

HONG KONG / JUDGMENT

W, LT v. GWH

[2019] HKFC 127

COURT

Family Court

DECIDED

14 May 2019

CASE / FILE NUMBER

FCMC12735/2015

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bjbj FCMC 12735 / 2015

[2019] HKFC 127 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NUMBER 12735 OF 2015

BETWEEN W, LT Petitioner and GWH Respondent

Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to public) Dates of Hearings:
7 December 2018 and 16 January 2019 Dates of the further affidavits that were filed as ordered on
the 16 January 2019: 30 January, 13 February and 5 March 2019 Date of Judgment: 14 May 2019

J U D G M E N T (Maintenance pending suit/Interim maintenance and litigation funding)

Introduction

AUTONUMOUT This is an application by a Petitioner wife for maintenance pending suit for herself pursuant to s.3 Matrimonial Proceedings and Property Ordinance Cap 192 (MPPO) and interim maintenance for the child of the family, a little girl C, who will be 4 years of age on the XX June, pursuant to s.5 of the same ordinance. In addition, the wife seeks litigation funding. The main issues AUTONUMOUT Consequently, there are only two issues to be determined, namely how much maintenance should the husband pay to the wife for herself and the child of the family on an interim basis and should there also be an order for litigation funding? Background to the litigation AUTONUMOUT The parties married in Oslo, Norway on the XX August 2005 and on the 5 October 2015 the wife issued a divorce petition based on the husband's unreasonable behaviour. This was the wife's second divorce petition, the first having been issued on the 27

August 2010. This was withdrawn by consent on the 8 April 2011.

4. It is the husband's case that the parties have effectively lived separate and apart from about 2010. It is of note that he relocated to Singapore in June 2010 in order to take up a new job opportunity there. He says that the parties' marital relationship had come to an end prior to that and that the wife remained living in Hong Kong after he left for Singapore. Notwithstanding that they decided to have a child together and C was subsequently conceived seemingly with medical assistance.
5. On the 18 December 2015 the parties agreed to have joint custody of C, with care and control to the wife and reasonable access to the husband.
6. On the 11 December 2015, the parties also agreed to attempt to settle the question of ancillary relief through mediation and they undertook to each other and the court to preserve the financial status quo. This approach is echoed in a number of orders that follow on the 29 January 2016, 17 June 2016, 30 August 2016, 16 November 2016, 9 February 2017, 9 May 2017, 9 August 2017 and 1 November 2017. In summary there appears to have been very little progress during 2016 and 2017. Matters took a more litigious turn in 2018 when the wife issued a summons seeking to set aside a disposition and raised issues concerning the beneficial interest and ownership of a painting by a well-known artist that had been in the husband's family for generations. She also sought to join the husband's father as a third party. On the 7 December 2018 the court delivered a short oral Ruling on the matter, in which it declined to make the order requested.
7. On the 21 June 2018 the wife had also issued the summons that is the subject of this judgment, in which she sought maintenance pending suit/interim maintenance as follows:
 1. The Respondent do pay to the Petitioner maintenance pending suit in the sum of HK\$296,700.00 per month for the Petitioner and the child of the family, namely, CWH, a girl born on XX June 2018 (the Child) payable on the 1st day of each calendar month backdated to date of petition or at such sum and for such period as this Honourable thinks fit and reasonable;
 2. The Respondent do pay to the Petitioner interim interim maintenance pending suit in the sum of HK\$296,700.00 per month for the immediate financial needs of the Petitioner and the Child payable on the 1st day of each calendar month until Financial Dispute Resolution or at such sum and for such period as this Honourable thinks fit and reasonable;
 3. The Respondent do pay the Petitioner the sum of HK\$72,000.000 per month being legal costs provision for the Petitioner until Financial Dispute Resolution or at such sum and for such period as this Honourable thinks fit and reasonable; and
 4. Costs of and incidental to this application be to the Petitioner.

8. After the hearing on the 7 December 2018 the court received a letter from the wife's solicitors dated the 21 December 2018 accusing the husband of material non-disclosure. This was denied by the husband. On the 16 January 2019, the court gave further directions for the filing of limited affidavits to deal with the discreet issue in dispute. This has delayed the judgment somewhat, the last affidavit having only been filed on the 5 March 2019.
9. Rather surprisingly, given the fact that the matter has been ongoing for approximately 3 years, the decree nisi has yet to be pronounced. This issue will need to be resolved before the matter can be set down for a Financial Dispute Resolution hearing. In the meantime, I am told that the parties are ready to proceed to a preliminary issues trial with respect to the painting. General background
10. Both parties originally worked in the financial field and are well educated. The wife, who is Hong Kong Chinese, studied at X College in the United States and subsequently worked for a well-known Investment Bank and as the CFO of another local company. She moved away from the financial sector prior to the party's marriage and in 2002/03 she began to work in what has been described as an educational start up, although it seems that the company in question is now about 17 years old. It is the wife's case that this company G Ltd, is loss making. It is not clear to me why she has not taken a salary from this company or why she would remain working in it if it is truly a loss making venture. The wife is now 49 years old and she is also primarily responsible for the care of C. Longer term however, she will need to maximize her own earning capacity and to consider the various career options now open to her.
11. The husband, who is Norwegian, was also employed in the financial field as a banker and he has held a number of senior positions in both Hong Kong and Singapore mainly in the commodities field. During the period of time that he was employed he was handsomely remunerated and the parties enjoyed a high standard of living as a result, with the husband supporting the wife who remained based in Hong Kong throughout. Unfortunately, the husband was made redundant in January 2016 and it is his case that he has been unable to find a similar position in the banking field since, although he has actively sought alternative employment. Consequently, he says that he has had no option but to look at other ways to earn a living. He subsequently set up his own metals trading business known as Y. The husband is 46 years old and he is currently cohabiting with a new partner. He says that he intends to remarry and to have a family with her.
12. It is the wife's case that the husband has not made full and frank disclosure of his assets, that he has either hidden much of his recent income or he has overspent it, that he also has the ability to borrow and that he has a significant earning capacity that he has simply refused to exercise. In sum she says that he does have the ability to maintain her and C at the very high standard requested.

13. The husband for his part says that the wife is simply refusing to accept reality and that both parties must now cut their clothe according to his very much reduced income. He has offered to contribute HK\$35,000 per month towards C s expenses and says that this is approximately 50% of his current net income. He also suggested previously that the parties divide his deferred payments (from his previous periods of employment as a banker) and that the wife use these monies in order to fund her expenses in the short to medium term. This was rejected by the wife. Similarly, she rejected his suggestion that some assets be liquidated in order to provide both sides with access to additional cash. He says that he is doing everything within his power to get back on his feet again and that the wife is being unrealistic. He also says that the wife has a significant earning capacity of her own. The law Maintenance pending suit and interim maintenance
14. The law is well known and not in dispute. Section 3 of the Matrimonial Proceedings and Property Ordinance Cap 192 states that the only governing principle is that the court shall make such order as it considers reasonable in all of the circumstances of the case. Consequently, applications such as these are approached on a broad-brush basis. A detailed examination of the parties means may be examined at a later date at a full ancillary relief hearing if there is no agreement in the meantime, when there is then every opportunity to achieve fairness by means of a set off. In other words, if there is any overpayment or underpayment that can normally be rectified at a final ancillary relief hearing. Applications for interim maintenance under section 5 of the same ordinance are approached in the same way. As Rayden points out 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. (See paragraph 16.17 of Rayden, 18th edition).
15. Further In practice, as oral evidence is rarely given, it will be unusual for the court on an application for maintenance pending suit to be in a position to make findings of fact on issues in dispute sufficient, for example, to deal with conduct or allegations of non disclosure. However, if it is demonstrated that the paying party has not performed his duty to make full and frank disclosure of his financial resources, then the court can take a broad and robust view of his means, and it does not have to accept and proceed on the basis of the assertions of the paying party as to his means and an inability to pay. The court can look at the reality of the situation Any under provision or over provision in the order for maintenance pending suit can always be corrected when the account comes to be taken at the substantive hearing when there are every opportunity to do fairness by set off (See paragraphs 16.18 of Rayden, 18th edition).
16. Likewise the court may look to the assertions made by the payee and take a similar approach when looking at her means and alleged reasonable requirements. The court should look to the reality of the situation, in so far as it can, in relation to bare assertions made by either the husband or the wife.

17. Reference was also made by both sides to the Court of Appeal decision *HJFG v KCY* [2012] 1 HKLRD 95 where it was held that:
 - (a) The sole criterion to be applied in determining the application is reasonableness, which is synonymous with fairness.
 - (b) A very important factor in determining fairness is the marital standard of living. That is not to say that the exercise is merely to replicate that standard.
 - (c) 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.
 - (d) 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.
18. Counsel for the wife also referred to the case of *F v F* as follows:
21. In *F v F* (ancillary relief substantial assets) [1995] 2 FLR 45, Thorpe J gave some guidance on the exercise of the court's discretion in deciding maintenance pending suit in cases with substantial assets. He stated: I think that it is very important to recognise that in measuring affluence, extravagance and reasonable needs, there are no absolutes. All these concepts are comparative. Thus, in determining the wife's reasonable needs on an interim basis it is important as a matter of principle that the court should endeavour to determine reasonableness according to the standards of the ultra-rich and to avoid the risk of confining them by the application of scales that would seem generous to ordinary people. Thus I conclude that if the wife cannot manage at the rate of a quarter of a million a year, she ought to be able to. I think that it is necessary to establish a yardstick that more nearly reflects the standard of living which has been the norm for the wife ever since marriage and for the husband for considerably longer. (Emphasis added)
19. As things stand the court does not necessarily accept that the disclosure to date puts this case into the bracket of the super-rich. The husband was well paid during the marriage, whilst employed as a senior banker, and it seems that the parties enjoyed a very comfortable standard of living at that time. But their asset base is quite modest in comparison. Consequently, it does not seem to me that *F v F* is particularly relevant given the circumstances of this case. Maintenance pending suit/interim maintenance The wife's needs
20. The wife sets out her updated schedule of expenses for both herself and the child, in her affidavit in support dated the 21 June 2018 as follows: (A) General Item Amount(HK\$) Rent 75,000.00 Utilities 9,500.00 Food 12,000.00 Household expenses 12,500.00 Car expenses (including car loan) 13,500.00 Insurance premia 2,000.00 Domestic helpers 27,900.00 Other

(including membership of HK Jockey Club) 4,000.00 Total Monthly Household Expenses: 156,400.00 (B) Personal Item Amount(HK\$) Meals out of home 6,000.00 Transport 800.00 Clothing / Shoes 20,000.00 Personal grooming 15,000.00 Entertainment / presents 13,500.00 Holiday 6,000.00 Medical/Dental 15,000.00 Insurance premia (in-patient only) 2,000.00 Total Monthly Personal Expenses: 78,300.00 (C) Children Item Amount(HK\$) School fees 3,700.00 Extra Tuition fees 15,500.00 School books and stationary 800.00 Medical / Dental 5,000.00 Extracurricular activities 8,400.00 Entertainment / presents 10,000.00 Holidays 2,500.00 Clothing / Shoes 3,200.00 Insurance premia 1,800.00 Other transport 500.00 Child minding fees 5,500.00 Uniform 100.00 Other (specify) 5,000.00 Total Monthly Children Expenses: 62,000.00 This totals HK\$296,700 per month, although the wife now says that she is prepared to accept a reduced figure of HK\$210,000 per month. It is not altogether clear however which areas she says that she can now sensibly reduce or why.

21. For his part the husband makes the following points with respect to this estimated expenditure:
38. I do not accept the expenses set out in paragraph 13 of L s 3rd Affirmation are a fair estimate of her and C s actual costs. She has provided almost no supporting documents for those figures. I set out some of my observations as follows:
 - (i) L recently moved to ABC Mansions at DEF, Midlevels, in around July/August 2018. I do not know how much rent she currently pays. (ii) I cannot understand how L s utilities can be as high as HK\$9,500 per month for herself, a young child and 2 domestic helpers. (iii) L s claim for HK\$24,500 per month for food and household expenses is excessive, as is her claim for medical/dental expenses. (iv) L has included HK\$27,900 per month for domestic helpers and HK\$5,500 for child minding fees. This is excessive and unnecessary. It is not reasonable for her to maintain a car and driver in our current circumstances.
 - (v) L s claims for HK\$20,000 per month for clothes, HK\$15,000 per month for personal grooming, HK\$13,500 for entertainment and presents and HK\$6,000 for holidays mean that she requires a total of HK\$54,500 per month for purely discretionary expenditure. This is a very clear indication of how out of touch L is with the reality of our drastically changed financial reality. In addition, she claims C needs HK\$10,000 per month for entertainment and presents. (vi) L s claims for C s expenses all seem far higher than reasonable. I cannot understand why L included HK\$15,500 per month for extra tuition fees and HK\$8,400 per month for extracurricular activities for C, who is currently 3 and a half years old.
22. I tend to agree with this analysis. However, it should also be noted that the husband does not appear to have conducted himself historically, as he says the wife should have conducted herself. In particular, it seems that he has continued to spend at a very high level, notwithstanding his now rather more reduced circumstances. For example, it is clear from his credit card statements that in the period from January 2017 to September 2018 he continued to spend large amounts on his credit cards and that he would pay them off in part only, presumably as and when he had more cash at his disposal. Counsel for the wife said

that he would spend in the region of HK\$100,000 per month on credit cards alone. It is also clear that he did not pay them off at a uniform or regular rate. For example, the statements for March to April 2017 show that he paid off SGD20,750 on his premier HSBC credit card, SGD22,000 on his HSBC visa platinum card and a further SGD500 on his Amex card i.e. SGD43,250 in total which equates to just under HK\$250,000. In comparison, he paid off only SGD8,500 or approximately HK\$49,000 on his credit cards in January 2017 (SGD1,000 - premier HSBC credit card, SGD4,468 - HSBC visa platinum card and a further SGD3,000 - Amex card), but another huge amount of SGD85,415 or approximately HK\$492,170 was paid off in August 2018 (SGD35,000 - premier HSBC credit card, SGD45,000 - HSBC visa platinum card and a further SGD5,415 - Amex card). There does not appear to be any rhyme or reason to these payments although the level of expenditure on the credit cards seems to have remained at a fairly high level throughout. The husband's ability to pay

23. Thus it is the wife's case that the husband has the ability to pay. Although the husband is now working in a start-up and is paying himself only HK\$91,000 per month, she says that he has received significant sums of money in deferred payments etc and that it is simply not feasible for all of these funds to have been spent. On the husband's own case he says that he has received approximately HK\$8.8 million in the last two years or so, as follows: Payment Date received Amount (HKD) Credit Suisse March 2017 4,781,732 BNP Paribas April 2017 1,305,907 October 2017 1,533,229 April 2018 576,472 October 2018 605,193
24. In addition, he received a salary at various times in the period from March 2017 November 2018, which on the wife's case increased his available resources to approximately HK\$10.5 million, without taking into account a loan taken out by him in August 2018. Put simply the wife asks where these funds have gone? She does not accept the husband's explanation that in addition to paying maintenance to her, that there have also been loans to his start-up and other costs to pay including significant tax payments and repayment of loans to other people which have led to there being limited funds available now. Counsel for the wife said that this would mean that the husband has been spending at a rate of HK\$363,950 per month for the 21-month period in question. Having reviewed the credit card expenditure, it seems to me, rightly or wrongly, that it is perfectly feasible for the husband to have made a significant dent in this sum, especially given the additional expenses referred to above.
25. The wife also asks me to take into account the husband's ability to borrow, pointing to the fact that he has in the more recent past borrowed HK\$1.1 million and HK\$830,000. I accept that he does have some ability to borrow. It is also clear that the parties have some other joint assets available to them which they could rely upon in the medium to short term.

Conclusion

26. Time will tell if the husband does indeed have significant hidden assets. On a broad brush basis however and having had an opportunity to now go through some of the credit card statements, it seems to me that it is clear that following the husband's redundancy in January 2016 both sides had continued to spend at a high rate. Certainly, as I have said, the

husband was continuing to spend freely on the credit cards. Since then both sides have made some attempt to reduce their expenditure, but it is simply not going to be possible for them to live as they have done historically on the husband's now much reduced salary alone. I tend to accept that a lot of the HK\$8.8 million is now most probably spent. This is especially given the fact that it is accepted that save for the first figure, the husband has paid the wife the following sums in addition to some of the other items referred to above: Cash/ Transfers from my Standard Chartered Singapore account Date Amount(HKD) January 2017 (SGD 12,150) (69,255) April 2017 775,000 July 2017 275,000 October 2017 150,000 January 2018 150,000 February 2018 150,000 March 2018 35,000 April 2018 35,000 May 2018 35,000 June 2018 35,000 July 2018 35,000 August 2018 35,000 September 2018 (including HK\$20,000 in cash) 55,000 Total: 1,834,255 *Exchange rate: SGD 1 = HKD 5.7 Transfers from my HSBC Singapore account Date Amount(HKD) July 2017 (SGD 24,000) 136,800 August 2017 (SGD 41,000) 233,700 September 2017 (SGD 15,000) 85,500 October 2017 (SGD 22,000) 125,400 November 2017 (SGD 46,000) 262,200 Total: 843,600 *Exchange rate: SGD 1 = HKD 5.7 The wife's needs General expenses

27. The wife's schedule shows that she originally put her case on a very high needs basis. She said that she needed approximately HK\$156,000 per month for general expenses including HK\$27,900 for domestic helpers. As indicated above it is not accepted that the wife needs a domestic helper, a driver and a Nanny for the child (the Nanny's expenses are referred to under the Child's expenses as HK\$5,500 per month for Child minding fees), especially when she also maintains that she is not receiving a salary from G, although she is continuing to work for the company. Similarly, it is not accepted that her car expenses should be as high as HK\$13,500 per month, especially when she sold two of the family cars and then purchased a third on a loan. HK\$12,000 for food for one adult and one child and HK\$12,500 for household expenses also seems very high. The child's expenses
28. I also accept as pointed out by the husband that the expenses for the child are very high. For example, it is not accepted that the wife needs HK\$15,500 for extra tuition fees and a further HK\$8,400 for Extra Curricular activities. This seems excessive, especially for a child so young. Similarly, HK\$10,000 per month for entertainment and presents also seems to be very much on the high side. The wife's expenses
29. In a similar vein the wife claims very high amounts for her own expenses including HK\$20,000 per month for clothes and shoes, HK\$15,000 per month for personal grooming and so on and so forth.

Conclusion

30. I simply do not accept many of the estimates put forward by the wife. I intend therefore to make an order premised primarily on the husband's ability to pay. On a broad brush basis therefore I shall order that the husband contribute HK\$60,000 per month towards the expenses of the wife and child. I accept that this is more than he says that he can currently afford, but in making this order I have also taken into account his ability to borrow including his credit card expenditure.
31. Both parties also have an earning capacity and access to some joint assets. With that in mind it seems to me that the parties should give serious consideration to liquidating part if not all of the Springs China Opportunity Feeder Fund and that they should then use that money in order to fund their living expenses in the short to medium term, whilst they reorganise their finances, obtain remunerative employment and generally get themselves back on their feet.
Litigation funding
32. In addition to maintenance pending suit/interim maintenance the wife also seeks litigation funding of HK\$72,000 per month. The law
33. As far as the law on the funding of litigation costs is concerned, *Currey v Currey* [2006] EWCA Civ 1338 continues to be routinely applied in Hong Kong. This states inter alia that: the conditions for a costs allowance are as follows:
 - (1) That the applicant spouse has no assets, or none that can reasonably be deployed (at para [19], [20]).
 - (2) That she can provide no security for borrowing, or none which can reasonably be offered (at paras [19], [20]).
 - (3) That she cannot reasonably obtain legal services by offering a charge on the outcome of the litigation (at para [20] and see *Sears Tooth*, per Wilson J).
 - (4) That she cannot secure publicly funded legal help at a level of expertise apt to the proceedings (at para [20]) There is also a requirement to undertake an overarching enquiry At para [20], Wilson J held that the initial, overarching enquiry should be into whether the applicant for a costs allowance could demonstrate that she cannot reasonably procure legal advice and representation by any other means. Therefore, to the extent that an applicant has assets (as in *C v C*), she has to demonstrate that they cannot reasonably be deployed (whether directly or as the means of raising a loan) in funding legal services Other factors may well come into play. The subject matter of the proceedings would always be relevant, as would the reasonableness of the applicant's stance in the proceedings. Is this an appropriate case to award litigation funding?

34. It does not seem to me that this is an appropriate case to award litigation funding, even if the husband could afford to pay, which I think is unlikely. The wife does have some assets and the monies held in the Springs China Opportunity Feeder Fund referred to above in particular could be used by the parties in part to fund for their legal fees. I am also concerned in the way in which this application has been approached and the rather litigious undercurrent generally. Costs
35. I am aware that the husband made a number of offers to the wife which have not been accepted. I do not know if there has been any without prejudice correspondence that may be relevant to the issue of costs. There is also a related issue concerning the second round of affidavits post hearing, which on the husband's case were wholly unnecessary. The husband also seeks his costs of those affidavits on an indemnity basis. Consequently, I shall in the first instance reserve the costs of this application for further argument/directions. Order
36. I shall make an order as follows: The parties shall be released from their undertakings as set out in the orders referred to in paragraph 5 above, to preserve the financial status quo. The Respondent shall pay maintenance pending suit to the Petitioner for herself in the sum of HK\$30,000 per month and interim maintenance to the Petitioner for the child of the family in the sum of HK\$30,000 per month the first payment to be backdated to the 1 May 2019 and thereafter to be paid on the 1st day of each succeeding month until further order. The First Appointment hearing, the preliminary issues hearing and the issue of the costs arising out of this application shall be adjourned to the 28 August 2019 at 9:30 a.m. Both parties shall personally attend that hearing. (Sharon D. MELLOY) District Judge Ms Athena Wong instructed by Pang, Wan & Choi for the Petitioner Mr Shaphan Marwah instructed by Gall for the Respondent
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