

CSFK v HWH [2020] HKCA 207

New guidance from the Court of Appeal on the powers of the FDR judge and the use of Video-Conference Facilities

This case involved an appeal against a substantive order for ancillary relief (the “FDR Order”) made by the judge at the Financial Dispute Resolution (“FDR”) hearing without the Wife’s consent. The FDR judge made an order in terms of a “memorandum” signed by the parties after an earlier FDR hearing, that the Wife sought to back out of at the subsequent hearing.

The appeal was allowed after a remote hearing was conducted making use of the court’s video conferencing facilities (“VCF”) in view of Covid-19 pandemic. In doing so, the court provided guidance on the powers of an FDR judge, an “unperfected” order and an order made without consent, as well the use of remote hearings.

VCF Hearings (at paragraphs [5 – 27])

- (1) The court was satisfied that it was permissible and lawful to conduct remote hearings through VCF under existing statutory frameworks and the conclusion that the physical attendance of all participants at one location is not mandated was approved.
- (2) The essential considerations were fairness and openness of the proceedings whilst the facility for the keeping of an accurate and official record of the proceedings was also important.
- (3) VCF hearing enabled parties, through their counsel, to address the court as effectively as an ordinary hearing. The [Guidance Note issued by the Chief Judge of the High Court on 2 April 2020](#) encapsulates the rationale for a VCF hearing at para 9. When the right to public hearing is engaged, the principles of open justice were examined and duly observed in the VCF hearing, given that at the time of the hearing members of the public and the media were permitted to come to court to observe the proceedings.
- (4) VCF is one possible solution to answer the need occasioned by the Covid-19 pandemic to ensure prompt and safe conduct of proceedings which stands in line with the underlying objective in [Order 1A Rule 1 of the Rules of the High Court \(Cap. 4A\)](#) to ensure that a case is dealt with as expeditiously as is reasonably practicable.

Setting Aside Leave to Appeal (at paragraphs [48 – 54])

- (5) Leave and extension of time applications were meant to be summary filtering process, and when leave to appeal (including extension of time) has been granted by a judge, the court will usually refuse to revisit the question of leave.
- (6) The court viewed Ground 1 had a strong merit. Notwithstanding the Wife’s delay, it was clear to the Husband that she had been taking every possible step to challenge the FDR Order. Despite the pursuit of wrong procedure, the court was satisfied on a multi-

facet assessment that there was no abuse by the Wife. Further, given the court's view of the merit, the Husband should not have resisted the challenge to the FDR Order.

The Powers of an FDR judge (at paragraphs [55 – 80])

- (7) Only three categories of order can be made in an FDR (a) an order adjourning the appointment; (b) a consent order disposing of the case; or (c) directions to progress the case to its final hearing.
- (8) The Court of Appeal emphasised that FDR hearing is a without prejudice process, where the confidential nature of the process was emphasised as essential so that parties can express themselves without fear of their statements being subsequently taken into account on a substantive determination of the ancillary relief (see [AB v MAW](#) [2017] 1 HKLRD 385).
- (9) It goes against the inherent nature of an FDR hearing for an FDR Judge to make an order (other than an order by consent) which may impinge or pre-empt some issues that may have to be determined by the judge presiding over an ancillary relief trial.
- (10) The memorandum only had the status of an agreement between the parties. In family proceedings the court was not bound to accept the terms of such agreement as the appropriate ancillary relief, and in cases where there are children involved the court had to examine if sufficient provision has been made for the children.
- (11) The FDR Order made in terms of the memorandum was not an order which a judge could legitimately make at an FDR hearing. The point was that an FDR judge should not make an order which might have an effect on the adjudicative process in the ancillary relief trial.

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