

AYM v AYL and another appeal
[2014] SGCA 46

Case Number : Civil Appeal Nos 116 of 2013 and 20 of 2014
Decision Date : 26 August 2014
Tribunal/Court : Court of Appeal
Coram : Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Judith Prakash J
Counsel Name(s) : Anamah Tan and Wong Hui Min (Ann Tan & Associates) for the appellant; Kee Lay Lian, Nigel Pereira, and Vithiya Rajendra (Rajah & Tann LLP) for the respondent.
Parties : AYM — AYL

Family Law – Maintenance – Variation of Consent Order

Family Law – Maintenance – Child

Family Law – Maintenance – Wife

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [\[2013\] SGHC 237.](#)]

26 August 2014

Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 AYM (“the Husband”) and AYL (“the Wife”) were married for more than 20 years when the Wife filed for divorce on 8 April 2010. They have three children, J, N, and L (henceforth collectively referred to as “the Children”). As part of the divorce proceedings, the parties reached an agreement on the ancillary matters regarding custody, care and control, maintenance, and the division of matrimonial assets. They recorded the terms of their agreement in a consent order as part of the interim judgment entered on 13 July 2010 (“the Consent Order”).

2 The Consent Order provided, among other things, that:

(a) the Husband was to pay:

(i) \$2,670 per month as maintenance for each of the Children;

(ii) the Children’s school fees (which at that time amounted in aggregate to about \$7,000 per month); and

(iii) \$3,990 per month as maintenance for the Wife;

(b) a piece of landed property (“the Matrimonial Property”) was to be sold within six years and the proceeds would be divided in the proportions of 80% to the Wife and 20% to the Husband if the sale price was equal to or less than \$2.5m, or 70% to the Wife and 30% to the Husband should the sale price be more than \$2.5m; and

(c) a list of other cash assets amounting to about \$900,000 would be divided between the parties.

3 The appeals before us arise from the decision in *AYL v AYM* [2013] SGHC 237 (“the GD”) concerning the variation of the terms of the Consent Order providing for maintenance payments by the Husband to both the Wife and the Children.

4 On 10 July 2014, we heard oral submissions from the parties and adjourned the matter for the parties to furnish us with information regarding the amount of maintenance that had been already paid by the Husband since the Consent Order was entered into. Having received the information requested, we now deliver our decision.

Facts and background to the dispute

5 The dispute between the parties has resulted in substantial litigation in both the State Courts and the Supreme Court, and has already come up before the Court of Appeal on one previous occasion. The facts of the case have been set out in detail in a number of decisions (see *AYL v AYM* [2012] SGHC 64, *AYM v AYL* [2013] 1 SLR 924, and the GD), and it is unnecessary to canvass them again at length. For present purposes, we set out only the facts that are material to our decision.

6 We begin with the Husband’s financial situation at the time the Consent Order was entered into. The Husband was made redundant at work in or about 2007. He then decided to enter into a business venture with another partner. Together, they incorporated a company which was in the business of providing solutions for the felling, renewal and processing of rubber wood in Indonesia. The Husband’s evidence is that he and his partner each invested \$1m in the company while also seeking funding from external investors. The company, however, was never profitable. Despite that, the Husband was paid a substantial monthly salary of \$22,438 by the company from September 2009 onwards. As mentioned above, the terms of the Consent Order were recorded on 13 July 2010.

7 Less than a year later, on 14 June 2011, the Husband brought an application to vary the terms of the Consent Order in relation to the division of the matrimonial assets and maintenance for the Wife and the Children on the ground that there had been a material change in the circumstances due to the failure of the company. The District Judge ordered that the Consent Order be varied but not quite in the way the Husband had wanted. The District Judge ordered that the Matrimonial Property be sold within six months and also made provisions for some minor variation to the maintenance of one of the Children, JLR. The Husband appealed to the High Court, and later to the Court of Appeal. The Court of Appeal decided the appeal in relation to varying that part of the Consent Order concerning the division of matrimonial assets but remitted the issue of varying the Consent Order in relation to maintenance back to the High Court.

8 In the meantime, three significant events took place. First, the Matrimonial Property was sold for \$5.1m, which was a much higher price than what the parties had contemplated (even on their most optimistic calculations). Secondly, the Wife brought an application for the order for periodic maintenance payments to be converted to a lump sum payment. Thirdly, the Wife and the Children relocated to Sydney, Australia in January 2012, while the Husband remarried a Singaporean lady and currently lives in Singapore with her and her two children from her previous marriage.

9 As directed by the Court of Appeal, all issues relating to maintenance were heard by the Judge (by which time the events described in the preceding paragraph had already transpired). Before the Judge, the Husband sought to reduce the amount of periodic maintenance payable under the Consent Order by arguing that there were two material changes in the circumstances: (1) that there had been

a change in his financial circumstances due to the failure of his business venture; and (2) that the parties had obtained an unexpected windfall from the sale of the Matrimonial Property. The Wife, on the other hand, sought to vary the Consent Order by converting the periodic maintenance payments into a lump sum. In her application, the Wife initially sought \$750,000 for herself and \$1.845m for the children but was eventually willing to accept a reduced amount of \$250,000 for herself and \$750,000 for the Children. Although there was no specific evidence on this, we deduced that these sums were arrived at having regard to payments already made by the Husband by this time. The Wife did not take any position on the Husband's contention that the windfall gain from the sale of the Matrimonial Property should be taken into account.

10 The Judge held that a lump sum payment was appropriate, and the quantum of maintenance sought by the Wife was reasonable in light of the original amount of maintenance payments that were to be made under the Consent Order. He also specifically found that neither of the two changes of circumstances relied on by the Husband were made out or warranted any adjustment. The Judge therefore ordered on 12 August 2013 that:

- (a) the Husband pay a lump sum maintenance to the Wife fixed at \$250,000; and
- (b) the Husband pay lump sum maintenance for the children, fixed at \$750,000 (inclusive of school fees).

The parties' cases on appeal

11 The Husband was dissatisfied with the orders made. On appeal, he again asserted that the two material changes in circumstances set out at [9] above warranted a reduction in the maintenance payable under the Consent Order; he also argued that he would be financially crippled if compelled to make lump sum maintenance payments.

12 The Wife maintained that the Judge's decision to refuse a downward variation of maintenance was correct because there had in fact been no material changes in the relevant circumstances. She also contended that the Judge was correct to order an aggregate lump sum maintenance payment of \$1m.

Variation of consent orders

13 As a preliminary point, we note that an aspect of this case concerned the principles relating to when the terms of a consent order may be varied in the matrimonial context. Sections 118 and 119 of the Women's Charter (Cap 353, 2009 Rev Ed) provide for the variation of maintenance orders and agreements for maintenance for the wife respectively:

Power of court to vary orders for maintenance

118. The court may at any time vary or rescind any subsisting order for maintenance... on the application of the person in whose favour or of the person against whom the order was made... where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

Power of court to vary agreements for maintenance

119. Subject to section 116, the court may at any time and from time to time vary the terms of any agreement as to maintenance made between husband and wife... where it is satisfied that

there has been any material change in the circumstances and notwithstanding any provision to the contrary in any such agreement.

14 Thus, the court may vary agreements for maintenance where it is satisfied that there has been a material change in the circumstances. The circumstances in question must be those prevailing at the time the agreement for maintenance was entered into. The material changes, which any party seeking to vary an agreement for maintenance must show, therefore relate to those circumstances.

15 In relation to variation of maintenance for children, the relevant provisions are in ss 72 and 73:

Rescission and variation of order

72.—(1) On the application of any person receiving or ordered to pay a monthly allowance under this Part and on proof of a change in the circumstances of that person, his wife or child, or for other good cause being shown to the satisfaction of the court, the court by which the order was made may rescind the order or may vary it as it thinks fit.

(2) Without prejudice to the extent of the discretion conferred upon the court by subsection (1), the court may, in considering any application made under this section, take into consideration any change in the general cost of living which may have occurred between the date of the making of the order sought to be varied and the date of the hearing of the application.

Power of court to vary agreement for maintenance of child

73. The court may, at any time and from time to time, vary the terms of any agreement relating to the maintenance of a child... notwithstanding any provision to the contrary in that agreement, where it is satisfied that it is reasonable and for the welfare of the child to do so.

Although the parties did not cite these provisions in their respective cases or submissions before us, we thought that we should make clear the basis for varying the maintenance of the Children if that is what we are minded to do.

16 Section 73 provides that any agreement relating to maintenance may be varied where the court is "satisfied that it is reasonable and for the welfare of the child to do so". The parties did not address us at all on this requirement under s 73. But in our judgment, the provision is wide enough to encompass a material change in the circumstances of the parents as a basis for varying the maintenance for the child. Whether or not this should result in the maintenance actually being varied is of course a factual inquiry that depends on the circumstances of each case. In the present appeals before us, the parties addressed us solely on whether there were material changes in the circumstances. Nonetheless we also considered the provisions of s 73.

Our decision

17 Turning to the substance of the appeals, there are two issues before us:

(a) Should the payment of maintenance be effected in a lump sum payment instead of through periodic payments?

(b) Should the quantum of maintenance be varied, and if so, what should this variation be?

Should the mode of maintenance be a lump sum payment?

18 The following principles concerning lump sum maintenance payments may be extracted from the case law:

(a) A lump sum payment allows for a clean break in the marriage and should be availed of whenever feasible (*Lee Puey Hwa v Tay Cheow Seng* [1991] 2 SLR(R) 196 (“*Lee Puey Hwa*”) at [9]). Such a clean break may help avoid further litigation and acrimony between the parties (*Wan Lai Cheng v Quek Seow Kee and another appeal and another matter* [2012] 4 SLR 405 (“*Wan Lai Cheng*”) at [88]).

(b) A lump sum payment should not be ordered if it would cripple the husband financially (*Lee Puey Hwa* at [9]; and *Neo Mei Lan Helena v Long Melvin Anthony* [2002] 2 SLR(R) 616 (“*Neo Mei Lan Helena*”)).

(c) A lump sum payment is appropriate where there is reason to believe that defaults in payments may be likely (*Neo Mei Lan Helena*; and *BCS v BCT* [2012] SGDC 338).

Is a clean break desirable?

19 In most cases, as between the former spouses, a clean break would be desirable as suggested in *Lee Puey Hwa*. It is clear from the extent of the litigation in the present case that there remains much acrimony between the parties and a clean break would be desirable.

20 It is also clear that both parties have since moved on with their lives. As already mentioned, the Wife and the Children have relocated to Australia, and the Husband has since remarried and now has step-children to care for. A lump sum payment is plainly called for in these circumstances to enable both parties to be able to move on with their lives and avoid further rancorous interactions.

21 A lump sum order is most likely to prevent any further legal disputes between the parties; an especially relevant concern in this context given the multiplicity of legal proceedings this dispute has generated.

Would a lump sum payment cripple the Husband financially?

22 In order to determine whether the Husband would be financially crippled by a lump sum payment, we first have to ascertain what this sum might be. Given our finding that a clean break is desirable in the circumstances, we proceed to quantify what a lump sum payment of maintenance would be in this case before returning to this question.

Should the quantum of maintenance be varied?

Is there a material change in the circumstances?

The failure of business venture

23 The cases have established that a material adverse change in the financial circumstances of the Husband, especially where the Wife is reasonably provided for, is a good basis for a downward variation of a maintenance order. This also applies to agreements for maintenance. In *Chua Chwee Thiam v Lim Annie* [1989] 1 SLR(R) 426, the husband was able to show that his previously strong financial status had deteriorated drastically: his company was placed in receivership, his credit cards were cancelled and he was unable to pay his income tax. On the other hand, the wife was well-off,

owning two properties in prime locations and a luxury car. On that basis, Chan Sek Keong J (as he then was), varied the agreement as to maintenance that the parties had previously entered into.

24 The Husband's argument is that at the time of the Consent Order, he was in a good financial position as the company he incorporated had just secured fresh investment funding of US\$1.2m from a Jersey-based fund. He was drawing a monthly salary of \$22,438 and the business prospects looked promising. It was on that basis that he agreed to provide the maintenance of \$3,990 per month to the Wife and a sum of about \$15,000 per month for the Children (including school fees). This was on top of him agreeing to divide the matrimonial assets in a manner which would give the Wife a generous share of the assets. The business, however, did not take off. This resulted in a withdrawal of the external funding and the Husband eventually resigned from the company in March 2012. This, said the husband, caused his financial circumstances to take a drastic turn for the worse.

25 The Wife on the other hand argued that by the time the parties were negotiating the Consent Order between January and May 2010, the business was already not doing well, and the Husband in fact already knew that it was likely to fail. Even if it might be something of an overstatement to say that the Husband *knew* the business was going to fail, the Wife's argument, more fairly put, was that the Husband could not have been relying on any sustainable future income from the company in order to meet his maintenance obligations. Although the Husband was drawing a substantial monthly salary from the company, it had recorded losses in each financial year, and did not own any substantial assets. The Husband was effectively paying himself through his initial capital investment in the company. The Wife also noted that by coming to an agreement on these terms, neither party was required to disclose its assets. It is not disputed that the Husband had other assets.

26 In our judgment, the Husband's version of the events was difficult to accept. The Husband alleged that he agreed to the terms in the Consent Order entered into in July 2010 because the Company had secured the Jersey-based funding in June 2010. However, as pointed out by the Wife, the documentary evidence shows that parties had agreed to the proposed terms in the Consent Order as early as May 2010. The documentary evidence also shows that the Husband had raised concerns at various points in 2010 and that by October 2010, less than three months after the date of the Consent Order, he was claiming that he was in a precarious financial position. These facts lead us to conclude that the Husband could not reasonably have been relying on the success of the Company at the time of the Consent Order. He was well aware of the risks he was facing. But those were the circumstances in which he agreed to the Consent Order. We do not wish to speculate on the Husband's reasons for taking the stance that he did, but it is clear to us that in these circumstances, the failure of the Company could not constitute a material change in the circumstances. We therefore agree in substance with the Judge's conclusion on this point.

The higher sale proceeds received from the Matrimonial Property

27 We now consider the second change of circumstance relied on by the Husband. As mentioned above, it is not disputed that the sale of the Matrimonial Property at \$5.1m was at a much higher price than what the parties had envisaged even on the most optimistic basis. This was clear from the correspondence between the parties when negotiating the Consent Order, where the parties estimated that the highest price the Matrimonial Property could fetch would be \$3.75m. Using this as the outer limit, the parties therefore obtained an entirely unforeseen and unexpected windfall of \$1.35m.

28 As we have mentioned above, the Consent Order provided that the Wife would get 70% and the Husband would get 30% of the proceeds of sale if the sale price of the matrimonial property exceeded \$2.5m. As it stands, the Wife has received 70% of the \$1.35m windfall which neither party

had expected at the time when they agreed on the terms of the Consent Order.

29 When the terms of the Consent Order (including those in relation to maintenance) were agreed upon, this was done with certain expectations of what the Wife would be getting from the division of the matrimonial assets. We agree with the Husband that the reality, which departed considerably from those expectations, constituted a material change in the circumstances. As matters transpired, the Wife has in fact received a larger amount than what was initially expected from the division of the matrimonial assets. In our judgment, this would justify a reduction in the agreed quantum of maintenance since the Wife would be in a better position to provide for herself and the Children as a result of this windfall.

30 As to the extent of the downward variation, we find that an appropriate figure would be \$270,000. We arrive at this figure on the following basis:

(a) The Wife received \$945,000 out of the windfall of \$1.35m while the Husband received \$405,000.

(b) The Wife therefore received \$540,000 more than the Husband in terms of additional assets beyond what the parties had contemplated at the time of agreeing the maintenance arrangements in the Consent Order.

(c) In our judgment, half of this \$540,000 (*ie*, \$270,000) should be deducted from any lump sum order made as a fair adjustment to take proper account of this change of circumstances.

Variation of the quantum of maintenance

31 Having decided that a clean break was desirable, and that the deduction of \$270,000 from any lump sum order would reflect a fair adjustment to address the change in the circumstances, we now proceed to ascertain the amount of lump sum payment for maintenance.

Calculation based on converting the periodic payment provided for in the Consent Order into a lump sum payment

32 At the outset, it may be noted that the Husband's appeals are against the orders made by the Judge and those orders were for a lump sum of \$250,000 in favour of the Wife and \$750,000 in favour of the Children. This was in essence an acceptance of the position that the Wife had put forward and it is therefore unsurprising that the Wife has not appealed those orders. These lump sum orders are logically the point at which our analysis should begin.

33 In the course of the arguments, however, the Husband made reference to the fact that he had already made substantial payments since the date of the Consent Order and there was a suggestion that these payments should, *in addition to* any other adjustment we might make, be offset against the lump sum of \$1m ordered by the Judge. We disagree. In our view, it is only fair to proceed on the basis that when the Wife proposed the aggregate lump sum order of \$1m, this *already* took into account all the payments made by the Husband until then. Let us elaborate.

34 We begin by examining the terms of the Consent Order. In relation to the Wife, she was entitled to a sum of at least \$3,990 per month under the Consent Order. Using a multiplier of 26 years based on the Wife's submissions, in reliance on the formula used by this Court in *Wan Lai Cheng*, this yields a sum of \$1,244,880. Subjecting this to a 20% discount to take account of the fact that the payment is being made upfront in a lump sum would reduce this to \$995,904. This was also the figure arrived at

by the Judge. In addition, the parties agree that the Husband has already paid maintenance for the Wife amounting to \$100,264.83. This leaves a balance of approximately \$895,640 yet to be paid.

35 As for the Children, we consider the amounts payable for maintenance and school fees separately. We should state that the calculations we have used are approximate but it does not matter because we have undertaken this exercise only to determine whether, and if so, to what extent, the Husband's contributions are to be offset against any order for lump sum payment that we might make.

36 On that basis, we base our calculations on the following premises which were contained in the Consent Order:

(a) That maintenance is payable for J at \$2,670 per month until she commences her university education and then \$1,350 per month for the next four years (which is the time within which she is expected to finish her undergraduate degree).

(b) That maintenance is payable for both N and L at \$2,670 per month until they are both 21.

37 At the time of the Consent Order in July 2010, J, was 16 years and 11 months old. Assuming that she started university in January 2012, the lump sum payable for her maintenance would amount to \$112,860. N was 10 years and 2 months old, and the lump sum maintenance for her would have amounted to \$347,100. L was 7 years and 6 months old, and the lump sum maintenance for him would have amounted to \$432,540. This amounts in total to \$892,500.

38 For school fees, we base our calculations on the following premises:

(a) That the Children all attend high school at private schools until they graduate at the age of 19.

(b) J's four year undergraduate degree will be the only tertiary education for the Children which the Husband will pay for.

(c) The costs of the schools fees are taken from the agreed table of payments made by the Husband to the Wife. This indicates that J's school fees were \$2,500 per month for high school, and N's and L's school fees are \$2,250 per month each for high school.

(d) J's university fees are approximately \$30,000 per year.

39 At the time of the Consent Order, J still had two years of high school left and four more years in university, and her school fees in total would therefore amount to \$180,000. For N, she still had about eight years of high school left, and the amount of school fees payable would be \$216,000. For L, he still had about 11 years of high school left, and the amount of school fees payable would be \$297,000. The total amount of school fees payable would be approximately \$693,000.

40 The sum of the maintenance and school fees that would be payable on the foregoing basis, for the Children is, \$1,585,500. We apply a discount of 15% to this on account of payment being by a lump sum and accordingly, this amount is reduced to \$1,347,675. We have used a 15% discount (as compared to the 20% discount used for the Wife's maintenance) because the advancement of the time for payment in the case of the Children is less than in the case of the Wife since the periodic payments would have been payable for a longer duration in the latter case. The Husband has already paid \$463,265.38 towards the Children's maintenance and education. This therefore leaves a balance

of \$884,410 yet to be paid on this basis.

41 The sum of the amounts that would have remained payable if the periodic payments due under the Consent Order had been converted to a lump sum order would have been in the region of \$1,780,050. This would have taken account of all the payments that had been made by the Husband up to the time of the Judge's order in 12 August 2013 (see [10] above). Allowing a further deduction of \$270,000 on account of the adjustment that we consider should be made by reason of the change of circumstances and a further sum of \$40,000 which was the sum of maintenance paid by the Husband for the Wife and the Children *after* the 12 August 2013 order was made, the amount of maintenance payable as a lump sum on this basis would have been around \$1,470,050. Thus, it is plain that starting our analysis with the lump sum order of \$1m already puts the Husband in a better position than he would have been in otherwise, even having regard to all the sums he had paid. It would therefore be wrong to make a further deduction on account of the payments he had made prior to 12 August 2013 and we proceed accordingly.

Variation of the maintenance based on adjusting the position taken by the Wife before the Judge

42 We accordingly return to the orders made by the Judge on 12 August 2013.

43 It is evident that the Judge did not take into account the adjustment of \$270,000 that we consider should have been allowed. The Wife's submission before the Judge acknowledged that the parties received a windfall from the sale of the Matrimonial Property. However, as stated earlier, she never once mentioned that her receiving a higher proportion of the sale proceeds was something material to be taken into consideration in deciding on the quantum of maintenance. In other words, she did not take the additional windfall of \$270,000 into account in seeking the aggregate lump sum maintenance amount of \$1m. The Judge in essence also did not consider this windfall and held (at [8] of the GD) that "the increase in value of the Property improved not only the [Wife's] but also the [Husband's] financial situation, in that his 30% share of the proceeds is by reason of that increase likewise larger than originally anticipated", and therefore did not think that the higher sale price "called for a significant reduction in the amount of maintenance".

44 However, for the reasons we have already explained, we consider that this was a material change in the circumstances. Also for the reason we have given, the fact that the Husband also got a share of that windfall (albeit a significantly smaller one) does not address or affect the need to take account of the additional resources that the Wife had over and above what had been contemplated at the time of the Consent Order. We therefore hold that any lump sum order should be reduced by this amount to take account of this.

45 We add that reducing the amount of maintenance in this way is not in any way contrary to the welfare of the Children. The reduction is made having regard to the resources available to the Wife to provide for herself and the Children (as explained above at [29]). Moreover, we are satisfied that it is in the interests of the Children's welfare that there be a lump sum order for maintenance since this would, as we have observed, help reduce the occasion for acrimony between the parties.

46 We further consider that the sum of \$40,000 that has been paid by the Husband *after* the 12 August 2013 by way of interim maintenance should also be deducted from the lump sum amount. This leaves a balance of \$690,000 which we hold should be the lump sum payable by the Husband. We further hold that this sum should be apportioned as \$100,000 in respect of the payments due to the Wife and \$590,000 in respect of the payments due to the Children.

Conclusion

47 Finally, we return to the issue of whether a lump sum payment would cripple the Husband financially. In our judgment, an order requiring payment of the sum of \$690,000 would not do so. It is the Husband's own affidavit evidence that he has \$985,323.87 left from his share of the sale proceeds from the Matrimonial Property. The Husband later asserted in his submissions before the Judge that he only has \$800,000 left, but even if we accept that to be the case, that is still a sufficient sum of money for him to make the lump sum payment without crippling him financially. This is aside from the other assets that he owns. Insofar as the Husband contends that he has undertaken fresh obligations to his new family, we do not consider that this should affect or compromise the pre-existing obligations he continues to owe to the Wife and his children from his previous marriage.

48 For the foregoing reasons, we allow the appeals in part and order that the Judge's order for maintenance be reduced so that the Husband is to pay a lump sum of \$690,000 to the Wife being a sum of \$100,000 by way of lump sum maintenance for her and a sum of \$590,000 by way of lump sum maintenance for the Children inclusive of their school fees.

49 We make no order as to costs. The usual consequential orders will apply.

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