

FCMP 143/2016
[2018] HKFC 139

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
MISCELLANEOUS PROCEEDINGS NO. 143 OF 2016**

BETWEEN

D,A

Applicant

and

SJR

Respondent

Coram: HH Judge C.K. Chan in Chambers (not open to public)

Date of Hearing: 16 August 2018

Date of Judgment: 21 August 2018

J U D G M E N T (O N C O S T S)

1. This is a hearing on costs after the settlement of the Applicant (“the mother”)’s claim for maintenance for the daughter (“S”) against the Respondent (“the father”). The mother asks for costs of the proceedings whilst the father resists by saying that there should be no order as to costs.

Background

2. The mother is a Thai national. In about 2010, she met the father, who was and still is an expatriate Englishman working in the construction field in Hong Kong. From their romantic relationship and outside wedlock, S was born in 2012. The parties' relationship started to deteriorate in 2015 which led to their eventual separation in 2016. On 12 July 2016, the mother issued an originating summons applying for S' maintenance under section 10 of the *Guardianship of Minors Ordinance, Cap.13 ("GMO")*.

3. The parties went through a Financial Dispute Resolution ("FDR") hearing before HH Judge Melloy which was not successful and the case was therefore transferred to my court for further handling. At a Pre-trial hearing ("PTR") before me on 18 May 2018, the parties finally came to a settlement on the terms that the father shall pay a monthly sum of \$75,000 with \$67,000 as S' maintenance and \$8,000 as a carer's allowance for the mother. In addition, the father also agreed, by way of undertakings, to pay the tuition fees, school bus fees, extra-curricular activities expenses, medical insurance premiums and the future rental deposits and moving costs. However, the parties failed to reach an agreement on the costs of the proceedings, which subject was therefore adjourned to today for argument.

Discussion

4. Mr. Lung, counsel for the father has helpfully set out in his written submission the list of costs orders that needed to be decided by

this court. Broadly speaking, there are 3 categories of costs orders that are the subjects of today's hearing:

- (1) 7 costs orders relating to the Originating Summons ("OS");
- (2) 4 costs orders relating to the Interim Maintenance Orders ("IMO"); and
- (3) 1 costs order relating to the father's application for schooling and variation of IMO ("the father's summons").

Legal Principles

5. In considering the issue on costs, the starting point must be O.62 r.3 (2) of the *Rules of District Court* ("RDC"):

"(2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings (other than interlocutory proceedings), the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs." (underline added)

6. Three things are clear from the above rule:

- (1) Costs are awarded at the court's discretion;
- (2) The starting point should be costs to follow the event; and
- (3) The starting point can be deviated from if there are special circumstances to justify such deviation.

7. I am also bound by the case of *L v C* (unreported, CACV 169/2006, date of Judgment: 19 March 2008) in which Yuen JA set out the relevant principles on costs in matrimonial cases at para 23 of the judgment as follows:

“23. As a matter of law, it is clear that costs are in the court’s discretion. Pointers as to how that discretion should be exercised include the following:

- (1) in family cases, as in others, costs should normally follow the event;
- (2) however because of the special dynamics of family litigation (e.g. where the case involved children, or where financial resources were inadequate to meet the needs of both parties, etc.), the discretion may be broader than in civil matters generally (*Gojkovic v Gojkovic* [1991] 2 FLR 233, *F v F (No.2)* [2003] 3 HKLRD 977); these special dynamics do not however apply to the present case;
- (3) the court also retains a discretion to deprive successful litigants of costs under the *Elgindata* principles (*In re Elgindata Ltd (No.2)* [1992] 1 WLR 1207);
- (4) where a litigant succeeds on appeal but only on a new point, the court can deprive him of the costs below (*Farquharson v Morgan* [1894] 1 QB 552) or even order him to pay those costs (*Yip Lai Fong v Sin Tung Hing* [2004] 3 HKLRD 230), and the court can deprive him of the costs of appeal (*Chard v Jervis* (1882) 9 QBD 178).”

8. Although *L v C* actually concerns with matrimonial proceedings, there is no dispute that the same principles are equally applicable to family proceedings.

My Views

9. I shall first deal with the costs of the father’s summons.

10. In the summons, the father asked for directions on S’ schooling, namely to change it from the Hong Kong International School

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B to an EFS school. He also asked for a downward variation of the IMO.
C The father later withdrew the said summons. I do not see any special
D reasons for costs not following the event. I am only dealing with the
E liability on costs. The fact that not very substantial amount of costs had
F been incurred, even if true, is totally irrelevant. I am of the firm view
G that the mother should be given the costs of the father's summons,
H including all costs reserved, if any, with certificate for counsel and to be
I taxed if not agreed. There will also be legal aid taxation in respect of
J her own costs.
K

L
M 11. As to the other 2 categories of costs orders, it is my view
N that the IMO was part and parcel of the main proceedings and therefore, I
O will deal with the costs of the OS and IMO together.
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R 12. I note that the mother, by instituting the OS, has
S successfully obtained, albeit by consent, a maintenance order in favour of
T S and herself (as carer of S) in the monthly sum of \$75,000. Therefore,
U the mother should be regarded as the *prima facie* winner of the litigation
V and should therefore be entitled to the costs of the proceedings. The
issue now is whether there are any special circumstances justifying the
deprivation of her costs.

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R 13. One of the main arguments of the father is that during the
S FDR hearing before Judge Melloy on 12 February 2018, the monthly
T sum of \$75,000 had already been offered but was unreasonably refused
U by the mother. Therefore, not only that she should be deprived of any
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costs after that date, she should also be required to bear the father's costs as well.

14. Mr. Hughes, counsel for the mother objects by saying that anything said or done during the FDR hearing were privileged and should therefore, not to be relied upon at this hearing. Mr. Lung for the father did not formally concede on the point but was prepared to rely on a subsequent Calderbank letter dated 13 March 2018 instead.

15. I have no doubt that Mr. Hughes' submissions must be right. The purpose of conducting a FDR is for the parties to discuss an amicable resolution of their dispute. Any options for settlement could be put up for negotiation without the fear that they would be revealed in subsequent proceedings. Therefore, anything said or done during such negotiation must be privileged from future disclosure or else, no one will dare make any offers or counter offers towards such a settlement. In these circumstances, it is my ruling that the father could not rely on his offer made at the FDR hearing for the purpose of today's argument.

16. Having said that, I still have to consider the father's Calderbank letter dated 13 March 2018.

17. By reading the said letter (WP Bundle p.33), it may be true to say that the father did make an offer of \$75,000, together with other undertakings, to settle the mother's claim. However, he refused to make any offer towards the costs of the mother. He asked for no order as to costs save for legal aid taxation. In my view, the next and more pertinent question to be asked must be: is such an offer from the father reasonable in the circumstances of this case?

18. The answer must be no. One undeniable fact is that there has never been any such offer before 13 March 2018. In other words, the mother had to come to court in order to get such an order. I see no valid reason to deny the mother of her costs incurred at least up to that date. Of course, if the father has included the mother's up to date costs in his offer but was unreasonably refused, then it will be open to him to argue on his entitlement to any costs incurred thereafter. But without such an offer on up to date costs, the mother was perfectly entitled to reject the father's then offer.

19. The next argument put forward by Mr. Lung was that the mother should have accepted the offer of \$75,000 but leave the issue on costs to be decided by this court.

20. In my view, the mother was clearly entitled to the costs up to the date of offer and there was no reason for this issue to be left open for another round of argument before the court. Moreover, I note from a letter issued by the mother's solicitors on 6 April 2018 (WP Bundle, p.43), such an offer was actually made by the mother which was accepted in the father's letter dated 10 April 2018 (WP Bundle, p.46). Therefore, it is not true to say that the mother has not made such an offer for costs argument, which in my judgment was not really necessary.

21. During counsel submissions, much time has also been spent on the issue of conduct. There were quite a large number of allegations and counter-allegations on the parties' respective conduct. I must say that it is an impossible task for this court to make a ruling on those conduct as I was not the docket judge who dealt with this case prior to

the PTR hearing and more importantly, without a full hearing on the evidence, I am simply not in a position to rule on those factual disputes. Having said that, I would simply make one further comment here and that is, on a cursory reading of the allegations on the mother's "conduct", I am not convinced that, even if they can be proved, they are serious enough to justify a departure from the usual order of costs following event.

22. The last argument of the mother was that even if the father should be entitled to some of the costs, but in view of the huge financial disparity between the parties, the court should still rule in her favour on the issue of costs, especially after taking the best interest of the child into consideration. In view of the above discussion, I think there is no need to go into a detailed discussion on this topic, except to say that I am satisfied that there does exist such a huge disparity in the financial resources of the parties, I am prepared to exercise my discretion to award costs to the mother even if (which is not the case here) I should find that the mother has unreasonably refused the father's Calderbank offer.

Conclusion and Order

23. Based on the above reasons, I am satisfied that the mother is entitled to the costs of the OS, IMO and the father's summons, including all costs reserved, to be taxed if not agreed, with a certificate for counsel. There shall also be legal aid taxation in respect of the mother's own costs.

Costs of this hearing

24. The costs of this hearing, including all costs reserved, with certificate for counsel should also be given to the mother, to be taxed if not agreed. There shall also be legal aid taxation. This will be in the form of an order *nisi* to be made absolute within 14 days from the handing down of this judgment.

C.K. Chan
District Judge

Representation:

Mr. Sebastian Hughes, instructed by Messrs. Payne Clermont Velasco, Solicitors, for the Applicant

Mr. Vincent Lung, instructed by Messrs. Tang, Wong & Chow, Solicitors, for the Respondent