of its purpose. As Au-Yeung J summarized in *Bruno Arboit v Koo Siu Ying* [2016] HKCFI 403 at paragraph 112:

“What must be ascertained is the meaning which the document would convey to a reasonable person having all the background which would reasonably have been available at the time the order was made. This includes the purpose for which the order was made: JSC BTA Bank v Mukhtar Ablyazov [2013] EWCA Civ 928, §§37, 64-65; Sino Wood, §§12-15; Kao, Lee & Yip, §§24-26.”

(emphasis supplied)

With the above in mind, I turn to the relevant paragraphs of the Return Order.

The relevant paragraphs of the Return Order

In the present case, the Return Order states amongst other things that:

“1.

The above-named Minor [AAR], a girl, born [in] October 2007 to continue to be a Ward of the Court until further order;

2.

.....

3.

The above-named Minor, [AAR], a girl, born [in] October 2007 do be returned either by [P] of [D], to the jurisdiction of Hong Kong within 14 days of today;

4.

[D], do surrender to [P] or the Court all other travel documents which have been issued to the above-named Minor within 24 hours of the above-named Minor returning to Hong Kong;

5.

Leave be granted to serve a copy of the sealed Order on the Director of Immigration;

6.

Leave be granted to [P] to serve [D] outside the jurisdiction of Hong Kong in accordance with Order 11 of the Rules of the High Court at Russia, Crimea, Sudak, ... or elsewhere in Russia;

7.

Penal notice to be endorsed;

8.

Until further order of the Court [D] by herself, her servants or agents be restrained from taking the above-named Minor out of the jurisdiction of the Court or causing or permitting the above-named Minor to go out of the jurisdiction of the Court; and

9.

.....”

D’s submissions

In D’s Reply Submissions of 12 August 2022, she has submitted, amongst other things, that:

“Yes, it does impose obligation on to [D] and so as on the [P] equally, but they are by no means can be interpreted as mandatory. Because [D] was stated only just as one of the possible executors on the Return Order...”

“... As [D] was stated only just as one out of the two possible executors on the Return Order. Leaving her choice not to do it herself and therefore making it not Mandatory for her.”

“Child should be returned either by [P] or [D], giving [P] fair right to choose do it himself. And the only explanation as to why he didn’t take it, it can only be one thing and it is that he doesn’t want for the child to be returned, but only make trouble for [D]...”

Discussion

Mr Marwah has referred the Court to Re S (Abduction: Sequestration) [1995] 1 FLR 858. In that case, the children went to England with their Israeli parents who had intended to return to Israel at the end of their sabbatical leave, but they separated before this. The mother then unilaterally retained the children in England. The father initiated return proceedings under the Convention and the judge ordered the children be returned to Israel in the following terms, as far as it was material:

“It is ordered that the minors, Y and N, be returned to Israel forthwith.”

The mother then disappeared with the children. In an effort to enforce the return order, the father then applied for leave to issue a writ of sequestration to seek sequestration of the property of the mother’s intimate personal friend H in England. H was not a party in the return proceedings under the Convention, nor was H referred to in the return order, nor was he served with the return order, nor with the leave application.

Johnson J had pointed out that it was important on an application such as that before him that the due process of law should be followed and that was not a circumstance in which the court should be seen to be taking shortcuts, and the procedure must be followed. Neither the mother

or H had appeared before Johnson J but the father instructed counsel, and also the Official Solicitor had instructed counsel as amicus curiae to assist the court. Johnson J then considered in particular whether he was satisfied so that he was sure that H in the above case knew of the return order, knew that it required the immediate return of the children to Israel, and that he had deliberately conducted himself in such a way as to frustrate the order or aid and abet the mother in avoiding compliance with the return order, and the judge was so satisfied on each of those matters.

Johnson J had considered the terms of the order as both counsel had pointed out to him that the return order did not require the mother to perform a particular act in a particular time, but was thus, on its face, not seemed to be an order within the provision of RSC Ord 45 r 5 which referred to ‘a person required by a judgment or order to do act within a time specified in the judgment or order...’. But as Johnson J pointed out, the return order was made in accordance with Article 12 of the Convention, and although it was not directed to the mother, it did not require the mother to return the children, and neither did it specify a time within which she should do so, he was satisfied that it was plain what that order required to be done with the children.

What can be gathered from Re S is that even though the return order was not directed at any particular person, nor is a deadline stipulated, the court would consider whether it was plain to the alleged contemnor as to what was required to be done with the children under the return order and in particular would consider the following:

whether the alleged contemnor knew that the return order required the immediate return of the children;

(ii)

whether the alleged contemnor had deliberately conducted himself/herself in such a way as to frustrate the return order; or

(iii)

whether the alleged contemnor had aided and abetted the parent in question, in avoiding compliance with the return order.

Mr Marwah has submitted that in the present case, D herself has clearly understood the Return Order to impose on her a mandatory obligation to return the ward AAR to this jurisdiction, as seen in her affidavit of 16 May 2022:

“First of all, please let me apologize to you again for not being able to fulfil your order and bring child back to HK.”

“... I am still unable to bring child back to HK to fulfil your order”

In any event, in D's own Reply Submissions, D has said that the Return Order imposes an obligation on D and on P equally. D then went on to submit that the terms could by no means be interpreted as mandatory as she was only just one of the possible executors of the Return Order, and that she had every lawful right to expect for the Return Order to be executed by P and not by her.

In my view, the Return Order is clear in that it imposes a mandatory obligation not only on D but equally on P to return AAR to this jurisdiction. That paragraph 3 of the Return Order is directed at not only D but also P does not mean that it is not a mandatory order, nor does it mean that there is no mandatory obligation on D to return AAR to the jurisdiction.

The Return Order states clearly that AAR continues to be a ward of this Court. Even though the Return Order was not specified to have been made under Article 12 of the Convention, these proceedings were issued not only under Order 90 of the RHC for wardship, but also under the Child Abduction and Custody Ordinance, Cap 512, which give effect to certain provisions of the Convention, including returning a child wrongfully removed to his/her place of habitual residence. Unlike *Re S*, the Return Order is clear in that it has specifically stipulated a deadline for the return of AAR. Paragraph 4 of the Return Order has specifically provided that D (not P) has to surrender all AAR's travel documents within 24 hours of AAR returning to Hong Kong, and also paragraph 8 of the Return Order specifically restrains D (not P) by herself, her servants or agents from taking AAR out of the jurisdiction of the Court, or causing or permitting AAR to go out of jurisdiction. The Return Order is endorsed with a penal notice.

Having considered the above, on the Preliminary Issue, I have come to the view that the Return Order does impose a mandatory obligation on D to return AAR to Hong Kong within the stipulated deadline.

CONCLUSION

In light of all said and having considered the authorities, in my view, sequestration is in principle an appropriate tool to be used in the present proceedings to secure the return of AAR to the jurisdiction of this Court. As said above, the Return Order does impose a mandatory obligation on D to return AAR to Hong Kong within the stipulated deadline. Thus, I find that stage one of the Three Stage Test for civil contempt has been fulfilled.

The remaining two stages of the Three Stage Test will be determined at the resumed substantive hearing and for the sake of D, I will set out again the remaining stages, which are:

Stage Two: to determine whether D has in fact complied with the Return Order

Stage Three: to consider whether any failure to comply was accompanied by a state of mind necessary to establish punishable contempt

At the Hearing, I have directed that the Leave Summons be adjourned to a date to be fixed with 2 hours reserved after this Court's determination of the Preliminary Issue. The parties should inform the Court in writing within the next 7 days as to whether any other directions are necessary prior to fixing date.

D should seek legal advice immediately as to any directions she may wish to seek from this Court, including whether she elects to give oral evidence and be cross examined at the substantive hearing, whether she wishes to call any witnesses to give evidence on her behalf, and also whether she wants to cross examine P. If D elects not to give oral evidence and be cross-examined, her evidence in her affidavits will not be admitted unless otherwise directed. D should also seek legal advice as to the consequences of sequestration of her assets, in the event that leave is granted for P to issue a writ of sequestration.

Costs on the determination of the Preliminary Issue are reserved.

(Bebe Pui Ying Chu)

Judge of the Court of First Instance

High Court

Mr Shaphan Marwah, instructed by Oldham, Li & Nie, for the Plaintiff

The Defendant, unrepresented, acting in person

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