

HONG KONG / JUDGMENT

CMSJ v. G,JJ

COURT

Family Court

DECIDED

1 August 2014

CASE / FILE NUMBER

FCMC904/2012

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bjbj FCMC 904 / 2012 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 904 OF 2012

BETWEEN CMSJ Petitioner and G,JJ Respondent

Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to public) Dates of Hearing: 20 23 May 2014 Date of final written submission: 10 June 2014 Date of replies: 24 June 2014 and extended to the 11 July 2014 for the Respondent Date of Judgment: 1 August 2014

J U D G M E N T (Ancillary Relief)

Introduction

AUTONUMOUT This is an application by a petitioner wife for ancillary relief pursuant to sections 4 and 5 of the Matrimonial Proceedings and Property Ordinance, Cap 192. In particular she seeks maintenance for herself and the child of the family plus a lump sum payment. AUTONUMOUT This case is primarily concerned with the financial support of the parties son, a little boy J, who turned 4 years of age in June 2014. This is against a back drop of an extremely short marriage and dwindling financial resources. Central themes throughout the trial have included the length of the marriage and the earning capacity of each party. The wife is a qualified teacher, but she has not worked since shortly before the party s separation i.e. not since the 1 September 2010. She maintains that the husband promised to support her and the child financially and that it was on that basis that they married and had the child. The husband for his part is said to be suffering from chronic fatigue syndrome which, in the short term has limited his ability to earn a living. The husband previously worked as a management consultant in the field of quality assurance. He also has an international financial advice qualification. The husband also maintains that certain

assets are pre marital assets and that as such they should not be included in the pool of matrimonial assets available for distribution. AUTONUMOUT The litigation has been fairly protracted, the wife having first issued proceedings on the 26 January 2012. Agreement was eventually reached on a number of issues including the basis for the divorce. It appears that final agreement could not be reached in relation to J, although the wife has care and control and the husband defined access. Both parties complain that the other is difficult about access. From the papers it appears that on the 11 October 2013 the Children s Dispute Resolution hearing was adjourned sine die with liberty to restore. To date that hearing has not been restored. Neither has the husband issued any further summons in relation to the arrangements for J. If he wishes to do so then, as has been suggested previously, he must issue the appropriate summons supported by an affidavit at the Registry. AUTONUMOUT That leaves the issue of final ancillary relief which unfortunately could not be resolved, despite the parties trying to mediate the issue on a number of occasions. It is that matter that now falls to be determined by the court as set out below.

Issues

What should be included in the computation of assets available for distribution? Should any of the assets be regarded as pre marital assets and if so how should they be treated? Should this case be regarded as a needs based case or should the sharing principle be applied? In the event that this is a needs based case how should the assets be divided? What is the earning capacity of each party? How much maintenance should the husband pay for the wife and J going forward? What order should be made for costs? Background to the marriage AUTONUMOUT The parties married in January 2010 and separated in September of the same year. This was then a marriage of some 8 months duration. Their son J was born in June 2010 and is now 4 years of age. It seems that the parties married primarily because of J. By all accounts the couple had a fairly stormy relationship. They met in June 2006 when they were both living on different floors of the same village house. They began to live together in the summer of 2007 and separated in January 2009 amid allegations of infidelity on the part of the husband. In or about September 2007 the husband purchased a property in Sai Kung and about a year later the wife purchased a property in Tsing Lung Tau (the TLT property). The parties subsequently reconciled but lived apart and in September 2009 the wife realized that she was pregnant. They decided to keep the baby and in January 2010 they subsequently married. Unfortunately the marriage was very short lived. It is the wife s case that the husband persuaded her to give up work as a secondary school teacher in order to become a full time mother. She seeks recompense now from the husband for debts that she says she has accumulated since the separation. The husband for his part says that he should not be held liable for debts that have accumulated as a result of the wife s own choice not to return to work post separation. He queries whether or not the wife is in reality not working and points out that despite his illness he has always supported the wife as best he could in the circumstances. In any event the relationship appears to have been a fairly turbulent one and on the 28 September 2010 the wife finally left and took J with her. In April 2011 the parties discussed the possibility of reconciliation and the husband subsequently rented out a third property in which they could both live as an intact family with their son. Unfortunately however, to put it as

neutrally as possible, other difficulties then arose and the reconciliation did not take place as planned. The litigation to date AUTONUMOUT The wife issued proceedings for divorce on the 20 January 2012 based on the husband s unreasonable behaviour. Sensibly the parties compromised this aspect of the divorce and the particulars were amended to one year separation with consent. Progress has been slow however, in part because the husband has failed to comply with court orders requiring him to file affidavits etc. The decree nisi was pronounced on the 31 July 2012. On the 19 November 2102 my brother judge, HH Judge Bruno Chan made an order recording inter alia the following undertakings:- AND UPON the undertaking and acknowledgment of the Respondent to the Court and to the Petitioner that:- the interim maintenance in the sum of HK\$12,000 per month as mentioned in the court order dated 28th May 2012 is interim maintenance for the child of the family namely J (the child); to deposit 25% of the net sale proceeds of the Malaysian Property situated at R, Unit XX-XXXX, Kuala Lumpur, Malaysia into the Respondent s HSBC account no. XXX-XXXXXX-XXX and not do deal with or dispose of the same without a court order or the Petitioner s written consent until the determination of the ancillary relief matter by the court; and AUTONUMOUT Unfortunately it became clear during the trial that the husband had not complied with the second undertaking and that this sum of money was not available for distribution. The husband however, sought to make amends and said that he would try to borrow the equivalent of 25% of the net proceeds of sale of the Malaysian property i.e. the sum of approximately HK\$400,000. I will hold the husband to his agreement in that respect. Open Proposals The wife s open proposals AUTONUMOUT The wife made the following open proposal prior to the trial:- The Husband shall continue to pay the Wife periodical payment in the sum of HK\$12,000 per month being maintenance for the Child on the 1st day of each and every calendar month until the Child shall reach the age of 18 or completes full time education, whichever is the later. The Husband shall deposit the following lump sums into the designated joint bank account of the Husband and the Wife for educational expenses of the Child on the date set out as follows:-

- a. HK\$81,080 on 1st September 2014 being educational expenses between September 2014 to August 2015; and
- b. HK\$88,108 on 1st June 2015 being educational expenses between September 2015 and August 2016. The Husband shall pay the Wife a lump sum payment of HK\$300,000 on or before 1st August 2014 so that the Wife can use the money to pay off the debts owed to her sisters. The Husband shall pay the Wife a further lump sum payment in the sum of the HK\$120,000 on or before 1st August 2014 (representing maintenance for the Wife commencing from 1st June 2014 up to 31st May 2016) and the Wife agrees not to seek any further maintenance payment against the Husband thereafter. The Husband shall agree not to seek any maintenance payment from the Wife. The Husband shall bear the legal costs and disbursement of the Wife in this suit, (which is not less than HK\$400,000), to be paid by the Husband to the Director of Legal Aid directly on or before 30th June 2014. The Parties shall be entitled to retain for his or her absolute ownership and possession all real properties, personal chattels and effects, shares in any limited or unlimited companies, investments and assets now belonging to him or her or under his or her control or in his or her possession or in his or her sole name or in joint names with others whether in Hong Kong or

overseas and each party renounces disclaims and relinquishes all his or her rights against the other in respect of such properties, personal chattels and effects, shares in any limited or unlimited companies, investments and assets. The Husband's claim against the Wife or the Wife's estate for all ancillary reliefs shall stand dismissed upon grant of Decree Absolute. Upon full payment of the lump sum payment as stipulated in Clauses 1.2 to 1.5 above, the Parties agree to discharge any *lis pendens* registered against each other's properties in this suit at the Husband's sole costs and all the Wife's claims against the Husband and/or the Husband's estate for ancillary relief and/or other financial provisions in Hong Kong shall stand dismissed. The Husband shall undertake:- Not to further encumber the Sai Kung Property without the written consent of the Petitioner or the order of the Court (save and except to raise the lump sum payment on or before 1st August 2014); That should the Husband intend to sell his flat, he shall inform the Wife in writing within 7 days of signing Provisional Agreement for Sale and Purchase or Formal Agreement for Sale and Purchase selling the Sai Kung Property, whichever is the earlier; and To pay into court a lump sum payment of HK\$2 million out of the net sale proceeds of the Sai Kung Property within 7 days of completion of sale so that further periodic maintenance, school fee and extra-curricular activities for the child can be paid out of the funds in court. AUTONUMOUT In her closing submission the wife makes it clear that she is seeking an order for sale with respect to the Sai Kung property. She wishes to pay her legal costs (HK\$400,000), clear all of her other debts (HK\$300,000) and put HK\$2 million aside from the net proceeds of sale for J's future educational needs. She says that the husband should still have sufficient monies to buy an alternative property in which to live. The husband's open proposals AUTONUMOUT At the beginning of the trial the husband made the following proposal:- A lump sum payment to the wife of HK\$330,000 to be paid by the end of June 2014; A continuation of the existing interim maintenance arrangements ie HK\$12,000 per month being HK\$6,000 per month for the wife and HK\$6,000 per month for J plus payment of the school fees and other related expenses. He agreed to pay these amounts as an annualized payment of HK\$80,000 in or about August of each year; No order as to costs. AUTONUMOUT At the end of the trial, when asked by the solicitor for the wife to clarify the situation, the husband revised his offer as follows:- A lump sum payment of HK\$400,000 to be paid by the end of June 2014. This was on the premise that the notice at the Land registry on the husband's property in Sai Kung would be removed. The husband would undertake to pay the school fees and other related expenses to the wife in the annualized sum of HK\$80,000 per annum for the next 2 years whilst J is at kindergarten, whereupon the financial arrangements for his schooling (including tutorials and extracurricular activities) would be reviewed. Maintenance payments as above, save that the maintenance payments for the wife would only be for the next 2 years, whereupon she should return to work. No order as to costs. AUTONUMOUT In his closing the husband makes an entirely different proposal which as far as I am aware had not been put to the wife previously. Certainly it had not been placed before the court. Ms Ho, for the wife complains about this in her Reply and with some justification it seems to me, given that she was not able to put any questions about this proposal to the husband in the witness box or to consider it properly with her client. In such circumstances I do not intend

to attach any weight to this latest proposal or to include it in this judgment. The law on Ancillary Relief AUTONUMOUT The Court of Final Appeal s decision in LKW v DD (FACV no 16 of 2008) 13 HKCFA 537 sets out the approach that the lower courts should now take when determining issues relating to final ancillary relief. AUTONUMOUT Mr Justice Ribeiro PJ reiterates that there are four underlying principles that should guide ancillary relief proceedings namely fairness, the absence of discrimination, the upholding of the concept of the yardstick of equality and the rejection of a need for a minute retrospective investigation of the parties finances. AUTONUMOUT In addition he identifies a four step approach to be adopted in an ancillary relief trial which if I may I will summarize as follows:- The identification of the assets An assessment of the parties financial needs Whether or not the sharing principle should be adopted? Whether or not there is a good reason to depart from an equal division of the assets? AUTONUMOUT The s.7 factors are largely dealt with within this general framework. They are:-

- (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;
 - (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. AUTONUMOUT In addition the following factors should be taken into account by the court when considering the issue of financial provision for a child, namely:- the financial needs of the child; the income, earning capacity (if any), property and other financial resources of the child; any physical or mental disability of the child; the standard of living enjoyed by the family before the breakdown of the marriage; the manner in which he was being and in which the parties to the marriage expected him to be educated. Discussion AUTONUMOUT I must now turn to consider the issues, the law and the parties evidence as set out in their Form E s, together with their supporting affidavits and in their answers to the questionnaires raised by the other side. Further I will rely on each party s oral testimony. Identifying the

assets What should be included in the computation of assets available for distribution? Should any of the assets be regarded as pre marital assets and if so how should they be treated? AUTONUMOUT The wife s lawyer prepared a schedule of assets as follows:- I. JOINT ASSETS Assets Joint assets Nil II. THE WIFE Assets Property Flat X, Xth Floor, Block X, H Garden, Tsing Lung Tau, N.T. Market Price (SJE s report dated 16.05.2014): \$2,246,000.00 Less: Outstanding mortgage: \$573,101.08 Outstanding on other loans: \$110,000.00 Net Value: \$1,562,898.92 Bank accounts \$14,128.62 Life insurance \$5,380.30 MPF and Provident Fund \$117,940.71 TOTAL ASSETS OF WIFE: \$1,700,348.55 Liabilities Legal costs \$400,000.00 (not less than) Loans from her 2 sisters \$300,000.00 TOTAL LIABILITIES OF WIFE: \$700,000.00 The Wife s net assets (HK\$) \$1,700,348.55 - \$700,000.00 = \$1,000,348.55 Income III. THE HUSBAND Assets Property XF, XX Man Nin Street, Sai Kung, N.T. Hong Kong Market Price (SJE s report dated 16.05.2014): \$5,267,000.00 Less: Outstanding mortgage: \$456,054.08 Net Value: \$4,810,945.92 Bank accounts \$157,943.93 Securities and investments \$170,000.00 Life insurance \$5,000.00 Valuable personal car wedding ring watches household items \$10,000.00 \$3,000.00 \$7,500.00 \$15,000.00 \$35,500.00 MPF and Provident Fund \$28,414.00 TOTAL ASSETS OF HUSBAND: \$5,207,803.85 Liabilities Legal costs \$80,000.00 Sale of property (estimated) \$20,000.00 Estate Agent Fee \$20,000.00 Renew office expenses and business marketing/promotion \$100,000.00 Professional exams and licenses \$10,000.00 TOTAL LIABILITIES OF HUSBAND: \$230,000.00 The Husband s net assets (HK\$) \$5,207,803.85 - \$230,000.00 = \$4,977,803.85 Income In summary Amount *HK\$) Joint assets = The Wife s net assets = \$1,000,348.55 The Husband s net assets = \$4,977,803.85 TOTAL NET ASSETS AVAILABLE (at least): \$5,978,152.40 AUTONUMOUT The husband takes issue with respect to a number of items on this schedule. For example he argues that his property in Sai Kung is a pre marital asset and therefore should not be included in the computation of assets available for distribution. He appears to concede this in relation to the wife s property i.e. he makes no claim against it. He also makes similar arguments in relation to other assets. He also takes issue with the joint valuation obtained of the Sai Kung property in any event. In addition he objects to the inclusion of the wife s debts in the schedule and in particular to those sums that she says that she has been obliged to borrow from her sister s in order to make ends meet. I will deal with each of these issues in turn, namely the issue of pre marital assets, the joint valuation of the Sai Kung property and the wife s debts. The law on pre marital assets AUTONUMOUT In *Miller v Miller, McFarlane v McFarlane* [2006] UKHL, 24, Lord Nicholls of Birkenhead said, when discussing the concepts of matrimonial and non-matrimonial property A complication rears its head at this point. I have referred to the financial fruits of the marriage partnership. In some countries the law draws a sharp distinction between assets acquired during a marriage and other assets. In Scotland, for instance, one of the statutorily prescribed principles is that the parties should share the value of the "matrimonial property" equally or in such proportions as special circumstances may justify. Matrimonial property means the matrimonial home plus property acquired *634 during the marriage otherwise than by gift or inheritance: HYPERLINK "http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=121177&SerialNum=0111156696&FindType=Y&AP=&fn=_top&rs=WLW8.04&mt=WestlawUK&vr=2.0&sv=Split" \t

"_top" Family Law (Scotland) Act 1985, sections 9 and 10 . In England and Wales the
HYPERLINK "http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=121177&SerialNum=0292575419&FindType=Y&AP=&fn=_top&rs=WLW8.04&mt=WestlawUK&vr=2.0&sv=Split" \t "_top" Matrimonial Causes Act 1973 draws no such distinction. By
HYPERLINK "http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=121177&SerialNum=0111178322&FindType=Y&AP=&fn=_top&rs=WLW8.04&mt=WestlawUK&vr=2.0&sv=Split" \t "_top" section 25(2)(a) the court is bidden to have regard, quite generally, to the property and financial resources each of the parties to the marriage has or is likely to have in the foreseeable future.

22. This does not mean that, when exercising his discretion, a judge in this country must treat all property in the same way. The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavour, the latter is not. The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been. 23. The matter stands differently regarding property ("non-matrimonial property") the parties bring with them into the marriage or acquire by inheritance or gift during the marriage. Then the duration of the marriage will be highly relevant. The position regarding non-matrimonial property was summarised in the White case [2001] 1 AC 596, 610: "Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property." 24. In the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage.
25. With longer marriages the position is not so straightforward. Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not. After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to be retained in specie. Some of the

matters to be taken into account in this regard were mentioned in the above citation from the White case. To this non-exhaustive list should be added, as a relevant matter, the way the parties organised their financial affairs. AUTONUMOUT In this case it seems to me that in reality all of the parties assets are pre marital assets. This includes the wife s MPF and provident fund both of which were accumulated as a result of her working prior to marriage. Likewise the assets held in the husband s name, including the property in Malaysia and other securities and investments such as the Perth Mint. All of these were acquired prior to marriage. AUTONUMOUT With respect to the parties existing properties namely the wife s TLT property and the husband s Sai Kung property, it seems to me that likewise both should be regarded as pre marital assets. They were both purchased solely from the resources of each party prior to marriage and not in contemplation of the marriage. Although the parties lived in both properties from time to time I agree with the husband that neither property could properly be regarded as the matrimonial home. In the event that I am wrong in this it seems to me that at best the Sai Kung property could be said to have been the matrimonial home for a very short period of time. Further when the parties were discussing reconciliation it was specifically agreed that they would not live in the Sai Kung property which seems to have been regarded as the husband bachelor pad . Instead the intention was that they should live in another rented property. Joint valuation report on the Sai Kung property AUTONUMOUT The husband took great exception to the joint valuation of the Sai Kung property at HK\$5,267,000 but at the end of the day did not seek to adjourn matters (for which there might have been significant cost implications). Thus the valuation of HK\$5,267,000 stands although as I have said prima facie I accept that this is a pre marital asset in any event. The wife s debts AUTONUMOUT The wife alleges that she has accumulated debts because the maintenance money paid by the husband was insufficient. She claims to have borrowed HK\$300,000 from her sisters. However there was no evidence of any borrowing save for a note from each sister. The wife said that she received these loans in cash. There is no evidence of these monies actually being received. Neither sister gave evidence. The husband queried this at trial. Subsequently Ms Ho for the wife argued that in the event that the husband was not satisfied with the evidence provided by the wife that he should have sought further and better particulars ahead of time. Although this is true, the onus was also on the wife to prove her case with sufficient particularity in any event. AUTONUMOUT My difficulty with the husband s stance is that although the wife had some savings when the parties separated it is also clear that she was not a wealthy woman. Ms Ho also points out that the husband did not begin to provide maintenance for the wife on a regular basis until after the court order of the 28 May 2012. I am not clear the extent to which the husband did provide financial support but I am satisfied nevertheless that on the balance of probabilities that it was more likely than not that the wife borrowed from other family members in order to make ends meet. AUTONUMOUT The husband s other argument relates to the wife s earning capacity. I have some sympathy with him in this respect. The wife is a secondary school teacher by profession. She said that she gave up work to look after the son and that this was initially at the insistence of the husband. She maintained her stance i.e. that she would not return to work even after the husband

became ill and it was clear that his finances were very tight. This is notwithstanding the fact that she had an earning capacity and that the marriage and indeed the relationship was rather short. For the record I do not accept that this was reasonable. It seems to me that the wife should have returned to work in some capacity in order to relieve the husband's burden although I also accept that this would have had ramifications with respect to her legal aid certificate. The husband says that the wife was working as a tutor but was unable to provide any evidence in support of what he said in this respect. Consequently to all intents and purposes it appears that the wife did not work during this period and that she did accumulate debt as a result. Thus somewhat reluctantly I will allow the debt of HK\$300,000. AUTONUMOUT I also accept that the husband has liquidated a number of assets including the Malaysian property, precious metals held in the Perth Mint and other savings in order to support both himself and the wife and son during the intervening period whilst he has not been working. Much of the trial was spent looking at what had happened to those assets. Generally speaking it seems to me that the husband came up to proof with respect to the answers that he gave. Should the sharing principle be adopted? Should this case be regarded as a needs based case or should the sharing principle be applied? In the event that this is a needs based case how should the assets be divided? AUTONUMOUT In the event that the sharing principle was applied to all of the assets each party would expect to receive just under HK\$3 million. The difficulty with that, as highlighted above, is that all of the assets are pre marital and in addition this is a very short marriage. If the pre marital assets are excluded from the matrimonial pot there is really nothing to divide. AUTONUMOUT Thus I would agree with Ms Ho that it is more appropriate to approach this case on the basis of need. I accept that the wife needs to repay her debts - HK\$300,000 and to receive capitalized maintenance of HK\$120,000 AUTONUMOUT I do not accept that in the context of this case that HK\$2 million should be put to one side from the net proceeds of sale from the Sai Kung property for J's future education costs. With respect this does not seem to be to be either fair or reasonable in the circumstances. AUTONUMOUT In the event that the wife receives a capital sum of HK\$420,000 and she retains her property and all other assets held in her name as set out in the schedule, then she would receive/retain HK\$1,700,348 + HK\$420,000 = HK\$2,120,348 or say HK\$2,120,350. Out of this she would need to repay her sister's the debt of HK\$300,000, which would leave her with a total of HK\$1,820,350. In addition she seeks her costs of HK\$400,000. The husband for his part would retain HK\$4,557,803, with the issue of the wife's legal costs still to be resolved. If indeed he did pay the wife's costs of HK\$400,000 he would still retain HK\$4,157,803. AUTONUMOUT In the circumstances it seems fair and reasonable that the husband shall pay the wife a lump sum of HK\$420,000 in full and final settlement of her claims for all ancillary relief within 8 weeks of the pronouncement of the decree absolute. The wife shall retain the other assets held in her sole name. I accept that in order to pay the wife that the husband will need to borrow or remortgage the Sai Kung property or even possibly to sell it and that he does not have liquid cash of HK\$420,000 available to him at the present time. However I am also mindful of the fact that he is in breach of his undertaking and that he has already committed to the court to make the sum of HK\$400,000 available. For the avoidance of doubt however the liens on both properties

will be uplifted forthwith so as to enable the husband either to borrow against the Sai Kung property or to sell it. What is the earning capacity of each party? AUTONUMOUT The husband was quite reticent about his earning capacity in the witness box. However he is reasonably well educated and I accept that in the normal course of events that he should be able to earn quite a good salary. He admitted to being able to earn HK\$40,000 per month. Since the trial I have been informed that he has begun working for P on a temporary basis as a Project Completion Co coordinator earning HK\$50,000 per month for a three and a half month period from the 17 June until 30 September 2014 inclusive. AUTONUMOUT I also accept that the wife has a decent earning capacity and that at present the maximum that she could hope to earn is approximately HK\$30,000 per month. This is based on her salary as a secondary school teacher prior to having J. I also accept that the wife may wish to work part time initially certainly until J has started P1. But even in the interim, it seems to me that the wife does have the ability to earn a reasonable sum of money either as a part time teacher or from doing tutorial work. AUTONUMOUT I should add that I also accept that the husband s earning capacity has been severely undermined of late by chronic fatigue syndrome . Although the husband did not call a Dr to give evidence on his behalf he did provide a letter from his GP and further test results which supported this diagnosis. Consequently I accept that he does suffer from this condition and that it can be very debilitating. The wife is not presently working but it seems to me that she must now do everything within her power to get back into the work force as quickly as possible. The husband must likewise do everything within his power to regain his health and to maximize his earning potential. How much maintenance should the husband pay for the wife and J going forward? AUTONUMOUT I accept the husband s proposal with respect to J s school fees i.e. that he pay the sum of HK\$80,000 annually on or about August/September of each year to cover J s school fees and other related expenses. The husband asks that this arrangement be reviewed in 2 years time. The wife for her part asks that HK\$2 million be put to one side from the sale of the husband s Sai Kung property in order to cover J s future educational expenses. As I have already indicated it does not seem to me that this is the sort of case that lends itself to an educational trust fund of this type. Rather J s educational expenses will need to be met from the parties respective incomes going forward. Thus I will make an order to cover the next two years only. I accept that the parties may need to review matters thereafter. AUTONUMOUT In so far as the maintenance is concerned, in addition to the capitalized figure of HK\$120,000 to cover a two year period for the wife as referred to above, the wife seeks HK\$12,000 per month for J. The husband offers HK\$6,000 per month each for the wife and J the wife s maintenance to run for 2 years. At present the husband is paying HK\$12,000 per month as interim maintenance plus the annualized figure of HK\$80,000 for J s educational costs. AUTONUMOUT In the wife s most up dated Form E she sets out her schedule of expenses as follows:- Part 4 Current Monthly Expenses 4.1 General Item Amount (HK\$) Rent Mortgage instalments \$5,594.20 Utilities (water, electricity, gas, rates and government rent, internet, etc) \$900.00 Management fees \$695.00 Food \$3,000.00 Household expenses \$1,500.00 Car expenses Insurance premia \$65.00 Domestic helper(s) Others (specify) Total monthly household expenses \$11,754.20 Attach copies of the latest rental

receipt. 4.2 Personal Item Amount (HK\$) Meals out of home \$1,200.00 Transport \$1,500.00 Clothing/shoes \$600.00 Personal grooming (including haircut and cosmetics) \$800.00 Entertainment/presents \$500.00 Holiday \$500.00 Medical/dental \$300.00 Insurance premia \$724.00 Interim maintenance Contribution to parents Dependent family members Others (specify) daily necessities \$300.00 Total monthly personal expenses \$6,424.00 4.3 Children Item Amount (HK\$) School fees Extra tuition fees School books and stationery Transport to school (including school bus) Medical/dental \$700.00 Extra curricular activities Entertainment/presents \$1,200.00 Holidays Clothing/shoes \$1,000.00 Insurance premia Lunches and pocket money Other transport \$600.00 Child-minding fees Uniform Other (specify) a) Food, b) daily necessities, and c) Books or educational materials \$3,000.00 \$500.00 \$1,000.00 Total monthly expenses for children \$8,000.00 Total monthly expenses (4.1 + 4.2 + 4.3) \$26,178.20 AUTONUMOUT On the face of it these expenses seem quite reasonable. The husband complains quite bitterly that he has been contributing towards the wife's mortgage repayments although on the face of it that seems unlikely. I accept that the husband was not paying the wife enough to cover all of her expenses and that of J and consequently the mortgage repayments are more likely to have been met from her own savings or from the monies borrowed from her sisters. AUTONUMOUT However if one deducts the mortgage repayments from the general expenses then one is left with HK\$6,160 plus an additional HK\$8,000 for J's own expenses. As indicated above the husband pays for J's school fees etc separately. If one divides the general expenses in half then the husband is paying for all of J's general expenses at HK\$3,080 (with no contribution from the wife) and for all of J's own expenses at HK\$8,000 (again with no contribution from the wife) i.e. a total of just over HK\$11,000. The wife also seeks an additional sum of money for extracurricular activities. I will allow HK\$1,000 per month. Thus in total I will order that the husband do pay HK\$12,000 per month as maintenance for J. I accept that this amount will most probably need to be reviewed in due course. The section 7 factors AUTONUMOUT I am also required to take into account the section 7 factors, which I have largely done in the context of the discussion set out above. For the avoidance of doubt however I have referred to each section below as follows: Section 7 MPPO, Cap 192. (7)(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; AUTONUMOUT As indicated above although I accept that the wife is not working at present it seems to me that she does have an earning capacity and one that she must now realize. I accept that this is likely to be on a part time basis until J begins full time school. Thereafter in the normal course of events it seems to me that she should be able to work full time. In so far as the husband is concerned I also accept that his earning capacity is to an extent limited by his present health condition. But in the normal course of events the husband should be able to earn a reasonable amount of money

- 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;
- 44. I accept that both parties need in broad terms a roof over their heads and sufficient money to live on. J also needs to be provided for.
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- 45. The parties enjoyed a reasonable standard of living commensurate to their salary levels prior to the breakdown of the marriage.
- (d) the age of each party to the marriage and the duration of the marriage;
- 46. The wife is 39 and the husband 51 years of age. By any definition this was a short marriage that lasted just over 8 months and there does not appear to have been a seamless period of cohabitation prior to it. It was in reality a fairly short and turbulent relationship that produced one child.
- (e) any physical or mental disability of either of the parties to the marriage;
- 47. Thankfully this is not in issue save for the husband's general health condition referred to above, T hankfully this is not in issue save for the husband's general health condition as referred to above.
- (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;
- 48. As I have said this was a very short marriage. I accept that both parties made a proper contribution both during the period of the marriage and since. The wife has contributed by being J's primary care taking parent and the husband has contributed by being the main financial provider for J since his birth.
- (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.
- 49. In the context of this case, this section is not really relevant. What order should be made for costs?
- 50. Costs follow the event in ancillary relief proceedings. However in this case neither party could be said to have been completely successful the husband was more successful when it came to the issue of the capital award and the wife was more successful when it came to the issue of maintenance and the repayment of her debts. But on the face of it the fact remains that the wife had no option at the end of the day but to come to court in order to achieve this judgment. She is also legally aided. I will therefore make an order nisi to be made absolute in 28 days time that the husband do pay 50% of the wife's costs of and occasioned by this application on a party and party basis to be taxed if not agreed such costs to be capped at HK\$400,000. Order

- I will make an order as follows:- The Respondent do pay to the Petitioner a lump sum of HK\$420,000 in full and final settlement of all of the Petitioner s claims for ancillary relief within 8 weeks of the pronouncement of the decree absolute. The Respondent do pay to the Petitioner capitalized maintenance for the child of the family for a two year period in the sum of HK\$80,000 per annum such sums to be paid on the 1 September 2014 and the 1 August 2015 respectively being the educational expenses for the said child. The Respondent do pay to the Petitioner periodical payments for the child of the family in the sum of HK\$12,000 per month first payment to be made on the 1 day of August 2014 and subsequent payments to be made on the 1st day of each succeeding month until the child s 18th birthday or cessation of full time education whichever is the later or until further order. The Petitioner and the Respondent shall be entitled to retain for his or her absolute ownership and possession all real properties, personal chattels and effects, shares in any limited or unlimited companies, investments and assets now belonging to him or her or under his or her control or in his or her possession or in his or her sole name or in joint names with others whether in Hong Kong or overseas and each party renounces disclaims and relinquishes all his or her rights against the other in respect of such properties, personal chattels and effects, shares in any limited or unlimited companies, investments and assets. The liens on each party s respective properties shall be removed forthwith. Upon the making of this order all of the Respondent s claims against the Petitioner for all forms of ancillary relief shall stand dismissed. There shall be an order nisi to be made absolute in 28 days time that the Respondent do pay 50% of the Petitioner s costs to be taxed if not agreed on a party and party basis such costs to be capped at HK\$400,000. The Petitioner s own costs to be taxed in accordance with Legal Aid Regulations. A s 18 declaration to issue. (Sharon D. MELLOY) District Judge Ms E Ho of Hampton Winter & Glynn for the Petitioner
- The Respondent appeared in person PAGE - PAGE - A B C D E F G H I J K L M N O P Q R S T U V
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