

FCMC 11432 / 2018
[2024] HKFC 165

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

BETWEEN

MCYP Petitioner

and

CWYW Respondent

Coram: Her Honour Judge Elaine Liu in Court
Date of Hearing: 19 January 2024
Date of Judgment: 29 August 2024

**DECISION
(Committal:
Mitigation, Sentencing and Costs)**

1. On 24 November 2023, H was committed for contempt of court in breach of paragraphs 1 to 3 of the LCA Order after trial (“**Committal Trial**”). This is the hearing on sentencing and costs. The background and reasons for the committal order were set out in the Judgment (“**Judgment**”)¹ which shall be read together with this Decision. The same abbreviations are adopted for ease of reference.

A. H’s mitigation

2. One development after the Committal Trial is H’s payment of the outstanding LCA.

3. After the close of evidence on 5 October 2023, H made a “without prejudice save as to costs” offer on 10 October 2023. He sent (through solicitors) 2 cheques (“**Post-dated Cheques**”) for the outstanding amounts post-dated to dates after the oral closing submissions on 16 October 2023 and indicated his agreement to pay W’s costs on indemnity basis on term that W withdraws her application for committal. One of the Post-dated Cheques is in the sum of \$2,017,000 post-dated 19 October 2023. The other cheque of \$6,701,330.40 post-dated 2 November 2023 is for the remaining outstanding LCA up to 2 November 2023.

4. W responded by asking if H agreed to the amount of her costs. No reply was received from H. The parties proceeded to make the oral closing submissions on 16 October 2023.

¹ [2023] HKFC 198.

A 5. On around 3 November 2023, with the consent of H, W
B presented the Post-dated Cheques by which the payment under the LCA
C Order was settled up to 2 November 2023.

D 6. The Judgment was handed down on 24 November 2023.

E 7. H advanced the following matters for mitigation²:

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G 7.1. He purged the contempt by payment before the Judgment.
H After evidence in the Committal Trial was closed, he took
I steps to liquidate his assets and raise funds, including
J liquidation of the available Pledged Shares, drawing the
K available loan facilities, procurement of a loan from his sister
and a bridging loan from moneylender for payment of the
outstanding LCA.

L 7.2. He had previously endeavoured to perform the LCA Order.
M These endeavours include his proposal to sell the UK Property,
N the sale of Wu Guanzhong painting, the attempt to obtain
O loans from KC and his extended family members, the attempt
P to sell other paintings and to seek additional mortgage on the
UK Property.

Q 7.3. There is no irremediable prejudice suffered by W. W was not
R deprived of legal representation by reason of H's breach of the
S LCA Order.

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² H written submissions section B.

8. Mr Li (together with Ms Lee) acting for H submitted that the appropriate sanction is to order H to pay a “humble” fine and W’s costs on party and party basis with certificate for one counsel. Despite enquiry from the court, Mr Li has not given a figure that he or H considered to be “humble”.

B. Applicable legal principles

9. Contempt of court orders is a serious matter. Court orders are made to be obeyed. Civil contempt serves dual function: coercive and punitive. The sentence shall reflect this duality. Successful litigant is entitled to have the “fruits” of the order. A sentence on contempt for disobedience of court orders often serves as an incentive for belated compliance. In the public interest of maintaining an effective administration of justice, the sentence shall carry the message to the public that wilful disobedience of court orders will be punished.

10. The court has a wide discretion under common law to determine the sanction for contempt of court. Order 52 of the Rules of the High Court and Rules of the District Court empower the court to punish contempt by sentences ranging from a fine to a term of imprisonment, including suspended sentence. It is acknowledged that imprisonment should be a sanction of last resort in civil contempt. In cases of wilful failure to observe court order, intentional flouting of the court’s authority or hindrance to due administration of justice, a sentence of imprisonment is often appropriate. The public shall not be given a wrong perception that a civil contempt of court order can be paid off by a fine with no real consequence: *Arboit v Koo Siu Ying (No 2)*³ per Au-Yeung J; *Willwin*

³ [2016] 3 HKLRD 154.

*Development (Asia) Company Limited v Wei Xing*⁴, per B Chu J; Arlidge, Eady & Smith on Contempt 5th edition §3-89.

11. The factors that may be considered on sentencing include the following⁵:

- 11.1. nature of the order and severity of the breach;
- 11.2. whether the contempt was contumacious;
- 11.3. whether the claimant has been prejudiced by the contempt and the extent of harm caused;
- 11.4. whether the contemnor has cooperated;
- 11.5. any remorse;
- 11.6. any act to purge the contempt;
- 11.7. any mitigating factor;
- 11.8. any aggravating factor.

C. Deliberation

Severity of the breach

12. The LCA Order was made on 12 August 2022. H did not make any payment pursuant to the LCA Order in the first 10 months. He only made a partial payment on 23 June 2023 (about 5 months after service of penal notice) by applying the sale proceeds of the Wu Guanzhong painting which W said was belonged to her.

⁴ HCMP 2946/2014, 16 November 2015.

⁵ *Arboit v Koo Siu Ying (No 2)* §§7 to 8.

13. The total amount outstanding is large. As at 16 October 2023, the unpaid amount inclusive of interest was \$7,992,804.

14. The long period of delay and the huge amount outstanding are indicative of the severity of the breach.

15. In the context of a matrimonial dispute, non payment of LCA should not be taken as less culpable than non payment of maintenance for daily expenses.

Contumacious intent and lack of remorse

16. Mr Li submitted that:

16.1. the timing of the payment offer is a strong mitigating factor; and

16.2. H explored various options “suggested” by W at the Committal Trial immediately after the close of evidence “speaks volumes of [H’s] lack of contumacious intent” and his remorse.⁶

17. Payment of the outstanding sums by the Post-dated Cheques before the Judgment is a mitigating factor. However, I do not agree to the assertions of lack of contumacious intent and remorse, nor that the timing is a strong mitigating factor for the following reasons:

⁶ H written submissions §§17-21, §27.

A 17.1. H appealed to the Court of Appeal against the LCA Order on
B the ground of inability to pay, and failed. Yet, he continued
C his breach, used his failed assertion of inability to pay as the
D only defence in the Committal Trial which was proved to be
without merits.

E 17.2. At the Committal Trial, he admitted that he prioritised his
F other creditor to complying with the LCA Order⁷; and he
G could have terminated the TSB OD Lines and realised the
H remaining value of the Pledged Shares to pay the LCA⁸, but
I he had not done so. The above admissions negated the
assertion of lack of resources to comply with the LCA Order.

J 17.3. Having made the above admissions at the Committal Trial and
K after the Judgment, H still “stressed” in his affirmation on
L mitigation as the “first and foremost” point that “[t]he reality
M is that [he] simply [does] not have the available resource nor
liquidity to comply with the LCA Order”.⁹

N 17.4. H is an educated businessman. He does not need “suggestions”
O from W (a housewife) or W’s counsel (a lawyer) on financing
P and fund raising to discharge his obligations under the LCA
Order.

Q 17.5. As a matter of fact, W had already suggested in her 11th and
R 12th Affirmations filed before the Committal Trial some

S ⁷ Judgment §§67-68.

T ⁸ Judgement §§54-55.

U ⁹ H 10th Affirmation filed on 15 December 2023 §3.

A options, for example H should have realised the Pledged A
B Shares instead of paying a monthly interest of \$60,000 for the B
C overdraft facilities.¹⁰ Notwithstanding these suggestions, H C
D chose to take no action to purge his contempt, but insisted in D
E putting W at the witness box to prove her case and be cross E
examined in open court.

F 17.6. H’s “achievement” after the Committal Trial is an evidence F
G showing that contrary to his assertion, he has the resources to G
H comply with the LCA Order.

I 17.7. H might have attempted to contain the severity of I
J consequences that may flow from his breach. His action after J
K the close of evidence was, in my view, a calculated move with K
L the hope to fend off a possible finding of guilt, but can hardly L
M be considered to be illustrative of remorse or lack of M
contumacious intent.

N *Endeavours before the Committal Trial*

O 18. With respect to H’s attempts prior to the Committal Trial to O
P obtain funds for payment of the LCA, P

Q 18.1. Mr Li submitted that “though noting the Court’s Judgment on Q
R point, H’s proposal for the sale of the UK [Property] must still R
S carry some weight for mitigation” as had W agreed to the sale, S

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¹⁰ W 12th Affirmation dated 21 July 2023 §22. T
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A H's share of the proceeds would have enabled him to fully
B comply with the LCA Order.¹¹

C 18.2. With respect, H's proposal to sell the UK Property when he
D has other available resources to pay is an aggravating (not
E mitigating) factor. I have held in §46 of the Judgment that Mr
F Li failed to support his argument with any legal basis that H
G could force W to sell her interests in the UK Property in order
H to fund the LCA, nor that H would be exonerated from
punishment for his contempt because he has made the
proposal to sell.

I 18.3. H's conscious decision to utilise the UK Property (which W
J has an interest) to satisfy his payment obligations instead of
K deploying his other resources and implicitly criticised W for
L her objection to sell, are aggravating. The reiteration of this
point after the Judgment indicated a lack of remorse.

M 18.4. It was also submitted as a mitigating factor that after H was
N served with the penal notice on 13 January 2023, he
O "immediately" explored the options by seeking to sell the UK
P Property. Mr Li described this as a "prompt action" and "best
Q attempt at full and early satisfaction of the LCA Payment"¹².
R Such submissions must be met with grave disapproval. It
S ignored the fact that a court order is to be obeyed when made,
but not when it was served with a penal notice.

T ¹¹ H written submissions §34.

U ¹² H written submissions §35.

18.5. The other attempts referred were either attempts to realise properties owned or partly owned by W, or attempts done half-heartedly when H had other financial resources to deploy. I do not see much credits can be placed on these attempts in mitigation.

H's personal circumstances

19. On H's personal circumstances, Mr Li highlighted H's philanthropy, his being a member of a wealthy family, he was the chairman of the TW Group and was recently awarded a [REDACTED]¹³.

20. It was H's testimony at the Committal Trial that he was chosen by his wider family to be a representative to become the chairman of the TW Group. He only donated \$3,099.37 with his own funds in the year 2022/2023.¹⁴ The evidence in support of H's philanthropy is in fact scanty.

21. As H has portrayed, he is a person with status and influence in the society. Coleman J had said in *Secretary for Justice v Cheng Lai King* that "The greater the reach of a person's actions, the greater that person's responsibility is likely to be."¹⁵ A person who disobey court order should not be absolved from punishment because of his wealth and influence in the society. The public should not be given a wrong message that a person can use his wealth to test the limit of the court, and would face no real consequence of his wilful disobedience of court order by

¹³ H written submissions §1.
¹⁴ Judgment §79.
¹⁵ [2020] 5 HKLRD 356 §72.

A paying and performing his obligations after completion of the entire
B Committal Trial.

C *Prejudice against W*

D 22. H contended that W suffered no prejudice because she
E continued to have legal representation despite the non-payment. This is
F misconceived.

G 22.1. The non-payment of LCA would affect W's ability to get legal
H representation.

I 22.2. It is not suggested that W has any resources of her own to pay
J her legal fees. There is no guarantee that W will continue to
K have legal representation if non-payment is persistent.

L 22.3. It is H's obligation to perform the LCA Order. He disobeyed
M the order and strenuously defended each and every step in the
N committal proceedings, persistently required W to prove her
O case and testify in open court. But for H's flouting of court
P order and the manner he conducted this litigation, W did not
Q need to go through all these.

R **D. The Sentence**

S 23. I have carefully considered H's mitigation and submission.
T A fine is not an appropriate sanction in this case for the following reasons:
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A 23.1. It does not reflect the seriousness of the continuing and
B persistent breach, the contumacious intent and the lack of
C remorse.

D 23.2. The imposition of a fine will deplete the matrimonial assets,
E and thus creates further prejudice against W. W should not
F be punished by H's contempt.

G 23.3. The public should not be given a wrong signal that a wealthy
H person can get away from punishment for disobeying court
I order by making a monetary payment.

J 24. Mr Li cited *YKL v YCF*¹⁶ in support of his submissions that a
K committal or suspended committal order should not be made when a party
L has remedied the breach *before* the hearing. In this case, the breach was
M not remedied before the hearing. H only offered payment with condition
N *after* all the parties have testified in the Committal Trial. The contempt
O was only purged when H consented to the presentation of the Post-dated
P Cheques *after* completion of the entire trial.

Q 25. This is a deliberate breach with contumacious intent. The
R delay and extent of breach (even counting from the date of personal service
S of penal notice¹⁷) was severe. H's attempts to deploy assets in which W has
T an interest instead of utilising his own resources are aggravating. H's
U conduct before and during the Committal Trial demonstrated a lack of
V remorse. He was found to have been evasive at the Committal Trial¹⁸.
Imprisonment is the appropriate sentence. Taking into account the payment

T ¹⁶ FCMC 14949/2013, 20 June 2016 §41.

U ¹⁷ Judgment §87.

V ¹⁸ Judgment §§63-65.

A of the outstanding LCA before the Judgment, which is the only mitigating
B factor, H is committed to an imprisonment of 3 weeks suspended for 12
C months on condition of H's compliance of the LCA Order during the
D suspended period.

E **E. Costs**

F 26. H accepted that he is liable to pay W's costs. He disputed
G the basis for taxation and the appropriateness of a certificate for two
H counsel.

I 27. It is well established that a successful claimant in contempt
J proceedings will usually be awarded costs on an indemnity basis.

K 28. Rogers VP (as he then was) has said in *Lau Yee Ching v. Wong
L Tak Kwong & Ors*¹⁹ that:

M "I have to say that it is, in my experience at any rate, a normal order
N on contempt proceedings that costs are ordered on an indemnity
O basis. It has to be borne in mind that the complainant in committal
P proceedings stands to gain very little other than the enforcement of
Q the order which is the subject of the committal proceedings; he
R stands to gain no damages because of the breach of that order or any
S material benefit. Hence, the bringing of a contempt proceedings is,
T in itself, an expensive exercise but it is for the benefit of the court
U because the court's orders are enforced and adhered to. This is a
V matter which the courts naturally bear in mind when coming to a
conclusion as to what penalty to impose and the courts are alive to
the fact that an order for indemnity costs is, in itself, a penalty."

29. Mr Li argued that the payment at issue is LCA, there is a
possibility of overlap and double-jeopardy if H is to pay both the LCA and
costs of the committal proceedings. He asked the court to focus on the

¹⁹ CACV385/2005, 3 March 2006.

A little progress of the ancillary relief suit and that there has been months in
B which the sum of \$350,000 for LCA was of no conceivable purpose.

C 30. Mr Li has not cited any authorities nor specific scenario
D showing a case of double recovery. It appears that the above argument
E confused the nature of LCA with the costs of committal proceedings. LCA
F is a part of maintenance pending suit, of which account could be taken at
G the final award of ancillary relief. At issue is W's costs in the committal
H proceedings. But for H's contempt, it is not necessary to incur any of these
I costs. Taking a broader picture, all these legal costs and expenses of the
J parties may ultimately affect the matrimonial pot. There is no real
K prejudice to H if he is ordered to pay indemnity costs of these proceedings
L in line with the well established principles.

M 31. This is a big money case. H was represented by two junior
N counsel. The way in which H has conducted himself added certain level of
O complexity to the assessment of H's financial resources and liquidity. W
P may lose legal representation if this application is unsuccessful, hence this
Q application bears some importance. W's counsel, Ms Yip SC and Ms Yu,
R have provided valuable assistance to this court. It is apt to grant a certificate
S for two counsel. The amount of costs shall be taxed if not agreed.

T 32. I order H to pay forthwith W's costs of and incidental to this
U committal application on an indemnity basis, to be taxed if not agreed, with
V certificate for two counsel.

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(Elaine Liu)
District Judge

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

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