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Neutral Citation Number: [2024] EWFC 276

Case No: ZC19D00032

IN THE FAMILY COURT

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The Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 31 July 2024

Before :

Mr Justice Moor

- -

Between :

Zhaolong Li (known as Nathan Li)
Appellant
-and-
Oliver Benjamin Simons
Respondent

- -
- -

Mr Simon Calhaem (instructed via Direct Access) for the **Applicant**
Mr Conor Fee (acting pro-bono) for the **Respondent**

Hearing date: 20 June 2024

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JUDGMENT

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MR JUSTICE MOOR:-

1. I have been hearing an application made by Nathan Li (hereafter "the Applicant") to vary an order that I made on appeal on 30 June 2023. The judgment is reported as Li v Simons [2023] EWHC 1626 (Fam). Oliver Simons (hereafter "the Respondent") opposes the application.

2. The case has a very long history and I do not propose to set it all out again in this judgment. I simply refer to my previous judgment for the relevant background.

3. Suffice it to say that my decision in June 2023 was to allow an appeal from Recorder Chandler KC and substitute an order that the Appellant pay periodical payments for the child of the family, K, who is now aged six, at the rate of £1,650 per month until he completed the end of year 2 (namely July 2025) and then at the rate of £1,550 per month. There was no order as to costs below, but the Respondent was to pay £12,115 towards the Applicant's costs of the appeal, which were to be set off against the arrears under the various orders. This meant that the Applicant owed the Respondent total arrears, after the costs set-off, of £25,590. The arrears were to be paid at the rate of £1,500 per month until December 2024.

4. In my judgment, I proceeded on the basis of the assessment of the Respondent's net income by Recorder Chandler in September 2022. At that time, his earned income was £1,600 net per month. He also received child benefit and universal credit, which brought his income to £1,934 per month. The Applicant's income was £4,336 net per month but that was on the basis of working three days per week. I could see no reason why he could not work five days per week, which I inferred would give him a monthly net income of £7,166. I increased that figure to £7,500 per month on the basis that he was living in China at the time and could therefore increase his income slightly by renting out his London flat at Canada Water.

5. I took the view that there was a significant element of spousal support in the child maintenance. It could equally easily have been termed a carer's allowance, as the Respondent was unable to work full-time due to his commitments to K. Having decided that I should take the Applicant's income as being £7,500 per month, I decided he should pay 22.1% in maintenance which was the same percentage as in the original order. I said that I did expect there to be no further litigation.

6. The Applicant paid the maintenance and arrears for, I believe, six months. His case is that he lost his employment in China with PersolKelly on 8 October 2023. As he had no job, he said he had no income. He had a second child, a girl, Z, with his new partner on 12 November 2023.

7. He informed the Respondent of his loss of employment on 15 November 2023. He said that the "job market is really slow" and that it was "likely I will take a few months off to support my partner and two children".

8. On 8 December 2023, he sent an email to the Respondent in which he suggested a payment holiday for six months, on the basis that he would pay the arrears at the end of the six months. He also proposed either mediation or arbitration. He says the Respondent rejected his proposal and refused to mediate or arbitrate. He therefore applied on 13 December 2023 to vary the periodical payments and remit the arrears, although it appears that he did not serve the application on the Respondent at that point.

9. The Respondent made an enforcement application on 16 February 2024, at which time the arrears were £9,450. He says that, when he made this application, he discovered the existence of the Applicant's application to vary.

10. The Applicant made a statement dated 27 March 2024. He gave his address as the flat in Canada Water. He said he had applied for several jobs in both China and the UK, but without any positive response. He added that he would continue to try. His family were giving him support to enable him to make ends meet. He had been unable to pay £2,368 per month mortgage instalments in London, but he could not rent out the flat, as he did not believe that the rent, after deduction of expenses such as management fees, would even cover the mortgage instalments. Moreover, he said that he was living in the property with his partner and two children and had been there for 103/165 days. He complained that the Respondent had refused to provide disclosure despite the rules requiring him to do so.

11. He exhibited a letter from Joan Zhou of PersolKelly, dated 8 October 2023, which said that his employment had been terminated and his last day would be 31 October 2023. In fact, his case is that he was required to leave the premises immediately, which does not surprise me, but he was paid his salary until the end of the month. The letter also says that he would be given a goodwill payment of HK$157,500, which was approximately £15,900.

12. He filed a Form E2 dated 27 March 2024. It said that he was overdrawn (£997.10) at HSBC, but had £1,983 at Citi Bank. All his other accounts had nominal balances. He valued the Canada Water property at £775,000, but it is subject to a mortgage of (£491,142). He said he had a credit card debt of (£7,514) and loans from family and friends of (£520,895). He had no income. He deposed to expenses of £2,798 per month, of which the mortgage is £2,368 per month. To suggest that he could live on only £430 per month does not seem realistic to me.

13. The case was listed before Sir Jonathan Cohen on 10 April 2024. A recital to his order noted that the arrears figure of £25,590 was the figure at the time, after deducting the costs owed by the Respondent to the Applicant as a result of my order. Sir Jonathan made no directions pursuant to the Domestic Abuse Act 2021, given that the Respondent has pro-bono representation for this hearing. He declined to hear the Respondent's <u>Hadkinson</u> application without a formal application being issued. He made various directions for evidence and set the matter down for a final hearing before me on 20 June 2024 with a one-day time estimate.

14. The Respondent filed his Form E2 on 1 May 2024. He is a Business Development Advisor for Bond, a recruitment specialist. His bank accounts were in credit of just under £600. He does not give the value of his property or set out his mortgage. His net income was given as £3,036.47 per month from his employment and child benefit of £96, making a total of £3,132 net per month. His outgoings were given as being £3,868 per month, including his mortgage at £701 per month. He deposed to loans from his family of (£135,025) and a credit card debt of (£1,400). The exhibits included his P60 for 5 April 2024, which showed a gross income of £38,359. His pay had increased to £4,130 per month gross in April 2024, which is around £49,570 per annum. His net income was, indeed, £3,036 per month. His claim for Universal Credit has been closed as a result of the significant increase in his income since the last hearing. He claims "other commitments" of £1,600 per month, which I believe is repayment of the loans from his step-father, Michael Huntley, that funded the earlier litigation.

15. The Respondent formally applied for a Hadkinson order on 21 May 2024 and for a penal notice to be endorsed on my earlier order. He said that the arrears of maintenance were, by that point, periodical payments of £9,900 and £9,000, in relation to the order that the Applicant pay the earlier arrears at the rate of £1,500 per month. The Hadkinson application sought an order that the Applicant be prevented from proceeding with his application until he had paid these arrears.

16. He filed a statement dated 30 May 2024. It says that he is a Business Development Advisor for a charity, which I don't entirely understand, but it does not matter for the purposes of my determining the applications. His property is only a small 2 bedroom terraced house in Orpington. He has received no maintenance since November 2023. He has increased his work from 3 days per week to 5 days per week. This goes to his considerable credit, although it is, of course required by section 25(2)(a). This increase is undoubtedly relevant to the application, given my decision on the appeal about the element of spousal maintenance in the existing order. His mortgage is due to increase from £701 per month to £967 per month. He says his overall outgoings are £5,486 per month, but that includes the £1,600 debt repayment. He says that the Canada Water flat could be rented for £3,000 per month, or the Applicant could purchase a property near K. He is surprised by the jobs that the Applicant has applied for. There has been no disclosure of the Applicant registering with the big financial recruiters. He adds that there is a shortage of qualified accountants. He reminds the court that the Applicant has an MBA; is a chartered accountant; and a chartered financial analyst. The Applicant is, he says, bilingual in English and Mandarin. He asserts that the Applicant was Chief Finance Officer of PersolKelly from 2013 and then Country Head, China. He makes the point that the Applicant has spent £202,178 in costs. He says that, even since he lost his job, the Applicant has spent £16,500 in legal fees; has flown to London five times at a cost of £3,750; has spent £778 on games for K; and £730 on a trip to Legoland overnight.

17. The Applicant's response is dated 6 June 2024. He says he is relieved that the Respondent does, at least, accept that he has lost his employment, given that the Respondent had previously asserted that he did not accept the Applicant had done so. The Applicant added that he has now applied for unemployment benefit. The Respondent's costs have been funded from his deceased mother's bank account. The Applicant has been unsuccessful in obtaining employment. There were no arrears prior to December 2023. He points out that the Respondent transferred half of the funds he received from the sales of the two properties, as ordered in the original financial remedy proceedings, to his late mother's bank account. This is the account held by the Respondent's step-father and I presume it was repay at least part of the costs previously advanced to him. K has spent about 1/3rd of days with the Applicant since October 2023, namely around 70. The Applicant says he owes £7,414 in service charges and the like. He hopes to obtain employment in the UK, but is also looking in Hong Kong and China. There is then a lot of irrelevant material which accuses the Respondent of being the unreasonable litigator, which is very hard to justify given the previous findings of each judge who has heard this case, including myself. In relation to the £778 spent on games for K, he says that the Nintendo he has given K was free, but K mistakenly downloaded some paid apps. He makes the fair point that the Respondent's income has increased from £1,934 per month net to £3,132 per month net. He ends by saying that he will notify the Respondent as soon as he returns to employment.

18. The Applicant's replies to the Respondent's questionnaire are dated 15 May 2024. He says he was handed his dismissal letter by Joan Zhou on 8 October 2023 and escorted straight out of the building. He does not have a LinkedIn profile as it has been banned by the Chinese Government. He has made applications for jobs via Mandarin specialist recruitment websites. If an application is closed, there is no access to it any longer. Myworkday.com declined his application. The salary would have been about £40,000 per annum. He paid for the trip to Legoland on his credit card. He does not have a paid childminder. The person mentioned by the Respondent is a family member. His flights to the UK were mostly paid by his late grandmother before she passed away on 29 December 2023. His legal fees have been funded by borrowing from friends. He has funded his mortgage instalments from personal savings that have now dried up. The replies attach an email from Joan Zhou, Senior HR Director at PersolKelly which says that the Applicant's role was not needed any more and the firm had no other suitable roles for him.

19. The Respondent's replies to the Applicant's questionnaire are dated 4 June 2024. He confirms that he now works five days per week. The increase in pay in April 2024 was a combination of a cost of living increase and a band increase for his role, but, in relation to the latter, he has now reached the final spine in his pay bracket. The account to which he repays his costs debt was previously in the joint names of his mother, Elaine Huntley, and his step-father, Mike Huntley, so that, following his mother's death, the account is now in Mr Huntley's sole name. He was making repayments until the child maintenance stopped. He is not able to afford a holiday at present. The documents attached to the replies include a letter from Bond saying his hours

increased in January 2024 from 28 per week to 35 per week; confirmation that his gross salary is now £49,570 per annum; and a MBNA credit card balance showing he owes (£1,975).

The law I have to apply

20. The jurisdiction to vary orders for periodical payments is to be found in section 31 of the Matrimonial Causes Act 1973 which provides at section 31(1):-

> "*Where the court has made an order to which this section applies, then, subject to the provisions of this section and of section 28(1A) above, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.*"

21. Pursuant to s31(2A), the court has power to remit the payment of any arrears due under the order or of any part thereof. Pursuant to s31(7), in exercising the powers conferred by the section:-

> "*…the court shall have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen, and the circumstances of the case shall include any change in any of the matters to which the court was required to have regard when making the order to which the application relates…*"

22. The section goes on to require the court, in cases where there is an order for spousal periodical payments, to consider:-

> "*whether, in all the circumstances and after having regard to any such change, it would be appropriate to vary the order so that payments under the order are required to be made only for such further period as will, in the opinion of the court, be sufficient…to enable the party in whose favour the order was made to adjust without undue hardship to the termination of those payments*".

23. There are then provisions as to the capitalisation of periodical payments which do not apply in this case.

24. In my previous judgment, I quoted the relevant authorities as to the law to be applied when hearing a variation application, as they had been summarised by Recorder Chandler KC in his earlier judgment. The court exercises a broad discretion. In the case of Morris v Morris [2016] EWCA Civ 812, Moylan J said at [87]:-

> *"On a variation application, is the court required to consider the matter de novo? In my view, the simple answer is that it is not. The court must conduct an exercise which is proportionate to the*

requirements of the case. They might warrant a complete review but they can also justify…a light touch review".

25. Both Moylan J in Morris and Ward LJ in Flavell v Flavell [1997] 1 FLR 353 agreed with what Cazalet J said in Garner v Garner [1992] 1 FLR 573 at 581:-

> *"Almost invariably, an application to vary an earlier periodical payments order will be brought on the basis that there has been some change in the circumstances since the original order was made; otherwise, except in exceptional circumstances, the application will, in effect, be an appeal. If an order is not appealed against, or is made by consent, then the presumption must be that the order was correct when made. If it was correct when made, then there will usually be no justification for varying it unless there has been a material change in the circumstances."*

The Hadkinson application

26. At the commencement of the hearing, Mr Conor Fee, who appears, very generously, pro bono for the Respondent made his application for a Hadkinson [1952] P 285 order. I was very concerned that dealing with the application then would make it impossible to hear the application to vary due to a lack of time. I therefore immediately adjourned the application to be considered at the end of the hearing as part of this judgment.

27. I should, however, briefly deal with the law in relation to such applications. The Court of Appeal in De Gafforj [2018] EWCA Civ 270 has confirmed that the Hadkinson jurisdiction has survived the passing of the Human Rights Act 1998. At [11], Peter Jackson LJ set out the following requirements:-

    (1) The (Applicant) is in contempt;
    (2) The contempt is deliberate and continuing;
    (3) As a result, there is an impediment to the course of justice;
    (4) There is no other realistic and effective remedy; and
    (5) The order is proportionate to the problem and goes no further than necessary to remedy it.

Thomas v Thomas

28. In his closing submissions, Mr Fee referred to the case of Thomas v Thomas [1995] 2 FLR 668, which decided that:-

    (a) The court is not obliged to limit its orders exclusively to resources of capital or income which were shown actually to exist but might infer, from the evidence, the availability of unidentified resources;

    (b) Where a spouse enjoyed access to wealth, but no absolute entitlement to it, the court would not act in direct invasion of the rights of a third party, nor put a third party under pressure to act in a way which would enhance the means of the maintaining spouse,

> but nevertheless need not act in total disregard of the potential availability of wealth from sources owned or administered by others.

The hearing

29. I was clear that it was necessary to hear some limited oral evidence to enable me to decide the cross-applications.

30. The Applicant told me, in answer to questions from his counsel, Mr Simon Calhaem, that he has continued his search for jobs, particularly in relation to ones where Mandarin and English is required. He said that, only the week before, he had failed to get a job with Alliance Insurance company based in China. He is living in England at the flat in Canada Water with his partner and two children by that relationship. He has been here all this year, save for the month of April, when he was in China. He is, however, looking for jobs both here and in Hong Kong/China, although, ideally, he would like a job in this country.

31. He was then asked questions by Mr Fee on behalf of the Respondent. He said he was a Financial Controller at PersolKelly, not the Chief Finance Officer. He was taken to his original offer of a job with Kelly Services Hong Kong Ltd on 29 July 2013, which refers to him being offered the post of "Chief Finance Officer". He said that the reality was that he was Finance Controller and there was another Chief Finance Officer. I take the view that this is difficult to accept, particularly as, in his original CV, he described himself as CFO North Asia from July 2013 to July 2016 and then China Country GM and MD, as well as Board of Directors, Kelly Services, China. All he could say was that this was for "marketing purposes" and "a little overstated", but there were also a significant number of photographs with captions describing him as "Chief Executive Officer, Kelly Services, China" or "General Manager, Kelly Services China". At the end of the day, however, the only relevance of this, as far as I can see, is as to what job he should be able to get in the future, assuming I am satisfied that he has lost his employment with PersolKelly.

32. He was asked about the termination of his employment. He said that it was a nightmare and he would wake up sweating in the middle of the night. This has the ring of truth, as did his evidence about being marched out of the offices on the day his employment was terminated. Indeed, there is no evidence that he is still employed by PersolKelly. I simply cannot accept that the documentation from Joan Zhou is completely concocted. Indeed, if he was the Chief Executive Officer, I take the view that it would not be unusual for such a senior post to be terminated, if performance was not what it was hoped it would be. He was asked about a non-competition clause included in his 2013 contract for one year after his employment was terminated. He said that such a clause was included in his most recent contract in 2021 as well. He had spoken to rival companies, Hays and Randstad. He certainly seemed to accept that, if either company had a role for him, it would have been possible to

remove the non-competition clause, but he told me neither had a suitable role. He added that both companies are currently losing money. He denied having a job lined up. Again, there is no evidence that he does. He said he was "hungry for a job" as he has a mortgage to pay and children to support. He worries a lot. He told me he would do any role. Indeed, he said he had considered starting a Chinese restaurant, as he cannot continue as at present for much longer. I asked where the capital would come to set up a restaurant and he said that his sister would hopefully invest in it with him.

33. He was asked why he said that he would "take a few months off" when he first contacted the Respondent about losing his job in November 2023. He said that he thought he would be able to find a job in three to four months, but he became concerned as the job market was really slow. He said he did apply for a few jobs without success and his child had just been born. This does not really answer the question. He said he had applied for jobs in October/November 2023. He added that there were three or four such applications for Mandarin and English speaking jobs. The job advertisements said they were for an Associate Relationship Manager; a Corporate Communications Officer; and an Associate Accounting Manager; as well as one simply for an accountant. The salary levels were between £45-55,000 and £40-60,000 per annum gross, far less than the Applicant had been earning for PersolKelly. He said he did not have any response. He then applied for further roles in March/April 2024, again without success. The table produced with his replies to questionnaire showed eight such applications, with a mix of job titles, including Senior Internal Auditor; Associate Finance Director; Associate Accounting Director or Manager; and Senior Business Advisor. Again, the salaries quoted were all modest at between £35,000 and £50,585 per annum gross. I cannot see how the Applicant could manage on such a low salary, given his large mortgage and significant financial commitments. He added that he had made four or five further applications since the statement.

34. He was asked about the offer he made last year of a six months payment holiday with him then paying the arrears. He said he intended to do so, hoping he could secure a job within six months. It is not clear how he could have repaid the arrears on the incomes set out above. He said his original application was not to remit arrears, but he only sought to do so when filing an amended application in March 2024. He said he had to change his position due to the "Respondent's aggressive applications". I cannot see how the Respondent applying to enforce the order can legitimately be said to be an aggressive application, but I do accept that his failure to secure an alternative job quickly may have necessitated such an application. He added that, at this moment, he does not have an income, so he cannot pay. He said he will inform the Respondent as soon as he gets a job and that maintenance should then be calculated according to the CMS formula. He added that the Respondent was not interested in a payment holiday. He added that the Respondent could have suggested he pay a couple of hundred pounds per month. The point can certainly be made that the Applicant himself could have suggested that or even done it of his own accord.

35. He said he had borrowed money from a friend for the last couple of months to pay the mortgage of £2,000 per month. Returning to his job applications, he denied that he was over qualified for the roles he had applied for. He said he would do any job. He mentioned, in particular, a job at UCL giving career advice to Chinese students, which he thought he was very well qualified for, given his previous work in China and Hong Kong. He said he didn't get the job. He was asked why he had not used the services of a recruitment consultant. He said that he knew all about the industry. He was very dismissive of their abilities, referring to the recruiters being only interested in commission. That may be true, but they only get commission if the secure their client a job. He said that he has been doing it through his personal connections, which he said works better for him. He referred to arranging to have a coffee soon with a friend who works where he previously worked. The problem is that he has got nowhere doing it this way. I was not satisfied by his answers. I am sure he should be using recruitment firms.

36. It was then put to him that he had modified his CV to make it less impressive. There is absolutely no doubt that the old CV is far more impressive than the new one. The first one gives significant detail about his work with PersolKelly aimed at selling its author to the prospective employer. The second one does not. It simply describes him as "Controller" and "Controller (Part Time)" for PersolKelly. He said that the first CV was for marketing purposes and was "a little overstated". He said the second one was "a true reflection of my work history and latest employment contract". He attempted to justify this on the basis that a prospective employer would do background checks. He was concerned that PersolKelly are hostile to him and would not assist if he overstated his work for them. It was put to him that he had been earning £52,000 per annum net for three days work per week, but he was now looking for jobs at £40,000 per annum gross. He said some of the salaries are higher than that and that it is harder to get a job at 47. He said his priority is to get a job soon. It was put to him that this was a sham, but he did not agree. He accepted he should maximise his earnings. In relation to the Press extracts describing him as "Chief Executive Officer China", he said he had been acting in that role for a year or two, but that was back in 2017.

37. It was then put to him that part of his salary had been paid to a different secret source over the last few years. He rejected the suggestion that this had happened or that it was why he was not concerned about not getting a job. I have to say that I dealt with this in my previous judgment. I found that there was no evidence whatsoever of salary being paid to him "under the table" and I rejected the allegation. It could be said that this is res judicata but, in any event, there is no new evidence as to this and I again reject the suggestion. He did say that friends have loaned him hundreds of thousands of pounds to fund the litigation and his lifestyle. It was not his funds being returned to him. Again, there is no evidence that it was his funds coming back. Finally, Mr Fee took him to an advert via the Reed recruitment agency advertising a Financial Controller at a salary of between £115,000 to £125,000 per annum. He said that his weakness was that English was not his first language and he cannot compete with younger candidates who grew up in this country. Whilst there

may be some force in this, the simple fact of the matter is that he has not tried to get such a job.

38. There was cross-examination suggesting that he should rent out the Canada Water flat. I was not at all convinced by this. The rent would, at best, pay the mortgage and service charge. By the time he had paid other expenses, such as the management fee, insurances and the like, I fear there would be a small shortfall. Moreover, he would have to find somewhere else to live. It was also suggested he could sell the property and buy somewhere cheaper, perhaps nearer to K. He made the fair point that, without a job, he could not get a fresh mortgage.

39. I have to say that, overall, I was not impressed by the effort he has put into finding another job. His new CV is not an impressive document. The number of jobs he has applied for has been limited to say the least. He has not used a recruitment firm. He appears to have applied for jobs which command a salary that would be simply insufficient for his needs. In one sense, however, I wonder where this takes the case. I am satisfied he has lost his job and that he does not currently have one. I am clear that he desperately needs a job. It may be that he has not put in significant effort pending this hearing, but he is going to have to now or his family's finances will become impossible and he will have to sell his Canada Water flat. I hope he will see this and put a proper effort into finding employment, once this case is over.

40. The Respondent then gave evidence. Save in one respect, I take the view that his evidence is only of limited importance. Mr Calhaem, on behalf of the Applicant, attempted to get the Respondent to accept he had not behaved well in relation to the litigation. I cannot accept any significant criticism can be laid at the Respondent's door. He told me that that the Applicant just "keeps going and going". He said that, if one bout of litigation is settled or decided, a further application is immediately made. There is undoubtedly some truth in that. The Respondent added that the fees paid by the Applicant for legal representation exceeded the maintenance arrears. Whilst that may also be correct, I do accept that, if you genuinely lose your job, you cannot be expected to continue to pay the full maintenance indefinitely just because of the costs of returning to court. He was asked why he had not accepted the Applicant's offer of a payment holiday. He asked, rhetorically, where the arrears were, saying that he rejected the proposal as he knew the arrears would not materialise. He then said he did not know if the Applicant has lost his job. He added that the Applicant was Joan Zhou's boss, intending to cast doubt on the veracity of the termination letter. He said he did not know if the termination letter was a forgery. He added that he did not know what to believe any more. I do not know if the Respondent genuinely believes the Applicant may still have the job, but I am clear that, if he does, he is wrong. I accept that the Applicant did genuinely lose his employment and the termination letter from Ms Zhou is not a forgery. The Respondent then asked how the Applicant has afforded £211,000 on legal fees. Whilst the expenditure on legal fees in this case is a tragedy, it is not clear to me how this point helps me to decide the application. The Respondent then said that the Applicant could have a job lined up or he could be on gardening leave. Whilst

there is no evidence that he does have a job lined up, the undertaking offered to me on his behalf by Mr Calhaem in his closing submissions does deal with that point.

41. The Respondent said that the Applicant could have lots of money saved up. Whilst I have some concern as to how the Applicant is able, apparently with ease, to borrow very significant sums to fund both litigation and his living expenses, I accept that he has no earned income at present, so my concern is somewhat academic. I will deal with the Thomas submission made to me in closing later in this judgment. All I will say, at this stage, is that it is a difficult submission to make that third parties should fund periodical payments going forward, if the payer is out of work. The Respondent then said that the Applicant did not say why his employment was terminated, but, given that I have accepted that he was dismissed, the reason is neither here not there. The Respondent did accept that it was good for K that the Applicant is now here and that it would be best if the Applicant got a job in London. He added that the Applicant had not presented sufficient evidence that he cannot get a job or that he could not free up money by renting out the Canada Water apartment. I have already dealt with both these points.

42. He was then asked about his expenses. He made some good points and some that were not quite so good but I accept that, as he is now working full-time, having sufficient money to pay for wrap around care and holiday camps is important. He said that after-school care costs either £50 per day or £30 per day for a child-minder. I can well understand that. He made the additional point that he gets about five weeks holiday per annum, whereas he has K for at least seven weeks of school holidays per year. He added that weekends out with K are really expensive. He said his deficit is about £700 per month without making any repayments of his costs loan. I certainly accept that money is very tight for him and that he does need maintenance. He said that he has no dining room table and his hob and fridge freezer are broken.

43. He then gave the evidence that I consider is particularly important, relating to his work. He accepted that he now works full-time, having increased his hours considerably during the currency of this case. He accepted that he was earning £1,600 per month net at the time of the hearing before Recorder Chandler KC, whereas he is now earning £3,036 per month net. He had been receiving £400 per month benefit but has now lost that. He fairly accepted that it was anticipated that he would go back to work full-time in due course. It is to his great credit that he has done so and that he has increased his gross-pay to just under £50,000 per annum. Indeed, I consider that it is exceptionally fortunate that he has done so, as I cannot see how he could have survived financially without the maintenance if he had not increased his earned income dramatically.

Counsel's submissions

44. Unusually, I am going to make reference to a few points made by counsel in their closing submissions. Mr Fee, on behalf of the Respondent, reminded me that existing maintenance commitments come first, whereas the Applicant

views the obligation as the first thing to go. He added that the Applicant's submission that I should remit the arrears as calculated by me at the time of the appeal cannot be right, given that they have already been dealt with and quantified. I accept that submission. He argued that the offer by the Applicant to inform the Respondent when he obtained work was illusory as the history of the case shows that it will not happen. Whilst he may or may not be right about that, he made the fair point that the obligation should be to report every three months whether the Applicant had obtained employment or not. He suggested that the case of Thomas v Thomas [1995] 2 FLR 668 was relevant due to the resources available to the Applicant to enable him to continue to pay his mortgage; fund his litigation costs; and continue his existing standard of living.

45. Mr Calhaem reminded me that, if I make a nominal maintenance order, it can only last for twelve months before either party could refer the matter to CMEC, which would then have exclusive jurisdiction, unless a maximum assessment was made, which is highly unlikely at present. This is, of course, correct, provided that the Applicant does not return to China or Hong Kong. He then offered an undertaking that his client would pay 10% of his gross income by way of child periodical payments as soon as he obtained employment. It was thought that this would broadly equate to a CMEC assessment. It was certainly a timely and welcome offer.

My conclusions

46. It is a matter of great regret that this case has had to come back to court yet again. I must, however, deal with it dispassionately.

47. I have found that the Applicant has lost his job and that, at present, he does not have an earned income. I have found that his attempts to obtain alternative employment have not been as rigorous as they should have been, but I cannot be sure that he would have obtained employment by now, even if he had put more effort into the process. Moreover, it is absolutely clear to me that he desperately needs to obtain employment very soon and a failure to do so will have significant financial consequences for himself and his family.

48. I am not of the view that this is an appropriate case to apply the dicta in Thomas v Thomas. Whilst the Applicant does appear to be able to obtain finance, whether by gift or loan, from family and friends, I am not of the view that this will continue indefinitely. Moreover, it did not occur during the marriage, unlike in most of the cases where Thomas has been applied. I am of the view that it would not be right to direct that the Applicant pays child maintenance out of any such continuing resources.

49. There is no doubt in my mind that the maintenance order would have been varied, in any event, given the very significant increase in the income of the Respondent. In my judgment last year, I was clear that there was an element of spousal maintenance in the existing provision. Now that the Respondent is earning very close to £50,000 per annum, there is no doubt that such provision is simply no longer appropriate.

50. Moreover, I am of the view that the time has now come for me to apply section 31(7)(a) and bring any possibility of future spousal maintenance to an end. The original order of DDJ Chandler dated 14 July 2020, at paragraph 30, made a spousal periodical payments order in the sum of £1 per annum. That order was continued by HHJ Gibbons, on 6 December 2021, at paragraph [4] and by myself, on 30 June 2023, at paragraph [5]. I consider this provision has been something of a running sore in the case. I have already said that, now that the Respondent is earning close to £50,000 per annum gross, it is impossible to see how it can survive. I was satisfied that there was an element of spousal maintenance in the child periodical payments. There is no doubt whatsoever that the Respondent has maximised his earning capacity and that he can adjust without undue hardship to the termination of that aspect of the payments. The only possible reason for continuing the order would be as a safety net in case he was to lose his employment or be unable to work for health reasons. Whilst there is some support in the authorities for maintaining such a safeguard, the statute is clear and other authorities take a different approach. In this particular case, I am clear that this order should go. It has achieved nothing to date. I discharge the order.

51. This does not, of course, mean that the Respondent does not need child maintenance for K. He very much does need such support. He is entitled to child periodical payments. If the Applicant was earning the amount of £7,500 per month net that I attributed to him in my 2023 judgment, I would have considered child periodical payments of around £1,000 per calendar month to have been appropriate on the basis of the Respondent's current income. This would have involved a significant reduction in the figure of £1,650 per month in my 2023 order. It would have made up the Respondent's shortfall, but been fair to the Applicant. I doubt whether I would have reduced the figure when K completed Year 2 of his education.

52. The problem is that the Applicant does not have an income. With considerable regret, I have therefore come to the conclusion that the only order that I can make, at present, is for an order for nominal periodical payments for K. I do so strictly on the basis that the Applicant gives me the following undertakings:-

    (a) To take all reasonable steps to obtain remunerative employment as soon as possible;
    (b) To inform the Respondent in writing as soon as he has obtained employment and to give full particulars of his gross and net income, including by the provision of a copy of his contract and first payslip;
    (c) In the event that he does not obtain employment, to inform the Respondent on 1 September 2024, 1 December 2024 and every three months thereafter of the progress of his search for employment or self-employment; and
    (d) To pay 10% of his gross income to the Respondent by way of child periodical payments for K at the end of each month following his obtaining employment or taking up self-employment.

53. I have already made it clear that I do not intend to remit any of the arrears of child maintenance as assessed by me on 30 June 2023. At the time, I assessed the arrears at £25,590 but the Applicant paid several months at the rate of £1,500. I am told by both counsel that the arrears under the earlier order are £18,090, which figure I accept. I expect them to be paid at the rate of 10% of the Applicant's gross income from the date on which he obtains fresh employment or takes up self-employment.

54. I have found the most difficult decision to be the question of the arrears since 13 December 2023. The Applicant offered a payment holiday, but the Respondent did not accept. I have come to the conclusion that it would be unfair and wrong to hold the Applicant to his concession. He did, however, receive two months' income by way of termination payment, but only paid one month's maintenance after his employment ended. I therefore consider he should pay the December 2023 maintenance in the sum of £1,650. The order will therefore be varied to nominal periodical payments from 1 January 2024, with the consequence that there are no further arrears other than the sum of £1,650. I recognise that the Applicant might say that the December 2023 figure should be lower due to the Respondent's increased income at that point. I make it clear that I have taken this increased income into account in deciding what the appropriate arrears are. If I had reduced the order earlier, I would have just made him pay for slightly longer before reducing the order to a nominal level. It is agreed that these arrears of £1,650 should be paid within 28 days, which I consider a sensible resolution to the issue.

55. Finally, I dismiss the Respondent's Hadkinson application. The Applicant has been successful so it would be quite wrong to make such an order. I do, however, make it clear that this really must be the last litigation in this case.

Costs

56. After I sent a draft of this judgment to the parties, I received written submissions on costs from both counsel. In the original draft judgment, I referred to the fact that I had been critical of the steps the Applicant had taken to obtain alternative employment. Whilst I said I had not taken this into account in relation to arrears, I was of the view that it was relevant to the question of costs, in so far as the Applicant might be considering an application that the Respondent pay his costs of this application.

57. The Applicant did, indeed, then apply for his costs, namely counsel's fees in the sum of £18,500. Mr Calhaem relied on three grounds. First, that the Respondent had completely failed to negotiate. Second, that the Applicant had made a more generous proposal, before the proceedings commenced, than that obtained by the Respondent in the litigation. Third, that the Respondent had initially refused to provide financial disclosure and, when he did so, it revealed a dramatic rise in his income. He also submitted that the Applicant had no legal obligation to make a better job of obtaining alternative employment.

58. Mr Calhaem relied on the case of LM v DM [2021] EWFC 28; [2022] 1 FLR 393 in support of his contention that a failure to make a serious attempt to negotiate was justification for a costs order.

59. Mr Fee, on behalf of the Respondent sought no order for costs of both the variation application and the application for enforcement. He made the point that the no order rule applies to the variation application. Although it does not apply in relation to the enforcement application, the Respondent was, at least in part, successful in that application in relation to the sum of £1,650. Mr Fee submitted that it was not unreasonable of the Respondent not to accept at face value what the Applicant said given the previous judicial findings of dishonesty and manipulation on the part of the Applicant. He contended that the offer in December 2023 of a payment holiday was an empty offer, given that the arrears have not been paid. He added that the litigation conduct of the Respondent had been entirely reasonable. Moreover, he asserted that the failure of the Applicant to take adequate steps to find work was critical. Finally, Mr Fee submitted that, although the Applicant might not have a legal obligation to obtain alternative employment, he did have a legal obligation to pay child periodical payments.

60. I have decided that I should make no order for costs of both applications. In relation to the variation application, there is a presumption of no order as to costs. I cannot see any reason, in the circumstances of this case, that would take the matter outside the presumption. Whilst there was no negotiation after the date of the application, I consider that applies to both parties. After all, the offer of undertakings by the Applicant only emerged during the hearing. Moreover, the December 2023 proposal was not maintained by the Applicant and the arrears were not paid.

61. I do consider that the Respondent was entitled to be sceptical as to the merits of the application, given the previous findings of fact in relation to the Applicant and the fact that this was yet another application made relatively soon after my decision on the appeal. Moreover, I am of the view that my critical findings in relation to the Applicant's attempts to find work are relevant to costs. Whilst there could be some criticism of the failure by the Respondent to disclose his improved income, I take the view that the steps he has taken to increase his income goes to his credit and is in sharp contrast to the efforts made by the Applicant to secure alternative employment.

62. On the basis that there is to be no order as to costs of the variation application, it would be quite wrong to make an order for costs of the enforcement application, given that both parties had some success in that regard.

Post-script

63. I want to pay tribute to both advocates for the way in which they presented the application to me. Nothing more could have been said or done on behalf of either party. I wish to pay particular tribute to Mr Fee for agreeing to undertake the matter pro bono.

Mr Justice Moor
31 July 2024

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