

HONG KONG / JUDGMENT

# YPC also known as CL v. SSSL

## COURT

Family Court

## DECIDED

4 December 2015

## CASE / FILE NUMBER

FCMP103/2012

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FCMP 103 / 2012 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE  
REGION MISCELLANEOUS PROCEEDINGS NO. 103 OF 2012

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BETWEEN YPC also known as CL Applicant (the Payee) and SSSL Respondent (the Payer)

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Coram: Deputy District Judge G. Own in Chambers (Not Open to Public) Date of Hearing: 11th  
November 2015 Date of Judgment: 4th December 2015

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J U D G M E N T (Judgment Summons : Setting Aside)

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## Introduction

1. This is the Respondent's (the Payer's) Summons dated 14 July 2015 ("SA Summons") for setting aside a Judgment Summons dated 22 May 2012 ("Judgment Summons"). This SA Summons was only issued and filed in the morning of 20 July 2015 (which was the date scheduled for hearing of the Judgment Summons). This SA Summons was listed for hearing on 14 August 2015 with 30 minutes reserved. The SA Summons was served on the Department of Justice ("DOJ") who acted for the Registrar of the District Court ("the Registrar"). 2. At the hearing of the Judgment Summons, the Respondent was legally represented and Counsel Mr. Shaphan Marwah was instructed to appear. Counsel submitted the Judgment Summons would be opposed. In light of the SA Summons having been filed and served, the DOJ who had already filed its legal submissions and authorities on 17 July 2015 before they were properly served with the SA Summons, agreed to have the Judgment Summons adjourned pending determination of the SA Summons. Leave was also sought by the DOJ and was granted by this Court for the Registrar to be excused from hearings in the subsequent proceedings, including the hearing(s) of the SA Summons. 3. With the parties'

consent that a 2-hour hearing may be required, the hearing originally scheduled for the SA Summons on 14 August 2015 was vacated and re-fixed to 11 November 2015 at 10:30 a.m.

Historical Background 4. By an Order granted by the Supreme Court of British Columbia on 26 October 2007 (“the Canadian Order”), the Respondent was ordered to pay maintenance for 4 Children in the amount of CAD\$2,000 per month commencing 1st July 2005 and continuing on the 1st day of each and every month for so long as the Children are “children of the marriage” as defined in the Divorce Act. 5. There had been attempt by the Respondent to seek variation of the Canadian Court Order in the Vancouver Supreme Court and suspension of enforcement action until conclusion of such variation proceedings in Canada. 6. As the Respondent had not complied with the Default Hearing demands within the Family Maintenance Enforcement Program (“FMEP”) in Canada, the Registrar was requested by the FMEP on 20 October 2011 to remove any enforcement suspension and commence necessary legal action against the Respondent. 7. Further matters that had emanated since the Canadian Court Order was granted until 20 October 2011 were set out in the Affirmation of Clement Lee Hing Nin, the then Temporary Registrar of this Court (as he then was) dated 30 April 2012, which I do not intend to repeat here save and except only when necessary for this Judgment. The Law 8. These proceedings were commenced by the Registrar pursuant to the Maintenance Orders (Reciprocal Enforcement) Ordinance, Cap.188 (“the MOREO”) to enforce payment on behalf of the Applicant (“the Payee”). 9. Section 7 of the MOREO provides :- “Registration in Hong Kong of maintenance order made in reciprocating country This section applies to a maintenance order, whether before or after the commencement of this Ordinance, by a court in a reciprocating country, including such an order made by such a court which has been confirmed by a court in another reciprocating country, but excluding a provisional order which has not been confirmed. Where a certified copy of an order to which this section applies is received by the Chief Executive from the responsible authority in a reciprocating country, and it appears to the Chief Executive that the payer under the order is residing in Hong Kong, he shall send the copy of the order to the Registrar of the District Court. Where the Registrar receives from the Chief Executive a certified copy of an order to which this section applies, he shall, subject to subsection (4), register the order in the court in the prescribed manner. Before registering an order under this section the Registrar shall take such steps as he thinks fit for the purpose of ascertaining whether the payer under the order is residing in Hong Kong, and if after taking those steps he is satisfied that the payer is not so residing he shall return the certified copy of the order to the Chief Executive with a statement giving such information as he possesses as to the whereabouts of the payer.” 10. Section 9 of the MOREO provides :- “Enforcement of maintenance order registered in Hong Kong A registered order may be enforced in Hong Kong as if it had been made by the District Court and as if that court had had jurisdiction to make it, and proceedings for or with respect to the enforcement of any such order may be taken accordingly. Any person for the time being under an obligation to make payments in pursuance of a registered order shall give notice of any change of address to the Registrar of the District Court, and any person failing without reasonable excuse to give such a notice commits an offence and is liable to a fine not exceeding \$500. (a) A sum ordered to be paid

under a registered order shall be recoverable as a civil debt. (b) If an application is made to the District Court alleging that default has been made in paying a sum ordered to be paid under a registered order, the District Court may, if it considers the circumstances require it, for the purpose of securing the presence of the person alleged to be in default, issue a warrant to arrest him and bring him before the court, whether or not a summons has been issued previously. On the hearing of an application for enforcement of a registered order, the District Court may remit the whole or any part of the amount due under the order. In any proceedings for or with respect to the enforcement of an order which is for the time being registered in the District Court under this Ordinance a certificate of arrears sent to the Registrar shall be evidence of the facts stated therein. Subject to subsection (7), sums of money payable under a registered order shall be payable in accordance with the order as from the date on which they are required to be paid under the provisions of the order. The District Court may, if it decides to confirm a provisional order under section 8, direct that sums of money payable under the order shall be deemed to have been payable in accordance with the order as from the date on which they are required to be paid under the provisions of the order or such later date as the District Court may specify, and subject to any such direction, a maintenance order registered under section 8 shall be treated as if it had been made in the form in which it was confirmed and as if he had never been a provisional order.” 11. Moreover, the Maintenance Orders (Reciprocal Enforcement) Rules, Cap.188A (“MORER”) provides, inter alia, as follows :- “Rule 8 : Method of payment of sums due under a provisional order Payment of sums due under a registered order shall, while the order is registered in the District Court, be made to the Registrar during such hours and at such place as he may direct, and the Registrar shall send those payments by post to the court which made the order or to such other person or authority as that court or the Chief Executive may from time to time direct. Where it appears to the Registrar to whom payments under any maintenance order are made by virtue of paragraph (1) that any sums payable under the order are in arrear he may and, if such sums are in arrear to an amount equal to four times the sum payable weekly under the order, he shall, whether the person for whose benefit the payment should have been made requests him to do so or not (my emphasis), proceed in his office and title of Registrar for the recovery of those sums, unless it appears to him that it is unreasonable in the circumstances to do so.” The Setting Aside Application (“SA Summons”) 12. The reliefs sought under the terms of the SA Summons, apart from costs, are :- “1. The Judgment Summons filed on 22 May 2012 (“the Judgment Summons”) shall be set aside on the following grounds : The Registrar does not have the jurisdiction to take out the Judgment Summons pursuant to the Maintenance Orders (Reciprocal Enforcement) Ordinance, Cap.188; and The Judgment Summons is irregular as it is not brought under any particular Rule of the District Court.” 13. Following the hearing on 20 July 2015, Counsel for the Respondent provides supplemental submissions as to the nature of Judgment Summons being ‘criminal in nature’ for the purposes of Articles 10 and 11 of the Bill of Rights Ordinance, Cap.383 (“BORO”) and with reference to the cases of Koon Wing Yee and Insider Dealing Tribunal (2008) 11 HKCFAR 170; Gray v. Servino [2001] 3 HKLRD 842; Mubarak v. Mubarak [2001] 1 FLR 693; CYM v. YML [2013] 1 HKLRD 701; and 2

decisions of the European Court of Human Rights in *Engel v. The Netherlands* [No.1] (1976) 1 EHRR 647 and *Funke v. France* (1993) 16 EHRR 297. 14. On the other hand, the DOJ whose stance being neutral to the Respondent's application, assisted this Court and provided its Second Legal Submissions on 31 August 2015 with reference to the recent English Court of Appeal case of *Prest v. Prest* [2015] EWCA Civ 714 (dated 7 July 2015) highlighting the development of the judgment summons procedure in England and Wales after *Mubarak*. Submissions have also been made as to the procedural aspects under Orders 48 and 49B of the Rules of the District Court ("RDC") in Hong Kong and also Order 90A as to the judgment summons procedure. 15. At today's hearing, Counsel for the Respondent further produced a 'Speaking Note' making submissions that the Judgment Summons should be set aside for the following reasons :- There is no party seeking relief; The Judgment Summons has been abandoned; The Judgment Summons is irregular; and No evidence of the Respondent's means has been provided. The Respondent's stance 16. Towards the end of this hearing, this Court obtained confirmation from Counsel Mr. Marwah that the Respondent is not challenging the validity of the Canadian Court Order. The Respondent for obvious reasons did not provide further instructions to Counsel to answer this Court's second question as to whether the Canadian Court Order had now been complied with. 17. At today's hearing, this Court also obtained confirmation from Counsel for the Respondent that no amendment would be made to the 2 grounds relied upon for the setting aside application as stated in paragraphs 1(a) and (b) in the SA Summons. 18. The Respondent, with the benefit of legal advice, took no issue as to the process of registration of the Canadian Court Order here in Hong Kong under Section 7 of the MOREO, which is a prerequisite requirement for commencement of enforcement proceedings under the MOREO. The Respondent also took no issue as to those supporting evidence adduced by the Registrar by way of Affirmation filed herein and the attached exhibits thereto, including but not limited to, the fact that at the material time there were arrears of maintenance accrued under the Canadian Court Order which were due and payable by him to the other party, namely, YPC also known as CL, that is the Payee. 19. Thus and as I see it, the Respondent's stance is simply to challenge :- the jurisdictional aspect for the Registrar to take up enforcement proceedings for YPC also known as CL, namely, the Payee by way of Judgment Summons ("the Jurisdictional Challenge"); and the regularity of the Judgment Summons enforcement procedure in Hong Kong since such process, in light of the case of *Mubarak* in England and Wales and the subsequent amendment of the English Family Practice Rules on judgment summons, had been rendered irregular for infringement of the Hong Kong Bill of Rights Ordinance, Cap.383 ("the Regularity Challenge") . The Court's Views The Jurisdictional Challenge 20. The Respondent is contending that since the Registrar had agreed that he is not a party to the Judgment Summons, not the legal representative of the Payee, not advocating for either party in these proceedings and is taking a neutral stance; accordingly, it does not satisfy Rule 8(2) of the MORER which requires him or her to 'proceed in his office and title of Registrar' of which had not so happened in the present proceedings. It is submitted by the Respondent that this is a fundamental and irreparable defect in these proceedings. 21. Moreover, the fact that the Registrar represented by the DOJ had obtained leave to be

excused from attending the subsequent proceedings and the hearing of the SA Summons, amounted to an express repudiation to the Respondent's application and also a waiver of any entitlement to relief. 22. In my view, it is trite that there could be joinder of parties where separate actions are being brought by or against two or more persons claiming reliefs in respect of or arising out of the same set of facts; and also that some common question of law or fact are involved. Order 15 rule 4 of the Hong Kong Civil Procedure 2016 ("HKCP") provides for "Joinder of Parties". At paragraph 15/4/1 of the HKCP at page 309 where it said :- "The 'relief' in respect of which parties may be joined must be relief arising out of the same set of circumstances or circumstances involving a common question of law or fact..... If the above conditions are met, the aim of the court would be to strive to achieve an efficient resolution of common factual issues in a single trial, rather than to wait to see if one set of proceedings would catch up with another. This objective could be achieved, with minimal delay, if the judge seized of the case made appropriate directions and retained a firm control over the progress of the proceedings. This would avoid inconsistent findings, save costs and not waste judicial time." 23. Further, my view as to the true interpretation of Rule 8(2) of the MOREO is that it sets out the administrative role of the Registrar, in so far as recovery of maintenance due under a registered order (as required by Section 7 of the MOREO) is concerned, rather than any pre-requisite provision for the Registrar to be named or joined as a party in order to proceed with the reciprocal recovery or any enforcement proceedings. Those words 'proceed in his office and title of Registrar' should not be read in isolation or disjunctive from the words 'for the recovery of those sums' which immediately follow. Moreover, there is no 'reliefs' claimed by the Registrar in the recovery process or is there any common question of law or fact entitling the Registrar to be joined or named as a party in the enforcement proceedings. The Registrar is, for enforcement process under the MOREO, perfectly entitled to proceed with the enforcement on behalf of the Judgment Creditor (which is the Payer in these proceedings) without the Registrar's name being added or subrogated for the Payee. 24. Any contention that the reciprocal enforcement proceedings under the MOREO require the Registrar to be named or joined before he or she could proceed with enforcement, in my decision, must fail for the following reasons :- The Registrar is not an interested party, or indeed a party or privy, to the subject judgment or order being registered under the MOREO in respect of which enforcement is being undertaken; The judgment or order so registered is already an adjudication by the foreign court in the reciprocating country in respect of the parties' rights, claims and reliefs. There is simply no 'reliefs' claimed by the Registrar which require the Hong Kong court to adjudicate. 25. Section 7 of the MOREO is the statutory provision which confers jurisdiction upon the Registrar in appropriate cases to take up enforcement of maintenance orders obtained in the reciprocating countries. This is in essence an administrative task to compel implementation rather than a judicial intervention to seek reliefs. To give the words 'proceed in his office and title of Registrar' a meaning equate to 'taking over the proceedings in the Registrar's name' is, in my view, unorthodox. Thus, I do not accept there is any fundamental and irreparable defect submitted by Counsel Mr. Marwah for the Respondent. 26. The other contention as to repudiation and waiver of entitlement to relief by reason of

the Registrar or DOJ's excusal from attendance is also misconceived. The Respondent's case here involves legal and procedural argument as to the enforcement process rather than any dispute as to facts between the parties privy to the Canadian Court Order. The Respondent has also confirmed that he does not contest the validity of the Canadian Court Order. Given the fact that the Registrar's role being administrative and empowered by statute to recover arrears of maintenance, there is no question of repudiation and/or waiver which would only arise or emerge where there are disputes as to facts and claims for reliefs. Plainly and at the risk of repeating myself, there is no 'claim' of any reliefs by the Registrar in the enforcement process under the MOREO. 27. For the above reasons, the Respondent's Jurisdictional Challenge must fail. (b) The Regularity Challenge 28. The Regularity Challenge is slightly more complicated than the Jurisdictional Challenge as it involves consideration of a wider spectrum of the common law and procedural rules. 29. Mr. Marwah in his Supplemental Submissions, in addition to his earlier Submissions on the technicality and procedural aspects for the Registrar to take out the Judgment Summons, raised the question as to the 'criminality nature' of the Judgment Summons, the test for criminal proceedings and also the nature and severity of penalty. Further reference was made to the common law privilege against self-incrimination in determination of criminal charges enshrined by Articles 10 and 11 of the BORO. 30. In my view, the Respondent's contention that the appropriate party to enforce the Canadian Court Order should be the Wife (i.e. the Payee) and not the Registrar missed the point. The present enforcement process was brought under the reciprocal enforcement regime codified by the MOREO. It is not an enforcement process under the domestic law of the reciprocating country, namely, British Columbia, Canada, where the Canadian Court Order was granted. I believe the rationale and objective behind the MOREO is for enforcement in Hong Kong of maintenance orders obtained in foreign jurisdictions of the reciprocating countries without the need of the party to whom maintenance was due to pursue the fruits of the maintenance order in a jurisdiction and legal system unfamiliar to him or her. Any contention as to the 'identity' of the party pursuing under the MOREO should be the party privy to the order being enforced completely missed the point. Was the Judgment Summons irregular ? 31. In the case of CYM v. YML [2013] 1 HKLRD 70, Hon Lam JA reminded family law practitioners as to the draconian nature of enforcement for arrears of maintenance by way of judgment summons. At paragraphs 51 and 52 of the Judgment, his Lordship said :- "51. It has to be remembered that a judgment summons is a draconian procedure. It may result in the imprisonment of the judgment debtor. We understand that the judgment summons procedure has often been adopted by family practitioners in the enforcement of arrears. Unfortunately, there is a tendency of using this as the primary means of enforcement without considering whether less draconian means are more appropriate. When I pointed out in the course of argument that it is possible to seek a court order or payment of a judgment sum by a certain date without using a judgment summons, Ms Yip's initial reaction was that this could not be done. When she was referred to O.45 r.6 of the Rules of the High Court (Cap.4A, Sub.Leg.), counsel agreed this could be done. In my view, like committal proceedings in other types of civil litigation, judgment summons should be a last resort. In cases where the parties have a genuine bona fide dispute about the

quantum of an item under an order for payment, such disputes should be resolved by a summons taken out under O.45 r.6 instead of a judgment summons. Likewise, in cases where there is a genuine bona fide dispute on the judgment debtor's ability to pay (and very often such debtor would take out an application for variation), those representing a judgment creditor should reflect on the appropriateness of the continuation of the judgment summons procedure after seeing the evidence of the judgment debtor. Given the penal consequence, like a committal for civil contempt, the judgment creditor has to satisfy the court beyond reasonable doubt that the judgment debtor has the means to pay the judgment debt, see *Kao, Lee & Yip v. Koo Hoi Yan* (2009) 12 HKCFAR 830. If a judgment creditor has no firm and cogent evidential basis to discharge such onus, it would not be appropriate to proceed by way of judgment summons. 52. The judgment summons procedure, as applied in Hong Kong at present, has been subject to successful challenge for infringement of human rights in the United Kingdom : see *Mubarak v. Mubarak* [2001] 1 FLR 698. As a result, the rules under CCR O.28 were changed in England. Though this is not the occasion for discussing at length the merits of a similar challenge in Hong Kong, I would point out that there are similar safeguards for human rights in Hong Kong in arts. 10 and 11 of our Hong Kong Bill of Rights. Family practitioners should bear this in mind when they advise their clients to enforce a judgment debt by judgment summons. In particular they should consider whether it is Bill of Rights-compliant to combine a process of examination of debtor with a process of commitment.” 32. Counsel Mr. Marwah at paragraph 10 of his Skeleton Submissions made submissions that the application for judgment summons was fundamentally defective as the Registrar did not apply under either of the relevant rules, namely, O.48 or O.49B of the RDC. For the sake of completeness, O.48 is about ‘Examination of Judgment Debtor, Etc’ and O.49B is about ‘(HK) Execution and Enforcement of Judgment for Money by Imprisonment’. Both of them are different means of enforcement of judgments and orders in Hong Kong. 33. Mr. Marwah had not, however, went further to explain how such contention could stand when the Respondent on the one hand contests the ‘locus standi’, so to speak, of the Registrar in taking up the enforcement process, but on the other hand asserting the Registrar did not apply under O.48 and O.49B and thereby the application for judgment summons was ‘fundamentally defective’ ? Nonetheless and oddly, Mr. Marwah then went on at paragraph 11 of his Skeleton Submissions made submissions that this is a breach of the rule that applications should include a ‘margin note’ identifying the relevant statutes and rules. Thus, this is also a breach of the Respondent's rights to a fair hearing and to know the charges that he faces. 34. With due respect, I cannot agree with Mr. Marwah on both contentions. The Rules of the District Court (“RDC”) and indeed also that of the High Court (“RHC”), are practice and procedural rules covering different types of applications in civil proceedings which, so far as they are applicable or with modifications, include family proceedings (see Rule 3 of Matrimonial Causes Rules, Cap.179A (“MCR”)). O.48 and O.49B are two of them amongst the different means of enforcement of judgments and orders in all civil proceedings of the Court. Besides, there is the specific provision under Rule 87 of the MCR dealing with enforcement of maintenance orders obtained in the Family Court through the use of the Judgment Summons procedure. 35. Rule 87 (2) of the MCR

provides :- “(2) Where an order has been made, the court may, on an application made ex parte by the judgment creditor, direct a summons to issue to the judgment debtor to attend before the court and be orally examined on the questions – whether any and, if so, what debts are owing to the judgment debtor, and whether the judgment debtor has any and if so, what other property or means of satisfying the order, and the court may also order the judgment debtor to produce any books or documents in the possession of the judgment debtor relevant to the questions aforesaid at the time and place appointed for examination.”

36. Mr. Marwah’s contention as to ‘fundamental defectiveness’ and ‘marginal note’ seems to premise upon the comments of Hon Lam, JA in CYM v. YML. Given the fact that there are different means of enforcement of judgment and orders, Mr. Marwah had not been able to demonstrate how an application for judgment summons would be rendered ‘fundamentally defective’ simply because the other options of enforcement under O.48 and O.49B of the RDC/RHC had not been chosen. This is, in my view, not even the ratio of Hon Lam JA in the CYM v. YML case (supra). Although his Lordship echoed concern over the judgment summons procedure in Hong Kong, when comparing with the amendment of the relevant rules on judgment summons in England and Wales after Mubarak, the fact remain is that the judgment summons procedure in Hong Kong is still in place and intact although practitioners were reminded by his Lordship to also consider less draconian means of enforcement before contemplating the judgment summons option. 37. On a close scrutiny of Rule 87, it is a process for securing attendance of the judgment debtor to attend court for oral examination as to his means and, in appropriate cases, to produce books and documents relevant to his means and resources for repayment. It is, to a considerable extent, akin to those examination processes under O.48 or O.49B of the RDC/RHC. 38. The absence of ‘margin note’ does not, in my view, constitute any breach or infringement of the Respondent’s rights to a fair hearing provided that it is clear to him the subject matter of the complaint. Mr. Marwah had not been able to state with precision which rule he alleged to have been breached by the Registrar. Since the judgment summons procedure by itself is part of the civil proceedings, it is trite that non compliance with rules would not nullify the proceedings or any step taken in the proceedings, or any document, judgment or order therein (see O.2 r.1(1) of HKCP 2016). 39. As to the alleged breach of the Respondent’s rights to know the charges he faces, I am also not convinced by Mr. Marwah. In the prescribed format of Judgment Summons, there are preceding paragraphs at the beginning of it which sufficiently set out the terms of the Order in question which had been breached followed by details of the default or breaches complained of. There is no exception to the Judgment Summons issued in this case against the Respondent. Thus, the absence of any ‘margin note’ would not prejudice the Respondent in that he does not know what charges he was facing under the Judgment Summons process. Moreover, the prescribed form of Judgment Summons does not seem to require Rule 87 to be designated as a marginal note somewhere akin to the prescribed form of a usual summons. 40. Mr. Marwah in his ‘Speaking Note’ relied upon the case of Re M [1989] 2 HKLR 117. The submission made was that since judgment summons is a penal process in which the judgment debtor is at risk of imprisonment, it is imperative that in such proceedings there should be strict compliance

with the rules. 41. The case of *Re M* is an appeal against an order of committal for contempt made under O.52 r.2(2) of the RDC. The non compliance in that case was that the application for leave was not accompanied by a separate Statement so required by the rule and also the order of committal did not conform to Form No.85 of Appendix A of the Rules of the Supreme Court in that it did not specify what the contempt was. 42. The nature and importance of the Statement under O.52 r.2(2) needs no elaboration and has been discussed at length in the Hong Kong Civil Procedure 2016, para 52/2/6, at page 1010 as follows :- “The statement in support of the application is to be treated in a similar manner as an indictment in criminal proceedings having regard to the penal nature of the sanctions for contempt. At the substantial hearing the applicant cannot (except with the leave of the court) rely on any grounds not stated in the originating summons, being grounds in respect of which leave for making the application for an order of committal has been granted. The statement should state all the factual elements which, if proved, are sufficient to establish the contempt, but not the evidence in support. Great care therefore must be exercised in drafting the statement.....” 43. The learned author went on to say at page 1010 :- “The following should be included (r.2(2)) : the name and the description of the applicant; the name, the description and the address of the person sought to be committed..... the relief sought, i.e. an order for committal and/or fine (and/or sequestration if appropriate) and costs; particulars of the order or the undertaking alleged to have been breached; in case of civil contempt, the personal service thereof on the alleged contemnor (see para 52/2/8) (if personal service is unnecessary for some reason, the statement should state why : *Chou Yi Feng –v- Chou Yi Chen.*, unrep. HCA No.4393 of 2001, November 23, 2002, [2002] HKEC 1437, *Chung J.*, para 44); how and in what manner is it alleged the order or undertaking has been breached, with sufficient particularity to enable the alleged contemnor to defend himself, .....The test for the sufficiency of the statement is : ‘Does it give the person alleged to be in contempt enough information to enable him to meet the charge ?’ (*Chiltern D.C. –v- Keane* [1985] 1 WLR 619 CA at 622, per Sir John Donaldson M.R.,.....; .....”) 44. In my view, *Re M* is not analogous to the present case. For committal proceedings under O.52 of the RDC/RHC, the party initiating the committal proceedings would have to file a ‘Statement’ which, as a matter of law, is akin to an Indictment in criminal cases which the alleged contemnor has to face and answer (see *LPK v. HSH* [2012] 2 HKLRD 1031). For judgment summons procedure under Rule 87 of the MCR, the creditor would have to seek leave to issue a summons to bring the debtor to attend court and be orally examined as to his means and, if appropriate, also to produce books or documents at the hearing. As said earlier, Mr. Marwah had not referred to any rule (my emphasis) in respect of which there was non compliance in the present Judgment Summons. To the contrary, the Judgment Summons was issued in strict compliance with the relevant rule, namely, Rule 87 of the MCR. The Praecipe and the Judgment Summons were not signed by the Payee personally (my emphasis) as Mr. Marwah had so submitted simply could not stand as a contention at all. Reason is that these reciprocal enforcement proceedings were brought by the Registrar in his official capacity on behalf of the Payee under the MOREO rather than by the Payee herself in her personal capacity. This follows without the need for further elaboration that

the party signing would be the Registrar and not the Payee. 45. For the above reasons, I find there was no irregularity in respect of the Judgment Summons. Criminal Nature of Judgment Summons 46. The submission made was that the Judgment Summons proceedings are 'criminal proceedings' for the purposes of Articles 10 and 11 of the BORO. The case of *Koon Wing Yee v. Insider Dealing Tribunal* [2008] 11 HKCFAR 170 was cited and the common law privilege against self-incrimination was referred to in Mr. Marwah's Supplemental Submissions. 47. The whole issue which the Respondent was trying to bring out, as I see it, is that whenever proceedings which carry punitive sanctions irrespective of whether they are civil or criminal by nature, it should not undermine one's privilege against self-incrimination. 48. Referring to the case of *Mubarak v. Mubarak* (supra), the English Court of Appeal had held that the previous process of judgment summons that had been practised was not compliant with the European Convention of Human Rights ("ECHR"). At paragraph 36 of the Judgment where Thorpe LJ said :- "However, an application under the Act may originate in family proceedings, it is clearly a procedure subjecting the respondent to the risk of the criminal sanction of imprisonment, and it seems to me manifest that Mr. Howard is correct in his submissions as to its proper classification in terms of Convention law. The difficulties of adapting the age-old Court 51 procedure to the arrival of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 are, it seems to me, considerable. As my Lord has pointed out during the course of argument, the procedure under the Debtors Act 1869 essentially combines in one what might be said to be two distinct exercises, namely the examination of means, for which the husband respondent may well be a compellable witness; and the determination of whether he is in default and whether or not the sanction should be applied, as to which the husband is certainly not a compellable witness." 49. Following the decision of the English Court of Appeal in *Mubarak*, there were amendments to the Family Procedure Rules 2010 ("FPR") in England and Wales. Rule 33.14(1) now provides that no person may be committed on an application for a judgment summons unless the judgment creditor proves that the debtor :- "(i) has, or has had, since the date of this order the means to pay the sum in respect of which the debtor has made default; and (ii) has refused or neglected, or refuses or neglects, to pay that sum." 50. Further, Rule 33.14(2) now made it explicit that the debtor may not be compelled to give evidence. 51. The English Court of Appeal in the case of *Prest v. Prest* [2015] EWCA Civ 714, which is a recent decision few months ago on 7 July 2015, where Lord Justice McFarlane discussed at length the common law development of the judgment summons procedure after *Mubarak* :- "53. In the course of submissions we were taken to a number of authorities relating to the use of an application for a judgment summons under the 1869 Act, s 5, in matrimonial proceedings. As is well known, this court in the case of *Mubarak v. Mubarak*

[2001] 1 FLR 698 identified the difficulties involved in adapting the judgment summons procedure to the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. Notwithstanding the criminal nature of the proceedings, the judgment summons process at that time made no reference to the criminal standard of proof, required individuals to incriminate themselves, placed the burden of proof on the

person facing committal and seemingly muddled the separate processes of undertaking a means enquiry and of committal proceedings. In consequence the court in Mubarak predicted that the practical effect of these difficulties would be to render the Debtors Act 1869 largely obsolete as a means of enforcement in matrimonial proceedings. 54. As a consequence of the decision in Mubarak the relevant court rules were amended and now appear in the form set out in FRP 2010, r 33.14 (see paragraph 11 above). Counsel have drawn attention to three authorities relating to the judgment summons process subsequent to these amendments : Zuk v. Zuk [2012] EWCA Civ 1871; [2013] 2 FLR 1466; Bhura v. Bhura [2012] EWHC 3633 (Fam); [2013] 2 FLR 44; and Mohan v. Mohan

[2013] EWCA Civ 586; [2014] 1 FLR 717. Each of these authorities contains dicta which, with respect, I consider should be treated with a substantial degree of caution. The relevant passages are, firstly, in Zuk at paragraph 19 where Thorpe LJ said : “19. However, all that said, where the order which the creditor seeks to enforce is a lump sum order, the judgment creditor starts from the strong position that the order itself establishes, either expressly or implicitly, that the payer had the means to pay at the date the order was made. As my Lord, Patten LJ, put it in argument, perhaps at that stage the evidential burden passes to the debtor, whilst not of course undermining the obligation on the creditor to discharge the burden of proof. Plainly in a case where there has been some major and unforeseen financial development which removes from the payer the ability to pay which he had at the date of order, the ordinary expectation is that he would be the applicant to the court seeking the variation of the order either under the limited powers of the court to revisit in the light of some volcanic development or perhaps simply to seek some relief by way of deferment of the date of payment or perhaps future payment by instalments. So although of course the rule is and must remain that the burden of proof rests on the applicant, I think in a case such as this that burden is lightly discharged and an evidential burden may switch to the debtor.” In Bhura at paragraph 13, where Mostyn J said : “Stated shortly it seems to me that the applicable principles are these : (i)..... (ii)..... (iii).... (iv) It is essential that the applicant adduces sufficient evidence to establish at least a case to answer. Generally speaking, this need not be an elaborate exercise. Proof of the order and of non-payment will likely give rise to an inference which establishes the case to answer. (v)..... (vi) If the applicant establishes a case to answer an evidential burden shifts to the respondent to answer it. If he fails to discharge that evidential burden then the terms of s 5 will be found proved against him or her to the requisite standard.” And in Mohan, at paragraph 45 where Thorpe LJ said : “.....the wife’s advisers might have....concluded that....the only effective remedy was the immediate issue of a summons under the Debtors Act. Very little evidence would have been necessary from the wife in support...The reality is that if he attended [the summons hearing], although not compellable, he would have been obliged to proffer explanation and excuse.” 55. The collective professional experience of Thorpe LJ and Mostyn J in these matters makes me most hesitant to express a contrary view, but my reason for advising caution concerning this set of observations is that they each suggest that, in the course of the criminal process

that is the hearing of a judgment summons, it is simply sufficient to rely upon findings as a wealth made on the civil standard of proof in the original proceedings and that those findings, coupled with proof of non-payment, is sufficient to establish a 'burden' on the respondent which can only be discharged if he or she enters the witness box and proffers a credible explanation. The facts of each case will differ, and the aim of Thorpe LJ and Mostyn J in envisaging a process which is straightforward and not onerous to the applicant is laudable, but at the end of the day this is a process which may result in the respondent serving a term of imprisonment and the court must be clear as to the following requirements, namely that : The fact that the respondent has or has had, since the date of the order or judgment, the means to pay the sum due must be proved to the criminal standard of proof; The fact that the respondent has refused or neglected, or refuses or neglects, to pay the sum due must also be proved to the criminal standard; The burden of proof is at all times on the applicant; and The respondent cannot be compelled to give evidence.” 52. Having said, Order 90A of the RDC (Proceedings Concerning Judgment Summons) in Hong Kong sets out the definition of 'judgment summons' (O.90A r.2(1)), the procedural aspects of such process (O.90A r.2(2) to (4)) and the powers available to the Court (i) upon hearing of the judgment summons (O.90A r.2(5)) and; (ii) after an order of commitment was made (O.90A r.2(6)). The provision which provides the Court with the power to make an order of commitment is under O.90A r.2(5)(c) where it said :- “(5) On the hearing of the judgment summons the judge may (my emphasis) - where the judgment debtor, having been ordered under subparagraph (b) to attend at a specified time on a specified day, fails to do so, or where the judgment debtor attends, but fails to show cause why an order of commitment should not be made against him, make an order for the commitment of the judgment debtor.” 53. In my view, the discretionary powers of the court to make an order of commitment coupled with the power to, in appropriate cases, suspend execution of the order of commitment on terms, if such an order was made, have had a neutralizing effect for a civil process of enforcement to carry with it somewhat akin to criminal sanction or penalty of imprisonment. Bearing in mind the serious consequences which might follow, it has long been the Court's views that judgment summons is only a remedy of last resort. 54. Back in 2002 in the case of X v. Y (FCDJ 536/1997), His Honour Judge Gill said :- “26. To incarcerate a judgment debtor is a remedy of last resort. As Nazareth NPJ said in Gray v. Servino, FACV 8 of 2001, 'In family cases it should be the very last resort.'. I take that to mean reserved for the debtor who has shown contumelious disregard for his court-ordered obligations to those dependent on him.” 55. Thirteen years later in the recent case of BT v. YHK (FCMC 943/2011), date of judgment : 29 May 2015, Her Honour Melloy sets out the law on judgment summons, inter alia, as follows :- “The law on Judgment Summonses 7. Turning next to the law on judgment summonses. The judgment debtor is required to show cause. He has to show the court why he should not be committed to prison for contempt. The court is to ascertain whether he had the ability to make the payments ordered and whether he has wilfully failed to do so (reference Ellis v. Ellis

[2005] EWCA Civ 853). The judgment creditor needs to prove this beyond reasonable doubt. Mubarak v. Mubarak [2007] 1 WLR 271 is the case in question. Further, it is accepted that a judgment summons like all proceedings for contempt is a remedy of last resort and, particularly so, in the Family Court, reference CYM v. TML [2013] 1 HKLRD 701, the Court of Appeal decision. 8. The court has the power to commit a judgment debtor to prison certainly for up to 3 months and, arguably, for longer, or to commit suspended upon payment of the outstanding debt, either in its entirety or by instalments, or to adjourn sine die with liberty to restore. 9. When considering the possibility of imprisonment, the court is bound by the claims made in the original judgment summonses. In other words, the court looks at the amount that the judgment creditor says it is owed at that date and the judgment debtor is put to strict proof in relation to those amounts. If the court is considering the possibility of making a new order in which the judgment debtor is, for example, asked to pay by instalments, then it is possible to calculate the outstanding amount due up-to-date or to remit or suspend or in some other way to vary the amount owed. 10. ....” 56. Whilst amendment somewhat similar to those in the England and Wales has yet to be seen in our rules on the judgment summons process of enforcement, I find no basis for the Court not to accept such process of enforcement if they are properly taken out under the existing rules and procedure. 57. In my view, if there are any potential problems on whatever issues arising from the legislation, it could only be tackled by legislative amendments rather than by judicial restraint. As I said earlier, the Bill of Rights compliant issue only came about from the obiter dicta of Hon Lam VP in CYM v. YML (supra). Through the use of discretionary powers of the Courts under the judgment summons procedure ((O.90A r.2(5) and (6)), along with the 4 safeguards set forth by Lord Justice McFarlane in Prest v. Prest (supra), I believe any potential problems arising could have been resolved, to the very least temporarily, and not for the Court to put a complete halt to the judgment summons process of enforcement for reason of ‘irregularity’ as the Respondent now submitted. 58. The DOJ went further in their Second Legal Submissions at paragraph 11 made submission that the process of committal under Order 90A rule 2(5) (c) could be procedurally separated from the other provisions of Order 90A, of which are essentially civil in nature and that the applicable standard of proof for those other provisions are the civil one. At this stage and for this Judgment, I do not intend to venture into the severability of O.90A rule 2(5)(c) from other provisions of Order 90A for the judgment summons enforcement process nor do I have to go into details as to standard of proof. Both English and Hong Kong cases have already sufficiently set out the standard of proof in judgment summons process required of the judgment creditor is that of beyond reasonable doubt. What really needs to be tackled is the risk of self incrimination; possibly embraced within the existing rules and procedure of the judgment summons process; in respect of which could only be fully resolved through legislative process rather than judicial intervention or restraint. 59. For all the above reasons, I find the Respondent’s Regularity Challenge also fails. Decision of the Court 60. In my decision, the Respondent’s SA Summons must fail and be dismissed. Costs 61. Taking into account the neutral stance of the DOJ in respect of the Respondent’s SA Summons, it is fair and

reasonable not to make any costs order. 62. I will so order accordingly. Hearing of the Judgment Summons 63. Following this decision, I now direct the Judgment Summons dated 22 May 2012 be restored for a call over hearing on 21st March 2016 at 2:30 p.m..

## Orders

64. I now make the following Orders :- The Respondent's (Payer's) Summons dated 14 July 2015 be dismissed; The Judgment Summons dated 22 May 2012 be restored for hearing on 21st March 2016 at 2:30 p.m.; There be no Order as to costs of the Respondent's (Payer's) Summons dated 14 July 2015 including any costs reserved. 65. Last but not least, I wish to express my gratitude to Counsel for their assistance in this case. (George Own) Deputy District Judge Department of Justice for the Registrar, on behalf of the Petitioner (Judgment Creditor) under the Maintenance Order (Reciprocal Enforcement) Ordinance, Cap.188 Mr Shaphan Marwah instructed by Messrs. Gall, Solicitors for the Respondent (Judgment Debtor)

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Prepared on 26 October 2026 · Esheria