

FCMC 11432 / 2018
[2023] HKFC 198

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
MATRIMONIAL CAUSES
NO. 11432 OF 2018**

BETWEEN

Ma Ching Yeung Philip Petitioner

and

Chin Wai Yee Winnie Respondent

Coram: Her Honour Judge Elaine Liu in Court

Dates of Hearing: 4, 5 and 16 October 2023

Date of Judgment: 24 November 2023

JUDGMENT

**(Committal / Breach of LCA Order /
Ability to Pay / Penal Notice)**

A A. THE APPLICATION

B 1. This is the Respondent's ("W") application for an order of
C committal of the Petitioner ("H") for civil contempt of court pursuant to
D Order 52, Rules of the High Court.

E 2. The allegation made by W is that H has failed to pay her the
F litigation costs allowance ("LCA") in breach of paragraphs 1, 2 and 3 of
G the order made by DDJ R. Chow (as he then was) dated 12 August 2022
H ("LCA Order").

I 3. The undisputed terms of paragraphs 1 to 3 of the LCA Order are
J as follows:

J "1. The Petitioner do pay the Respondent a monthly sum of
K HK\$350,000 as litigation costs allowance to cover the
L Respondent's legal costs from 20th August 2021 until the end of
M the FDR hearing or further order;

L 2. The first aforesaid monthly payment shall be paid by the
M Petitioner to the Respondent on or before 20th August 2022 and
N thereafter on or before the 20th day of each month;

N 3. The Petitioner shall pay the Respondent the sum of
O HK\$4,200,000 as the aforesaid monthly payments between 20th
P August 2021 and 19th August 2022 within 28 days from the date
Q of this Order;"

P 4. A sealed copy of the LCA Order endorsed with a Penal Notice
Q has been personally served on H on 13 January 2023.

R 5. The parties admitted¹ that up to 7 July 2023, the outstanding sum
S of LCA (excluding interest) is HK\$6,717,500².

T ¹ Admitted Facts dated 11 September 2023 ("Admitted Facts").

U ² HK\$4.2 million (LCA Order §3) + HK\$3.85 million (HK\$350,000 x 11 months under LCA Order §1
V for 20 August 2022 to 21 June 2023) Less HK\$1,332,500 (payment from sale proceeds of a painting).

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B 6. In this connection, I have referred the parties at the beginning of
C the trial to the following observations of the Court of Appeal in H’s
Renewed Application for leave to appeal against the LCA Order³:

D “Having found the sum of HK\$5.89 million to be reasonable,
E and having taken the view it could take a longer time for the case
F to reach the FDR hearing, he *reduced* the monthly sum sought
G by the Wife from HK\$420,000 to HK\$350,000. There is no
reason for reading the order as an open-ended order for the
Husband to pay HK\$350,000 per month to the Wife as litigation
funding (until the end of the FDR hearing) *in excess* of HK\$5.89
million.”

H 7. After an opportunity to take instruction, Mr Jeffery Li (together
I with Ms Elizabeth Lee⁴) for H, confirmed that H did not seek to amend the
J Admitted Facts. In other words, H admitted that the LCA Order was not
subject to a ceiling of HK\$5.89 million.

K 8. It was agreed by the parties at their closing submissions that as at
L 16 October 2023, the outstanding balance of H’s payment obligations
M under the LCA Order was HK\$7,992,804.60 which includes outstanding
N principal balance of HK\$7,417,500.00 and outstanding interest of
O HK\$575,304.60. The breakdown is set out in the Schedule to this
Judgment.

P 9. H further admitted that:

- Q (1) he is fully aware that he has to comply with the LCA Order,
R and

S
T ³ [2022] HKCA 1891 [20.1].

U ⁴ Ms Lee acts for H on a complimentary basis.
V

(2) he has not complied with the LCA Order in whole.⁵

10. The broad issue in dispute is whether H’s non-compliance was “accompanied by a state of mind necessary to establish punishable contempt”, that is stage three of the process⁶ summarised in *Kao Lee & Yip v Koo Hoi Yan*⁷.

11. After W’s oral testimony and having heard both parties’ submissions, I ruled that W established a *prima facie* case for H to answer. H elected to give evidence. This court then received the evidence in H’s 9th Affirmation and his oral testimony at court.

B. RELEVANT BACKGROUND

12. The parties have a long marriage of about 23 years. They have 3 adult children who are studying or living abroad.

13. H was born into a very wealthy family. His father had established a successful business in land development and banking. Upon the death of his father in 1980s, substantial wealth passed on to H and his siblings. The family wealth is held in various private companies, including KC.

14. H declared in his Form E filed on 14 May 2019 that he had asset worth over HK\$370 million, of which HK\$304 million was attributable to his 25% shareholding in KC. H also holds share in TSLD, a listed land

⁵ Admitted Facts [4(5)] and [4(6)].

⁶ The three-stage test for a committal for civil contempt due to the failure to comply with a court order as summarised in *Kao Lee & Yip v Koo Hoi Yan* (2009) 12 HKCFAR 830 at [21] are (1) to construe the relevant court order so as to ascertain its meaning and operation; (2) to determine whether the defendant has in fact complied with the order as so construed; and (3) to consider whether any failure to comply was accompanied by the state of mind necessary to establish punishable contempt.

⁷ (2009) 12 HKCFAR 830.

A development company of which he is a Deputy Chairman and Executive
B Director.

C 15. Since marriage, W has been a housewife and was financially
D dependent on H.

E 16. Shortly after the petition, the parties agreed the terms of W's
F maintenance pending suit ("MPS") and the Children's interim
G maintenance ("Interim Maintenance"). A consent order was made on
H 30 November 2018 ("Consent Order") under which H shall pay W the
I MPS in a monthly sum of HK\$120,000. It was recorded in the Consent
J Order that H undertook to settle, among others, the credit card expenses of
K W and the Children up to a maximum limit of HK\$300,000 and
L HK\$60,000 respectively per month.

M 17. On 12 August 2022, W successfully obtained the LCA Order.
N Dissatisfied with the LCA Order, H sought leave to appeal against it
O ("Leave Application") on 25 August 2022. His application was dismissed
P on 13 October 2022.

Q 18. H then made a renewed application to the Court of Appeal on 26
R October 2022 for leave to appeal against the LCA Order and for an order
S to stay the execution of the LCA Order ("Renewed Application"). These
T applications were also dismissed on 19 December 2022.

U 19. In the Leave Application and the Renewed Application, H had
V advanced the argument that he was not able to pay the LCA Order. His
argument was rejected by both courts.

20. H failed to pay under the LCA Order save a sum of HK\$1,332,500 on 23 June 2023 from the sale proceeds of a painting.

21. W took out the application for leave for committal against H in January 2023 to enforce the LCA Order.

C. W'S CASE

22. W's case is that H has or has had the ability to pay the LCA Order, but wilfully refused to do so. The Leave Application and the Renewed Application were his delaying tactics. Since the LCA Order, H has enjoyed the use of a brand new Porsche 911 GT4.0 in early 2023 which cost at least HK\$3.6 million, and has continued to enjoy the exclusive use of a Porsche GT3, a Porsche GT3R, two Bentleys, a Tesla and two 7-seated vans. Further, H donated or caused his resources to donate to TWGH in his personal name and as one of its board members.

23. In the closing submissions, Ms Anita Yip SC (together with Ms Lily Yu) for W submitted that H could have deployed the following resources to meet the obligations under the LCA Order:

- (1) the stocks pledged to TSB (“Pledged Shares”);
- (2) the 48 pieces of watches⁸ listed in his 2019 Form E (“Watches”);
- (3) HK\$1.5 million received from KC on 11 October 2022 (“HK\$1.5 million”)

⁸ including Patek Philippe, Cartier and Rolex watches.

(4) the TSB overdraft facilities made available to H and ML (H's wholly owned company) ("**TSB OD Lines**");

(5) borrowings from KC ("**KC Loan**").

D. H'S CASE

24. H's primary case is that W bears the burden of proving her case to the standard of beyond reasonable doubt, but she failed to prove that H had or has had the ability to meet the payment obligations under the LCA Order. As a secondary or fall-back position, H raised the defence of "impossibility of performance".⁹

25. H contended that the bulk of his income was utilised to pay the substantial amounts of MPS and Interim Maintenance. He has been living beyond his means since the Consent Order was in place. He has resorted to loans to cover the shortfall.

26. He had also used his maximum borrowing ability. His request for a further loan from KC was refused. He does not have the ability to borrow.

27. He does not own the Cars. Most of his assets including the Watches and the Pledged Shares are illiquid and/or subject to pledge.

28. His 25% shares in KC was subject to transfer restriction under his late father's Will and the articles of association of the company. He had

⁹ H's opening submission [9].

written to the members of KC and eligible members of his extended family, inviting them to purchase his shares, but received no positive response.

29. He only donated to TWGH a sum of HK\$3,099.37 out of his own funds. The other donations were made as the representative or agent of the donors.

E. RELEVANT LEGAL PRINCIPLES

30. It is trite that¹⁰:

- (1) In an allegation of civil contempt, an applicant is required to strictly prove both the conduct and the state of mind of the respondent to the criminal standard, that is, beyond reasonable doubt. It is sufficient if the body of evidence relied on, viewed as a whole, satisfies the burden. An applicant is not required to prove every single aspect of a case to the required standard.
- (2) It is sufficient to prove that the conduct was intentional and that the respondent knew of all the facts which made it a breach of the order.
- (3) It is not necessary to prove that the respondent intended to disobey the order (i.e. contumacious).

¹⁰ *Kao, Lee & Yip v Koo Hoi Yan, BT v CBY (Committal for Contempt)* [2020] 3 HKLRD 287, [2020] 6 HKC 196, [2020] HKCA 426, at [3]; *YBL v LWC* [2016] 1 HKFLR 531 [112]; *BT v YHK, supra* [6.2] - [6.10]; *Jeanny Helena Franslay v Fung Ariel Mei Shan* [2021] HKCFI 258, [37(7)].

A (4) Disobedience that are causal, accidental and unintentional A
B will not amount to a contempt. The plea that one has “done B
C his best” does not show that the failure was “causal or C
D unintentional or accidental”.

E (5) In the case of non-payment of a monetary sum under an E
F order, the court will consider whether the respondent to the F
G committal application “has, or has had” the means to pay. G

H (6) The relevant time to consider whether a party was in H
I contempt is the period from the judge’s order to pay until I
J the stipulated deadline (and a reasonable short period J
K thereafter which may be needed to prepare for the K
L committal application).

M 31. The evidentiary principles applicable to a contempt proceedings M
L were summarised by G Lam J (as the learned JA then was) in *Jeanny L
M Helena Franslay v Fung Ariel Mei Shan*¹¹ as follows:

N “37. The evidentiary principles applicable in these N
O proceedings are not in dispute:

O (1) The burden lies on the plaintiff to prove the alleged O
P contempt beyond reasonable doubt: *Kao, Lee & Yip v P
Q Donald Koo Hoi Yan* (2009) 12 HKCFAR 830, §30.

Q (2) Whilst the defendant may bear an evidential burden in Q
R relation to particular matters he has raised to exculpate R
S himself, there is no legal burden on him to prove S
T anything affirmatively: *Concorde Construction Co Ltd v T
U Colgan Co Ltd (No 2)* [1984] HKC 253, 257; *Ip Pui Lam U
V Arthur & another v Alan Chung Wah Tang & another V
W (CACV 214/2016, 16 February 2017), §4.3.*

(3) No adverse inference against the defendant may be W
X drawn from his failure to call one or more witnesses or X
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¹¹ [2021] HKCFI 258, [37].

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adduce certain evidence: *China Metal Recycling (Holdings) Ltd v Chun Hei Han* [2018] 1 HKLRD 455, §§36-37; *Kissel v HKSAR* (2010) 13 HKCFAR 7, §82.

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(4) If by cross-examination to credit a plaintiff proves that the defendant’s evidence cannot be relied on, and he has testified that he did not do a certain act, the plaintiff does not thereby prove that he did it: *Hobbs v Tinling (CT) and Co Ltd* [1929] 2 KB 1, 21. The plaintiff has to prove affirmatively, though this may be done by inference.

(5) For an inference of fact properly to be made: (a) it must be grounded on clear findings of primary fact; (b) the inference must be a logical consequence of those facts; (c) beyond being logical, the inference must be “irresistible”, that is, it must be the only inference that can reasonably be drawn on the basis of those facts: *Winnie Lo v HKSAR* (2010) 15 HKCFAR 16, §115. The third requirement has also been expressed in other ways, such as that “the inference must be compelling – one (and the only one) that no reasonable man could fail to draw from the direct facts proved”: *Kwan Ping-bong v R* [1979] HKLR 1 at 5, or that the facts must be such as to exclude reasonable hypotheses consistent with innocence: *Nina Kung v Wang Din Shin* (2005) 8 HKCFAR 387, §185.

(6) In other words, if the court concludes from the evidence that there is more than one reasonable inference to be drawn and at least one of them is inconsistent with a finding of contempt, the plaintiff fails: *Daltel Europe Ltd v Makki* [2005] EWHC 749 (Ch), §30.

(7) The standard of proof beyond reasonable doubt does not mean that every piece of evidence that does not by itself establish a fact beyond reasonable doubt should be disregarded. It is sufficient if the body of evidence relied on, viewed as a whole, satisfies the burden: *Myers v R* [2015] UKPC 40, §46; *HKSAR v Lo Hung Kwong* [2000] 3 HKC 474, 480.

(8) In appropriate cases, proof of a fact by inference to the requisite standard may be achieved by taking various pieces of circumstantial evidence together, like cords comprised in a rope, or strands in a cable, or conveying rays of light producing a body of illumination, such that “there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion, but the whole, taken together, may

create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.”

32. The well established principle that an applicant is not required to prove every single piece of evidence in an allegation of civil contempt was also explained in the following English Court of Appeal cases.

33. In *Gulf Azov Shipping Company Limited v Chief Humphrey & Anor*¹², it was held that:

“[18]... It is not right to consider individual heads of contempt in isolation. They are details on a broad canvas. An important question when that canvas is considered is whether it portrays the picture of a Defendant seeking to comply with the orders of the Court or a Defendant bent on flouting them. It is right that the individual details of the canvas should be informed by the overall picture. But, having said that, each head of contempt that has been held proved must be established beyond reasonable doubt.”

34. In *JSC BTA Bank v Ablyazov*¹³, Rix LJ has said that:

“[51] ... it is not true that every single aspect of a criminal case has to be proved to the criminal standard, although of course the elements of the offence must be.

[52] It is, however, the essence of a successful case of circumstantial evidence that the whole is stronger than individual parts. It becomes a net from which there is no escape. That is why a jury is often directed to avoid piecemeal consideration of a circumstantial case ... The matter is well put in *Shepherd v R* (1990) 170 CLR 573 ... :

‘... the prosecution bears the burden of proving all elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact – each piece of evidence – relied upon to prove an element by inference must itself be proved beyond reasonable doubt. Intent, for example, is, save for statutory exceptions, an element of every crime. It is something which, apart from admission, must be proved by inference. But the jury may quite properly draw the necessary inference

¹² [2001] EWCA Civ 21.

¹³ [2012] EWCA Civ 1411.

having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately.”

35. The learned author of *Arlidge, Eady & Smith on Contempt* (5th edition) summarised in [12-52] as follows:

“In *JSC BTA Bank v Ablyazov*, the Court of Appeal stressed that, although the criminal standard of proof would apply on an application for committal, that did not require every single aspect of a case to be proved to that standard, but only the necessary elements of the offence were so established. This was particularly so in a case based on circumstantial evidence, where the whole was stronger than the individual parts. In criminal case, proof of intent to the criminal standard could be established having regard to the whole of the evidence, whether or not each individual fact which comprised that evidence could itself be proved beyond reasonable doubt.”

36. The above approach was applied in the matrimonial context in *Re A (Abduction: Contempt)*¹⁴:

“[7] ... I do not, however, accept the additional submissions ... that the only way contempt can be proved in a case such as this is by the applicant mother adducing positive evidence to demonstrate a particular step which is available to the father. It would, as it seems to me, be sufficient for her to make the judge sure that the father could achieve the return of the child, for example, through the siblings if not through the grandfather, and she might be able to do that without calling specific evidence to refute each obstacle successively raised by the father. Nor do I think that the only way contempt could be proved is by adducing evidence that the family in Syria is ready, willing and able to assist in bringing about the return. All those facts which it might be open to the judge in an appropriate case to find proved from the surrounding evidence so that he is sure.”

37. On the defence of impossibility of compliance, it is relevant to note that the Court of Final Appeal in *Kao Lee & Yip*¹⁵ drew a distinction

¹⁴ [2009] 1 FLR 1.

¹⁵ *Supra* [56].

A between a case where compliance is impossible and a case where the
B respondent has “done his best” to comply with the order. The latter does
C not show that the failure was “causal or unintentional or accidental” and
D the respondent could be found guilty of contempt¹⁶. With respect to the
E former, Sir Brennan NPJ (as he then was) cited *Concorde Construction Co
F Ltd v Colgan Co Ltd (No 2)*¹⁷ and held that there can be no penal liability
G for a failure to perform an impossible task.

38. Mr Li also cited *Sectorguard plc v Dienne plc*¹⁸ as follows:

“33... even a mental element of that modest quality assumes that
H the alleged contemnor had some choice whether to commit the
I relevant act or omission. An omission to do that which is in truth
J impossible involves no choice at all. Failure to comply with an
K order to do something, where the doing of it is impossible, may
L therefore be a breach of the order, but not, in my judgment, a
M contempt of court.”

39. The respondent who raises a defence of “impossibility of
K compliance” shall satisfy the evidential burden. If evidence is adduced to
L show that it is impossible to comply with the order, the burden is on the
M applicant to prove that compliance was possible in the sense that the
N respondent has the choice about what to do. The following passage in
O *Perkier Foods v Halo Foods*¹⁹ was quoted in *Barclay v Barclay*²⁰:

“14. ... In *Sectorguard*, Briggs J reasoned that a person who has
O no choice, because compliance with the order is impossible,
P does not have even the modest mens rea required for contempt.
Q It is for the applicant to prove to the criminal standard that the
R respondent had the necessary mens rea. In a case where the
S respondent says that compliance was impossible, and there is
T some evidence to that effect, mens rea is in issue and it should
U be for the applicant to prove to the criminal standard that
V compliance was possible, in the sense that the respondent had a

¹⁶ *Kao Lee & Yip, supra* [55].

¹⁷ [1984] HKC 253.

¹⁸ [2009] EWHC 2693 (Ch) [33].

¹⁹ [2019] EWHC 3462 (QB).

²⁰ [2022] EWHC 2026 (Fam) [25].

choice about what to do. That result is consistent with the general rule in criminal law. (emphasis added)”

40. I consider the present application in accordance with the above principles and approaches.

F. FINDINGS IN THE LEAVE APPLICATION AND THE RENEWED APPLICATION ON H’S ABILITY TO PAY

41. H’s ability to pay the LCA is a key issue in this contempt proceeding. It was also an issue found against H in the Leave Application and the Renewed Application. These findings *per se* is not sufficient to discharge W’s burden of proof in the contempt proceedings because these findings were made by the civil standard of balance of probabilities, whereas W has to prove to the standard of beyond reasonable doubt in a contempt proceedings: *YBL v LWC* [97] and [134].

G. H’S ABILITY TO PAY

42. The following properties and/or financial resources are in issue:

(1) The UK Property jointly owned by H and W. It is common ground that the UK Property is occupied by their eldest son²¹.

(2) The remaining value of the Pledged Shares, i.e. 71,893 HSBC shares and 16,000 Tencent shares held in H’s name,

²¹ H’s 9th Affirmation [21b].

and 113,200 HSBC shares and 20,000 Tencent shares held
in the name of ML.

(3) The Watches.

(4) The HK\$1.5 million.

(5) The undrawn facilities in the TSB OD Lines.

(6) The undrawn borrowings from the KC Loan.

(7) The Cars.

(8) The TWGH donations.

G1. The UK Property

43. H admitted that he has the ability to pay the LCA by selling the UK Property, a property jointly owned by him and W, and had offered to do so.

44. W refused to sell the UK Property because it is the residence of the Children when they are in the UK. W said that the Children disagreed to the sale.

45. Mr Li argued that H had the intention to pay by selling the UK Property but was prevented by W from doing so. He submitted that H's conduct is therefore "unintentional", he had "no choice at all" and "lacks

A *the requisite culpable mental state of mind to be found guilty*".²² Mr Li
B went further to argue that in the circumstances, this Court does not need to
C consider H's ability to pay through his Pledged Shares or the Watches.
D His argument was set out in paragraph 10 of his written closing
submissions as follows:

E "In other words, the Court need not even go into a consideration
F of H's ability to pay through his Pledged Shares / Watches. His
G admitted ability to pay stems from the UK Property. He
attempted to sell this to fund the LCA. The proceeds will pay off
the entire LCA. Such attempt was obstructed by W. Therefore,
it could not be said that H's breach of the LCA Order has been
"intentional" on H's part."

H 46. No authority was cited in support of the above argument. If Mr
I Li's argument is correct, it would mean that because W rejected H's
J proposal to satisfy the LCA Order by deploying a property jointly owned
K with her, this court does not need to consider the other resources of H, and
L H would be exonerated from the payment obligations under the LCA Order
M or punishment for his contempt although he could deploy other assets to
N pay the LCA. I do not see any basis in this argument and am unable to
O accept it. Further, Mr Li has not put forward any legal basis to explain why
P H could force W to sell her interest in the UK Property for the purpose of
Q funding the LCA.

R 47. This court ought to consider all the other financial resources
S available to H.

T **G2. The Pledged Shares**

U 48. H disclosed in paragraph 25 of his 9th Affirmation that,
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²² H's closing submissions [6] and [7].

- A
- B (1) the Pledged Shares are pledged with TSB as securities for
- C the TSB OD Lines;
- D (2) as of 5 July 2023, the value of the Pledged Shares is
- E HK\$19,042,856.70²³;
- F (3) as at 10 July 2023, the total outstanding balance of
- G overdraft balance owed to TSB was HK\$11,350,580.47²⁴;
- H (4) the remaining balance in the value of the Pledged Shares
- I was therefore HK\$7,692,276.23²⁵;
- J (5) the limit of the two facilities was HK\$11,400,000 (i.e.
- K HK\$5,700,000 each);
- L (6) in July 2023, there was a total of HK\$49,419.53 credit
- M remaining in aggregate for the two overdraft facilities.²⁶

N 49. H said in the affirmation that the amount of facilities available to

O him was limited to 80% of the market value of the Pledged Shares. He

P also said that in July 2023, the value of the Pledged Shares was

Q HK\$19,042,856.70. If so, the facilities' limit should be in the region of

R HK\$15.2 million but not HK\$11.4 million as stated in H's affirmation. In

S either case, the value of the Pledged Shares is higher than the outstanding

T loan.

23 HK\$9,819,776.70 (in H's personal name) + HK\$9,223,080 (in the name of ML).

24 HK\$5,669,552.19 (in H's personal name) + HK\$5,681,028.28 (in the name of ML).

25 HK\$19,042,856.70 – HK\$11,350,580.47.

26 HK\$11,400,000 – HK\$11,350,580.47.

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B 50. H further said that he was paying a monthly interest of
C HK\$60,000 for the two overdraft facilities. He needs to keep the facilities
D active because he does not have the means to repay the loan in full, and he
E can continue to use the available facilities for payment of MPS and Interim
F Maintenance as well as his daily expenses. He was aware of the risk that
TSB would terminate the overdraft facilities if he does not pay the interest.
His affirmation evidence is as follows:

G “25g. ... both overdraft facilities currently require a monthly
H interest payment of around HK\$60,000 per month, or otherwise
I I run a risk of the bank terminating the overdraft facilities and
J calling the entire outstanding balance. I need to keep the
K facilities active because I do not have the means to pay if off in
L full any time soon, and I can continue to exploit any available
M facilities towards payments of interim maintenance for [W] and
N the Children, as well as our daily expenses.”

O
P 51. H admitted that he made no mention of the pledge at all in his
Q opposition to W’s LCA application. He only disclosed the pledge in this
R committal proceedings. His explanation in the 9th Affirmation was as
S follows:

T “I had overlooked the importance of informing my solicitors and
U the Court that in or around October 2019 before the LCA
V Hearing, I was required by the bank to provide more collateral
to the overdraft facility in my personal name, and I did so by
pledging my remaining HSBC shares (which was worth around
HK\$3.92 million at the time of my Form E).”²⁷

52. Apart from the pledge, H also disclosed for the first time an oral
agreement with TSB that he would not sell the Pledged Shares (“No Sale
Condition”). H said that he could not sell the Pledged Shares before
repaying the TSB loan and he has no funds to make the repayment. He also

²⁷ H’s 9th Affirmation [12].

A said that TSB does not have the licence to trade the Pledged Shares and
B could not sell them.

C 53. Ms Yip submitted that H's assertion of inability to sell the
D Pledged Shares before repaying the TSB loan is incredible for the
E following reasons:

F (1) At law, a pledger retains the legal ownership of the
G property. He has the right to sell and transfer the good title
H to buyer subject to the pledgee's right of redemption:
*Wong Man Hon Frederick v China Times Securities Ltd*²⁸.

I (2) The value of the Pledged Shares is higher than the
J outstanding loans. H admitted that he had never attempted
K to sell the Pledged Shares. Thus, he has no basis to assert
L his inability to sell before repayment.

M (3) H agreed that the No Sale Condition is an information
N important to his financial condition. If there was such a
O condition, he ought to have mentioned it in Form E, and
P his previous affirmations, including the affirmations filed
Q in W's application for LCA. However, he had not.

R (4) H had not produced the pledge agreement. During cross
S examination, he initially claimed that he was told about the
T No Sale Condition "2 to 3 months ago", which was "about
U July this year". He never sought legal advice on the
V viability of the No Sale Condition. Later on, he changed

²⁸ HCA 2715/2016, 15 February 2017 [28].

A and said he was aware of this condition when he made the
B pledge.

- C (5) In his oral testimony, H said that selling the Pledged Shares
D is one of the options to pay the LCA when he was asked
E why he did not sell the Watches for the payment.

F 54. Ms Yip further pointed out that even if it is assumed that H could
G not initiate the sale of the Pledged Shares, he could terminate the TSB OD
H Lines or stop paying the hefty monthly interest of HK\$60,000, let TSB call
I the loan, sell the Pledged Shares, use the sale proceeds to repay the TSB
J loan, and release the remaining balance to H for the LCA payment.

K 55. H admitted that although he has never tried to terminate the TSB
L OD Lines or let TSB to call the loan by stop paying the interest, he could
M have done so if this is the last option.

N 56. Turning to H's need to keep the two facilities for payment of
O MPS and Interim Maintenance²⁹, Ms Yip pointed out that H's asserted need
P is contradicted by documentary evidence³⁰.

- Q (1) For about a year from 30 June 2022 to 9 May 2023, H did
R not use his personal OD line at all.³¹

- S (2) From 9 May 2023 to 30 June 2023, a consistent pattern
T was observed in which precise sums of cash were first
U

²⁹ H's 9th Affirmation [25g].

³⁰ W's closing submission [6.2].

³¹ C/460.

A deposited into H's personal passbook account³² and the
B exact amounts were almost immediately transferred from
C the said passbook account to his TSB personal OD account.
D The exact amounts were then paid out from his TSB
personal account.³³

- E (3) From 31 July 2022 to 30 June 2023, there has been a
F consistent pattern of receiving deposits in exact sums to
G ML's TSB OD account, and immediately after, such exact
H sums were paid out the ML's TSB OD account.³⁴

I 57. I agree with Ms Yip that H could pay the LCA by deploying the
J unencumbered value of the Pledged Shares but he did not do so.

- K (1) The value of the Pledged Shares exceeds the amount of
L outstanding facilities.
- M (2) H's assertion that he needs the overdraft facilities to pay
N the MPS and the Interim Maintenance was contradicted by
O documentary evidence on the flow of funds in the overdraft
accounts.
- P (3) Even if H's assertion of No Sale Condition is true, it does
Q not prevent him from realising the remaining value of the
R Pledged Shares by stopping to pay the hefty interest and
S terminating the facilities.

T ³² C/86-92.

U ³³ C/460-461.

V ³⁴ C/462-472.

- A (4) H accepted that it is an option to sell the Pledged Shares
B for payment of the LCA.

C **G3. The Watches**

D 58. According to Part 2.10 of H's Form E dated 10 May 2019, the
E Watches accumulated by H since 1982 has an estimated value of HK\$32.24
F million. The total purchase price was HK\$19,317,938.

G 59. In the affirmation³⁵ filed in opposition to this committal
H application, H said that:

- I (1) Since 30 March 2020, his family companies (including KC)
J raised concerns regarding his longstanding and escalating
K loans owed to them. KC requested H for repayment
L solutions.
- M (2) H had no alternative but to pledge on 30 September 2021
N all his Watches to KC as security for the loan. KC accepted
O HK\$19.32 million as the total value of the Watches.
- P (3) A KC Loan Agreement was made on 30 September 2021³⁶.
- Q (4) The loan was matured by 31 March 2023. H could not
R repay the outstanding loan of HK\$17,983,000. KC had
S taken possession of the Watches and has the full power to
T sell the Watches and use the sale proceeds to offset the
U outstanding loans owed by H.

T ³⁵ H's 9th Affirmation [22e].

U ³⁶ C/210.

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(5) He does not know whether the Watches or its sale proceeds is sufficient to offset the outstanding loans as no independent valuation of the Watches has been conducted.

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(6) He was making enquiries with KC about the intended logistics for the valuation and/or disposal of the Watches.

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(7) He offered to undertake that in the event the Watches are valued or disposed of for value higher than the loan of HK\$17,983,000, he will pay W all the remaining proceeds to be received by him to discharge the LCA Order. Yet he added that the Watches are not with him, and he is not in control of the process. (“**Offer of Undertaking**”)

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60. W submitted that the pledge of Watches is a sham for the following reasons:

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(1) The directors of KC are H’s siblings.

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(2) Before the KC Loan Agreement, H had an unsecured outstanding loan of HK\$11.343 million.

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(3) H executed the KC Loan Agreement to pledge the Watches for an increased credit line of less than HK\$9 million.

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(4) It does not make commercial sense for H to pledge the Watches worth HK\$32.24 million for an increase of HK\$9 million facility.

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(5) It does not make commercial sense for H to agree to take HK\$19.32 million as the value of the Watches without an independent valuation when he estimated in 2019 that the Watches worth a total of HK\$32.24 million.

(6) The pledge was made in September 2021, shortly after the LCA Summons in August 2021.

61. While there are suspicious features in the pledge of the Watches, there is no compelling evidence to prove that the pledge of the Watches is a sham.

62. By reasons of the following, I find that H could use the unencumbered value of the Watches to discharge his payment obligations under the LCA Order but he chose not to do so:

(1) The KC Loan was matured on 31 March 2023 with a total outstanding loan of HK\$17,983,000.

(2) The value of the Watches exceeds the outstanding loan by HK\$1.337 million when compared to the purchase value of HK\$19.32 million. Compared to H's estimated value of HK\$32.24 million in 2019, there is an excess of HK\$14.257 million.

(3) I do not accept H's bare assertion that the value of the Watches may not be sufficient to settle the outstanding

loan³⁷. In particular, H had stated on oath in 2019 that the estimated value of the Watches was appreciated by HK\$12.92 million (an increase of over 65% of the purchase price). **There is no evidence to suggest a drastic depreciation of value between 2019 and now, nor evidence to suggest that the current value of the Watches would be lower than the purchase price.**

(4) Under cross examination, H accepted that the KC Loan Agreement did not prohibit him from selling the Watches.

(5) Under cross examination, H said that it is an option to pay the LCA by selling the Watches. He did not do so because he has other options, including selling the UK Property, the Pledged Shares and the painting; and also it takes longer to sell the Watches. Later on, H retracted and said that the option to sell the Watches was only in his mind.

(6) For more than 6 months since KC has taken possession of the Watches on 31 March 2023, H had not taken constructive step to redeem the balance of the value of the Watches.

(7) He only wrote a letter to KC on 14 July 2023 (about 4 months after the taking of possession) requesting for a valuation of the Watches and then set off the outstanding loan against the value of the Watches. It is of note that

³⁷ H's 9th Affirmation [22e].

A this letter was written after the call over hearing of this
B committal proceedings in June 2023.

C (8) KC remained silent for more than 3 months from the letter.

D H took no follow up action.

E (9) I do not accept H's assertion that he is not in control of the
F process. He is legally entitled to require KC to release the
G remaining value but he had not actively pursued this right.
H The letter to KC is merely a half-hearted gesture.

I (10) H's Offer of Undertaking is half-hearted and subject to
J uncertainties. I do not accept that it can absolve him from
K being punished for a contempt of court.

L 63. At cross examination, H was put several times that he could have
M sold the Watches, repaid the outstanding loan of HK\$17.98 million to KC,
N and had a huge surplus of about HK\$14.3 million³⁸ to pay the LCA. H
O answered "*arithematically, yes*" or "*with that arithematic, yes*".

P 64. Mr Li argued that H only agreed to the statement in the context
Q of an arithmetic calculation, but not accepted that it is practically possible.
R I do not accept this argument. H himself had accepted this is an option to
S fund the LCA. I listed the evidence and reasons above to show that H was
T able to realise, or enforce his right to realise, the unencumbered value of
U the Watches for the LCA payment but he chose not to.

V

³⁸ On the basis of his estimated value in Form E.

65. The above answers of H is, in my view, an example showing that he was evasive when giving evidence. Another obvious example of his evasiveness is when he was asked about the non-disclosure of loans in his Form E:

“Q: You confirmed that these are your loans. They are your liabilities. Did you record them in your Form E dated 10 May 2019?

A: It is not on the page.

Q: Why not?

A: The thing is D and ML are my companies. I used the loans to pay all my wife’s expenses.

Q: You said in your answers that they were loans. You confirmed that they were loans. Why were they not here in your Form E dated 10 May 2019?

A: I have no answer.

Q: Are you saying that your Form E is not correct?

A: I did not say that.

Q: It is obvious. If these are loans in 2018, then in 2019, you must have recorded them in your Form E, do you agree?

A: Yes.

Q: Why not?

A: I did not record it.”

G4. The HK\$1.5 million

66. On 11 October 2022, there was a cash of HK\$1.5 million deposited into the bank account of ML³⁹. H did not use this sum to pay the LCA.

³⁹ C2/464.

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67. H's evidence at cross examination was as follows:

“Q: There was a cash deposit of \$1.5 million, where did you get the money?

A: I cannot remember, may be from KC.

Q: Could you turn up to C1/216? You have said many times this morning that KC refused to lend you further since October 2022, so your money must not be from KC?

A: I think it is dividend from KC.

Q: Why didn't you pay W?

A: I can't remember, I think this is dividend from KC. I did not pay W because I got demand from the bank.

Q: So you prioritized paying TSB than W?

A: The priority is to pay the bank over W.”

68. H received HK\$1.5 million cash deposit about 2 months after the LCA Order. This is a source of funds for the LCA payment. H prioritised his other creditor to discharging his obligations under the LCA Order. This is an evidence of his deliberate intention not to pay the LCA.

69. In *BT v CBY* (formerly known as *YHK* and also known as *YCB*)⁴⁰, the Court of Appeal found that the husband used the loans purely for his own benefit instead of paying the judgment debt is an evidence of his deliberate intention not to pay. The husband has had the means to pay the wife but he has refused to do so because he chose not to use the available funds to satisfy the debt he owes to the wife. The Court of Appeal found

⁴⁰ [2020] HKCA 426 [6.14], [6.15], [7.10].

A that there was sufficient evidence to find the husband to be guilty of
B contempt.

C **G5. The TSB OD Lines**

D
E 70. Upon the aforesaid cash deposit of HK\$1.5 million and between
F 11 October 2022 and 6 March 2023⁴¹, ML had HK\$7.2 million overdraft
G facilities with TSB, while the outstanding loan was about HK\$5.68 million.
There was thus an available overdraft facilities of about HK\$1.52 million.

H 71. H confirmed at cross examination that there was the above
I available balance of HK\$1.52 million overdraft facilities and it could be
J used to fund the LCA. He did not so because he preferred paying the other
K creditor. H's preference to other creditor is an evidence of his deliberate
intention not to pay the LCA: *BT v CBY*⁴².

L 72. H's allegation of the bank's right to reduce the overdraft facilities
M limit or require the placing of further collateral if the limit falls below 80%
N of the market value of the Pledged Shares is not relevant in the present
O context. A majority of the Pledged Shares is HSBC shares. As admitted by
H, HSBC share price was on the rise during this period.

P **G6. The KC Loan**

Q 73. Under the KC Loan Agreement, KC agreed to make available to
R H loan financings in an aggregate amount of not more than HK\$20 million

T ⁴¹ On 6 March 2023, the bank reduced the overdraft facilities limit from HK\$7.2 million to HK\$5.7 million. [C2/455].

U ⁴² *supra*

A interest free without a fixed term of repayment before the maturity date on
B 31 March 2023.

C 74. H accepted the following in his evidence:

D (1) As at the maturity date on 31 March 2023, he still had a
E balance of unused facility of about HK\$2,107,000. He
F could pay the LCA if he borrows to the maximum limit of
G this loan.

H (2) This loan was secured by a pledge of the Watches.

I (3) KC's refusal to lend him any more money since August
J 2022 was a breach of KC Loan Agreement.

K (4) He was entitled to enforce his right under the KC Loan
L Agreement but he only made some verbal demands, and
M nothing further.

N 75. H was legally entitled to borrow, and enforce his right to borrow,
O the unused facility under the KC Loan Agreement. H could have used this
P unused facility to meet his payment obligations under the LCA Order but
he did not do so.

Q **G7. The Cars**

R 76. H did not deny that he has the use of eight cars, including a
S recently purchased Porsche 911 GT3 4.0⁴³. The Cars are registered in the

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U
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⁴³ According to W, the marked price of Porsche 911 GT3 4.0 posted on the website of Porsche is over HK\$3.6 million.

A name of companies in which H is either a minority shareholder and/or one
B of the directors. Seven of the eight cars mentioned by W were purchased
C pre-LCA Order.

D 77. There is no evidence that H has the right to sell any of the Cars
E for the LCA payment.

F **G8. TWGH Donation**

G 78. According to the annual report of TW Group, H made a donation
H of over HK\$9 million in the year 2022 – 2023.

I 79. H said that he was chosen by his wider family to be a
J representative to take up the chairmanship of the TW Group. Most of the
K donations were funded by MEL or TSLD or other members of his wider
L family. He had only donated a total of HK\$3,099.37 with his own funds.
M He was a representative of the donors. He produced receipts issued to MEL
N or TSLD for their donations in 2020 and 2021. He also produced a
O breakdown of the donation for 2022/2023, which recorded that the receipts
P of a majority of the donation were issued to MEL or TSLD.

Q 80. No irresistible inference could be drawn from the TWGH
R Donation that H has had the means to pay the LCA but chose not to.

S **G9. Summary**

T 81. In summary, I find that at the relevant time, H has or has had the
U ability to pay the LCA or part of it as follows:
V

A (1) He could have terminated the TSB OD Lines (instead of
B paying a monthly interest of HK\$60,000) and used the
C remaining balance of the value of the Pledged Shares to
D pay or partially pay the LCA.

E (2) He could have sold the Watches or some of them before
F the pledge. After maturity of the KC Loan Agreement,
G he could demand the prompt release of the remaining sale
H proceeds of the Watches but he had not done so. His letter
I in July is an half-hearted gesture.

J (3) He could have used the HK\$1.5 million received in
K October 2022, but he chose to prioritise other creditor to
L W.

M (4) He could have utilised the available balance of facility
N under the KC Loan Agreement. He is entitled to enforce
O his right to request for the borrowing of the available
P balance, but he did not do so.

Q 82. I am satisfied that there is sufficient evidence to establish that H
R has the requisite state of mind and he has committed a contempt of court
S in breach of the LCA Order.
T

U **H. SERVICE OF PENAL NOTICE – PUNISHMENT**
V

83. Mr Li submitted that H should not be punished if he was found
to have an ability to pay the LCA before 13 January 2023 because the
endorsed penal notice had not been served on H before that date.

84. There is a recognised distinction between the ability to make a finding of contempt and the ability to punish the contemnor so as to enforce the order. In *Hong Kong Civil Procedure 2023* para 52/2/9:

“A distinction must be made between an ability to make a finding of contempt, and the ability to punish so as to enforce the order, and it is only the latter case that O 45 applies requiring a penal notice.”

85. In *Yeung Lin Mui v Chu Kwok Wai*⁴⁴, Peter Ng J explained how service of a penal notice is relevant to enforcement:

“Fifth, as a pre-requisite to enforcement, the relevant order must contain a penal notice and must have been served personally, although where there has been a failure in this regard, the court nevertheless has the power, in the exercise of its discretion, to enforce it ... Where the relevant order is not endorsed with a penal notice, it is essential that the alleged contemnor shall have been told, whether by being present in court or by being notified by telephone or otherwise, that the consequences of breaching any order made is to be held in contempt of court. Whether the penal notice is made in writing or given orally, the alleged contemnor must be made aware of the consequence of a breach of the relevant order.”

86. In *LPK v HSH*⁴⁵, HHJ G Own held that:

“27. ... Where the order alleged to have been breached is not endorsed with a penal notice, and the alleged contemnor is not otherwise aware of the consequences of a breach of order, the court can still make a finding of contempt and to make appropriate orders in enforcement, and to award indemnity costs, but it should not impose any punishment. A distinction must be made between an ability to make a finding of contempt, and the ability to punish so as to enforce the order, and it is only in the latter case that Order 45 applies requiring a penal notice. ...”

87. In the present case, a penal notice was endorsed on the LCA Order and personally served on 13 January 2023. To exercise the discretion to punish H for his acts or omissions committed in contempt of

⁴⁴ [2020] HKCFI 2655 [24].

⁴⁵ FCMP 237/2011, 5 April 2012.

A court before the penal notice was served, the court shall be satisfied that H was otherwise told or aware of the consequence of the breach before the service of penal notice. There is no evidence for the court to make this finding.

88. I will not exercise my discretion to punish H for his receipt and use of HK\$1.5 million which was before the service of penal notice.

89. The other acts or omissions summarised in paragraph 81 above were either committed or continued after the penal notice was served. The court may impose a punishment on H for these acts or omissions in contempt of court.

I. CONCLUSION

90. W established to the requisite standard that H had or has had the ability to meet the obligations under the LCA Order but he chose not to do so. I make an order of committal for H's contempt of court in breach of paragraphs 1 to 3 of the LCA Order. A date will be fixed to hear H's mitigation and submission on sentencing and costs.

91. I thank counsel for their assistance.

(Elaine Liu)

District Judge

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Mr. Jeffrey Li and Ms. Elizabeth Lee instructed by Rita Ku & Ser for the
Petitioner.

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Ms. Anita Yip S.C. and Ms. Lily Yu instructed by Chaine Chow & Barbara
Hung for the Respondent.

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Schedule

Outstanding principal and interest as at 16 October 2023

(see paragraph 24 of W's closing submissions)

	<u>Outstanding Principal sum</u>	
a.	Backdate payment at \$350,000 per month from 20/08/2021 to 19/08/2022 to be paid on 09/09/2022	\$4,200,000
b.	Litigation costs allowance from 20/08/2022 to 21/09/2023 (\$350,000 x 13 months)	\$4,550,000
c.	<u>Less:</u> Sales proceeds of the painting of Wu Guanzhong made to H's solicitor on 23 June 2023	(\$1,332,500)
	Total outstanding principal:	\$7,417,500
	<u>Interest</u>	
d.	Interest on \$4,200,000 at 8% p.a. from 11/09/2022 up to 22/06/2023 (at a daily interest of \$920.5) i.e. 285 days	\$262,342.50
e.	Interest on \$2,867,500 at 8% p.a. from 23/06/2023 up to 16/10/2023 (at a daily interest of \$628.50) i.e. 115 days	\$72,277.50
	<u>Interest on the following instalment payments up to 16/10/2023</u>	
f.	\$350,000 payable on 20/8/2022 at a daily interest of \$76.7 for 20/08/2022 to 16/10/2023 (422 days)	\$32,367.40
g.	\$350,000 payable on 20/9/2022 at a daily interest of \$76.7 for 20/09/2022 to 16/10/2023 (391 days)	\$29,989.70
h.	\$350,000 payable on 20/10/2022 at a daily interest of \$76.7 for 20/10/2022 to 16/10/2023 (361 days)	\$27,688.70

A	i.	\$350,000 payable on 20/11/2022 at a daily interest of \$76.7 for 20/11/2022 to 16/10/2023 (330 days)	\$25,311.00	A
B				B
C	j.	\$350,000 payable on 20/12/2022 at a daily interest of \$76.7 for 20/12/2022 to 16/10/2023 (300 days)	\$23,010.00	C
D				D
E	k.	\$350,000 payable on 20/01/2023 at a daily interest of \$76.7 for 20/01/2023 to 16/10/2023 (269 days)	\$20,632.30	E
F				F
G	l.	\$350,000 payable on 20/02/2023 at a daily interest of \$76.7 for 20/02/2023 to 16/10/2023 (238 days)	\$18,254.60	G
H				H
I	m.	\$350,000 payable on 20/03/2023 at a daily interest of \$76.7 for 20/03/2023 to 16/10/2023 (210 days)	\$16,107.00	I
J				J
K	n.	\$350,000 payable on 20/04/2023 at a daily interest of \$76.7 for 20/04/2023 to 16/10/2023 (179 days)	\$13,729.30	K
L				L
M	o.	\$350,000 payable on 20/05/2023 at a daily interest of \$76.7 for 20/05/2023 to 16/10/2023 (149 days)	\$11,428.30	M
N				N
O	p.	\$350,000 payable on 20/06/2023 at a daily interest of \$76.7 for 20/06/2023 to 16/10/2023 (118 days)	\$9,050.60	O
P				P
Q	q.	\$350,000 payable on 20/07/2023 at a daily interest of \$76.7 for 20/07/2023 to 16/10/2023 (88 days)	\$6,749.60	Q
R				R
S	r.	\$350,000 payable on 20/08/2023 at a daily interest of \$76.7 for 20/08/2023 to 16/10/2023 (57 days)	\$4,371.90	S
T				T
U	s.	\$350,000 payable on 20/09/2023 at a daily interest of \$76.7 for 20/09/2023 to 16/10/2023 (26 days)	\$1,994.20	U
V				V
		Total outstanding interest:	\$575,304.60	
		Total outstanding sum:	\$7,992,804.60 =====	