

SSLT v SMFC

4 March 2020

District Court

DC

Matrimonial Causes No 11056 of 2017

FCCM 11056/2017

Citations: [2020] HKFC 42  
[2020] HKEC 512

Presiding Judges: Judge I Wong in Chambers

Phrases: Civil procedure - costs - order nisi - variation - refused

Counsel in the Case: Ms Madeleine Booth, instructed by Payne Clermont Velasco, Solicitors, appeared for the petitioner  
Ms Lareina Chan, instructed by CRB, Solicitors, appeared for the respondent

Cases cited in the judgment: W v K & Another (Costs) [2008] HKFLR 378  
F v F (No 2) [2003] 3 HKLRD 976  
GW v RW (Financial Provision: Departure From Equality) [2003] 2 FLR 108  
Gojkovic v Gojkovic [1992] Fam 40  
L v C (CACV 169/2006, [2008] HKEC 489)  
LKW v DD (2010) 13 HKCFAR 537  
Re Elgindata Ltd (No 2) [1992] 1 WLR 1207  
TL v SN (CACV 196/2009, [2010] HKEC 1589)  
Z v X (CACV 166/2011, [2013] HKEC 340)

**RULING By Paper  
Disposal (Variation of  
Costs Order Nisi):**

Judge Wong in Chambers (Not open to Public)

1. By a judgment dated 20 September 2019 (" the AR Judgment "), I made the following orders in the resolution of the parties' dispute over their financial matters:

The respondent do pay the petitioner a lump sum of \$7,366,200 within 28 days upon the decree being made absolute; and

The respondent do pay the petitioner periodical payments in the sum of \$33,300 for the maintenance of the two children of the family (\$16,650 each).

2. As regards the costs, I made an order nisi that there be no order as to costs.
3. The respondent husband was not happy with this costs order. He applied, by way of summons dated 2 October 2019, for a variation of the costs order. He seeks for his costs of and incidental to the ancillary relief proceedings to be borne by the petitioner wife, to be taxed if not agreed.
4. The parties agreed that this application be dealt with by way of paper disposal without a hearing.
5. In this Ruling, I shall continue to refer the petitioner as " the wife " and the respondent " the husband " notwithstanding that they have already divorced.

#### Issues at Trial

6. At trial, a number of issues were strenuously contested. For the purpose of this application, they are briefly recapped below.
7. On the ascertainment of the parties' financial resources, the court had to consider whether or not and to what extent the husband's post-separation receipts in the form of discretionary bonus and deferred share profit payment were to be included. The parties had mixed success on this issue as only half of the payments were included.
8. Another issue is the illiquidity of the parties' assets in the form of pensions and MPFs. The husband succeeded in obtaining a discount of these assets.
9. It is to be recalled that this case was not a 'big money' case. Both are highly educated young professionals, but given their personal peculiarity at the time of trial, the wife being handicapped by her language ability and the husband was without a permanent job after being laid-off, it called for the court to assess their earning capacity and their financial needs.
10. When it came to question of whether there were good reasons for a departure from equality, the court gave considerations to a number of factors.
11. First, the court agreed with the husband that the parties' pre-marital assets were to be excluded.
12. Secondly, the court agreed with the wife that she should be awarded compensation for relationship-generated disadvantage.
13. Thirdly and fourthly, the court held against the husband's contentions that financial assistance from the wife's family (ie third-party financial assistance) and the wife's future inheritance are factors that warrant consideration in the section 7 (Matrimonial Proceedings and Property Ordinance Cap 192) exercise.
14. Fifthly, the court dealt with a minor point in relation to the duration of relationship, viz whether the parties had ever cohabitated briefly in the UK before coming to Hong Kong. The wife failed on this issue.
15. In addition to the above, as a preliminary point, the court also had to deal with an argument raised by Ms Chan regarding the Rule in *Browne v Dunn* as it applied to ancillary relief proceedings. It was ruled against the husband that this rule is not strictly applicable to family proceedings.
16. It cannot be emphasized enough that it was after the consideration of the circumstances of the case including of all these issues and a broad range of interlocking factors that the court came to a decision that the wife was awarded 55% of the total matrimonial assets or about 47.16% of the total assets of the parties and that the husband had to take up a larger responsibility in maintaining the children. It was on these bases that the husband was ordered to pay an equalization money of \$7,366,200 to the wife on a clean break basis and to pay a monthly sum of \$33,000 for the maintenance of the children.
17. The reasoning for the costs order nisi is set out in [183] to [185] of the Judgment,  

"In terms of the awards given neither party can be considered as entirely successful in his or her application. Judging from who has been successful on the issues in dispute, the wife has been successful in her claim for compensation and in resisting the husband's grounds of third party financial assistance and future inheritance. She has too been successful in part on the husband post-separation bonus. Yet she has failed on the duration of the relationship. Meanwhile, the husband has been successful in his case on pre-marital assets and in obtaining a discount on the illiquid assets but his ground of future inheritance is as unmeritorious as the wife's ground of duration of the

relationship. All in all, on any view, neither party can be regarded as the overall winner.

Hartmann J (as he then was) has mentioned in *F v F (No 2)* [2003] 3 HKLRD 976 at [22] that " the long-established principle that costs are determined not by dividing litigation into quantifiable subjects and figures, like a profit and loss account, but rather by way of overall impression ".

Taking a broad-brush approach, for the reasons that neither party can be regarded as the winner, I consider that the appropriate costs order should be no order as to costs ..."

### The Applicable Legal Principles

18. In general terms, apart from children's cases, the starting point on costs in matrimonial and family proceedings, as they are in civil litigations, remains to be " costs follow the event ": Order 62, rule 3(2) RHC.

19. Broadly speaking, in the exercise of its discretion in civil cases including matrimonial and family cases, the court will have to take into account, where appropriate in the circumstances, the special matters set out in Order 62, rule 5 of RHC, namely, the underlying objectives set out in Order 1A, rule 1, any offer of contribution, any payment of money into court and the amount of such payment, any written offer made under Order 33, rule 4A(2), any written "without prejudice save as to costs" offer ( Calderbank offer), the conduct of the parties, whether a party has succeeded on part of his case, even if he has not been wholly successful; and any admissible offer to settle made by a party, which is drawn to the Court's attention: see Order 62, rule 5(1)(aa) to (g), RHC.

20. In

*Gojkovic v Gojkovic* [1992] Fam 40

Butler-Sloss LJ stated as follows (at 59E/H):

"There are many reasons which may affect the court in considering costs, such as culpability in the conduct of the litigation: for instance (as I have already indicated earlier) material non-disclosure of documents. Delay or excessive zeal in seeking disclosure are other examples. The absence of an offer or of a counter-offer may well be reflected in costs - or an offer made too late to be effective. The need to use all the available money to house the spouse and children of the family may also affect the exercise of the court's discretion. It would, however, be inappropriate, and indeed unhelpful, to seek to enumerate and possibly be thought to constrain in any way, that wide exercise of discretion. But the starting point in a case where there has been an offer is that, prima facie, if the applicant receives no more or less than the offer made, she/he is at risk not only of not being awarded costs, but also of paying the costs of the other party after communication of the offer and a reasonable time to consider it. That seems clear from the decided cases and is in accord with the Rules of the Supreme Court and the County Court Rules 1981 requiring the court to have regard to the offer. I cannot, for my part, see why there is any difference in principle between the position of a party who fails to obtain an order equal to the offer made and pays the costs, and a party who fails by the offer to meet the award made by the court. In the latter case prima facie costs should follow the event, as they would do in a payment into court, with the proviso that other factors in the Family Division may alter that prima facie position."

21. Where the assets are not substantial, as is in a great majority of cases, Butler-Sloss LJ observed that,

The incidence of legal aid, the inadequacy of the financial assets available, for instance, to house both parties or even one spouse and the children, are major circumstances which may affect or even distort an order for costs that would otherwise have been expected to be made. In the vast majority of cases, where one party is or both parties are legally aided, and where the assets are insubstantial or at least inadequate for the needs of the family, the question of who pays the costs may be academic: 58E-F

22. Locally, as regards the costs in ancillary relief cases, Yuen JA sets out the principles in

*L v C* CACV No. 169/2006

(date of judgment: 19 March 2008):

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:

in family cases, as in others, costs should normally follow the event;

however because of the special dynamics of family litigation (eg 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); ...;

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);

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).

23. Thus, the court has full power to determine by whom and to what extent the costs are to be paid. The discretion of the court is much wider in family cases and the starting point is more easily displaced than in any other civil proceedings. In

*TL v SN* CACV 196/2009

(19 October 2010), Kwan JA, in her unanimous judgment for the Court of Appeal, reaffirmed that in matrimonial cases, as in other cases, costs should normally follow the event. This approach was reaffirmed in

*Z v X & C* CACV 166/2011

(8 March 2013) where Cheung JA said that costs should follow the event although because of the special dynamics of family litigation, the discretion may be broader than in civil matters generally: at [10].

24. Finally, as I have already referred to in [184] of the AR Judgment, costs are determined not by dividing litigation into quantifiable subjects and figures, like a profit and loss account, but rather by way of overall impression:

*F v F* (No 2) [2003] 3 HKLRD 976  
at [22].

#### The Husband's Grounds

25. It has been emphasized by Ms Chan on behalf of the husband that not all issues in dispute carry equal weight.

26. She relies upon the often-quoted judgment of

*Re Elgindata Limited* (No 2) [1992 1 WLR 1207

where, notwithstanding the petitioners' claim against the respondent for unfairly prejudicial to their interests as a minority shareholder was successful, the trial judge's decision, in the exercise of his discretion, to order the petitioners to pay an apportioned part of the respondent's costs based on the degree of the petitioners' success in establishing the various categories of their complaints was reversed. Ms Chan refers to what Beldam LJ said in *Re Elgindata Limited* (No 2), at 1217D-H,

"... Yet the judge made no finding that the petitioners had been guilty of improper or unreasonable conduct in the proceedings or were deserving of any penalty. His order was based solely on the ground that they had failed to establish some of the factual matters which they had alleged or in some cases had failed to show that the acts of mismanagement which they did establish were of a sufficient degree to warrant the statutory description of unfairly prejudicial conduct.

If a penal order of this severity could be so justified, few litigants would recover any damages. It would add a hazard to the pursuit of justice which few, if any, would be prepared to risk....

The effect of the judge's order, though it did not deprive the petitioners of their rights altogether, would clearly have such an adverse effect on the rights they were forced by the respondents to establish in proceedings as to make them valueless and their pursuit ruinous. In the absence of any finding by the judge of improper or oppressive conduct, I am bound to conclude that the exercise of his discretion was based on a wrong principle or at least that the injustice to the successful petitioners is so manifest that the court ought to review it."

And at 1218C-E,

"... It was no doubt convenient for the judge to consider the factual issues in four groups, but by concluding on a purely numerical basis that costs should be borne in the proportion three-quarters to one-quarter the judge apparently assumed, first, that the costs of the groups of issues would all be equal and, secondly, he made no allowance for the fact that proof of some of the facts in the groups of issues on which he had deprived the petitioners of all costs was essential to establish the petitioners' right to an order that the respondents buy their shares. In my view it is only if it is possible so to isolate an issue in the case that it can properly be said that it is unnecessarily pursued as having no bearing on the real questions in the suit that it would be proper to deprive the successful party of all costs of that issue. Otherwise a more general assessment should be made."

27. Ms Chan develops her argument by saying that as a matter of logic, the success of a party on an issue with a "value" of \$20,000 does not carry the same weight as a party losing on an issue with a value of \$2 million. On this footing, it is submitted by Ms Chan that in the present case, the 3 main issues with the largest monetary difference in dispute were (1) the pre-marital assets, (2) spousal maintenance; and (3) compensation for 'relationship-generated disadvantage'. The other issues in disputes, without any value being ascribed at trial, such as the duration of the relationship, the illiquidity of the assets and the future inheritance only formed part and parcel of and were ancillary to the 3 main issues.

28. She highlights that at the end of the day the court agreed with the husband's proposal that the entire pre-marital assets should be excluded and that spousal maintenance was denied. Whilst the court accepted the wife's application for compensation for 'relationship generated disadvantage', it is stressed by Ms Chan that the award of 5% of the total matrimonial assets, or \$695,000, is far less than what the wife asked for.

29. In order to illustrate her arguments, Ms Chan prepared a table summarising the monetary values of the issues that the wife would have been set to receive:

	The Husband's Table			
	The wife's Open Proposal	The wife's Written Opening	The husband's Open Proposal	AR Judgment
Spousal Maintenance	2,730,000	2,730,000	0	0
Pre-Marital Assets	The wife's share at 2,848,950 (with 100% of value at 5,697,900)	The wife's share at 2,848,950 (with 100% of value at 5,697,900)	1,103,800 (the wife's own pre-marital assets; none of the husband's)	1,103,800 (the wife's own pre-marital assets; none of the husband's)
Compensation	0	1,890,220	0	695,000
Post-Separation Bonus	503,200	503,200	0	251,600
Third-party Financial Assistance	0	0	0	0
Inheritance	0	0	0	0
Duration of Marriage	0	0	0	0
Total	HK\$6,082,150	HK\$7,972,370	HK\$1,103,800	HK\$2,050,400

30. Ms Chan submits that as can be shown on the table, the figures from the judgment (\$2,050,400) are far closer to the figures (\$1,103,800) in the husband's Open Proposal than the wife's figures in her Open Proposal (\$6,082,150) or her Opening (\$7,972,370). This is predominantly due to the husband's success on the 2 main issues of pre-marital assets and spousal maintenance.

## Discussion

31.

F v F (No 2) [2003] 3 HKLRD 976

was a case where the husband conducted a detailed 'time-to-subject' analysis and in reliance upon this, argued that only 15% of the trial time was spent on issues which were determined in favour of

the wife. This approach was rejected by Hartmann J (as he then was) who said,

Leaving aside what I consider to be the long-established principle that costs are determined not by dividing litigation into quantifiable subjects and figures, like a profit and loss account, but rather by way of overall impression, I have a number of difficulties with the husband's "time-to-subject" analysis:

As Beldam LJ observed in *Re Elgindata (No 2)* [1992] 1 WLR 1207, not all subjects canvassed during a trial are of equal importance. A critical issue may take a relatively short time to be disposed of while it is axiomatic, I believe, that issues of less importance may, if they are contentious or complex or a witness testifying to the issues is overly long, take a relatively longer period.

The fact that a particular issue at trial took a particular time to be canvassed, does not define who was most responsible for the use of that time. One party, for example, may advance an issue in respect of which he is unsuccessful in a manner that is commendably brief while the opposing party may spend an inordinate time opposing that issue. In such circumstances, who is to be penalised, the party who advanced the unsuccessful issue or the party who successfully opposed it but did so in a time-wasting manner?

The fact that an issue advanced by one party has not found favour with the court does not mean that the issue was not necessary, if only peripherally, to assist the court in considering the overall strength of that party's case. This, in my opinion, is especially important in ancillary relief proceedings in which, in terms of s.7(1) of the Matrimonial Proceedings and Property Ordinance (Cap.192), a broad range of matters must be taken into account, the one invariably interlocking with others so that, by that interlocking process, a full picture is woven. As Beldam LJ observed in *Re Elgindata (No 2)* [1992] 1 WLR 1207, it is only if it can properly be said that an issue that has been advanced has no bearing on the real questions in the suit that it would be proper to deprive the successful party of his costs in respect of that issue. (emphasis added)

32. I agree with Ms Booth that the husband's forensic attempts to categorise and separate each of the arguments raised at trial and attribute a 'value' to them on the basis of the monetary figure is fundamentally flawed.

33. As a starting point, at trial some issues such as the third-party financial assistance, the wife's future inheritance or the duration of the relationship never involved a specific value. Yet, this does not mean that these issues are less important. It is pointed out by Ms Booth that Ms Chan spent at least 2 hours on cross-examining the wife on her future inheritance. More importantly, it is to be remembered that the monetary value of an issue may not have a direct bearing on the final outcome, whether in terms of how the assets are to be divided or whether one party has to pay another any lump sum payments. By way of illustration, in the present case, the parties' non-matrimonial assets as an issue was hotly debated. Yet, even where a property is identified as 'non-matrimonial' it does not necessarily lead to a straightforward conclusion that this piece of asset must be excluded. Whether or not and to what extent the asset is to be excluded is very much a matter within the judge's discretion to be exercised taking account of all the circumstances of the particular case:

*LKW v DD* (2010) 13 HKCFAR 537

, at [91]. Specifically, in respect of 'non-matrimonial' asset, it should not be forgotten that courts in Hong Kong are to adopt the "telescoped approach". Insofar as this case is concerned, apart from the parties' pre-marital assets, the court had to take other factors such as compensation, third-party financial assistance, the wife's future inheritance and the duration of the relationship into consideration. As has been stressed by Ribeiro PJ in *LKW v DD*, while the factors, individually or cumulatively, are potentially capable of resulting in a departure from an equal division, a finding that one or more of those factors are engaged does not necessarily mean that a departure must occur: at [85]. The court is required to give an examination of the overall picture. That being so, there is no direct relationship between the monetary value of the non-matrimonial asset involved and the final outcome.

34. In response to Ms Chan's table, Ms Booth prepared her own table that contains more categorisations. For the present purpose, it is unnecessary to set the table out. Suffice to say is that the wife's table is far more detailed than that of the husband's in that 11 issues in disputes are set out; and according to the wife's analysis, she was successful in 7 out of these 11 issues. I have no doubt that more tables could be prepared, depending on how one coins the issues and then further

categorises them into major, less major or ancillary issues and the list can go on. I take the view that this is exactly what litigants are barred from so doing in *Re Elgindata (No 2)* and *F v F (No 2)*. The approach adopted by the husband falls into the same trap as the time-to-subject analysis and is in defiance of the established principle that costs are determined not by dividing litigation into quantifiable subjects and figures like a profit and loss account but rather are to be assessed by way of overall impression.

35. This money-to-subject analysis is another good recipe for litigation and is no better than the time-to-subject analysis decried in *Re Elgindata (No. 2)*. Hartmann J's opinion quoted above applies equally to the money-to-subject analysis.

36. It is further submitted by Ms Chan that according to the wife's Open Proposal, she proposed a total of \$12,593,000 in her favour (\$9,863,000 + capitalised spousal maintenance of \$2,730,000) and as for the husband, he proposed a sum of \$5,686,000 in the wife's favour. On that basis, Ms Chan argues that the lump sum of \$7,366,200 awarded by the court to the wife is far closer to the husband's proposal: the husband's offer was \$1,680,200 below the final lump sum but the wife's offer was \$5,226,800 over the final sum.

37. With respect, I do not find any merit in this argument which can be disposed of summarily. It is utterly unhelpful for the husband to say his figure is closer to the final figure than that of the wife's and so he should be given the costs. Perhaps it is pertinent to be reminded of the criticism by Mostyn QC (as the deputy judge of the English High Court) in

*GW v RW (Financial Provision: Departure From Equality)* [2003] 2 FLR 108  
, at [88] which I think is germane in rejecting the husband's argument,

"... it seems to me that the present system in effect forces the parties to engage in a mandatory form of spread betting. The parties are required to guess the outcome of the case and to take a position. If they have guessed correctly then they win a large amount; if they have not then they lose. But there is one significant difference to a spread bet. With a spread bet the amount the gambler wins or loses is the difference between the result and the position-maker's spread. If he has bought and the result is higher than the top of the spread, he wins; if it is lower, he loses. If he has sold and the result is lower than the bottom of the spread, he wins; if it is higher, he loses. The closer the result is to the position-maker's spread the smaller the amount the gambler wins or loses. The orthodox Calderbank theory in ancillary relief proceedings is, however, different in that it does not reflect the closeness of the litigant's call. Instead, the mere fact of beating his guess by even a tiny amount entitles the maker of the offer to call for payment of the entirety of his costs from 28 days after the date of his offer. Similarly, if his guess is a fraction less than the result, then the other party can call for all her costs to be paid by the maker of the offer. So it can be seen that vast sums can swing on even the smallest failure to guess accurately. And there is no premium for guessing really well."

38. In my opinion, the proper question to be asked is whether the wife ought reasonably to have accepted the husband's proposal:

*W v K & Another (Costs)* [2008] HKFLR 378

, at [13]. There is simply nothing in Ms Chan's submission on why with a shortfall of \$1,680,000 the wife ought to have accepted the husband's open proposal.

39. Ms Chan also refers to 2 "Without Prejudice Save as to Costs" offers made by the husband respectively on 28 March 2018 and 30 May 2018; the first being made before the FDR.

40. It is not necessary for me to set out the offers at length. In brief, on the basis of equal division of the matrimonial assets, on 28 March 2018 the husband offered to pay a sum of \$4,889,056.55 as equalization money. As far as arithmetic goes, this offer was \$2,477,143.45 short of the final award of \$7,366,200.

41. The 30 May 2018 offer was different from the earlier one in that it was offered on the basis of 45% (the wife) / 55% (the husband) division of the matrimonial assets. On that basis, the husband agreed to pay the wife \$4,900,000 plus a sum of \$900,000 being 3 years' capitalised maintenance of \$25,000 per month, making a total of \$5,800,000. This sum, though an improved one, was still \$1,566,200 less than the final sum.

42. I must confess I do not quite follow Ms Chan's argument. As I understand it, Ms Chan's submission is that if the husband's 2nd offer of 20 May 2018 is transcribed into percentage, the wife would have 51% of the parties' total assets which is better than the 47% that she received in the judgment. In my view, this submission is both erroneous and misleading. Given that the base figure

upon which the percentage is calculated may be different (as is the present case where the values of the total asset pool as at the date of the offer and at trial were different), it is pointless to make such a comparison. Again, Ms Chan has fallen short of giving a reason, as it is incumbent upon the husband to do so, why the wife ought reasonably to have accepted the offer.

43. For the reasons aforesaid, I have doubt that the husband has failed to establish any basis for the variation of the costs order nisi . Specifically, he has failed to demonstrate how the judicial exercise of the discretion by me was wrong in principles.

#### Order

44. The respondent's application accordingly ought to be dismissed and I so order.

#### Costs

45. There is no reason why the respondent should not be responsible for the costs of his application. I make an order that the respondent do pay the costs of his application, to be taxed if not agreed, and with counsel certificate.

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