HCMP 2016/2014

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 2016 OF 2014

IN THE MATTER of an Application by the Applicant against the Respondent for an Order of Committal

and

IN THE MATTER of the High Court Miscellaneous Proceedings No 1780 of 2013

and

IN THE MATTER of a World-wide *Mareva* Injunction application

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BETWEEN

SUZANNE RUTH HENDERSON	Applicant
and	
SCOTT HENDERSON	Respondent

Before: Hon B Chu J in Court

Date of Hearing: 31 May 2016

Date of Oral Decision: 31 May 2016

Date of Handing Down of Written Reasons: 10 June 2016

DECISION

Introduction

1. On 14 April 2016, the respondent was sentenced to 3 months' imprisonment by Queeny Au-Yeung J. Au-Yeung J found him guilty of civil contempt on 14 July 2015 in breaching the terms of Mareva injunction orders, namely, firstly, failing to disclose the existence of two bank accounts and secondly, syphoning of funds subject to those orders using the two accounts, such funds amounting to US$205,446.64 in total.

2. The respondent had since been serving his sentence at Lai Chi Kok Reception Centre, and I understand that he was informed by the prison authorities that he would be released on 13 June 2016 after the normal reduction for good behaviour.

3. The respondent instructed his present solicitors and applied for discharge on 26 May 2016 under Order 52 of rule 8 of the Rules of the High Court.

4. An application for discharge should, if possible, be made to the judge who made the order of committal. As Au-Yeung J is on leave, the application was before this court.

5. Counsel, Mr Shaphan Marwah, appeared for the respondent who had been brought before this court under a body order. Mr Marwah had set out in his skeleton arguments the legal principles in paragraphs 19 to 23 which I set out hereunder.

6. The Court has the discretion to discharge a civil contemnor at any time (O 52, r8 (1)):

> "8. Discharge of person committed
>
> > (1) The Court may, on the application of any person committed to prison for any contempt of court, discharge him.
> >
> > ..."

7. The main principles are summarized in the *Hong Kong White Book 2016* at Note 52/8/3.

8. The purpose of the jurisdiction to punish for civil contempt and the principles for discharge were explained by Watkins LJ in *Enfield LBC v Mahoney* [1983] 1 WLR 749, at 757-758 (emphasis added):

> "... the reasons for a committal to custody for a civil contempt are twofold. First, to punish the contemnor for disobedience of an order of the court; secondly, to attempt to coerce him to comply with the order. Once a contemnor has been sufficiently punished for disobeying a court order he should not, in my judgment, be punished further for continuing to do the same thing –

> even though in a sense this shows that he is continuing to be contumacious. Given therefore that the court should not punish twice for the same offence, when an application is made for a contemnor to be released during the fixed term of custody imposed, the first question for the court must be whether the contemnor has been punished enough for the contempt for which he was sent to prison. If, in the view of the court, he has not, then probably the court will no release him. If, on the other hand, at the time of such an application the court takes the view that he has been punished enough for the original contempt, then the only remaining justification for continuing to keep him in custody is that this may still have a coercive effect and make him comply with the original order. If it is quite clear that he is not going to comply however long he stays in custody, then provided, as I say, that he has been punished enough, there is in my view no justification for continuing to keep him in prison."

9. This court was also referred to the case of *Harris v Harris* [2002] Fam 253, at [21] and [23], wherein the court emphasized the need for atonement by the contemnor through "purging" one's contempt.

10. However, in cases where it is not possible to "undo" a breach, the courts consider the protective effect of committal. Those principles have been discussed in detail in the case of *CJ v Flintshire Borough Council* [2010] 2 FLR 1224 at [6], [20] – [22], 32:

> "[21] With the advantage of more time for reflection than was vouchsafed to the judge, I consider that, had I been hearing the appellant's application for early discharge, I might have asked myself eight, somewhat overlapping, question. In case they prove to be of any value to other judges confronted with applications for early discharge in similar circumstances, I set them out as follows:
>
> > (i) Can the court conclude, in all the circumstances as they now are, that the contemnor has suffered punishment proportionate to his contempt?
> >
> > (ii) Would the interest of the state in upholding the rule of law be significantly prejudiced by early discharge?
> >
> > (iii) How genuine is the contemnor's expression of contrition?
> >
> > (iv) Has he done all that he reasonably can to demonstrate a resolve and an ability not to commit a further breach if discharged early?
> >
> > (v) In particular has he done all that he reasonably can (bearing in mind the difficulties of his so doing while in prison) in order to construct for himself proposed living and other practical arrangements in the event of early discharge in such a way as to minimise the risk of his committing a further breach?
> >
> > (vi) Does he make any specific proposal to augment the protection against any further breach of those whom the order which he breached was designed to protect?
> >
> > (vii) What is the length to time which he has served in prison, including its relation to (a) the full term imposed upon him and (b) the term which he will otherwise be required to serve prior to release pursuant to s 258 (2) of the Criminal Justice Act 2003?
> >
> > (viii) Are there any special factors which impinge upon the exercise of the discretion in one way or the other?
>
> [22] I am clear that the success of an application for an order for early discharge does not depend on favourable answers to all the questions.
>
> Nevertheless the first is a general question which, as May LJ suggested, probably needs an affirmative answer before early discharge should be ordered. The second will surely require a negative answer. An affirmative answer to the third will usually (although not always: see, for example, the *Enfield* case, cited above) be necessary but may not be sufficient. As Lord Clyde, the Lord President, said in the Scottish Court of Session in *Johnson v Grant* [1923] SC 789, at 791:

> ‘The mere circumstance that he presents a belated expression of contrition has, with regard to the public aspect of the matter, almost no importance at all. There is ample opportunity ... for repentance before sentence is pronounced. The appeal is simply to the clemency of the court ... and the idea must not be harboured that a person who has wilfully committed a breach of interdict can obtain remission of sentence by coming to the court and saying, ‘I realise my transgression and apologise for it’ – however sincerely such an apology may be made.’
>
> I suggest that, subject to what I have said above, answers to the questions go into the melting pot; and out of it, once they have melted together, comes the conclusion.”

11. As seen in *CJ v Flintshire*, Wilson LJ had set out eight questions which may be of value to other judges facing a discharge application. In particular, I would also add that Aikens LJ in *CJ v Flintshire* has also set out two broad issues to be considered by the court in an application for early discharge from the term of imprisonment imposed from which I would summarise as follows :-

> (i) Despite the fact that the contemnor has not served the term originally imposed, has the contemnor demonstrated that he has now received sufficient punishment for his breach of the injunction order. In this regard, the court will examine at the least whether the contemnor now not only accepts that he has been guilty of this contempt but also that he is genuinely sorry for his misdeeds and repentance.
>
> (ii) Assuming the answer to the first question is favourable, then the court must ask: will the interests of justice be best served in permitting his early discharge? The matters that the court will consider will depend on the type of case in hand. The court must make a judgment on that taking all the circumstances of the particular case into account.

12. The court will not be prescriptive of the issues to be considered. Sedley LJ in *CJ v Flintshire* had also made additional remarks, namely :

> (i) There are no unfettered discretions. A judge cannot let a contemnor out because he feels sorry for him or because he will not himself have imposed so long a sentence. There has to be a reason for discharge known to the law.
>
> (ii) It is for the contemnor to advance such a reason for discharge, not for the court to find a reason for refusing.
>
> (iii) This is not a matter or practice of parlance. It is a matter of substantive justice. That is why the vocabulary of judgment is not relevant than the vocabulary of discretion.
>
> (iv) It is at the point of sentence, that necessity and proportionality governs

judgment. When a judge comes to consider discharge from a sentence which has already been found both necessary and proportionate, he or she is looking at new factors if there are any, albeit these may modify what is now necessary and what is now proportionate.

13. To summarise, the burden was on the respondent to satisfy this court that he ought to be discharged two weeks early and that there were new factors to be taken into consideration. The respondent had signed an affidavit in the presence of his solicitors at Lai Chi Kok Reception Centre. He also gave brief oral evidence in court in relation to his employment situation and that he was on unpaid leave.

14. Mr Marwah had in his skeleton submissions submitted on behalf of the respondent as follows, with reference to the eight questions posed by the Wilson LJ in *CJ v Flintshire* :-

> "(1) The respondent has served a large part, at least half of his full sentence.
>
> (2) The sentence already served is proportionate in this current circumstances given that the respondent has paid all the support payments owed to the applicant which was the underlying purpose of the Mareva.
>
> (3) He has shown his intention and willingness to comply with the court's orders.
>
> (4) The respondent has expressed and demonstrated his contrition to both the court and the applicant.
>
> (5) The Mareva has been discharged and there is no prospect of future breach thereof.
>
> (6) The applicant agrees to the respondent's release and the respondent's continued imprisonment is not in the interests of either party.
>
> (7) There is a garnishee in respect of the applicant's costs of $80,000 related to the judicial review proceedings, such sum he has also undertaken to pay upon his release from prison.
>
> (8) The interests of justice and the rule of law are not prejudiced by his early release. The purpose of punishment and warning to the public having been already served."

15. During the morning of the hearing, Mr Marwah had further informed the court that a friend of the applicant, who was in court, was prepared to pay the $80,000 costs of the judicial review proceedings in cash into the court immediately on behalf of the respondent.

16. The applicant now acts in person. She was served with the respondent's summons and affidavit and all relevant documents through email. She had sent to the court prior to the hearing a number of faxes. Although she said she was of two thoughts, she had said she agreed to assist in any way possible for the release of the respondent. The applicant had in particular sent a letter which she would wish to be read aloud to the respondent. As Mr Marwah confirmed that the letter had been read by the respondent, this court did not require the letter to be read out aloud again in court. I would add that on mentioning the contents of the letter and the pain he had caused their daughters, the respondent was

visibly emotional and upset.

17. The respondent had written two letters directly to Au-Yeung J extending his deepest and most sincere apology for this contempt. He had also provided explanations for the whereabouts of the sums withdrawn from the two accounts.

18. As mentioned earlier, he had arranged for his friend to pay immediately into court the costs awarded of $80,000 which was subject to the garnishee order.

19. I consider the above were new matters since the committal order.

20. The respondent had also produced to the court an order from the Arizona Court, which I marked as Exhibit R1, attaching his salary for total payments of US$10,397.88 per month to the applicant. I understand Au-Yeung J was aware of this attachment order.

21. The respondent also had informed the court that he had been on unpaid leave since 14 April 2016 and while he was on unpaid leave, there would be no salary from Cathy Pacific to be attached under the Arizona Court order, and this would not be of benefit or interest to the applicant or their daughters as part of those payments relate to current child support and past due child support.

22. Having considered all the circumstances of this case and the new matters, the respondent had satisfied this court that although he had not served the term originally imposed he had received sufficient punishment for breach of the court's order by serving already 2/3 of the sentence. I accept the respondent's expression of contrition was genuine. I had also considered the letter which the applicant wished to be read out loud to the respondent. It was the applicant's hope that the hatred and vengeance the respondent held against her could be put behind them for the sake of their daughters. Keeping the respondent in prison for a further two weeks and refusing an early discharge would only add to further hatred or vengeance. It would not help the situation.

23. Further, more importantly, keeping the respondent in prison would mean that the applicant would not receive any payments while the respondent was on unpaid leave and this, again, could not be of benefit or interest to the applicant and the children.

24. As I have said, I accept the respondent was genuinely sorry for his contempt. In light of all the above, I was of the view that the interests of the justice be best served in permitting the respondent's early discharge and that the interests of the state in upholding the rule of law would not be significantly prejudiced by such early discharge.

25. The respondent's friend had said he would pay the sum of $80,000 immediately into court. Having considered all the circumstances, I ordered the discharge of the respondent

immediately upon the receipt by the court of the HK$80,000.

26. There would be no order as to costs.

(Bebe Pui Ying Chu)
Judge of the Court of First Instance
High Court

The applicant was not represented and did not appear

Mr Shaphan Marwah, instructed by Withers, for the respondent