

HONG KONG / JUDGMENT

YF v. WMP

[2024] HKFC 215

COURT

Family Court

DECIDED

27 November 2024

CASE / FILE NUMBER

FCMC1226/2021

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bjbj FCMC 1226 /2021

[2024] HKFC 215 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO. 1226 OF 2021

BETWEEN YF The Petitioner and WMP The Respondent

Coram: His Honour Judge I Wong in Chambers (Not Open to Public) Date of Hearing: 18 October
2024 Date of Judgment: 27 November 2024

J U D G M E N T (Appeal Against Master s Decision)

1. This is an appeal by the respondent against Master Chak s order made on 11 July 2024. By this order, the Master dismissed his applications for variation of maintenance in favour of parties children for the reason that he was absent at the hearing.
2. The wife is the petitioner and the husband is the respondent in these proceedings. Notwithstanding they have ceased to be married, I shall, for the ease of reference, continue to refer to them as the wife and the husband respectively.

Background

3. For the purpose of this appeal, I only need to set out the background briefly.
4. The wife is Chinese with family ties in the Mainland. She is a ____and is currently working as ____ in Hong Kong.

5. The husband is British. He is a _____ in Hong Kong.
6. The parties married in May 2010 in Hong Kong. They have two children. The elder is a son and the younger is a daughter. They are __ and __ years old respectively.
7. In February 2021, the wife petitioned for divorce on the ground of one-year separation with the consent of the husband. At the material times, both were acting in person.
8. The main suit ran uneventfully. Decree nisi was granted on 30 November 2021.
9. Parties, however, took a much longer time to have their financial and children's matters resolved. The Children's Arrangement
10. To keep the long story short, as far as the children's arrangement is concerned, it was not until 27 January 2023 that the joint custody of the son was granted to the parties, with care and control to the husband and defined access to the wife.
11. As for the daughter, her joint custody was granted to the parties, with a shared care and control arrangement in place for the parties to take care of the daughter on alternate week basis. The Ancillary Relief Settlement
12. While this case did not involve substantial assets, the resolution of the parties' financial matters was, in contrast to the main suit, a rocky journey. It was not until 4 September 2023 that their ancillary relief was resolved. By a consent order made by HH Judge Thelma Kwan on that date (the AR Order), their own ancillary relief against the other was dismissed.
13. As regards the financial arrangement of their children, they had it resolved by way of some undertakings as set out in the AR Order.
14. First, the wife undertakes to pay the husband the actual amount of school fees deducted from his salary provided that the amount payable is subject to a ceiling.
15. Second, the wife undertakes to pay the costs of all extracurricular activities in which the children are enrolled.
16. Third, the wife undertakes to pay for the children's flights to the UK in July 2024, capped at \$16,000. This undertaking bears some significance to the present appeal. I shall explain below.
17. Fourth, both parties undertake to share the costs of any non-elective dental treatments that the children need. The Variation Applications
18. As things turned out, the resolution was very short-lived. They soon ran into difficulties in carrying out the undertakings and so they re-appeared in court again.

19. In just 6 months time on 19 March 2024, the husband took out two summonses. The 1st was for an order that the wife is to pay him \$3,347 per month as maintenance of the son; and the 2nd application was to convert the wife's undertakings into orders of the court. These two summonses were fixed to be heard before Master Stanley Ho on 3 May 2024 (the Husband's Hearing Date).
20. In response, the wife took out her own application on 29 April 2024 seeking (1) to have the AR Order set aside and (2) an order that the husband is to pay \$23,213 per month as maintenance for the children. Her summons's return date was 11 July 2024 and was to be dealt with by another Master.
21. There was then a letter written by the wife to Master Stanley Ho informing him that her right knee had been injured on 3 April 2024 during a trip to the Mainland. She sought an adjournment (indeed, the vacation) of the Husband's Hearing Date and had it re-fixed to be heard together with her own summons on 11 July 2024, the reason being that all the 3 summonses essentially centre on the same issues, ie whether the Settlement Offer recorded in the Order dated 4 September 2023 should be enforced or altered or set aside. She believed it would be in the best interest of all parties concerned to adjourn the hearing on 3 May to 11 July to hear all issues together.
22. The letter was undated but it must have been written either on 29 April 2024 (the date when she took out her own application) or thereafter. I reckon that 29 April 2024 was a Monday and 3 May 2024 was a Friday. If it was written on 29 April 2024, it was just 3 clear days before the Husband's Hearing Date. In any event, it is clear that the husband was unaware of the application; he was not given any opportunity to respond.
23. On 2 May 2024, one day before the Husband's Hearing Date, Master Stanley Ho acceded to the wife's request. He vacated the hearing and had it re-fixed to 11 July 2024, to be heard together with the wife's summons. The notice was sent out by post to the parties on 2 May 2024.
24. Both parties appeared in court on the Husband's Hearing Date, only to find that the hearing had already been re-fixed. It was by then that they were given the notice.
25. On 5 May 2024, the husband wrote to the Registry that for the reason he would be in the UK with the children for the entire month of July, he would not be able to attend the hearing on 11 July 2024. He requested the hearing of 11 July 2024 be rescheduled to a date in June with reasons that I do not need to elaborate. Suffice to say is that these reasons were apparently not unreasonable.

26. The husband's letter was only brought up to the attention of Master Chak on 2 July 2024, the very first day she took up the post as a Master with the Family Court. The next day (ie 3 July 2024) the Master gave a reply that adjournment should be sought by way of taking out appropriate application or with consent of the other party. She gave the direction that the hearing of 11 July 2024 remained unchanged. The direction came too late as by then the husband had already left for the UK.
27. On 11 July 2024, the wife duly turned up at the hearing. The husband, for an obvious reason, was absent and his two summonses were dismissed by the Master. At the same time, the Master dismissed the wife's application to have the AR Order be set aside and gave case management directions on the wife's application for children's maintenance. Since the Master's decisions regarding the wife's summons is not relevant to this appeal, it is unnecessary to go into it in any detail.
28. On 5 August 2024, the husband appealed against Master Chak's dismissal of his 2 summonses. This is the appeal that now comes before me.
29. Before I proceed, I need to mention that Order 32, rule 5(4), Rules of the High Court () provides that where an application made by summons has been dismissed without a hearing by reason of the failure of the party who took out the summons to attend the hearing, the court, if satisfied that it is just to do so, may allow the summons to be restored to the list. Thus, it was open for the husband to have made an application to Master Chak to have his summonses restored instead of lodging the present appeal. Master's Appeal
30. Master's appeal before a Judge is by way of actual re-hearing, and the Judge treats the matter as though it came before him for the first time: Order 58, rule 1, RHC. The judge in chambers is in no way fettered by the previous exercise of the master's discretion: see Hong Kong Civil Procedure (2024) at 58/1/2, quoting *Evans v. Bartlam*
- [1937] AC 473; *Cooper v. Cooper*
- [1936] W.N. 205; and *Cremin v. Barjack Properties Ltd*
- (1985) 273 E.G. 299, CA. Discussion
31. It is necessary to start the discussion from Master Ho's decision to vacate the Husband's Hearing Date.
32. The Husband Hearing Date was obtained by him from the Listing Officer to deal with his application. In all likelihood, like any applicant acting in person, the husband might have to obtain leave from his employer or make special arrangement so that he can appear in court to pursue his claim.
33. In the present case, it was only one day before the Husband's Hearing Date that the Master decided to vacate the hearing. The relevant notice was sent out to the parties by post only. As such, it was virtually impossible for the notice to have reached the parties in sufficient time before the hearing. In this connection, it is to be reminded that Practice Direction 19.2

(Service of Documents by Post-Ordinary Course of Post) provides that in the case of ordinary post, the date of delivery is deemed to have been effected on the second working day after posting. It was therefore not surprising that both parties turned up in court on the Husband's Hearing Date, resulting in their time being wasted. This, in my view, was undesirable and unfortunate.

34. The court no doubt had discretion to hear both the husband's and the wife's applications together if it considered that they essentially turned on the same issues. The husband was the first one to take out the applications and obtained a hearing date that he was available. I would say he had the right to be heard on that day. Even if the Master considered that, in exercise of his active case management power, it was proper to move the Husband's Hearing Date, the husband was entitled to be heard on this matter. In my assessment, given the imminence of the hearing, the Master should have kept the Husband's Hearing Date. Where possible, he could have dealt with both parties' applications at the same time; and if the time allotted was insufficient, he could continue to deal with the matter on the wife's hearing date. Master's Chak's Dismissal of the Husband's Summonses
35. Order 32, rule 5(1), RHC provides that where a party to a summons fails to attend on the first or any resumed hearing, the court may proceed in his absence if, having regard to the nature of the application, it thinks it expedient so to do. It is clear that Master Chak proceeded to deal with the husband's summonses by dismissing them on the ground of his absence.
36. In addition to any express provisions that the court may have to dismiss an action for want of prosecution the court has inherent jurisdiction to do the same if there has been default in complying with the rules or excessive delay in the prosecution of the action. Generally speaking, the same principles are applied whether the court is acting under its express power or under its inherent jurisdiction: see Hong Kong Civil Procedure (2024), at para 25/L/1.
37. The power to dismiss or strike out for want of prosecution is a discretionary power. It has been said by the Court of Final Appeal in *Wing Fai Construction Co Ltd v Yip Kwong Robert* (2011) 14 HKCFAR 935 that this power is one of last resort, and actions may only be struck out in plain and obvious cases. The Hong Kong Civil Procedure (2024), summarized the main principles enunciated in *Wing Fai Construction Co Ltd* at para 25/L/2,
 - (a) Striking out is a remedy of last resort and only where it is plain and obvious to do so. Litigants and their legal advisers should make use of other powers of the court rules, thus avoiding an "all or nothing" approach in striking out.
 - (b) The foundation of striking out for want of prosecution is the abuse of process of the court. Mere delay per se would not suffice.

- (c) Abuse may take many different forms. It includes inordinate and inexcusable delay causing prejudice to a defendant (traditionally known as the second limb of [HYPERLINK "https://launch.westlawasia.com/document/I74C5F9C1E42711DA8FC2A0F0355337E9"](https://launch.westlawasia.com/document/I74C5F9C1E42711DA8FC2A0F0355337E9) Birkett v James [1978] AC 297) or contumelious conduct. It may also include "warehousing of claims, inexcusable non-compliance with or wholesale disregard of court orders or rules and litigation anxiety (traditionally known as Biss prejudice).
- (d) Regarding "warehousing of claims (that is where a plaintiff initiated a number of actions against various defendants and, for tactical reasons or otherwise, selected which action to proceed with or not), for it to justify striking out, it must be clear that the plaintiff was abusing the process of the court. Abuse may be found to exist if the plaintiff has no intention to bring proceedings to a conclusion or there was a wholesale disregard of the court rules or orders, since the courts exist to assist parties to resolve disputes and they should not be used by litigants for other purposes.
- (e) Where abuse is clearly demonstrated, proceedings may be struck out even where prejudice to the defendant cannot be shown. However, in the majority of applications, the issue of prejudice will be extremely relevant.
- (f) The conduct of the parties is also a highly relevant consideration. It is both relevant to the issue of abuse as well as to the overall justice of the case.
- (g) Since all parties (not just plaintiffs) are obliged to prosecute proceedings under the CJR and assist the court in furthering the underlying objectives, it is highly relevant to consider any failure on the part of the parties. As a result, there is no place anymore for defendants to adopt the attitude of "letting sleeping dogs lie .
- (h) The court shall consider not just the position of the parties but also that of other litigants who are entitled to a fair share of court resources.
- (i) Delay caused by legal advisers is not relevant factor to be taken into account in the exercise of discretion.
38. In the present case, the Master should be well aware of the husband s reason for his absence, as he had already informed her that he would be away from Hong Kong with the children. By the time when the decision was made, the husband had already left for the UK.
39. As a matter of fact, this was not the first UK trip. Earlier on, the parties had agreed that, by way of a consent order dated 19 June 2023, the husband was allowed to take the children back to the UK in July 2023; so it appears that the UK trip was an annual event.
40. On this, I need to turn to the wife s litigation conduct. It is to be recalled that the wife undertook in the AR Order to pay for the children s flights to the UK in July 2024: see [16] above. The husband s applications were taken out as early as on 19 March 2024. It was however not until 3 days before the Husband s Hearing Date that the wife took out her own application. Her alleged knee injuries happened on 3 April 2024. Her sick leave certificates

issued by two Hong Kong medical practitioners (so she was in Hong Kong) and attached to her letter to Master Ho covered a period from 8 April 2024 to 12 April 2024 only. There was simply no reason why the wife had taken out her application and sought the vacation of the Husband's Hearing Date at such a late stage.

41. Most importantly, it strikes me that she expressly requested the husband's summonses to be adjourned to July 2024 when she knew full well that the husband would be away from Hong Kong. The reason is simple: the children's flights to the UK were paid by her. I therefore agree with the husband that it was a deliberate attempt on the part of the wife to delay the proceedings. When the wife made her request by way of her unilateral letter to Master Ho (a copy of it was not sent to the husband), it was incumbent upon her to give a full and frank disclosure of all the materials needed for the court to consider but she deliberately failed to do so. I cannot help thinking this was a dishonest litigation conduct on the part of the wife; at the very least, it was a devious tactics for gaining unfair advantages over the husband.
42. Finally, I wish to remind the parties, especially the wife, that unless the AR Order is varied by an order of the court, they should continue to strictly comply with the terms of the order.
43. The husband's absence must be seen against the background that the Husband's Hearing Date was improperly vacated and re-fixed. The husband's letter dated 5 May 2024 should have been dealt with expeditiously by another judicial officer well before Master Chak took up her office on 2 July 2024. That being the case, the husband's absence could not be seen as being unjustified. The court should be slow to have the applications dismissed. The proper discretion to be exercised is to have the summonses adjourned to another date.
44. The dismissal was the result of a series of unfortunate mistakes and the deceit of the wife with no fault on the part of the husband. The husband's appeal must be allowed. I set aside the order of dismissal. The husband's summonses are to be restored with an early return date to be notified by the court together with this Judgment. Costs
45. The husband succeeds in his appeal. I find the wife was culpable for her litigation misconduct. She should bear the costs of the appeal. As both parties are litigating in person, I consider it is appropriate to have the husband's costs to be summarily assessed. The appeal hearing lasted for just about one hour; and only a few documents were involved. I assess the costs at \$2,000, to be payable by the wife to the husband within 14 days. This is an order nisi.
(I. Wong) District Judge The Petitioner, in person The Respondent, in person - PAGE PAGE A
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