

FCMC001425/1988

**IN THE DISTRICT COURT OF HONG KONG
DIVORCE JURISDICTION**

SUIT NO. 1425 OF 1988

BETWEEN

M

Petitioner

and

M

Respondent

Coram: Deputy Judge Saunders in Chambers

Date of Hearing: 2 June 1997

Date of Judgement: 10 June 1997

JUDGMENT

In this matter the Respondent wife has filed a summons seeking an order from the Court directed to the Director of Housing that he should supply to the wife the address, presently held by the Director of Housing, for the Petitioner husband.

The matter arises in the following way.

The husband and wife were married on 25 November 1981. They have one child, a daughter born on 26 October 1980. Unhappy differences arose between the husband and wife and they separated in June 1983. In March 1988 the husband issued a petition for divorce based upon two years apart with the consent of the wife to a decree. A decree nisi was pronounced on that petition on 14 July 1988 and at the same

time the judge ordered the husband, on his own application, to make periodic payments for the maintenance the child of the family at the rate of \$1,400 per month commencing on 1 August 1988. A decree absolute was made on 7 September 1988.

From July 1996 the husband has failed to pay the periodic payments, in breach of the Court order. He has not, for the last two years, exercised his rights of access to the child.

In an affirmation in support of the summons the wife says that in October 1986 she went to visit the husband at his last known address but discovered that he had moved. She made enquiries of the Housing Department Estate Office and was told that the husband had been allowed to move to a bigger room within the estate. The staff of the Housing Department were however, unwilling to tell the wife the husband's new address. Through her solicitors the wife sought from the Housing Department the address but the Department declined to supply that address, relying upon the provisions of the Personal Data (Privacy) Ordinance.

Until the commencement of the Personal Data (Privacy) Ordinance it was common practice for the District Court, in its Matrimonial jurisdiction, to order either the Director of Housing or the Director of Immigration to supply to a party to matrimonial proceedings the address or movement record of the other spouse. This information was sought to enable proceedings to be served, or to enable the Court to ascertain whether or not service should be undertaken by way of substituted service. The practice continued for many years and no objection was ever raised to it. With the commencement of the Personal Data (Privacy) Ordinance both the Housing Department and the Immigration Department have consistently declined to supply the information.

The issue in this case is whether or not I should make the order sought by the wife.

There is no doubt that by definition the information, including the husband's address, held by the Housing Department constitutes "personal data"; see s.2 of the Ordinance. Equally, the Housing Department (or the Immigration Department whenever relevant) is a "data user" as a "person controlling the collection, holding, processing or use of data": s.2 of the Ordinance. By s.4 of the Ordinance it is provided that:

"a data user shall not do an act, or engage in a practice, that contravenes a data protection principle unless the act or practice, as the case may be, is required or permitted under this ordinance."

The "data protection principles" are set out in schedule 1 of the Ordinance. Data protection principle 3 states as follows:

"Principle 3 - use of personal data. Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than-

(a) the purpose for which the data to be used that the time of the connection of the data; or

(b) a purpose directly related to the purpose referred to in paragraph (a)."

There is no doubt that supplying the address of a person for the purposes of proceedings under matrimonial legislation does not fall within the terms by which personal data may be used under data protection principle 3. Consequently, unless exemption from that principle can be found, the address of the husband may not be supplied to the wife without the prescribed consent of the husband, (the data subject).

Prima facie therefore, unless permitted under the Ordinance, and no matter how much it may obviously be in the public interest to pursue a person for unpaid maintenance, the information may not to be disclosed. It is, of course, in the public interest that husband's pay maintenance, for if they do not, wives are forced to seek the assistance of the Social Welfare Department, whose funds must come from taxation paid by the public. The public therefore have a clear interest in ensuring that maintenance orders are not ignored by husbands.

There are exemptions to the data protection principles of the Ordinance set out in Part VIII. Section 58, somewhat misleadingly entitled "Crime, etc.", contains the following provisions:

"58(2) Personal data are exempt from the provisions of data protection principle 3 in any case in which:

- (a) the use of the data is for any other purposes referred to in subsection (1) (and whether or not the data are held for any of those purposes); and
- (b) the application of those provisions in relation to such use would be likely to prejudice any of the matters referred to in that subsection".

Section 58(1)(d) contains the following in its description of purposes:

"The prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice by person;"

The husband is obliged, pursuant to the order made by the Court on 14th February 1988, to pay maintenance for the child at the rate of \$1,400 per month. He is not making those payments. He is in breach of that Court order.

When considering the exemption under section 58(2) it matters not what the purpose is for which the data is held: see section 58(2)(a). Mr Wong says that by failing to pay the maintenance pursuant to the Court order the husband is undertaking "unlawful or seriously improper conduct".

I do not think that the conduct of the Husband in acting in breach of the Court order is "unlawful conduct". In Lyons v Smart (1908) 6 CLR 143, at 147, Griffiths C J said:

"the word 'unlawfully' is a word commonly used in statutes creating crimes misdemeanours and minor offences, and in such Acts it is used in two

shades of meaning, one when referring to an act which is wrong or wicked in itself - recognised by everybody as wicked - as for instance, when it is used with reference to certain sexual offences, or with reference to acts which are absolutely prohibited under all circumstances; the other when referring to some prohibition of positive law."

In R v Clarence 22 QBD 23 Stephen J said:

"(the word) 'unlawfully' is used exceptionally in a wide, general sense as regards conspiracy; but its ordinary import is an act which is 'forbidden by some definite law' and does not embrace that which is merely immoral."

Thus, although the husband is in breach of the Court order, I do not think that it can be said that he is acting unlawfully. It is not an offence per se to breach the order. I hold that the husband's conduct in failing to pay maintenance is not unlawful.

A failure to pay maintenance may result in the issue of a judgement summons whereby the person ordered to pay is required to attend the Court to explain why he has not paid. If his explanation is not satisfactory he may be committed to prison. A civil contempt of Court is described as "disobedience to an order of the Court by a party to the proceedings" see *The Supreme Court Practice 1997*, para 52/1/2.

There is no definition in the Personal Data (Privacy) Ordinance of the expression "seriously improper conduct". In section 2(9) of the Ordinance an example is given as to conduct by which is deemed to be seriously improper conduct. That example does not purport to be an exclusive definition of the expression.

I am of the view that a contempt of Court is "seriously improper conduct" as those words are naturally used and understood. The Court has made an order that maintenance be paid at certain time. The husband is in blatant breach of that order. If he cannot afford to pay maintenance it is always open to him to come to the Court and ask for the order to be reduced or cancelled. If he is being denied access and believes that as a result he should not be liable to pay maintenance it is open to him to come to the Court to seek proper access. He is taken neither of these steps but simply, ignores the order.

I accordingly find his conduct to be seriously improper conduct as that expression is used in the Personal Data (Privacy) Ordinance.

The application of data principle 3 operates to prevent disclosure of the husband's address. That prevents the wife from taking proper steps to enforce the Court order. Thus the application of the provisions of data principle 3 prejudice the wife from taking steps to prevent the husband's seriously improper conduct and contempt of Court.

I accordingly find that where a person is in breach of a Court order and another person, being entitled to the benefit of that order, wishes to enforce the order, then, by virtue of the provisions of s.58(2) of the Data Privacy Ordinance, a data user is exempt from the provisions of data protection principle 3 and may supply the information upon appropriate request.

Mr Wong sought costs against the Petitioner husband. He has of course not been a party to these proceedings which have been taken by way of a test case. The wife is not legally aided and must meet her own costs. I propose to reserve the question of costs until the husband can be heard on the issue.

(J.L. Saunders)
Deputy District Judge

Representation: