

HONG KONG / JUDGMENT

C v. T

COURT

Family Court

DECIDED

23 January 2007

CASE / FILE NUMBER

FCMC4706/2001

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bjbj .,&L FCMC 4706/2001 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NO. 4706 OF 2001

BETWEEN C Petitioner and Respondent

Coram: Deputy Judge C.K. Chan in Chambers (Not Open to the Public) Dates of Hearing:
31October, 1-4, 7,13 and 29 November 2006 Date for Respondent to Submit Further Documents: 4
December 2006 Last Date for Petitioner to Submit Further Documents: 11 December 2006 Date of
Handing Down Judgment: 23 January 2007

J U D G M E N T

This is a trial of the Respondent wife s application for ancillary relief against the Petitioner husband. For the sake of convenience, I shall refer to the Petitioner as the Husband and the Respondent as the Wife in this Judgment.

Introduction

The Husband is now aged 42 and the Wife aged 40. The parties met each other and became lovers in 1982 (when the Husband was aged 18 and the Wife aged 16) during the time when both of them were trainee dancers with the TVB. After the completion of their training, they became professional dancers performing on stage in various Hong Kong and overseas concerts. They started cohabitation in 1985 and finally got married in 1992. After marriage, the Wife ceased her career as a full time dancer and became financially dependent on the Husband. The marriage did not work out as there were complaints from the Wife on the Husband s infidelity. The Wife even complained that the Husband had infected her with venereal disease because of his casual attitude in extra-marital relationship. They finally separated in 1997 when the Wife moved out of

the matrimonial home. The parties entered into a Deed of Separation on 3 January 1998 (hereinafter called the Deed of Separation) to record their agreement on financial settlement. In essence, the parties agreed that the Husband should pay a lump sum of \$85,000 and a periodical payment of \$5,000 per month to the Wife. In return, the Wife agreed to a divorce by one year consent. There are mutual complaints that the other party has breached the agreement. The Wife complains that the Husband has not honoured the terms of the Deed of Separation by stopping the periodical payments after only one year. Therefore, the Wife considers that it is only fair that the Husband should pay back the outstanding arrears of the periodical payments from July 1999 (the last payment made in June 1999) up to now and continue to pay her a monthly sum of \$5,000 from there after. It is also the Wife s case that the lump sum provisions as contained in the Deed of Separation were not fair to her. As the Husband is in a much better financial position than her, she asks the Court to reopen that aspect of the Deed of Separation by granting her a bigger lump sum.

12. On the other hand, the Husband complains that the Wife has not honoured her agreement to a divorce by consent. On 16 March 2001, the Husband issued the present Petition for Divorce based on the fact of 2 years separation. Decree Nisi was granted on 19 March 2002 which was followed by a Decree Absolute on 8 May 2002. On the issue of ancillary relief, it was adjourned for the parties to submit their affidavits of means and related evidence. Unfortunately, due to the Wife s deteriorating health, there has been much delay in the proceedings resulting in the trial of the Wife s application for ancillary relief only came before me over 4 years after the dissolution of marriage. It is now the Husband s case that he can no longer make a decent living by being a professional dancer due to his age (42). He said he has no job at the moment and is squatting in his parents flat in a public housing estate. He asks the Court to dismiss the Wife s claim for ancillary relief.

Issues

After hearing the parties evidence for 7 days, it becomes clear that the main issues of this case are: Whether the Husband has transmitted venereal disease to the Wife? What are the present financial circumstances of the parties? What are the parties respective circumstances by reference to section 7 of the Matrimonial Proceedings and Property Ordinance, Cap 192? Whether the parties should be held to the terms of the Deed of Separation? What orders should be made in the Wife s ancillary relief application? The Wife s Venereal Disease

17. The issue on whether the Husband had transmitted any venereal disease to the Wife is relevant because under S.7 (1) of Matrimonial Proceedings and Property Ordinance, Cap 192, the conduct of the parties which is obvious and gross is a relevant consideration in an ancillary relief application: *Wachtel v Wachtel* [1973] 1 All ER.
18. At trial, only the parties themselves gave evidence. According to the Wife, in the year of 1995 or 1996, shortly after a working trip by the Husband to the Gentings Highlands in Malaysia, the Wife suspected she might have been pregnant. Upon hearing such news, the Husband suddenly confessed that he had had casual sex with someone without using a condom while

he was working in Malaysia. The Husband suspected that he might have contracted some kind of sexual disease as a result of that casual sexual encounter. This had caused great concern to both of them because if the Wife was really pregnant, the baby in the womb might have been infected as well. Subsequently both of them went to a government clinic for testing. However, at the very last moment, only the Wife took the test whilst the Husband backed out by putting up a pretext that he would go for a medical test in a private clinic. He even persuaded the Wife not to go back to the government clinic for the result because if he were found clean during the medical test in the private clinic, that means the Wife would be clean as well. As a result of such persuasion, the Wife did not go back for her test result. However, the Husband did not keep his words and failed to go to have medical test at a private clinic. Starting from about 2002, the Wife said she started to have all sorts of medical problems. She was found to have been infected with Human Papilloma Virus () on her cervix. She is now in Stage CN II of the infection, which is the second stage out of a total of 4 stages. The infection will develop into full-blown cancer after Stage CN IV. The Wife said it was the Husband who had transmitted sexual disease to her in 1995/1996 which has eventually developed into this HPV infection. The Husband flatly denied that he had casual sex in the Gentings Highlands as alleged by the Wife. He also denied he had ever contracted or transmitted any sexual disease to the Wife. In deciding this issue, I bear in mind that the allegation put forward by the Wife is indeed a very serious one. The burden is on her to prove the transmission of sexual disease by the Husband. In this regard, I note that apart from the words of the Wife concerning the 1995/1996 incident, there is no other evidence to support what she said about the transmission of sexual disease from the Husband. If she had obtained the result of her medical test done in the public clinic to confirm her infection back then, a reasonable inference might be drawn against the Husband. However, the confirmation of a HPV infection 5 years after separation (6 years after the alleged incident) does not carry her case very far. In short, I can not be satisfied, even on a balance of probability, that the Wife's HPV infection was caused by the Husband.

Present Financial Circumstances of the Parties

The Wife At trial, it was the Wife's evidence that after the parties had separated, she had once obtained an employment as a driving instructor with an income of about \$10,000 per month. However, she was only able to keep that employment for about 6 months. From then on, she could not obtain any permanent employment. It was also impossible for her to resume her former occupation as a professional dancer for the simple facts that she had been out of the profession for many years and the deterioration of her facial conditions. In order to make a living, the Wife had started to work as a private tutor for young children. From about 1999 to June 2006, she was able to earn an average monthly income of \$4,500. However, as from June 2006, due to the health conditions of her parents (her father suffers from dementia and her mother suffers from cancer), the Wife had to move back to live with and look after her parents. She also had to cut down her time on giving private tuitions and she is presently earning about \$3,000 per month as a private tutor. The Husband challenged the Wife's evidence in 3 major aspects. First, the Husband contends that the Wife and him both received the same kind of training as a professional dancer. As far as educational level is concerned, the Wife had completed Form 5 while he

only had Form 3 level. Therefore, the Wife should have a better earning capacity than him. Second, the Husband said the Wife had led a life style well above the income that she claimed to have made in the past few years. According to the Husband, despite the Wife claimed to have an income of \$4,500 per month only, she was able to rent a flat to live on her own. She was also able to maintain a private medical insurance policy. All these indicate that the Wife has always been able to earn an income well above of what she claimed. Third, the Husband said he has previously requested the Wife to provide some of her bank statements for checking. The Wife failed to provide those documents and so it is the Husband's contention that the Wife must be hiding some of her wealth from this Court. The Wife explained that she was able to maintain an independent household from her parents because she had received financial support from her parents from time to time. She said her father was not a rich man but he was a retiree from a big public utility and had a pension. Due to her financial difficulties, her parents had tried their best to help. As to the maintenance of a medical insurance, the Wife said she was in real need of this policy because of her deteriorating health. She said she had a friend who helped her in paying the premium of this policy. Regarding the Husband's complaint that she had not provided the bank statements as requested, she said she was more than willing to provide the same but she did not have the money to obtain those documents from the bank. She said she had already offered the Husband her full and complete authorisation to check with the bank if he really wanted to have those documents. Discussion

37. In assessing the parties evidence in this area, I think it is quite clear that the Wife has only very limited earning capacity at this stage. I have considered the Wife's medical evidence very carefully. She is suffering from HPV infection which has a very high chance of turning into cancer. She has serious facial problem which is obvious to everyone who has seen her face in court. She has skin breakdowns with cavities of various shapes and sizes on her face. Her face was covered with numerous scars which render her immediate return to gainful employment impossible. She also had right nipple discharge and right breast lump. All these, together with the fact that she has stopped professional dancing shortly after marriage which was over a decade ago, mean that her chances of returning to her trained profession as a dancer is virtually nil. Only equipped with an education of Form 5 and out of a permanent job for so long, I am satisfied with her evidence that she has only been able to work as a private tutor for small kids in the past few years. As to income, I think it is reasonable to accept what the Wife claims because of her obvious bad health, namely \$3,000 per month. As to the Wife's claim that she has been assisted by her parents and friend in the past, there is no evidence to contradict what she said. Besides, I have already ruled on her limited earning ability. The only reasonable inference to be drawn is that there had to be some financial assistance provided by her relatives or friends. Lastly, as to the complaint against the Wife's failure to provide bank statements to the Husband, I take note of the following facts:

- (1) There is no dispute that the Wife had ceased full time employment after marriage. In other words, she had been relying on the financial support of the Husband all along before separation.
- (2) There is no dispute from the Husband that the remaining family assets as at separation only amounted to about \$100,000 and under the terms of the Deed of Separation, the Wife only received a lump sum of \$85,000.
- (3) I have ruled that the Wife had been suffering from HPV and facial problem in all these years since separation.
42. Based on the facts in the preceding paragraph, the only conclusion to be reached is that the Wife has no assets at all. By the mere fact that she had not provided the documents as requested but offered an authorisation instead, I am not convinced that she is hiding some assets from this Court. The Husband
43. The financial circumstances of the Husband is much more controversial and has always been the central issue of this litigation. It is the evidence of the Husband that after his separation with the Wife in December 1997, his career in professional dancing has suffered a gradual decline. He said he is now aged 42 and is no longer working actively in the dancing field. He said he became an employee of a company called IF starting from 2001. During cross examination, the Husband gave the following evidence:
 - (1) IF was a production company and supplier of stage equipment set up on 18 May 2001 and owned solely by his mother who is now aged 65.
 - (2) He started employment with IF on 1 July 2001 with an income of \$9,000 per month and he was the only employee of the company.
 - (3) He was the one who actually ran the business of IF with very limited involvement of his mother.
 - (4) He was a signatory of IF's bank account.
 - (5) He operated the business of IF from his residence.
 - (6) He resigned from IF in July 2006 and the business closed down on 29 September 2006.
 - (7) On 10 February 2004, the Husband purchased a property at Tokwawan, Kowloon (City 151 Property) as a trustee of IF and in the joint names with his mother. The Wife challenged the evidence of the Husband by saying that the Husband was in effect the real owner of IF. As IF used to own the City 151 Property, that shows the Husband is not a person without means. I must say I have no doubt that IF belonged to the Husband. According to the Husband, his mother was aged about 60 when she set up IF. He agreed that his mother had all along been a housewife with no prior business experience, not to mention experience in the stage equipment business. I think it is difficult for the Husband to explain, why all out of a sudden, his mother would be interested in the stage equipment business. Even stranger was that

after the setting up of the business, she basically took on part in it at all and let it run by the Husband solely. The business was run from the Husband's residence, the Husband signed all the cheques and the company was closed down shortly after his resignation. Even more bizarre was the purchase of a residential property by IF with the Husband as the trustee. It is not in dispute that the City 151 Property was purchased in the joint names of the Husband and his mother on 10 February 2004 with a consideration of \$1,819,000. They took out a mortgage from the Bank of China. The initial amount of the mortgage was not readily ascertainable from the documents but I think it is safe to assume a 70% mortgage in the sum of \$1,273,300 was taken out, with a monthly repayment of \$5,644.34 for a period of 25 years. There was no explanation why the mother, apart from suddenly setting up a business in which she had no prior contact, would also like to buy a residential property for this business. Again, there was no plausible explanation why this property should be occupied by the Husband as his residence. At one stage, the Husband did try to explain that since he had to rent a place any way, that was why he rented this property from his mother. However, I do not see any tenancy agreement or evidence to that effect. Furthermore, when the Husband affirmed his Financial Statement (Form E) on 17 March 2005, it was stated in paragraph 1.16 (p. 34 of section B of the Bundle) that he jointly owned the City 151 Property with his mother. Under paragraph 4.1 of the same document (p.45 of section B of the Bundle), he put the monthly mortgage repayments of \$5,644.34 as his general expenses. At trial, evidence was revealed that those monthly mortgage repayments were made directly out of the Husband's personal account to the mortgagee bank. I am afraid all these do not sit well with the Husband's evidence that he was only a trustee or a tenant of the City 151 Property. I think the final blow to the credibility of the Husband's evidence in this regard came with the Declaration of Trust (p.304 of section C of the Bundle) (the Declaration of Trust) put forward by the Husband to prove his trusteeship. One would remember that the City 151 Property was purchased on 10 February 2004. During the course of discovery, enquiries were made by the Wife on this property. Suddenly out of the blue, the Husband produced the Declaration of Trust dated 15 March 2005 signed by the Husband before his solicitors, purportedly to prove that he only held half of the City 151 Property as trustee for IF. At trial, the Husband failed to explain the following anomalies with this document:

- (1) There was no explanation on why the Declaration of Trust was only signed a year later but not at the time of purchase.
- (2) The Husband's Form E was affirmed 2 days after the signing of the Declaration of Trust but there was no mentioning of the trust in the Form E.
- (3) If IF was really the sole proprietorship business of his mother, why did not the Husband just declare that he was holding the property as trustee for his mother? Obviously, the Husband was treating his mother (CCW) and IF as 2 separate entities.
- (4) There was evidence that by a later Assignment on 20 August 2005, the City 151 Property was assigned by the Husband and his mother as joint owners back to his mother as the sole owner, but at a consideration of \$1,900,000 (see the land search record in Exhibit R13). If the

Husband was only a bare trustee, I fail to see why there should be a consideration when he assigned the property back to the beneficiary. In this regard, I do not accept the Husband's evidence. I find that the Declaration of Trust and the subsequent Assignment of the City 151 Property to the sole ownership of his mother is all a sham. I also find that the Husband was the beneficial owner of IF and therefore also the beneficial owner of the City 151 Property. I understand that an agreement for sale and purchase had been signed for the sale of the City 151 Property at a consideration of \$2,200,000 to a new purchaser (see the land search record in Exhibit R13). It is not apparent from the land search record when the completion will take place. The Husband said he has no such information. Judging from the fact that the agreement was signed on 9 October 2006, I think it is safe to assume that the completion should have taken place sometime in November or December 2006. At completion, a profit of \$381,000 ($\$2,200,000 - \$1,819,000 = \$381,000$) should have been generated. If one takes into account of the return of the 30% down payment at \$545,700 ($\$1,819,000 \times 30\% = \$545,700$) paid at the time of purchase, the Husband should have realised a sum of not less than \$926,700 ($\$381,000 + \$545,700 = \$926,700$). As the Husband failed to account for this sum of money, the only reasonable inference I can draw is that he is still retaining this sum of \$926,700. At trial, the Husband was also cross-examined on a deposit of \$325,629 appearing in his Hang Seng Bank account no. 232-256271-XXX on 13 October 2000. From the bank records, this sum was later rolled over until July 2001 when 3 sums of \$100,000 each were withdrawn on the dates of 12, 17 and 24 July 2001 respectively. The Husband explained that he had entrusted these 3 sums of money with a lady friend who had lost them in an investment. He provided no evidence to support this claim. I do not accept his explanation. If they were for a single investment, there was no reason for them to be withdrawn on 3 different occasions. There was also no good reason why there should not be any document to show where the sums had gone. I suspect that this sum of \$300,000 might have been rolled over in some accounts and later became the source of fund in the purchase of the City 151 Property. The Husband's Earning Capacity Another area of dispute is the Husband's earning capacity. At trial, the Husband said that after he had resigned from IF, he had been unable to find any employment because he had to prepare for this trial. As I find that the real owner of IF was the Husband, therefore, this so called resignation had to be a sham. More likely than not, I find that the Husband has deliberately closed down his business just to avoid the possible result of this trial. After considering all the above evidence, I am prepared to infer that the Husband must have an earning capacity of about \$9,000 per month. The Law on Ancillary Relief The jurisdiction of the Court in granting financial relief for a party is governed by section 4 of the Matrimonial Proceedings and Property Ordinance, Cap 192 which provides:

4. Financial provision for party to a marriage in cases of divorce, etc.

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- (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may, subject to the provisions of section 25(1), make any one or more of the following orders, that is to say-
- (a) an order that either party to the marriage shall make to the other such periodical payments and for such term as may be specified in the order;
 - (b) an order that either party to the marriage shall secure to the other to the satisfaction of the court, such periodical payments and for such term as may be so specified;
 - (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified.
- (2) Without prejudice to the generality of subsection (1)(c), an order under this section that a party to a marriage shall pay a lump sum to the other party-
- (a) may be made for the purpose of enabling that other party to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or herself or any child of the family before making an application for an order under this section;
 - (b) may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court.
- Section 7 Considerations
65. In deciding on how to exercise its power in this regard, the Court is bound to consider Section 7 of the Matrimonial Proceedings and Property Ordinance, Cap 192 which provides:
7. Matters to which court is to have regard in deciding what orders to make under sections 4, 5 and 6
- (1) It shall be the duty of the court in deciding whether to exercise its powers under section 4, 6 or 6A in relation to a party to the marriage and, if so, in what manner, to have regard to the conduct of the parties and all the circumstances of the case including the following matters, that is to say-
- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (c) the standard of living enjoyed by the family before the breakdown of the marriage;
 - (d) the age of each party to the marriage and the duration of the marriage;
 - (e) any physical or mental disability of either of the parties to the marriage;
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- (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
 - (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring. Conduct
66. Although the Wife has made allegations that the Husband has transmitted venereal disease to her during the course of marriage, I have already ruled that the Wife has failed to discharge her burden of proof (see the discussion in paragraphs 17 to 27 above). Income, Earning Capacity, Property and Other financial Resources The Wife I accept the Wife is presently working as a private tutor earning about \$3,000. Judging on her the present age (40), health conditions (HPV infection and facial problem), educational level (Form 5) and the period out of regular employment (14 years since 1992), I do not expect that there will be an dramatic increase in the Wife s earning capacity in the near future.
69. As I have said in paragraph 42 above, I do not accept that the Wife is hiding some of her assets. The Husband
70. As to the Husband, he gave evidence that he is having no employment at the moment. He said he is now squatting in his parents flat. I do accept that the Husband may have no employment at this very moment. But the real question is whether he is capable to find any gainful employment.
71. It is my ruling that the Husband was the real owner of a business called IF. He closed it down recently in order to avoid the possible outcome of this trial. Although he is already in his 40s, by the look of his appearance, he does not look too old to me. I have also observed his demeanour in giving evidence in court; he appeared to have a very sharp mind. His oral evidence was clear and his response to cross-examination was quick and coherent. I do not think he would have any difficulty in finding a gainful employment if he is really minded to. It is my view that he should have an earning capacity of at least \$9,000 per month. As to his assets, I have already ruled in paragraph 57 above that he is in possession of assets at least in the sum of \$926,700. Financial Needs, Obligations and Responsibilities The Wife In her Financial Statement (Form E), the Wife stated that her monthly expenses amounted to \$12,200 which consisted of: Rent \$6,100 Utilities \$400 Food \$2,400 Meals out of Home \$500 Transport \$300 Clothing \$500 Personal Grooming \$200 Medical/Dental \$1,000 Others (Medical Insurance) \$800 \$12,200 At trial, the Wife testified that she has now moved back to live with her aged and sick parents. That would have saved her at least \$6,100 for rent. There were also challenges by the Husband on the Wife s medical expenses and medical insurance expenses.

76. Judging from the facts that the Wife is suffering from HPV infection and having serious facial problem, I have no doubt that the taking out of a medical insurance is absolutely necessary. I also accept that due to the severity of the Wife s health problem, the spending of \$1,000 per month on expenses not covered by the insurance policy is reasonable.
77. Therefore, I would deduct the rent from the Wife s above expenses and rule that the reasonable monthly expenses of the Wife amount to \$6,100 only.
78. The Wife also said she was indebted to her parents, other relatives and friends. It was not too clear of the exact extent of those liabilities. In any event, there does not seem to be any immediate pressure from those creditors for repayment. The Husband In the Financial Statement (Form E) of the Husband, he stated his monthly outgoings amounted to \$8,938.34 which comprised of: Mortgage instalments \$5,644.34 Utilities \$409 Meals out of Home \$1,600 Transport \$500 Clothing/Shoes \$100 Insurance Premia \$585 Others (Mobile Phone) \$100 \$8,938.34 At trial, the Husband gave evidence in court and said that he had moved from the City 151 Property back to stay with his parents and so the \$5,644.34 mortgage instalment payment was no longer there. He said he had also cut down on other expenses and his present monthly outgoings amount to \$2,000 odd only. He also said since he is unemployed and so he is in a very stringent financial position. He would usually skip his breakfast in order to keep down his outgoings and he is now relying on his mother s financial support.
81. I find it quite hard to believe that for a man like the Husband who has been in the entertainment business for so many years and having hidden assets in the region of \$926,700, will be content with such a low living standard. The Standard of Living Before the Breakdown of the Marriage
82. During the subsistence of the marriage, the major breadwinner of the family was the Husband. They lived in privately owned accommodation and had bought private cars for transportation. I think they had kept the living standard of at least a middle-income family. Age and Duration of Marriage
83. The Wife is aged 40 and the Husband aged 42. Although they registered their marriage in 1992, it is not in much dispute that they started cohabitation some years earlier, namely in 1985. The years of pre-marriage cohabitation should be counted as part of the marriage: GW v RW [2003] 2 FLR 108. Therefore, I will treat this as a 12 years marriage (1985 to 1997). Physical or Mental Disability
85. The Wife is obviously not in good health. She has HPV infection which is likely to be developed into cancer. She has serious facial problem in that scars are all over her face. According to Dr. E. Lee s report (p. 562 of section C of the Bundle), the Wife s facial problem can partly be attributed to psychological factors. All these mean that it would be unrealistic to expect the Wife to obtain a gainful employment in the very near future.
86. I do not think the Husband is suffering from any physical or mental disability. Contributions to the Welfare of the Family

87. Financially speaking, the Husband's contribution to the family had to be greater than the Wife because he was the main breadwinner of the family. However, I also take note that the Wife's contributions might not only restrict to the looking after of the family, but also include her contribution to the success in property investments. Overall speaking, I am satisfied that the parties' respective contributions to the welfare of the family were more or less equal. Deed of Separation
89. The next issue concerns with the Deed of Separation signed by the parties on 3 January 1998. The relevant terms of the Deed of Separation are repeated herein as follows: NOW THIS DEED WITNESSETH as follows:- In pursuance to the said agreement and in consideration of the premises the Husband and the Wife hereby mutually covenants with each other as follows:- 1.1 1.2 the Husband and the Wife absolutely forgive and release any matrimonial offence of or cause of complaint (complaint) against each other arising before or which still exists at the date hereof and no act, deed, neglect or default of either party constituting or in relation to any such offence or cause of complaint (complaint) shall be received by any subsequent misconduct by either party hereto or be pleaded or alleged or be admissible in evidence in any proceedings brought by one party against the other or to which both of them may be parties. The Husband shall pay to the Wife the following payment: 2.1 a lump sum payment in the sum of HK\$50,000.00 being his half share of a Fixed Deposit account with Hang Seng Bank Ltd in the joint names of the Husband and the Wife in the sum of HK\$100,000.00 together with interest thereon; 2.2 a further sum of HK\$30,500.00 upon signing of this Deed of Separation; and 2.3 a periodical payment in the sum of HK\$5,000.00 per month commencing from the 1st day of February 1998 towards her maintenance. Upon the separation of one year period, the parties hereto hereby agree for the Husband to file a petition for divorce on ground of one year separation with consent and the Wife shall consent to the petition on the same conditions as set out herein save and except clause 2.1 & 2.2 above ..
90. The first observation I would make is that there were no terms as contained in the Deed of Separation to say that they were the full and final terms of agreement as between the parties on the issue of ancillary relief. At trial, the Wife gave evidence to the effect that the said Deed was prepared by the Husband's solicitors and she was never told to seek independent legal advice before she signed it. She said she was given a draft of the Deed which was amended a few times before actual signing. She said she agreed that Clause 2.3 should be binding on the parties and so she asked the Husband to honour it by: paying her the arrears of periodical payments as from July 1999 up to now (i.e. January 2007) in the total sum of \$455,000 (for 91 months); continuing the periodical payment of \$5,000 per month as from February 2007.
92. At the same time, the Wife is arguing that Clauses 2.1 and 2.2 of the Deed of Separation which deal with the division of capital between the parties should not be binding on her. She is now asking the Court to re-open the issue by taking into account of the profits kept by the Husband as a result of the parties' joint financial gains in property investments during the

course of the marriage. She asked for a lump sum from the Husband representing her share in the profits made on those property transactions (Paragraphs 21 and 22 of the Closing Submission of the Wife's solicitors).

93. It is the Wife's case that during the course of the marriage, the parties had invested in 3 properties which included:
- (1) A flat in Mei Foo Sun Chuen;
 - (2) A flat in Gold Coast, Tuen Mun; and
 - (3) A flat in Tai Hing Garden, Tuen Mun. Out of these properties, they had made a total profit of \$927,500. It is the Wife's case that the Husband had not properly accounted for this large sum of profit. Therefore, the Wife is saying that the settlement on the capital division as contained in the Deed of Separation was most unfair to her. Discussion I think it is not disputed that the parties have made some profits in property dealings during marriage. However, it is also a fact that a lion share of those profits was made in the first and second transactions, which took place in 1991 and 1994 respectively. The last property was sold on 20 June 1995, which was already more than 2 years before separation, but only with a meagre profit of \$3,150. During those profitable years, the parties have led a rather comfortable life despite the fact that only the Husband was working. They have even kept a family car for quite a few years. Therefore, I do not find it surprising that by the time of separation, at a time when the economy started to decline and with no more investment profits coming in, the major family assets have been reduced to the joint deposit of \$100,000 as mentioned in the Deed of Separation. Therefore, I see nothing being unfair in the term of capital distribution. Furthermore, even according to the Wife herself, the draft of the Deed of Separation had been sent to her for prior consideration. Amendments were made, presumably as a result of the parties' negotiation. Therefore, I think it is quite difficult for the Wife to argue that the terms were unfair to her. The fact that she had not been advised to seek independent legal advice on the Deed does not mean that she was not aware of its terms or her interest was necessarily prejudiced. Apart from the lump sum agreed in the Deed of Separation, the Wife was also provided with a periodical payment of \$5,000 per month. At the time of separation or shortly thereafter, the Wife had resumed working as a driving instructor with a monthly income of \$10,000. This sum, together with the \$5,000 periodical payment, means that the Wife had a monthly income of about \$15,000. I do not think that was an unfair deal to her at the time. Who has breached the Deed of Separation?
99. The next question now is: Who has breached the Deed of Separation?
100. It is the Husband's contention that the Deed had already been repudiated by the Wife in failing to give her consent to the divorce as provided under clause 3 of the Deed.
101. The Wife said during the time when the Husband requested for her consent, she was having a facial problem at that time. She requested the Husband to wait until her recovery and the Husband agreed. Therefore, she said she was not in breach of the Deed. On the issue of

whether the Husband had agreed to wait for the Wife's recovery, again, it is a one against one situation. Although there is no direct evidence to corroborate with the Wife's evidence that the Husband had acquiesced to the delay in the divorce petition, I take note of the following:

- (1) There is evidence that the Wife did suffer and still is suffering from serious facial problem. From the medical report prepared by Dr. E. Lee (p.559-563, section C of the Bundle), it was stated that the Wife started to consult the doctor on 23 April 1999. The diagnosis then was multiple large pustules, active sebaceous cysts, freckles and depressed scars of face. The report went on to describe the facial problem of the Wife from then on up to date. It can be seen that the facial problem has never really improved throughout all these years. These facts support the Wife's contention that she was having a serious skin problem at the time when the Husband requested her consent to divorce.
 - (2) Shortly after the Husband had stopped the periodical payment in June 1999, the Wife's then solicitors immediately complained against the non-payment by their letter dated 16 August 1999 (p.1, section D of the Bundle). There was no response from the Husband despite of the fact that he was still legally represented at that time. The first complaint against the Wife's breaching of the Deed of Separation only appeared 3 years later when the then solicitors of the Husband stated in their letter dated 19 April 2002 that the Husband's agreement to the periodical payment was conditional on the Wife's consent to the divorce and that the Wife had breached that condition.
103. Based on the above reasons and on a balance of probability, I am satisfied of the fact that upon the request by the Husband to proceed to divorce with consent, the Wife did obtain the Husband's agreement to wait for her recovery. Therefore, I am satisfied that it was the Husband's breaching of the Deed of Separation by stopping the periodical payments.
- Whether the Parties Should be Held to the Terms of the Deed of Separation
104. In *Edgar v Edgar* (1981) 2 FLR 19, Ormrod LJ stressed that it was important to consider the conduct of the parties in reaching a prior separation agreement as one of the circumstances to be considered in deciding ancillary relief applications. His Lordship had this to say in his Judgment: To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties leading up to the prior agreement, and to their subsequent conduct in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and

substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue.

105. After considering all the circumstances of this case, I am of the view that the parties agreement on capital division should not be re-opened because, as I have ruled in paragraphs 95 to 98 above, it was a just and fair distribution of the then available family assets. Of course, there have been changes in the Wife's circumstances since then, for example, the deterioration of the Wife's health since separation making her impossible to find any permanent employment. Still, I do not think it is fair to re-open this issue.
106. As to periodical payments, the Husband has breached the Deed of Separation by withholding the payment since July 1999. Since the Husband has always had gainful employment at least up to July 2006 and the fact that he is inferred to be in possession of the sale proceeds of the City 151 Property in the sum of \$926,700, there is no good reason not to hold him to the terms of the agreement in this regard. I am of the view that he should pay the arrears of the periodical payments from July 1999 to January 2007 (totally 91 months) in the total sum of \$455,000.
107. As to future periodical payments, it is my view that some adjustments have to be made because I have ruled that the Husband only has an earning capacity of about \$9,000 per month. Therefore, I will reduce the future periodical payment to \$3,000 per month starting from February 2007. With this level of periodical payment, the Wife will have a monthly disposable income of about \$6,000, being \$3,000 from the Husband and \$3,000 from her private tuitions. The Husband will also have a similar disposable income, being \$9,000 earning capacity less \$3,000 periodical payment to the Wife. I have thought of whether it is an appropriate case for clean break in view of the fact that there are no children in the family. I do not propose to take that course at this moment mainly because of the medical conditions of the Wife. But I do not rule out the possibility that sometime in the future, this issue may have to be reconsidered depending on the future circumstances of the parties. Order Based on the above reasons, I will make the following orders: The Husband shall pay a lump sum to the Wife in the sum of \$455,000 within 14 days from this order; He Husband shall pay periodical payments to the Wife in the sum of \$3,000 per month on the first day of every month starting from 1 February 2007; The above payments shall be paid into the Wife's Hang Seng Bank Account No. 280-7-354XXX. As this Judgment will be handed down in English, I also direct that if it shall be requested by the Husband, this Judgment shall be interpreted orally to the Husband in Chinese by the Court's interpretation service. Costs
110. Costs should follow the event. I see no special reason for departure in this case. I order that the Wife shall have the costs of her ancillary relief application including all costs reserved, to be taxed if not agreed. As to her own costs, there shall be legal aid taxation. This order shall be in the form of an order nisi which will be made absolute upon the expiry of 14 days from the handing down of this Judgment. C. K. Chan Deputy Judge District Court The Petitioner acting in person Ms. G. Chong of Messrs. Chong & Yen, solicitors acting for the

Respondent PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L
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Prepared on 26 October 2026 · Esheria