

One step at a time

Caroline McNally and Chantelle Woo outline the steps to register and enforce England and Wales maintenance orders in Hong Kong and recent changes in procedure



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Parties who obtain maintenance orders on divorce in England and Wales may find it necessary to pursue enforcement measures in Hong Kong should the paying party either live in or have assets in Hong Kong. The means of enforcing orders in Hong Kong deserves serious consideration before proceedings are started, given that enforcement procedures are neither straightforward nor quick. In this article we will focus on the enforcement of maintenance orders by way of a judgment summons application, which has been the subject of a recent overhaul following the handing down of the Court of Appeal decision in *YBL v LWC* [2017] and the introduction of Practice Direction SL 10.2 which came into effect on 11 February 2019.

Registration of maintenance orders in Hong Kong

As long as the paying party lives in Hong Kong, an order for periodical payments can be enforced under The Maintenance Orders (Reciprocal Enforcements) Ordinance (Cap 188). The first step is the registration in Hong Kong of the maintenance order made in England and Wales. Thereafter, the basic procedure is as follows:

- the 'responsible authority' in England and Wales (ie, the Reciprocal Enforcement of Maintenance Orders (REMO) Unit) must send a certified copy of the order to the Hong Kong Chief Executive's office;
- if the payer appears to be residing in Hong Kong, a copy of the order will be sent to the registrar of the District Court;

- the registrar will take such steps as they think fit to ascertain whether the payer is residing in Hong Kong; and
- if the registrar concludes that the payer is residing in Hong Kong, they shall register the order made in England and Wales, and it is enforceable as if it had been made by the Hong Kong District Court.

Pre-*YBL v LWC*

Before the decision in *YBL v LWC*, the judgment debtor was required to attend court for oral examination to show cause as to why they should not be committed to prison for contempt. The court would then ascertain whether the judgment debtor had the ability to make the payments ordered and whether they had wilfully failed to do so. The burden of proof was on the judgment creditor to prove beyond reasonable doubt.

The court had the power to commit a judgment debtor to prison for up to three months, and arguably for longer, or to suspend the committal upon payment of the outstanding debt, either in its entirety or by instalments, or to adjourn *sine die* with liberty to restore. When considering the possibility of imprisonment, the court was bound by the claims made in the judgment summons. In other words, the court looked at the amount that the judgment creditor said was owed at the date of the judgment summons and the judgment debtor was put to strict proof in relation to those amounts.

YBL v LWC

On 30 December 2016, the Court of Appeal handed down its judgment in

YBL v LWC and held that the judgment summons procedure had features which were incompatible with Arts 10 and 11 of the Hong Kong Bill of Rights Ordinance (Cap 383) (the Ordinance). The Court of Appeal concluded that having the committal process heard

Kong is different from England and Wales in that Hong Kong does not have the equivalent of the Child Support Act 1991 (CSA 1991). Under CSA 1991, the Child Maintenance Service (CMS) takes up the responsibility for the collection of child support and it has wider

high standard of proof is that of beyond reasonable doubt;

- the examination process and the committal process are segregated;
- the judgment debtor must be promptly informed of the factual basis for alleging that they have, or have had, the means to pay; and
- the parties have the right to legal representation and legal aid is available.

The Court of Appeal concluded in YBL v LWC that having the committal process heard at the same time as the examination process was unfair and incompatible with the right to a fair trial.

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The Court of Appeal explained that the purpose of an examination process is to facilitate a judgment creditor obtaining further information as to the financial means of the judgment debtor. The judgment creditor must take the information obtained through the process of examination to formulate their case against the judgment debtor at the time of default. This should be part of the judgment creditor's case against the judgment debtor and until such information is available, the judgment debtor cannot properly prepare their defence.

Seen in this light, the Court of Appeal held that the compression of the two processes (ie of examination of means and of committal) into one undermines the guarantees in Arts 11(2) (a) and (b) of the Ordinance which state that the judgment creditor must know the nature of the cause against them and have adequate time to prepare their defence. The court also noted the risk of the judge overlooking the point that the burden and standard of proof are different in the two processes.

Non-compellability and the right against self-incrimination

The Court of Appeal examined the extent to which a judgment creditor can rely on the evidence obtained under compulsion in the examination to establish a case of contempt.

In the context of the enforcement of a child maintenance order, Hong

powers of enforcement, including the disqualification of a defaulting debtor from driving. However, in Hong Kong, there is no government agency pursuing child maintenance claims. The onus rests entirely upon the judgment creditor. As explained above, sometimes it is necessary for the judgment creditor to resort to the information and answers obtained from the examination process to support effective enforcement by an application for committal.

In cases where a judgment creditor had to resort to examination before embarking on a committal application, the purpose of the examination is to gather information which would not be otherwise available to the judgment creditor. Although in some cases, it may be sufficient for the judgment creditor to rely on documents obtained from the examination without referring to the answers of the judgment debtor, there are cases where a judgment creditor would need to establish a case for committal on the basis of the answers.

The Court of Appeal in *YBL v LWC* therefore held that as long as the following safeguards are observed, the judgment debtor's right to a fair trial is not undermined and the direct use of the compelled answers in the examination process in the committal proceedings satisfies the proportionality test:

- The overall fairness of the committal process is safeguarded by recognising that:
 - the burden of proof remains on the judgment creditor, and the

The judgment debtor will also know in advance what they have said in terms of answers given at the examination and if they so wish they can explain, supplement or clarify those answers in the committal proceedings.

- The scope of examination (and thus the answers which a judgment debtor is compelled to give) is limited and the extent to which it could be used in a criminal context is also limited to the committal process for enforcement of the judgment debt.

- Even if the court is ultimately satisfied that the judgment debtor has the means to pay, they can still escape imprisonment by paying the arrears if the court gives a direction under r87(6) of the Matrimonial Causes Rules (Cap 179A) for the execution to be suspended on terms and they comply with the terms of suspension – bearing in mind the context of an application in a judgment summons (with its ultimate purpose in enforcing an order for maintenance payment), with imprisonment being a last resort, it is only in exceptional circumstances that the court would *not* give such a direction.

- For situations where the judgment summons is the only effective means of enforcement, it is often the case that the means of a judgment debtor is solely within their knowledge – if the compelled answers cannot be used, it would substantially frustrate the purpose

of examination and the effective enforcement of judgment debts by this procedure.

Ongoing arrears

The Court of Appeal considered the practice of expanding the scope of a judgment summons by including ongoing arrears in the amount in default (as opposed to the arrears up to the date of the judgment summons), and held that while this practice may be adopted for the examination process, it was unacceptable to adopt it for the committal process.

The court explained that in order to establish a case of default up to the date of the judgment summons, the judgment creditor needs to establish the means of the judgment debtor *during* the defaulting period. However, if further arrears were added in the course of the committal proceedings, that would effectively mean that the judgment creditor can commit the judgment debtor on their means *after* the date of the judgment summons. Thus, the charge is being constantly expanded and the judgment creditor can succeed even though they fail to establish the means of the judgment debtor for the pre-judgment summons period, so long as they manage to establish the debtor's means as they are after the date of the judgment summons.

Practice Direction SL10.2

In January 2019 the Hong Kong courts published Practice Direction SL10.2, which is a guidance note on the new judgment summons procedure. It provides guidance on the practice and procedure to be followed regarding the examination and committal of a judgment debtor.

The examination summons

The first step is to make an *ex parte* application to the court for permission to file the examination summons against the debtor. The *ex parte* application includes:

- a praecipe for issue of examination summons, which will set out the amount of arrears owed by the debtor; and
- a supporting affidavit.

The applicant is under a duty to provide full and frank disclosure in an

ex parte application, which will include letting the court know their current financial status including all bank accounts, assets, etc worldwide. The Hong Kong courts generally allow only 12 months of payments in arrears and

The debtor may make an application to vary the maintenance they have to pay, and the court is bound to first deal with the variation application, meaning that the enforcement application will be put on hold until the variation application has been dealt with.

any special circumstances will need to be set out in detail in the supporting affidavit.

If the court allows the application to issue the examination summons, it will be served on the judgment debtor accompanied with a warning notice in both English and Chinese in the form annexed to the guidance note. There will be a hearing date and the debtor will be asked to attend the court to explain whether they have the means to pay. The court may make a new order for payment of the amount due under the original order, together with the costs of the examination summons and the interest, either at a specified time or by instalments.

If the debtor fails to attend the examination hearing, the judge will adjourn the examination summons to another day and order the debtor to attend. If the debtor still fails to attend the adjourned hearing, the court may issue a warrant of arrest against them. At any time during this stage, the debtor may make an application to vary the maintenance they have to pay, and the court is bound to first deal with the variation application, meaning that the enforcement application will be put on hold until the variation application has been dealt with.

The committal summons

After the conclusion of the examination summons, the applicant may apply for leave to issue a committal summons against the debtor. The procedure is similar to that for the examination summons in that the judgment creditor must make an *ex parte* application

to the court for permission to file the committal summons against the debtor. The *ex parte* application includes:

- a statement setting out all relevant details of the default; and

- a supporting affidavit setting out the facts relied on in the statement.

After the court grants leave, the committal summons is served on the judgment debtor with the accompanying warning notice. In determining the committal summons, the court may, in its discretion, make an order for committal if it is satisfied that the judgment debtor:

- has, or has had, since the date of the order the means to pay the sum in respect of which they have made default; and
- has refused or neglected, or refuses or neglects, to pay the sum.

Given the serious consequences of imprisonment, the court is generally cautious in committing the judgment debtor to prison and the sanction is seen as the very last resort.

Conclusion

The new procedure for enforcement of a maintenance order in Hong Kong by way of judgment summons is complex and will take time to be dealt with by the Hong Kong courts. Other methods of enforcement, such as an attachment of income order to require an employer of the maintenance payer to deduct certain sums from their pay, should always be explored if the circumstances allow. ■

YBL v LWC
[2017] 1 HKLRD 823