

HONG KONG / JUDGMENT

F v. F

COURT

Court of First Instance

DECIDED

14 January 2003

CASE / FILE NUMBER

HCMC4/2001

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bjbj HCMC 4/2001 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MATRIMONIAL CAUSES NO.4 OF 2001 (Transferred from the District Court : FCMC 4932/2000)

BETWEEN F Petitioner and F Respondent

Before : Hon Hartmann J in Chambers Dates of Hearing : 10 14 June, 2, 5 7 August, 24 26 September, 13, 16 20 December 2002 Date of Judgment : 14 January 2003

J U D G M E N T

Introduction

AUTONUM The petitioner in this matter seeks various forms of ancillary relief from the respondent pursuant to the Matrimonial Proceedings and Property Ordinance, Cap.192 (the MPPO). For convenience, I shall refer to the petitioner as the wife and the respondent as the husband. AUTONUM The parties first met in 1971 at university in Canada. There was a love affair. However, it did not endure and they went their separate ways. In the summer of 1991, they met again and a new love affair began. At that time the wife was living in Toronto, the husband in Hong Kong. The wife was not married but had a daughter, A (born 25 May 1985). The husband was married and had three children by that union. AUTONUM In respect of the husband s marriage, divorce proceedings took place in Hong Kong, the husband obtaining a decree nisi in September

1992. Three months later, in December of that year, the wife sold her home and gave up her business in Toronto in order to come to Hong Kong to be with the husband. Her daughter, A, accompanied her. AUTONUM The husband and wife lived together until November 1994 when, on 25th of that month, they were married. The wife (born 5 August
- 1953) was then 41, the husband (born 27 November
- 1951) was nearly 43. One child, a son, was born of the marriage. He is J (born 25 1995). AUTONUM Mutual happiness within the marriage appears to have been relatively short lived. According to the wife, by mid 1997 difficulties were manifest. Matters came to a head in or about Lunar New Year in 1999 when the parties separated. Shortly thereafter the wife instituted divorce proceedings. Calculated from the date of marriage to the date of separation, the marriage had endured for a period of some four years and three months. AUTONUM Since the separation, J has remained in the care of the wife, the husband enjoying regular rights of access. Apparently, it is not yet decided whether formal custody will be shared or vested solely in the wife but, whatever the final determination, I am told that the present care and access arrangements will continue. As for J s present and future financial well being, that does not pose a problem. The husband has provided for him in both respects. More will be said of that later. AUTONUM The husband is a man of considerable wealth. His father, who died in or about 1986, had excelled in business and was for many years the Chairman and Managing Director of one of the region s leading finance companies. The husband was trained in his father s business and took over the corporate reins from him. The foundations of the husband s wealth, therefore, are to be found in what may broadly be described as the inheritance left to him by his late father. He has, of course, since his father s death managed the businesses and other assets left to him, building upon the foundations of his inheritance. AUTONUM During the hearing, the husband estimated his present wealth at around HK\$450 million. In a report dated June 2002, the husband s accountants, PricewaterhouseCoopers, estimated the net value of his holdings (including cash, bonds, equities, real estate and shareholdings in numerous companies) at a slightly more modest figure of some HK\$418 million. On behalf of the wife, it has been suggested that, in real terms, the husband s wealth may be greater. This is because he is indebted to his mother in respect of a loan of approximately HK\$119 million. If the mother (an elderly woman, apparently well disposed to her son) does not insist on repayment of the loan this will boost the value of the husband s net holdings from the HK\$418 million assessed by his accountants to something in the region of HK\$537 million. AUTONUM The husband s principal business interest appears to be as a director of a company which provides corporate finance services, stock brokerage and the like. All being well, the husband, who is now 51, will be able to continue in business for a good many years. AUTONUM The wife does not share the husband s affluent background. Although well educated (holding degrees in English literature and education), and having the experience of running her own business, when she came to Hong Kong her independent means were modest. The wife has not worked since her arrival in Hong Kong. With the husband well able to maintain her, there was no cause for her to do so. AUTONUM Now

that the parties marriage is at an end, the husband through his counsel has contended that, given a suitable time to find her feet again, the wife should become self supporting. Having regard to the relative shortness of the marriage, coupled with her inherent abilities to manage for herself, it has been contended that she should not be granted a meal ticket for life. The wife, however, wishes to remain a full time mother to J and has said that once those responsibilities fall away she will, for all practical purposes, be too old to find any meaningful employment. In addition, the wife is presently troubled with eye problems which will require surgery. She therefore seeks a financial settlement which will ensure her security for the rest of her life. AUTONUM The husband has sufficient realisable assets to be able to provide for the wife by way of a cash settlement, neither party having any further financial obligation to the other. Both parties seek a clean break and, in my view, it is to be encouraged. See, for example, Rayden and Jackson on Divorce and Family Matters (17th ed.) at page An object of the modern law is to encourage each [party] to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down. It would be inconsistent with this principle if the court could not make, as between the spouses, a genuinely final order AUTONUM As to the terms of any clean break award, from submissions made it was apparent that a considerable gulf exists between the parties. This is illustrated by their respective proposals which I summarise broadly (and in round figures) in the following paragraphs. AUTONUM Griffiths SC, senior counsel for the wife, proposed that awards giving to the wife cash and assets to the value of approximately HK\$99 million would meet the dictates of fairness. The wife s proposals may be summarised as follows : Cash to purchase a suitable home on the south side of Hong Kong Island close to J s school \$25 million Cash to purchase a suitable car (a Lexus saloon) \$0.75 million Cash to purchase a club debenture (or transfer to her of such a debenture) to ensure suitable recreational facilities \$0.75 million Cash to provide for an annuity (according to Duxbury calculations) \$55 million Cash to provide for a suitable cushion in respect of the annuity, say 15% of the sum provided for in (iv) \$8.25 million Retention of jewellery given to her by the husband, valued at \$2.13 million Retention of a holiday home in Canada (the Ontario cottage), valued at \$2.3 million Retention of cash in the wife s possession (assuming the wife s taxed costs are paid by the husband \$5.13 million Total HK\$99.31 million AUTONUM By contrast, the husband s proposals may be summarised as follows : Concerning a home in Hong Kong, the husband accepts that it should be more enhanced than would otherwise be the case because the wife will have day day care of J and the boy should not be disadvantaged. In this regard, the husband has contended that the higher the award for a home, the more appropriate would be an order obliging the wife, when J is independent, to dispose of the property in order to obtain something more modest, the surplus being returned to him in terms of what is known as a Mesher order or Elliott charge. The husband believes that a fair sum for the purchase of a home at this time would be \$12 million Cash to purchase a suitable car \$0.45 million As for a club debenture, he will transfer to the wife a debenture in the Aberdeen Marina Club having a value at this time of approximately \$0.7 million As for the wife s future maintenance, he has suggested that a period of 8 years should be sufficient to enable her to fulfill her responsibilities

towards J and find herself some means of livelihood. With maintenance being assessed at HK\$100,000 per month, that will make for a capital sum of \$9.6 million Total HK\$22.75 million AUTONUM The husband, however, has not proposed that the wife be entitled to retain all the assets presently in her possession in addition to receiving a figure of approximately HK\$22.75 million from himself. The assets presently vested in her must be off set against the capital sum offered by him. These assets consist of the Ontario cottage, the wife s jewellery, cash in her possession and the amount of a loan due to the wife in the sum of HK\$445,000. The husband has assessed these assets at a higher figure than the wife, giving to them a value of some HK\$12.9 million. AUTONUM In light of this, as I understand it, the husband has proposed that, by way of a clean break, he transfer to the wife his debenture in the Aberdeen Marina Club and give her a lump sum payment of approximately HK\$12 million. The settlement would then be as follows : Assets presently vested in the name of the wife \$12.9 million Aberdeen Marina Club debenture, value at, say \$0.7 million Cash settlement by the husband, say million Total HK\$25.6 million AUTONUM In summary, the wife has proposed that awards should be made in her favour approximating HK\$99 100 million. The husband has proposed awards in her favour approximating HK\$25 million. The gulf reflects a difference of HK\$73 million. This huge divergence is due in large measure to disputed factual issues but springs equally from conflicting views as to the applicable law. AUTONUM The conflict as to the applicable law has been brought about by a fundamental change in the manner in which the courts in the United Kingdom now approach contested ancillary relief applications in what are called big money cases. The change was effected by the House of Lords in October 2000 in the landmark decision of *White v. White* [2001] 1 AC

596. As I understand it, this is the first big money case in Hong Kong in which it is submitted that, as the relevant legislation is essentially the same as that of the United Kingdom, this court should adopt the *White v. White* principles, setting aside the restrictive approach that has previously applied in this jurisdiction, an approach that is said to be inherently discriminatory against the home maker in favour of the wealth creator. Should this court follow *White v. White*? AUTONUM The power of Hong Kong courts to make financial provision on divorce derives from statute, that statute being the MPPO which in 1972, some 30 years ago, came into force in order to consolidate and amend the law relating to ancillary relief in matrimonial proceedings. The MPPO greatly extended the powers of the Hong Kong courts. Today, in terms of sections 4, 6 and 6A of the Ordinance, our courts are empowered to order one spouse to make periodic payments to the other, to transfer property to the other or to sell property so that the proceeds may be used to ensure an equitable division. Of particular relevance in the present case, s.4(1)(c) empowers our courts to order that either party shall pay to the other such lump sum or sums as may be so specified . These powers must, however, be exercised within the confines of certain criteria which are detailed in section 7 of the Ordinance. As will be seen, the criteria are broadly defined and enable our courts to exercise a wide discretion. AUTONUM Primary consideration must of course be given to any child of the marriage. In this regard, s.7(2)

states it shall be the duty of the court in deciding whether to exercise its powers under section 5, 6 or 6A in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say

- (a) the financial needs of the child;
- (b) the income, earning capacity (if any), property and other financial resources of the child;
- (c) any physical or mental disability of the child;
- (d) the standard of living enjoyed by the family before the breakdown of the marriage;
- (e) the manner in which he was being and in which the parties to the marriage expected him to be educated; and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraph(a) and (b) of subsection (1), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him.

AUTONUM It is to be noted that, in considering the criteria detailed in s.7(2), our courts are obliged, in so far as practicality and justice allows, to place the child in the same financial position he or she would have been in if the marriage had not broken down. That is the explicit aim. AUTONUM As between spouses themselves, the relevant criteria are detailed in s.7(1) which states that 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. AUTONUM It will be seen that s.7(1) contains no explicit aim of the kind contained in s.7(2). That being the case, as between spouses, whatever approach is adopted, the authorities appear to be unanimous in holding that the legislative intent must be to weigh the necessary criteria in

order, within the parameters of those criteria, to achieve fairness between the parties. As Thorpe LJ said in *Dart v. Dart* [1996] 2 FLR 286 at 294, the statutory design was to give the judge exercising the power of equitable distribution the widest discretion to do fairness between the parties. As Lord Nicholls observed in *White v. White* at 604, the objective must be to achieve a fair outcome. AUTONUM In *C v. C* [1990] 2 HKLR 183, at this time the defining judgment in Hong Kong as to the manner in which our courts should discharge their duties under s.7 of the MPPO, Hunter JA observed that the history of our matrimonial legislation, more particularly that relating to matters of ancillary relief, demonstrates a legislative intent in Hong Kong to use English experience and to follow England's example. This is illustrated by the fact that s.7 of the MPPO was, to quote the words of Hunter JA, taken almost verbatim from s.5 of the English Matrimonial Proceedings and Property Act 1970 which itself had been enacted in order to modernise and rationalise the powers of the courts in ancillary relief matters. AUTONUM Although s.7 of the MPPO was drawn in almost identical terms from s.5 of the 1970 Act, there was one important difference. As originally enacted, s.5(1) of the 1970 Act (the equivalent of s.7(1) of the MPPO) stated that the purpose behind the duty of the courts to consider the criteria detailed in the section was to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other. AUTONUM The Hong Kong legislature chose not to include this explicit aim, the target provision as Hunter JA termed it in *C v. C*. Instead, as between spouses, our courts are obliged, in the absence of a stated aim, to have regard to the conduct of the parties and all the circumstances of the case including the criteria listed in paragraphs

- (a) to (g) in order, in the particular circumstances of each case, to achieve an equitable financial settlement. AUTONUM In the United Kingdom, the relevant provisions of the 1970 Act were re enacted in substantially similar terms in Part II of the Matrimonial Causes Act

1973. Sections 23, 24 and 24A of the 1973 Act are reflected in sections 4, 6 and 6A of the MPPO while s.25 of the 1973 reflects s.7 of our Ordinance. In the 1973 Act, however, in late 1984, the target provision inherited from s.5(1) of the 1970 Act was deleted from the legislation, no provision defining a specific purpose being inserted in its place. In the result, it may be said that today, as between spouses, the almost identical wording of s.25 of the 1973 Act and s.7 of the MPPO seek the same result; namely, what the circumstances of each particular case dictate should be a fair outcome. AUTONUM When in the United Kingdom and thereafter in Hong Kong the reformed legislation came into force, to quote the words of Thorpe LJ in *Dart v. Dart*, there was obvious curiosity and speculation amongst practitioners as to how these new powers were to be interpreted and utilised by the courts. AUTONUM Initially, in *Wachtel v. Wachtel* [1973] 1 All 275, Denning MR proposed a mathematical solution. If the applicant (invariably the wife) was to have periodical payments her capital share should be one third; if she was not to have periodical payments her capital share should be one half. However, this mathematical approach (not in any way specifically contemplated in the legislation) was later disapproved, the insistence being that

the courts must direct themselves to the criteria detailed in the legislation and not to a calculation of fractions other than as a broad check against the fairness of outcome.

AUTONUM This development left uncertainty as to the outcome in big money cases where the assets are very large and there is no serious liquidity problem. The uncertainty, however, was set aside by Ormrod LJ in a series of cases in which the principle of reasonable requirements was developed. In *O D v. O D* [1976] Fam 83 he said The next stage is to consider the wife's position, not from the narrow point of need, but to ascertain her reasonable requirements, bearing in mind that she will have to provide an appropriate home and background for herself and the children. In *Preston v. Preston* [1982] Fam 17, he expanded upon this by saying Secondly, the word needs in paragraph

- (b) of s 25(1) in relation to the other provisions in the subsection is equivalent to reasonable requirements, having regard to the other factors and the objective set by the concluding words of the subsection Paragraph
- (b) of s.25(1) of the 1973 Act is reflected in paragraph
- (b) of s.7(1) of the MPPO which places our courts under a duty, within the context of the conduct of the parties and the general circumstances of the case, to have regard to the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future. AUTONUM The reasonable requirements approach, although elastic, did not encompass in big money cases, where there was a surplus after meeting the spouses needs, any power to order the transfer of a capital sum to an applicant so that, for example, provision could be made in the applicant's will for his or beneficiaries. In *Preston v. Preston*, Ormrod LJ said the powers of the court ought not to be exercised for the benefit of adult children, by enabling the wife to set up a child in business or to provide by will for a child who is unlikely to benefit under the husband's will or otherwise. In the same judgment, Ormrod LJ said I think that on the true construction of s 25 there does come a point, in cases where the available resources are very large, as [counsel] submitted, when the amount required to fulfil its terms levels off, and redistribution of capital as such, in some unspecified ratio begins, which is outside the section. AUTONUM The logic of this was explained by Thorpe LJ in *Dart v. Dart* In this jurisdiction rights of property are not invaded or reduced by statutory powers save for specific and confined purposes. The purpose of this statute was to make fair financial arrangements on or after divorce in the absence of agreement between the former spouses. Beyond that the power was not introduced to reorganise proprietary rights within families. AUTONUM *Dart v. Dart*, a decision of the English Court of Appeal in 1996 may be said to be the high water mark of the reasonable requirements approach, the court endorsing the applicable principles as having been settled in big money cases for over a decade. Thorpe LJ commented that the certainty brought about by the approach had enabled practitioners to negotiate settlements in a large number of cases and, if there was to be a change, it would have to be brought about by the House of Lords or Parliament. As to the nature of reasonable requirements, Thorpe LJ said (at 296) it is implicit that reasonable requirements

are more extensive than needs. As a matter of ordinary language what a person requires is likely to be greater than what that person needs. So the check on what the applicant subjectively requires is the word reasonable. There must be an objective appraisal of what the applicant subjectively requires to ensure that it is not unreasonable. But the objective appraisal must have regard to the other criteria of the section, obviously including what is available, the standard of living to which the parties are accustomed, their age and state of health and, perhaps less obviously, the duration of the marriage, contributions, and pension rights both as affected by the marriage and as accrued or likely to accrue. Used thus the consideration of needs ceases to be paramount or determinative but an elastic consideration that does not exclude the influence of any of the others. As Mr Singleton rightly submitted, in a big money case where the wife has played an equal part in creating the family fortune it would not be unreasonable for her to require what might be even an equal share. Therefore in my judgment the essential function of the judge in the big money case is to declare the boundary between the applicant's reasonable and unreasonable requirements applying all the statutory criteria to the myriad relevant facts of the individual case. AUTONUM The endorsement of the reasonable requirements approach by the Court of Appeal in *Dart v. Dart* was not, however, without reservation. Butler Sloss LJ commented (at 305) I wonder whether the courts may not have imposed too restrictive an interpretation upon the words of s 25 and given too great weight to reasonable requirements over other criteria set out in the section. AUTONUM In October 2000 in *White v. White* the House of Lords expressly disapproved of the reasonable requirements approach with its inherent ceiling, Lord Nicholls saying (at 608) I can see nothing, either in the statutory provisions or in the underlying objective of securing fair financial arrangements, to lead me to suppose that the available assets of the respondent [the husband] become immaterial once the claimant wife's financial needs are satisfied. Why ever should they? If a husband and wife by their joint efforts over many years, his directly in his business and hers indirectly at home, have built up a valuable business from scratch, why should the claimant wife be confined to the court's assessment of her reasonable requirements, and the husband left with a much larger share? Or, to put the question differently, in such a case, where the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband? On the facts of a particular case there may be a good reason why the wife should be confined to her needs and the husband left with the much larger balance. But the mere absence of financial need cannot, by itself, be a sufficient reason. He continued There is much to be said for returning to the language of the statute. Confusion might be avoided if courts were to stop using the expression reasonable requirements in these cases, burdened as it is now with the difficulties mentioned above. This would not deprive the court of the necessary degree of flexibility. Financial needs are relative. Standards of living vary. In assessing financial needs, a court will have regard to a person's age, health and accustomed standard of living. The court may also have regard to the available pool of resources. Clearly, and this is well recognised, there is some overlap between the factors listed in section 25(2). In a particular case there may be other matters to be taken into account as well. But the end product of this assessment of financial needs should be seen, and treated by the court, for what it is: only

one of the several factors to which the court is to have particular regard. This is so, whether the end product is labelled financial needs or reasonable requirements. In deciding what would be a fair outcome the court must also have regard to other factors such as the available resources and parties contributions. In following this approach the court will be doing no more than giving effect to the statutory scheme. AUTONUM In disapproving of the reasonable requirements approach, Lords Nicholls commended the wide discretionary powers conferred by Parliament under s.25 to enable the courts to make financial provision orders in tune with current perceptions of fairness . He continued Today there is greater awareness of the value of non financial contributions to the welfare of the family. There is greater awareness of the extent to which one spouse s business success, achieved by much sustained hard work over many years, may have been made possible or enhanced by the family contribution of the other spouse, a contribution which also required much sustained hard work over many years. There is increased recognition that, by being at home and having and looking after young children, a wife may lose for ever the opportunity to acquire and develop her own money earning qualifications and skills. In *Porter v. Porter* [1969] 1 WLR 1155, 1159, Sachs LJ observed that discretionary powers enable the court to take into account the human outlook of the period in which they make their decisions . In the exercise of these discretions the law is a living thing moving with the times and not a creature of dead or moribund ways of thought. AUTONUM The House of Lords was particularly troubled by what appeared to be the discriminatory nature of the reasonable requirements approach. Lord Nicholls spoke of this at 605 there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties contributions. This is implicit in the very language of paragraph (f): the contributions which each has made or is likely to make to the welfare of the family, including any contribution by looking after the home or caring for the family . (Emphasis added.) If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money earner and against the home maker and the child carer. AUTONUM So that this principle of equality was not overlooked, Lord Nicholls continued A practical consideration follows from this. Sometimes, having carried out the statutory exercise, the judge s conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge s decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge

would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. AUTONUM It was emphasized, however, that this was not to introduce a presumption of equal division of family assets. Any such presumption would go beyond the permissible bounds of interpretation of s.25. Parliament had not by implication legislated for community of property. AUTONUM As Thorpe LJ commented in *Cowan v. Cowan* [2002] Fam 97, at 118, when considering the application of the principles in *White v. White* The decision clearly does not introduce a rule of equality. The yardstick of equality is a cross check against discrimination. Fairness is the rule and in its pursuit the reasons for departure from equality will inevitably prove to be too legion and too varied to permit of listing or classification. AUTONUM I would observe, however, that while *White v. White* may not have laid down a presumption of equality, clearly equality of division is now a starting point. That, in my view, does not represent the law in Hong Kong. There is, for example, no requirement for our judges to give reasons for departing from equality. Indeed, in marriages where there are few assets, studies have demonstrated that equality may act to the real detriment of the spouse who is left with the responsibility of raising the children : see *Figgins v. Figgins*, a decision of the Family Court of Australia [2002] Fam CA 688. AUTONUM As to the prohibition under the reasonable requirements approach to providing for a capital sum to enable the party seeking financial relief to make provision by will, Lord Nicholls said I agree with this proposition to a strictly limited extent. I agree that a parent's wish to be in a position to leave money to his or her children would not normally fall within paragraph

- (b) as a financial need, either of the husband or of the wife. But this does not mean that this natural parental wish is wholly irrelevant to the section 25 exercise in a case where resources exceed the parties financial needs. In principle, a wife's wish to have money so that she can pass some on to her children at her discretion is every bit as weighty as a similar wish by a husband In my view, in a case where resources exceed needs, the correct approach is as follows. The judge has regard to all the facts of the case and to the overall requirements of fairness. When doing so, the judge is entitled to have in mind the wish of a claimant wife that her award should not be confined to living accommodation and a vanishing fund of capital earmarked for living expenses which would leave nothing for her to pass on. The judge will give to that factor whatever weight, be it much or little or none at all, he considers appropriate in the circumstances of the particular case. AUTONUM As to what may broadly be described as inherited money or property, it seems that the House of Lords did not depart from the essential approach of earlier courts applying the principles of reasonable requirements ; namely, the fact that property is acquired before marriage or inherited is one of the circumstances of the case and is to be given such weight as is deemed appropriate. Lord Nicholls (at 610), having observed that property acquired before marriage or by inheritance had in many jurisdictions been accorded a class of its own, said According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited

property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property. 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. AUTONUM In *Cowan v. Cowan* Thorpe LJ (at 119) summarised the consequences of the House of Lords judgment as follows

- (i) Approved is the frequent theme of decisions in this court that the trial judge must apply such criteria as are to be found in section
- 25. (ii) Approved also is the almost inevitable judicial conclusion that the unexpressed objective of the exercise is to arrive at a fair solution. (iii) Disapproved is any discriminatory appraisal of the traditional role of the woman as homemaker and of the man as breadwinner and arbiter of the destination of family assets amongst the next generation. A calculation of what would be the result of equal division is a necessary cross check against such discrimination. (iv) Disapproved is any evaluation of outcome solely or even largely by reference to reasonable requirements. (v) In so far as the yardstick of reasonable requirements was a judicially created tool to enable negotiators and judges respectively to predict and calculate conclusions it introduced an element of predictability and accordingly curtailed the width of the judicial discretion conferred by Parliament. [my emphasis] AUTONUM There is no need for a more in depth analysis of those cases which developed and confirmed the reasonable requirements principles as contrasted with those laid down in *White v. White* to find that the differences are not simply ones of emphasis or a shift in the tone of guidance. The differences are fundamental, they go to applicable principles. As Thorpe LJ observed in *Dharamshi v. Dharamshi* [2001] 1 FLR 736, at 742 The ceiling of reasonable requirements originated by Ormrod LJ and applied by this court for nearly a generation must now be rejected. Certainly in England, judges of great experience in family matters such as Singer J, who in extra judicial pronouncements expressed misgivings as to the correctness of the reasonable requirements approach, nevertheless felt bound to adhere to it. AUTONUM What then of the Hong Kong courts, how have they interpreted and utilised the criteria contained in s.7 of the MPPO? As I have said earlier, the defining judgment is that of our Court of Appeal in *C v. C*, a judgment given in 1990. In that judgment, Hunter JA, giving the judgment of the court, noted that it was the first time that the court had to consider the impact of the s.7(1) criteria in relation to very wealthy parties where the usual constraints of insufficiency or of illiquidity did not apply. AUTONUM By 1990, the major decisions of the English Court of Appeal in which the principles applicable to reasonable requirements had been developed were available, particularly *O D v. O D* and *Preston v. Preston*. The matter did not

proceed before our Court of Appeal, however, on the basis that the reasonable requirements approach was assumed, without argument, to be the correct approach. To the contrary, Singer QC (now Singer J) criticized the reasonable requirements approach, advocating in essence for the approach that has now found favour with the House of Lords in *White v. White*. In this regard, Hunter JA said of Mr Singer's submissions First we were invited to construe s. 7 for ourselves in the light of our perception of Hong Kong's need, and to ignore all English authority. Secondly he subjected the English authority to a critical analysis with a view to persuading us that it was unpersuasive, inconsistent and in certain respects erroneous. Collectively the authorities constituted, he suggested, a shaky jerry built edifice where each decision took the court farther from the words of the section. AUTONUM Hunter JA, however, rejected Mr Singer's criticisms, preferring to adopt the principles applicable to reasonable requirements developed in the courts of England. In this regard (at 187), he said In my view the courts of Hong Kong can and should derive considerable help from the much wider experience of the English courts in this field. The English courts seem to me faithfully and carefully to have construed their s. 25 and I am unimpressed by Mr. Singer's criticism. For my part I gratefully accept and follow the guidance of these decision. AUTONUM But while Hunter JA spoke of the Hong Kong courts deriving considerable help from the wider experience of the English courts and said that he gratefully followed the guidance of these decisions ; that is, the decisions developing and confirming the principles applicable to the reasonable requirements approach, he did not say that our courts must (or would) follow the example of the English Court of Appeal in future in respect of the interpretation and utilisation of the criteria contained in s.25 of the 1973 Act whichever way that example led. AUTONUM As to the difference between s.7(1) of the MPPO and the English legislation by reason of the appendage to the English legislation of the target provision until 1984, that was considered and its impact rationalized by Hunter JA. AUTONUM As to the question of discrimination which was to trouble the House of Lords 10 years later in *White v. White*, Hunter JA cited with approval the dicta of Ormrod LJ in *Preston v. Preston* Active participation by the wife either by working in the business or by providing finance, will greatly enhance her contribution to the welfare of the family under paragraph (f), and may lead to a substantial increase in the lump sum over and above her reasonable requirements . This, in effect, recognises that she has earned a share in the total assets, and should be able to realise it and use it as she chooses Hunter JA then commented This does not downgrade the contribution of the lady who only fulfills the very important role of wife and mother, as Mr. Singer suggests. It simply recognises the different types of contribution which the award must reflect. All the cases are consistent in recognising the particular claim which can be advanced by the working wife. While, with respect, this does not appear to me to squarely answer the criticism that the contribution of a mother and home maker is equal to that of a bread winner, nevertheless the matter of discrimination was raised and dealt with. AUTONUM Nor, in my judgment, can it be said that Hunter JA was in any way equivocal in adopting the reasonable requirements approach. As to the criticism that the consideration of a claimant reasonable requirements constituted an unjustified judicial gloss, he said that the criticism would only have substance if it could be said the

Ormrod, L.J. was seeking to substitute this phrase for the words of the section. It is quite clear that he was not and that he was simply using it as a convenient paraphrase of the effects of the section. He was in effect saying that the section requires that a monetary value has to be put upon the wife's total claims upon the available assets. [my emphasis] AUTONUM As to the approach to be adopted by our courts, Hunter JA extracted the following guideline advice or principles from the English authorities :

- (i) The first task of the court is to consider all the circumstances and all the factors listed in paragraphs
 - (a) to (g) of s.7(1). The arithmetical approach suggested in *Wachtel v. Wachtel* was wrong and quite inappropriate in big money cases. The court's inquiry can conveniently start at the evaluation under paragraph
 - (a) of the income, earning capacity, property and other financial resources of the parties. As Hunter JA commented This usually involves the evaluation of the husband's contribution to the family fortunes which are under his control. But resources of both parties derived from any source, e.g. inheritance, have also to be considered The next stage was to evaluate the applicant's reasonable requirements . In so doing, it had to be borne in mind that possible dispositions by will are not relevant matters for consideration. The statutory scheme was to give the court jurisdiction to make financial orders for the benefit of wives only for their lives . That being the case, a lump sum intended to provide an income should be assessed on the basis not of the return on the capital sum, but upon the basis that the capital would be exhausted during the wife's lifetime . In this regard, the formula approved in *Duxbury v. Duxbury* [1987] 1 FLR 7 was endorsed. Any assessment of reasonable requirements must necessarily have a ceiling. As Ormrod LJ noted in *Preston v. Preston*, in big money cases there comes a point when the amount required to fulfill the requirements of s.25 of the English Act (or s.7(1) of the MPPO) levels off and beyond that the redistribution of capital as such is impermissible as being outside the terms of the section. AUTONUM In 1998, the Court of Appeal in *Li v. Li* CACV 70/1998 (unreported) fully endorsed the reasonable requirements approach, citing with approval the dicta of Thorpe LJ in *Dart v. Dart* that reasonable requirements are more extensive than needs and criticising any temptation, when considering a claimant's reasonable requirements, to adopt a budgetary or needs approach which diminished the other criteria set out in s.7(1), especially the lifestyle enjoyed during the marriage. AUTONUM In considering the submissions made by the appellant in *Li v. Li*, Leong JA (as he then was) said The starting point is whether the deputy judge was wrong in principle or his assessment is plainly wrong. The deputy judge in the beginning of his judgment referred to the court's duty to consider the matters under s.7(1) of the MPPO and to the applicable principles in *C & C* [1990] 2 HKLR
183. He stated that these were the principles he would apply in determining the appellant's reasonable requirements The appellant says that although the judge was aware of the relevant principles, he applied them wrongly. No suggestion was made by counsel or the court that the principles enunciated by Hunter JA in *C v. C* were not in big money cases the

defining principles. AUTONUM I have been at some pains to consider the principles set down in *C v. C* (and followed in *Li v. Li*) and the background against which those principles were adopted by Hunter JA to illustrate that, as in England, the Hong Kong authorities have given more than mere guidelines to the interpretation of the relevant legislation, they have set principles of interpretation which are binding on courts of lower or concurrent jurisdiction. In *Li v. Li* the essential questions were whether the judge at first instance had applied the correct principles (i.e. the principles defined in *C v. C*) and whether, if he was aware of those principles, he had applied them correctly. AUTONUM Prior to the change of sovereignty in 1997, the House of Lords decision in *White v. White* would, I believe, have been binding on this court : see *De Lasala v. De Lasala* [1980] AC

546. But the House of Lords decision was given in 2000, well after the change in sovereignty. Art.84 of the Basic Law permits the Hong Kong courts to refer to precedents of other common law jurisdictions . Clearly, when those precedents relate to legislation which is drafted in the same or substantially the same terms as the Hong Kong legislation then valuable guidance can be obtained from those precedents as to the proper approach to the interpretation of our legislation : see, for example, *AG of Hong Kong v. Lee Kwong Kut* [1993] AC 951 (at 967). But guidance obtained from other common law precedents even those as influential and pressing as the House of Lords can never take precedence over binding local authorities. On behalf of the wife, however, Mr Griffiths has submitted that I should abandon the principles set down in *C v. C* and adopt those enunciated by the House of Lords in *White v. White*. AUTONUM I confess that I find the philosophy underlying certain of the propositions in *White v. White* persuasive, in line not only with modern concepts of fairness but in accordance with what I believe our legislature intended. The core perhaps, in equitable terms, lies in the following words of Lord Nicholls (at 608) which I repeat If a husband and wife by their joint efforts over many years, his directly in his business and hers indirectly at home, have built up a valuable business from scratch, why should the claimant wife be confined to the court s assessment of her reasonable requirements, and the husband left with a much larger share? Or, to put the question differently, in such a case, where the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband? But the fact that I find principles set down in other common law jurisdictions to be persuasive does not mean that I am free to adopt them, not when I am bound by local authority to a different effect. AUTONUM In any event, the shift brought about by *White v. White*, as I have attempted to show, is not a matter of small moment, simply a permissible sideways move across the spectrum of discretion. *White v. White* has presented its own difficulties, often profound. As one judge observed (*N v. N* [2001] 2 FLR As is glaringly apparent from this case, the theory behind *White* is one thing, the actual practicalities involved in valuing, dividing up, and/or realising certain species of assets make the attaining of the *White* objective sometimes either impossible or only achievable at a cost which may not overall be in the family s best interests. In this regard of one thing I am convinced. I am sure the House of Lords did not intend courts to exercise their far reaching powers to achieve equality on paper if in doing so they, Samson like, brought down

or crippled the whole family's financial edifice to the ultimate detriment of the children (whose interests, of course, remain the top priority in this and every case). AUTONUM Griffiths, correctly in my view, submitted that matrimonial law, especially in regard to matters of ancillary relief, is not static and must move with the times. In this regard, he underscored the observations of Sachs LJ in *Porter v. Porter* cited with approval by Lord Nicholls in *White v. White* (see para.42 supra). But Sachs LJ was talking about the exercise of discretion. While, in my view, the exercise of that discretion must of course be fluid and responsive to the changing outlook of society, its exercise must nevertheless be contained within binding principles of interpretation. If not, consistency flies out of the window. AUTONUM Hong Kong, a first world city, has experienced many of the social changes that Lord Nicholls spoke of in *White v. White*. The traditional division of labour within the family is no longer the norm in Hong Kong. Typically both parents work, perhaps leaving the children with other family members during their working hours. Both share domestic routines. They care for their children together, they save for the future together. In the exercise of the broad discretion vested by s.7 of the MPPO and within the elastic confines of reasonable requirements, when that principle is appropriate, I venture that our family courts have on a day day basis responded to those changes. But, just as our family courts are bound by our legislation, so they are held to binding principles of how that legislation is to be interpreted. What must be remembered is that *White v. White* itself has laid down binding principles of interpretation, as broad as they may be. AUTONUM In seeking a return to the plain wording of s.7 of the MPPO, seen through the prism however of *White v. White*, Mr Griffiths cited the words of Lord Denning MR in *Farrell v. Alexander* (1976) 1 QB 345 (at 359) Finally, I would say this: This words of the Act of 1968 are plain. They admit of no doubt. They cover this case. No court is entitled to throw over the plain words of a statute by referring to a previous judicial decision. When there is a conflict between a plain statute and a previous decision, the statute must prevail. That appears from the decision of the House of Lords in *Campbell College, Belfast (Governors) v. Northern Ireland Valuation Commissioner* [1964] 1 W.L.R. 912. What must be remembered, however, is that Lord Denning was in the minority in that judgment. Scarman LJ and Lawton LJ disagreed with him although Scarman LJ had sympathy with the purpose behind Lord Denning's approach. At 371, Lord Scarman said I decline to accept his lead only because I think it damaging to the law in the long term though it would undoubtedly do justice in the present case. To some it will appear that justice is being denied by a timid, conservative adherence to judicial precedent. They would be wrong. Consistency is necessary to certainty one of the great objectives of law. The Court of Appeal at the very center of our legal system is responsible for its stability, its consistency, and its predictability : see my comments in *Tiverton Estates Ltd. v. Wearwell Ltd.* [1975] Ch. 146, 172. The task of law reform, which calls for wide ranging techniques of consultation and discussion that cannot be compressed into the forensic medium, is for others. In any event, in *C v. C Hunter JA* directed that in all big money cases, such as the present, the primary focus must be on the wording of s.7 itself, holding that, reasonable requirements constituted a convenient paraphrase of the effects of the section . In summary, Hunter JA adopted the reasonable requirements approach not to

interpret a particular word or phrase within s.7 but as a principle of interpretation concerning the effect of the section as a whole. That is a broader matter entirely than the matter in *Farrell v. Alexander* which concerned the interpretation of the single phrase any person within the context of the Rent Act 1968. AUTONUM As I understand it, however, the centre of Mr Griffiths assault on *C v. C* was to the effect that it was decided per incuriam. He advanced this bold proposition on the basis that the House of Lords in *White v. White* has now ruled the various authorities upon which the Court of Appeal relied in *C v. C* to have been wrongly decided. In essence, if I may describe it thus, he has suggested or so I take it that the Court of Appeal was per incuriam because it was ignorant of a decision not yet in existence; a decision moreover to be made at a time when it would no longer be binding on the Court of Appeal. In my view, that cannot be right. Nor, on the analysis given earlier, even if I had authority to do so, am I able to say that some part of the decision in *C v. C* or some step in the reasoning upon which it was based is demonstrably wrong. As I have illustrated, the Court of Appeal had both sides of the argument before it; there is no suggestion that it was in ignorance of any prevailing authorities that should or must have been taken into account and certainly no evidence that its reasoning was demonstrably wrong. To the contrary, it was at the time in accordance with the great weight of English authority. AUTONUM The fact that in England there has over a period of years been a call for a fresh consideration of the reasonable requirements approach one not demonstrated to exist here and that in England there has now been a change in the applicable principles does not, and cannot, of itself mean that *C v. C* was decided per incuriam. While consistency is to be encouraged, it is not unknown for courts in separate jurisdictions to adopt a different approach to substantially the same legislation. Law is part of the machinery of society and each society is subject to its own cultural, commercial and social imperatives. Perhaps C

- v. C may be found by a higher court to have been wrongly decided but, if I may make use of the language of Scarman LJ in *Farrell v. Alexander* (at 369), the Court of Appeal in *C v. C* was not in ignorance of the problem, did not fail to face it and its decision, although another was open to it, cannot be treated as given per incuriam. AUTONUM In the circumstances, I am satisfied that this court is bound by *C v. C* and that *White v. White*, while it may offer valuable guidance, may only do so within permissible limits. However, having come to that conclusion, I am of the view that in the present case, even if I had been free to fully adopt the principles in *White v. White*, the awards which I intend to make would not have been materially different. AUTONUM While at this time it seems to be uncertain in England whether the principles in *White v. White* should be restricted to big money cases, it is evident, I think, that the principles are most tangibly demonstrated in favour of the spouse who has not been the main breadwinner (and conversely, the principles applicable to reasonable requirements most tangibly demonstrated to the detriment of that spouse) when there has been a long marriage during which, for their mutual benefit, both parties the one mainly at home, the other mainly at the office or factory have built up a store of considerable wealth. Increasingly, where these factors have less prominence, so, in practical terms, it seems to me that the poles of the two principles must draw together. AUTONUM

Even though a host of arguments were advanced to the contrary, in my view the present case falls far short of what may be described as a classic *White v. White* case. To explain my reasoning, I must first return in more detail to the history of this matter. The relevant background AUTONUM The wife's family has its roots in Hong Kong. The wife was born here and underwent much of her schooling here. When she was in senior school, the wife's family emigrated to Canada, settling in the Toronto area. The wife completed her schooling in Canada. The husband, as I have said, comes from a well known, wealthy Hong Kong family, his late father being a businessman of repute and very considerable accomplishment. AUTONUM In 1971, the husband and the wife entered university in Ontario as undergraduate students. A romance ensued. Marriage was contemplated and, when the husband returned to Hong Kong to join his father in business, the wife came with him. The wife, however, was unhappy at the prospect of becoming what she has termed a trophy wife, living what she believed would be a gilded but nevertheless arid life. In the result she returned to Canada and the relationship came to an end. AUTONUM The wife had already obtained a Bachelor of Arts degree at the University of Waterloo majoring in English literature and on her return to Canada obtained a further degree, this time in education. Thereafter she worked for about three years as a teacher before taking up administrative duties with the Ontario Government. In the early 1980s she met the freelance film maker to whom reference has earlier been made, Mr M. They lived together and in August 1985 A was born of their union. The wife testified that she found it difficult living with Mr M, especially as finances were uncertain. According to her, it was either a feast or a famine. A time came, therefore, when the wife and Mr M went their separate ways. It appears, however, that they have remained on good terms. Indeed, since the breakdown of the wife's marriage to the husband, Mr M has visited her in Hong Kong. AUTONUM After her separation from Mr M, the wife purchased a home in Toronto where she and A lived. At about the same time, she started a business specialising in clothing for women and children. It went under the name of Snug. There was a workshop where designs were made up and a retail outlet. The wife ran the business for about seven years. The wife testified that the business provided her with a comfortable living but economically things were difficult in Canada and the business, although viable, was adversely affected. In a search for new business opportunities, the wife trained as a distributor for a corporation called Nu skin which marketed skin care and cosmetic products through a network of distributing agents. AUTONUM In the summer of 1991, hoping to recruit her own Nu skin distributors, the wife returned to Hong Kong. She and the husband had not seen each other in some 17 years. She telephoned him, they met and a love affair began. AUTONUM The husband was then married. He had entered into that marriage in 1979 and had three children now aged 21, 18 and 13. According to the husband, by the summer of 1991 his marriage had become a loveless union, he and his wife living separate lives. Divorce proceedings were in fact commenced that same summer; that is, in August 1991. AUTONUM From the summer of 1991 until December 1992 a period of some 15 or 16 months the husband and the wife conducted what may be described as a long distance romance, meeting whenever they could. The husband would fly to Canada, the wife would come to Hong Kong or they would spend time together at some other suitable place. During

this period the wife continued to live in Toronto and to manage her business. AUTONUM In September 1992, a decree nisi was issued in the husband's divorce proceedings. Three months later, in December of that year, the wife came with her daughter, A, to live in Hong Kong. Their first home was an apartment in Convention Plaza where they stayed for three or four months. Thereafter, in the spring of 1993, the wife and A moved to a house in the New Territories. It was situated in Sai Kung on an island called Isola Bella, an elite part of a development known as Marina Cove. The house was registered in the name of a company controlled by the husband. The dwelling (the Marina Cove residence) had been used by the husband as a weekend retreat but was to be the first matrimonial home. AUTONUM When the wife came to Hong Kong with her daughter, it was never intended that she should seek work. The agreement clearly was that the husband would look to her needs. In the result, since her arrival in Hong Kong in December 1992 a period of just over 10 years the wife has not worked. AUTONUM While nothing was certain concerning the future of the relationship, it was of course hoped that it would be permanent. That being the case, the wife sold her home in Toronto, netting a sum of approximately C\$50,000. As for the business, that was breaking even at the time, she said, although home parties and other marketing devices were required to boost sales. The wife said that she wished to sell the business but the husband was anxious for her to come to Hong Kong and said that he would reimburse her the paltry sum that she would be able to realise on sale. In the result, the wife gave the business to her manager, no payment being sought. AUTONUM With her home and her business gone, the wife appreciated the precariousness of her position. She therefore sought financial security from the husband, suggesting a sum of one million Canadian dollars. The husband agreed to pay her this sum. As to the nature of the agreement the wife said the following in her evidence The agreement was that if we did not get married and things didn't work out, that's what the security was for, so that I would be able to start up again. AUTONUM During the course of submissions, it was suggested by Mr Pilbrow, for the husband, that the wife's agreement to receive one million Canadian dollars extended not simply to what may be called the trial period ; that is the period of cohabitation in Hong Kong before the marriage, but was a statement by the wife that the one million dollars would be all she would ever seek from the husband by way of a capital sum, even if a marriage took place. In short, that in equitable terms it must be taken as some form of oral pre-nuptial agreement and in that regard placed into the scale of matters. Nothing, however, appears in the evidence to suggest that the agreement was to extend into any marriage. While, unsurprisingly, having regard to the husband's wealth and the bond of affection then existing, the husband did not ask for the return of the money when the marriage took place and the wife did not offer to return it, it is plain, in my view, that the payment, when made, was intended only as security for the wife in the event that a marriage did not take place. AUTONUM In this regard, it is to be noted that shortly before the parties were married in 1994, the wife was asked to sign a pre-nuptial agreement prepared by the husband's lawyers in terms of which, in the event of a breakdown of the marriage, the wife would restrict any financial claim to periodic maintenance payments. The wife held discussions with both her future mother-in-law (who had apparently suggested the agreement) and with her husband,

expressing her unhappiness. In the result, the agreement was not signed. If the wife had accepted the one million Canadian dollars as the limit of any capital claim, whether a marriage took place or not, it seems strange that she would on the eve of her wedding be so opposed to signing an agreement which, in the event of a breakdown of the marriage, ensured future maintenance but, as she had already conceded, no further capital.

AUTONUM On the evidence, therefore, I am satisfied that I cannot take account of any form of pre nuptial agreement, oral or written. AUTONUM Before leaving the matter of the one million Canadian dollars, one further factual issue must be considered. When the husband agreed to pay that sum, he advised the wife that in Hong Kong bricks and mortar constituted a better investment than cash. It was therefore agreed that the apartment in Convention Plaza which the wife and A had first lived in (or one similar to it) would be made over to her. The property had been purchased in June 1992 for a sum of HK\$6.24 million by a company controlled by the husband. In June 1993, a year after that original purchase, an agreement for sale and purchase was registered in terms of which for that same price (roughly equivalent to one million Canadian dollars) the wife acquired the shares in the company. The wife, however, was concerned that the property was not registered in her personal name. There were discussions on the issue which, according to the wife, caused a regrettable amount of stress. She therefore resolved to take the cash and was given it. Several months later, the husband sold the property to a third party for a sum of HK\$10 million, giving him a gross profit on his original investment of HK\$3.75 million. AUTONUM During the hearing, the husband was criticized for not sharing the profit he had made with the wife nor even informing her of the sale. When I enquired as to the relevance of this, bearing in mind that the wife had received the one million Canadian dollars she had requested (indeed, in the final accounting a little more than that), it was suggested that it indicated the manner in which, to the detriment of the wife, the husband had deceived her in money matters. It went therefore, in general terms, to undermine his credibility. In my view, however, the husband's failure to share the gross profits with the wife or to tell her of those profits is irrelevant. The couple were not married at the time. They were cohabiting in order to test the strength of their relationship. The wife had asked for financial security in a specific sum and had received it. It was the wife's choice to forego the property and take the cash. It may even be said that, in the buoyant market conditions of the time, the husband, in making over the apartment in June 1993, was making over an investment worth more perhaps a good deal more than was reflected in the sale price to the wife. What must also be remembered is that the husband was in the way of business, of exploiting investment opportunities. The apartment was essentially such an investment. With that investment back in his hands, it seems to me to have been a matter solely for him as to how he then dealt with it. It is not for this Court to look back over the marriage in order to make fine decisions of this kind as to how a couple should or should not have demonstrated their affection for each other. There is nothing to suggest that the wife and her daughter were not being generously maintained or that the wife was somehow cheated out of what she herself had sought; namely, a cash sum of one million Canadian dollars to secure her position. AUTONUM Many years earlier, when the wife had come to Hong Kong contemplating

marriage to the husband, she had balked at the prospect of becoming what she termed a trophy wife rather than a true partner in a close and abiding union. However, on her return in 1992, she said that any fears she had in this regard were allayed by the husband. To employ the wife's own words he said that that's the sort of lifestyle he and his ex-wife had, that he didn't want to have that again because they led virtually separate lives. He wanted to devote more time to himself, his hobbies and his family. And I also assumed that he had evolved into his own person after 18 years because I was certainly different from the young girl I was 18 years ago. The wife did not want to be a socialite. While she appreciated that the husband's business and community life demanded a public life on her part, she nevertheless valued her privacy. In an affidavit sworn in May 2002, speaking of an earlier interview with a journalist, she said She was surprised not to have found any photos of me in the newspapers archives. I explained it was because I did not want to be a trophy wife, and I had made it very clear to my husband before I came back to Hong Kong in 1992 that that was not the kind of life I wanted. I did not want to be in the social pages. I valued my privacy. I told her that at social functions when I saw reporters approaching us, I would retreat to the ladies room. I always made a very low key entrance and so nobody knew who I was and what I looked like. AUTONUM This desire on the part of the wife and the husband for a more family orientated lifestyle is relevant, in my view, in determining the level at which they chose to live during the course of the marriage. They eschewed the public, high society life to which the husband certainly had access and looked more to fulfilling their hopes within the context of the family circle. AUTONUM In pursuit of this shared goal, in the summer of 1994, before they were married, the husband and wife purchased a holiday home in Canada. It was in Ontario, well into the country in a village bordering a lake. The Ontario cottage was intended as a family retreat, a place where all the family, including the husband's children by his first marriage, could gather for summer holidays and other suitable occasions. It was intended that the husband and wife would hold the cottage in equal shares but, for tax reasons apparently, it was registered in the name of the wife. The wife's one half share of the Ontario cottage came from her surrender to the husband of a second hand Porsche that he had earlier given her. The car was sold. The wife, however, had available to her a number of other cars owned by the husband, although not perhaps of the same prestige. The wife said that, to the best of her understanding, the proceeds from the sale of the Porsche went towards the purchase of the cottage. The husband said that he gave the proceeds to the wife and paid for the cottage in full himself. Whatever the true situation, little turns on it. When the parties married, the cottage was at all times acknowledged to be a family asset. AUTONUM The Ontario cottage is positioned on the shoreline of a lake in landscaped grounds and consists of a main cottage, a guest cabin and a single room storage facility called a bunkie. The main cottage boasts a living room, dining area, two bedrooms and a loft. The wife has spoken of it as being a modest holiday cottage. That may at first blush seem a little disparaging; to the ordinary man in the street the photographs reveal it to be anything but modest. But having regard to the great wealth of the husband, the description of modest takes on a degree of accuracy. It appears to be a fine property but is in no way lavish. In respect of the Ontario cottage, one thing is certain, the wife has treated its

furnishing and improvement as a labour of love. Money has been sent regularly to enable the work to be done, much of it coming from the wife's allowance given to her by the husband. AUTONUM In respect of what may be described as leisure homes, during the earlier, happier days of the marriage the husband and wife searched for a retreat that was relatively accessible from Hong Kong. The area of Noosa on the Queensland coast of Australia was chosen and land purchased there. The Noosa estate, as I will call it, was purchased in the name of a company controlled by the husband. An architect designed residence was built on it including a swimming pool and tennis court. Modern and spare in design, suited to its natural surroundings, the residence contains five bedrooms, a teppenyaki grill room and two lounges. The husband is presently building (or intending to build) a nine hole golf course on the property. The Noosa estate is a property of high distinction, far grander than the Ontario cottage. The property has not been valued but to date the husband has invested some HK\$24 million in its purchase and development. While primarily the husband intends to use the Noosa estate for his own enjoyment and that of his children, he also intends to lease it commercially as an elite holiday retreat. The possibility of selling it if the price is right remains an option. AUTONUM It should also be recorded that recently, seemingly since the breakdown of the marriage, the husband has purchased a Royal Navy vessel and is having it outfitted in New Zealand as a luxury adventure vessel. The vessel will be capable, said the husband, of going down to Antarctic waters or into the Amazon; in short, it will be able to range the world. An aircraft will be made available to fly passengers to and from the vessel. The purpose, said the husband, is to exploit a growing demand by the very wealthy to charter such vessels. The investment, a most substantial one, is therefore primarily intended to be commercial. However, the husband accepts that he will enjoy the vessel himself; that is, he will use it for his pleasure and that of his children. AUTONUM This desire on the part of both the husband and the wife to seek fulfilment away from the pressures of city living was reflected in the first Hong Kong Home that they shared as man and wife; that is, the Marina Cove residence. The husband had had some commercial interest in the Marina Cove development from its earliest stages. He had identified the small island of Isola Bella as a desirable location for luxury homes and, in addition to building a home there himself, had persuaded a number of his Hong Kong contemporaries to build there. The Marina Cove residence was at all times held in the name of a company controlled by the husband. While used originally as a weekend retreat, after the wife and her daughter, A, moved into the residence in the spring of 1993 it became the home where cohabitation took place and, upon marriage in November 1994, the matrimonial home. AUTONUM Before J's birth on 25 May 1995, the residence was extensively renovated. Other renovations were to follow. The wife has estimated the total cost of these renovations at something like HK\$5 million. The Marina Cove residence had mooring facilities, a garden and its own swimming pool. On the ground floor there was a living room, dining room, kitchen, a teppenyaki grill room and maids quarters. The first and second floors included a family room, an exercise room and five bedrooms. It lacked for nothing. It was some 5,000 square feet in extent and, by definition, a luxury home. But that being said, photographs do not show it as being unduly lavish. As expansive as it is, it retains

the comfortable look of a family home. AUTONUM The husband had a 50% share in a luxury yacht which could be moored next to the house. Two coxswains were employed to maintain and crew it. On occasions a second vessel was also available for family use. Weekend entertaining would often take place on board one of the vessels. AUTONUM The husband had (and apparently still has) an interest in a car dealership and largely through that dealership kept a number of cars for family use. As I have said earlier, when the parties were first living together, the husband gave the wife a Porsche. That was surrendered by the wife, however, as part of the arrangement for the acquisition of the Ontario cottage. After J's birth, the wife was given a safer car to drive, a Lexus. At one time the husband owned a second hand Ferrari, later a BMW sports car. But having said that, there is no suggestion that the only cars used were high prestige models. Available vehicles included standard Japanese or Korean saloons and vans. Because of the husband's connection with the car dealership vehicles seemed to come and go fairly regularly. AUTONUM As for the marriage itself, as I have observed earlier, it appears that the husband and wife's happiness together was relatively short lived. The wife has spoken of difficulties from about mid

1997. The physical relationship deteriorated. Indeed, the husband has spoken of the wife leaving the shared bedroom after the birth of J in order to care for the child and never returning. Whatever the position, it is not disputed that by the time the parties separated in or about Lunar New Year of 1999 there had been no physical intimacy for some considerable time. AUTONUM In early 1998, with the marriage under stress, a fung shui master was consulted. The advice received was that the husband and wife should no longer continue to live in the Marina Cove residence. As a result, in March 1998 they moved into a rented property on the southern side of Hong Kong Island. The property was a penthouse in a building known as South Bay Tower. It was rented from a friend of the husband, the agreement being that, for a more favourable rental, the husband would undertake certain renovation work on the property. The couple lived in this penthouse until their separation approximately a year later. AUTONUM As for the husband's relationship with A, it appears that, although the husband accepted her into family as an integral member, even including her as one of the beneficiaries of a trust set up for J, the relationship was not a happy one. Difficulties came to a head in the summer of 1998 when there was a regrettable confrontation to which I shall refer later. In the result, A moved to Toronto to live with her father, Mr M, and still lives with him. A is no longer a beneficiary of any trust set up by the husband. AUTONUM Some six months after A had joined her father in Canada, the husband and the wife separated. As the wife has relied upon the circumstances of that separation in support of her claim for ancillary relief more will be said of those circumstances later. AUTONUM It appears that the separation took place either during or shortly after Lunar New Year in 1999. The holiday that year fell in mid February. Initially the wife and son moved to the Marina Cove residence which was still furnished although it had not been used as the matrimonial home for nearly a year. However, the husband had sold the property for a sum of HK\$30 million and unless the wife gave up occupation the husband would have been liable for damages. With the assistance of the parties solicitors, it was agreed that the husband would leave the

South Bay penthouse so that his wife and son could return to it. This move took place in or about mid April 1999. AUTONUM During the hearing, the husband was criticised for not informing the wife of the gross profit enjoyed on the sale of the Marina Cove residence a former matrimonial home and, presumably by some form of capital payment, endowing her with an equitable share of that profit. That again, so it was argued, demonstrates that the husband has been prepared to deceive the wife in financial matters and deprive her of what in fairness should be her due. That is, of course, a matter to be taken into account as a relevant circumstance. But it must be remembered that the residence was built by the husband well before the marriage as part of a development in which he had a commercial interest and at the time of sale had not been used as the matrimonial home for nearly a year. It is also apparent that in respect of his various assets, whether enjoyed for private use or not, the husband has always viewed them as being part of his general portfolio; in short, all grist for the machinery of his wealth production. AUTONUM The wife's occupation of the South Bay penthouse was an interim measure and in July 2000 the wife and J move into a rented apartment at 101 Repulse Bay Road (the 101 apartment). Since moving into that apartment the husband's monthly financial support for the wife may be summarised (in round figures) as follows : Housing (being rental, management fees, rates, electricity, gas, water and telephone expenses), say \$86,000 Car (being petrol, tunnel fees, licensing and insurance), say \$4,000 Maid and driver's salaries, say \$10,500 The wife's allowance \$70,000 Total HK\$170,500 AUTONUM Pilbrow, for the husband, has submitted that, although the allowance of HK\$70,000 was an amount settled by the husband, it nevertheless reflects a fair and reasonable figure, due regard being had to the shortness of the marriage and the private lifestyle to which the wife has always aspired. Mr Griffiths, for the wife, has responded by saying that the allowance was imposed by the husband, the wife being in no real position to contest it without risking costs in expensive interlocutory hearings, and that it is woefully inadequate. What is to be focused upon, he has said, is the standard of living enjoyed by the wife before the breakdown of the marriage (see s.7(1)(d) of the MPPO) and not the standard of living unilaterally imposed by the husband after the breakdown. In that respect, as a matter of principle, Mr Griffiths must be correct. AUTONUM As I observed earlier in this judgment, the huge divergence between what the wife has sought and the husband has offered is due in large measure to conflicting views as to the applicable law, a matter which I have determined. Equally, however, it is due to contested factual issues which arise out of the history of the parties relationship.

- a) Is A to be treated as a child of the marriage? AUTONUM The wife seeks financial provision for A pursuant to s.7(3) of the MPPO which directs that It shall be the duty of the court in deciding whether to exercise its powers under section 5, 6 or 6A against a party to a marriage in favour of a child of the family who is not the child of that party and, if so, in what manner, to have regard (among the circumstances of the case)

- (a) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;
- (b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;
- (c) to the liability of any other person to maintain the child. This court may therefore, in its discretion, order the husband to make financial provision for A but may only do so having had regard to the criteria detailed in s.7(3). AUTONUM Amortised for the purposes of her Duxbury calculations, the wife originally sought HK\$905 per month for A. However, in updating the calculations, Mr Grimsdick, her accounting advisor, took note of recent deflation in Hong Kong. The final figure claimed therefore speaking in round figures would be about HK\$825 per month. While that may not of itself be a great sum, when placed into an amortised calculation extending over some 35 years (the wife's actuarial life expectancy), it becomes a figure of substance. AUTONUM As I have said earlier, A is the natural daughter of Mr M. Mr M has always accepted his responsibilities towards A. This is illustrated by the fact that, even during the time when the wife and A were cared for materially by the husband, he regularly sent C\$500 to the wife towards his daughter's maintenance. The fact that the wife chose to employ those funds for some other purpose does not in any way reduce the fact that Mr M at all times was meeting his obligations and did not simply abdicate them in favour of the husband. In addition, since about August 1998, A has lived with her father in Canada and continues to live with him. A's return to Canada on a permanent basis took place some six months before the husband and wife separated; that is, during the subsistence of the marriage. But why did A return to her father? AUTONUM I do not think it can be disputed that originally the husband welcomed A as a full family member. He was happy to pay her expenses and, as I have said, for a time included her in a trust formed primarily to benefit J. However, the personal relationship between the husband and A soon became troubled. In the course of her testimony, the wife summed it up as follows Q. And when did she [A] leave to go to Canada? A. August 1998. Q. So she was for about 5
 - 6 years in Hong Kong. During that time where did she live? A. With us in Sai Kung. Q. With him and you? A. Yes. Q. And how did he, in the early days, treat her? A. He was a bit stand offish in the beginning and then their relationship deteriorated it seemed like on a weekly basis. The testimony of the husband was to similar effect : Q. How was your relationship with A? A. When she first arrived I think everyone was trying very hard to make things welcome. It was a new environment for her and it certainly was not easy. Very soon it has deteriorated and it has gotten worse as time went on. AUTONUM Difficulties came to a head in the summer of 1998 when the family was spending time at the Ontario cottage. It appears that the husband took an item (a television remote control) from A's hand. This prompted A to blurt out words to the effect that if he touched her again she would report him to the police for child molestation. After a discussion with her mother, A apologised for her

outburst. But it was profoundly hurtful to the husband. In so far as their relationship was concerned, it appears to have been the proverbial straw that broke the camel's back and, after discussions between the husband and wife, A returned to Toronto to live permanently with her father. The husband has been criticised for placing the wife in a position where she had to make an invidious decision between him and her daughter. But, against a history of difficulties in the relationship, the incident must have been a product of all that had come before and I do not believe it is for this court now to attempt to apportion blame. AUTONUM As to the law, it is plain that, having accepted a child into the family as a child of the marriage, it is not for a party thereafter to decide unilaterally that the child should no longer hold that position. The responsibility, once assumed, is not to be manipulated. In the present case, however, the circumstances were different. A had her natural father who had always discharged his obligations to her and was prepared to accept her back under his roof. Further to this, whatever the stress of the circumstances, the evidence indicates that it was agreed between the husband and the wife that A should return to live with her natural father. In summary, a joint decision appears to have been made that, for the benefit of all, A, who clearly was deeply at odds with the husband, should cease to be a child of the marriage as such and become the responsibility of her natural parents. AUTONUM Nor, in my view, can it be said that A has been prejudiced. In July 2000, when she had been back with her father for nearly two years, a residence was purchased in the Toronto area in the name of Mr M for a sum of C\$261,000. There are two charges over the house. The first, in the sum of C\$160,000, is in the name of a bank which loaned funds to enable the property to be acquired. The second, in the sum of C\$125,000 is in the name of A. This second sum came from the wife and, according to her, constitutes her contribution to A's maintenance. The charge protects A's interest in the property. The property is the home in which A and her father live. In July 2002 it was valued at C\$273,000, showing a slight increase over the purchase price. Where did the C\$125,000 from the wife originate? The wife brought about C\$50,000 into the marriage. In addition, it seems she was able to put to one side the C\$500 per month sent by Mr M as maintenance. She was able to do so, of course, because the husband at that time met A's expenses. Even taking those two sums, there must still be a balance which, directly or indirectly, either before or after the marriage, came from the husband. In equitable terms, therefore, it can be said that the husband has materially contributed to A's interest in the Toronto property. AUTONUM It has been said on behalf of the wife that she seeks financial provision for her daughter because Mr M will be unable to meet the college fees and other expenses. But there has been no evidence of this. In fact, during the course of her testimony the wife said that Mr M now had a steady job. Mr Griffiths intimated that I should be prepared to accept that Mr M will not be able to meet A's fees and expenses because the wife has said so. But that, in my view, in the present case is not sufficient. It is for the wife to demonstrate the fact and not the slightest attempt has been made to do so. AUTONUM In the circumstances, I am satisfied that A ceased to be a child of the family in or about August 1998 and that in any event, having regard to the criteria detailed in s.7(3) of the MPPO, this court should not exercise its discretion to order the husband to make financial provision for A. Indeed, looking to the history of the matter and

the fact that, on the evidence, A appears to have been secure and happy with her father in Toronto since 1998, I am somewhat perplexed as to why the claim should have been made.

- b) What duration should be given to the marriage? AUTONUM Pilbrow, for the husband, laid stress on the fact that, on well accepted principles of calculation, the marriage was a short one : four years and three months. For the wife, however, it was submitted that the duration of the marriage should not be calculated in that simplistic manner. The wife s submissions were based on two contentions. First, that the period of cohabitation prior to the marriage should be taken into account and second, that the husband s conduct his infidelity had brought the marriage to an end and that he should not be entitled to rely on his misconduct to his advantage.
- (i) Prior cohabitation AUTONUM As I have said earlier, the parties first had a love affair when they were students at university. That affair ended and for a period of some 17 years they lived independent lives before meeting again. During the course of submissions, although it was never proposed in direct terms, I gained the impression that somehow I should link this student romance to their later cohabitation and in some way to the marriage itself as being relevant to holding that the marriage should not be counted as a short one. If that was in fact suggested, I must reject it. There are no logical grounds for the contention. AUTONUM After meeting again in the summer of 1991, the parties began what I have termed a long distance romance. They would meet when they could but they did not cohabite. Sometimes a couple of months would pass the wife working in Canada, the husband in Hong Kong before they met again. It was only in December 1992 that the wife made a move of profound consequence, selling her home in Toronto and giving away her business in order to come to Hong Kong with her daughter. This period of cohabitation was to endure until November 1994 when they married, a period of some 23 months. Mr Griffiths, on behalf of the wife has argued that this period of time must be taken into account as extending the marriage, either because it is one of the relevant circumstances of the case or because it points to the conduct of the parties which always had as its eventual aim the formality of marriage. AUTONUM Although cohabitation prior to marriage is not specifically mentioned in s.7(1) as a criteria for consideration, it has long been recognised that there may be occasions when it would be unjust not to take it into account. In *Kokosinski v. Kokosinski* (1980) 1 FLR 205, Wood J, at 218, commented Having set out those matters prior to the ceremony of marriage itself, which seem to me to be relevant, I ask myself whether I can do justice that which is fair, just and reasonable between these parties if I ignore the earlier history and the wife s behaviour during those earlier years. To put the question in a different form: Would it really offend a reasonable person s sense of justice to ignore those events and that behaviour? I have no doubt that the answer from the reasonable man would be that they must be taken into account and, in my judgment, not only can I take these matters into account whether under the phrase conduct or in all the circumstances of the case in s. but that same section casts a duty upon me to do so. In this case, however, the husband, who had married in Poland, had fled to England to escape the German invasion of his country. He and the wife began living together in 1947. They had a son. Both contributed to the purchase of family

homes and to a business. It was only in 1971, after a divorce had been obtained in Poland, that they married. They had cohabited essentially as man and wife building the family's wealth for over 20 years. AUTONUM The nature of cohabitation will therefore dictate whether it should or should not be taken into account in the exercise of a court's discretion under s.7(1) of the MPPO. Cohabitation per se is not sufficient. In this regard, see for example *Foley v. Foley* [1981] Fam 160, in which the Court of Appeal in England held that it was quite proper to differentiate between the period of marriage and the period of cohabitation as the two periods were not the same. AUTONUM During the course of his submissions, Mr Griffiths emphasised the fact that notoriously today more couples are living together, often for extended periods, before marriage. That may well be the case. If so, it may mean that there will be more instances where the courts consider it appropriate to take into account the period of cohabitation as a relevant consideration. But, whatever the drift of social change, marriage and cohabitation remain separate states. In this regard, although it was not cited during the course of the hearing, it is appropriate, I think, to refer to a recent decision of the Supreme Court of Canada in *Nova Scotia (Attorney General) v. Walsh* 2002 SCC 83 in which the fundamental difference between marriage and cohabitation was emphasized. The headnote reads (in part) Although the courts and legislatures have recognized the historical disadvantages suffered by unmarried cohabiting couples, where legislation has the effect of dramatically altering the legal obligations of partners, choice must be paramount. The decision to marry or not is intensely personal. Many opposite sex individuals in conjugal relationships of some permanence have chosen to avoid marriage and the legal consequences that flow from it. To ignore the differences among cohabiting couples presumes a commonality of intention and understanding that simply does not exist. This effectively nullifies the individual's freedom to choose alternative family forms and to have that choice respected by the state. The decision to live together is insufficiently indicative of an intention to contribute to and share in each other's assets and liabilities. While many unmarried cohabitants have agreed as between themselves to live as economic partners for the duration of their relationship, it does not necessarily follow that these same persons would agree to restrict their ability to deal with their own property during the relationship or to share in all of the other's assets and liabilities following the end of the relationship. People who marry can be said to freely accept mutual rights and obligations. A decision not to marry should be respected because it also stems from a conscious choice of the parties. AUTONUM Concerning the present case, the nature of the cohabitation may best be described in a term accepted by the wife herself; namely, that it constituted a trial period to test whether there was any basis for marriage. In the course of her testimony, the wife said that both she and the husband had a history of unhappy relationships. Clearly, as two mature people, each exercised a degree of caution. AUTONUM It was not, of course, possible to marry for much of the cohabitation period, the husband, in law, remaining married until the decree absolute was issued in August

1994. But it cannot be said that this was a case in which the parties would otherwise have married within a short period of time. In the course of her testimony, the wife accepted that when she came to Hong Kong she was not aware of the two step process to divorce in Hong Kong : the decree nisi followed by the decree absolute. She assumed that when the decree nisi was issued in September 1992 the husband was divorced. In this regard, the transcript records the following exchange Q. You ve told me that he indicated that the divorce was through or things were finalised before you came in December
92. So when you arrived in December 92, were you of the belief that you would marry shortly?
A. I came on the assumption that it was a trial to see if things would work out and if there was a basis for our marriage. AUTONUM It is true that in coming to Hong Kong the wife had to sell her home and dispose of her business. But that being said, as security she obtained a sum of one million Canadian dollars from the husband. That was a payment to protect her position in case there was no marriage. That payment, in my view, is the best evidence of the true nature of the period of cohabitation. It was a trial period, no more, to test whether marriage was feasible. If it was not then the wife would be adequately compensated in cash for having had to uproot herself and her daughter and both parties would be able to go their separate ways without further call on the other. AUTONUM The imperative for the marriage, as the wife accepted, was the knowledge of her pregnancy, news that was welcomed by the husband. In the circumstances, it seems to me that, as the parties themselves chose to define the nature of their cohabitation as being distinct from marriage, that period should not be taken into account as somehow extending the duration of the marriage. ii) The husband s conduct AUTONUM The wife testified that, shortly before Lunar New Year in 1999, the husband said that he intended to make a business trip to Japan over the holiday period. She was already suspicious that he was being unfaithful and was concerned as to why he wished to be away at that time. When the husband was packing, she saw a number of sexual accoutrements in his toilet bag. As by that time there was no physical relationship between them she would have known that they were not intended for use within the marriage. An argument took place and it was that which led directly to the separation. The discovery, she said took place prior to the Lunar New Year holiday. The wife testified that her fears were later confirmed when she saw some photographs taken during the Japanese trip. They showed the husband with a business colleague in the company of younger women. AUTONUM The husband, however, denied being unfaithful to the wife at any time when they were together. As for the trip to Japan, he said that he took that trip with a close business colleague only after the wife had said that she did not wish to go away for the Lunar New Year and after she had raised no objection to his going. The husband accepted that his business colleague had women companions with him but denied that he had been involved with those women. The husband said that there was no discovery of sexual accoutrements in his toilet bag prior to his departure. He accepted, however, that at a later date after the parties had separated and at a time when he was vacating the matrimonial home in order to let his wife and son take up residence there his wife did see certain accoutrements in his toilet bag. These, he said, had been given to him in Japan by his business colleague who had

acquired them in that country. They had been handed over in some sort of jocular fashion presumably on the basis of all boys together and, although he did not need them or intend to use them, he had accepted them to avoid causing embarrassment. He had then put the items into his toilet bag when back in his room. AUTONUM As to the circumstances of the separation, the husband said he learnt that the wife had in fact gone away for Lunar New Year, she and J going to Australia. Upon their return, he expected them to return to the matrimonial home but learnt that they had instead gone to the Marina Cove residence. He drove out there and, to use his words I found this woman whom I was introduced to as Ms H. It was the first time I met this woman. She was in the living room with my wife and I sensed something terribly wrong and I said, What s going on? And she said she was not moving back, going back home, she s staying out in Sai Kung. I began asking her why. The only thing she said was re not moving and you ll hear from my lawyer. AUTONUM Contemporary correspondence between the solicitors appears to confirm that the wife did go to Australia over the Lunar New Year and, on return, went direct to the Marina Cove residence. A letter dated 7 April 1999 from the wife s solicitors speaks only in general terms of the reason Our client returned to Sai Kung in February 1999 and remained there with J, following Chinese New Year, as the situation between the parties had by that stage became intolerable. AUTONUM The wife s first petition for divorce, based on alleged behaviour, speaks again in relatively general terms As the marriage has deteriorated so too has the parties physical relationship and consequently they have not been intimate for a long period of time. The Petitioner believes that the Respondent has indulged in extra marital relationship. [my emphasis] AUTONUM Concerning the husband s version of how he came into possession of the sexual accoutrements, I confess I find it difficult to accept. There can, of course, be jocular, masculine exchanges and no doubt inappropriate gifts can be accepted for fear of causing offence. But if the husband had no use for them, why not put them in the waste bin in his room? Why keep them in his toilet bag? The probabilities point to the fact, that at or about the time of separation at least, there was infidelity on the husband s part. AUTONUM It is an accepted principle, of course, that in ancillary relief matters, financial awards cannot be used to punish one party for his or her misbehaviour during a marriage. Any contrary principle would open pandora s box. Without stooping to too broad a generalisation, it may be said that in many failed marriages there is some fault on both sides. But, as was observed by Wilmer LJ in *Brett v. Brett* [1969] 1 WLR 487 (at 492), when the conduct of a husband as it was in that case has the effect of driving the wife out, he can hardly be heard to use the argument that the marriage only lasted a short time. More recently, in *Wyatt Jones v. Goldsmith* 2000/0259/B1 (unreported) Thorpe LJ rejected criticisms made against the trial judge who, in respect of an adulterous husband his adultery being the major contributory factor to the breakdown of the marriage had gone on to say it is not appropriate to increase the award which the court would make because of the husband s bad conduct in this regard. Rather I see it as a significant counter balancing factor to the point made on behalf of the husband that this was a short marriage. Thorpe LJ did not accept the argument that the judge had invented a mechanism for increasing the wife s award by the back door , saying A judge has to do fairness between the parties, having regard to all the circumstances. He

must be free to include within that discretionary review the factors which compelled the wife to terminate the marriage as she did. The point was essentially taken as a defensive shield to the reliance upon the duration submission. There must surely be room for the exercise of a judicial discretion between the pole of a wife who is driven to petition by the husband's unfeeling misconduct and a wife who exits from a marriage capriciously and for her own advantage. It seems to me that the judge was doing no more than taking his bearings as to where he stood along that path. [my emphasis] Thorpe LJ qualified his observations by referring to the fact that the trial judge had found on the facts that, although the marriage had been comparatively short, the wife's contribution to the welfare of that union had been very significant indeed. AUTONUM The facts of each case must therefore decide the issue and that is where my difficulty lies in the present case. Even if I find, on balance, that towards the end of the marriage, the husband was unfaithful to the wife, how is that conduct to be placed into context? In the two English authorities to which I have referred it can be said that the husband's misbehaviour drove the wife out of the marriage, that the conduct of the husband, to use a term of family law, was gross and obvious. But can the same be said in the present case? It would be insensitive to imply that, even in a marriage under siege, the discovery of infidelity would be anything but hurtful, no doubt deeply so. But as against that, we have moved on from the earlier, Victorian approach of damning one party to a marriage for a proven act of marital misconduct and ignoring the imperatives the uncounted slings and arrows that may have led to it. AUTONUM The husband has testified that after the birth of his son the wife moved out of the marital bed in order to care for the son and never returned. On that basis, within six or seven months of the marriage, a regime was in place in terms of which the parties remained in separate beds. The wife herself has accepted that by about mid 1997 there were difficulties in the marriage. The husband has spoken of the atmosphere in the family home becoming anything but cordial. Where, within the context of the slow destruction of the marriage, if I am satisfied that the husband was unfaithful, do I rank his infidelity? The wife gave no evidence of what she did or did not do in order to try and save the marriage and, in light of such endeavours, the impact upon her of learning of the husband's infidelity. That is not to point the finger of criticism. Marriages often die a slow death, neither party sure how best to revive them. If the wife was correct in her suspicion that the husband had been unfaithful, was it, to employ an expression used earlier, the straw that broke the camel's back or was it the root cause of driving her from an otherwise resilient union? On all the evidence, if the husband was unfaithful, it does not seem to me that it was the root cause for the ending of the union. That cause lay in an earlier, more profound estrangement from each other. AUTONUM In the circumstances, I am satisfied that the wife is not in this case entitled to use the husband's conduct as a defensive shield to ward off the husband's submission that the marriage was a short one. AUTONUM The duration of the marriage must be calculated as it is invariably calculated; that is, from the date of the marriage to the date of separation. In the present case, that is a period of some four years and three months and that, while not dramatically so, is a short marriage.

- c) Should the wife seek her own livelihood? AUTONUM On the basis that the marriage was a short one and that the wife possesses skills, Mr Pilbrow has submitted, on behalf of the husband, that, after a suitable period of adjustment, the wife should be made to seek her own livelihood : fairness is not met by providing her with a meal ticket for life. The relevant principles, I think, are well summarised in Rayden and Jackson on Divorce and Family Matters (17th ed.) at page Where there are no children, the general attitude of the courts has been that where provision is called for, and there are of course cases where no provision is appropriate, the person in the weaker financial position (usually the wife) should be given a modest lump sum and/or a brief period of periodical payments designed to enable her to adjust herself to the situation and resume her career. Where there is a child (or children), the welfare of the child is the first consideration, and both continuing and more substantial provision (particularly housing) has to be considered. AUTONUM In the present case, there is a child and I am obliged, in terms of s.7(2) of the MPPO, to make the welfare of the child my primary consideration. During the course of the marriage it was manifestly the case that, in the interests of J, the wife would not work and would be a full time mother to him. No financial constraints exist to prevent that understanding being extended beyond the marriage and, in my view, the wife should be entitled to stay as J s full time mother until the boy is sufficiently independent to no longer require her day day care and assistance. But if the wife is to care for J on a full time basis for another eight or nine years, she will by then be in her late fifties and at an age when many working people are thinking of retiring. Yet it is at that age that the husband would have her move in a substantial way into the workforce. In my view, that cannot be right. AUTONUM During the course of the hearing, much was said, albeit indirectly and with elegance, to make it appear as if somehow the wife had no competency and that, as a woman, she was losing her bloom while the husband, as a man, was still in full vigour. No doubt there were tactical reasons for such submissions but frankly stereotyping of that kind is of no assistance. I am sure that the wife, if necessary, can fend for herself. She is not in the same position, for example, as an elderly person or the victim of a serious injury. She is educated, experienced and articulate. But that is not the point. The point is that in the marriage it was agreed that she would not work, that she would forego the opportunity to advance a career, and would rather devote herself to J and to the family. As a result, calculated from the beginning of the marriage, it means that she has not worked for some eight or nine years and cannot now, if she is to care for J, be expected to work in any substantial way for another eight or nine. How is she then in any meaningful way, in her late fifties, expected to start again? To insist that she attempt to do so would, in my opinion, be entirely unfair. Yes, she is qualified as a teacher and could perhaps return to that career. But she has not taught for many years (over 20) and in her late fifties, assuming she can find work, she will rationally be able to earn nothing more than a modest stipend. AUTONUM I am therefore satisfied that, in calculating a suitable capital sum to act as an annuity, I must do so on the basis that she will require an income for the full span of her life, that span of necessity being calculated in actuarial terms. Two matters concerning the wife AUTONUM Although neither caused any real disagreement, there are two matters concerning the wife which need to be settled; first, her Canadian connection and, second, her health. AUTONUM

In assessing the wife's awards, one of the matters that must be taken into account is her place of intended future residence. The wife does have roots in Canada. She lived and worked there for many years. She has family there. Her daughter, A, lives there. It is likely that J will go to college there, following in the footsteps of his parents. The wife, for good reason, wishes to spend time in Canada each year. That is one of the reasons why the Ontario cottage means so much to her. But that being said, the wife has by now reclaimed her Hong Kong roots too. She speaks Cantonese. She is no stranger to the place. The wife has stated clearly that she intends to continue living in Hong Kong. There is no talk of J being sent off to boarding school; he will continue to live here and go to school here. It is important that J's abiding relationship with his father not be undermined. The wife acknowledges this. In all the circumstances, while I have taken into account the wife's Canadian connection, I have based my awards on the fact that she will continue to live in Hong Kong. AUTONUM I move now to the question of the wife's health which is somewhat uncertain. In early 2000, the wife began to experience eye problems. She consulted a specialist, who, in a report, spoke of her numerous attendances at his clinic (30 in a period of 18 months) and recorded that she had been forced to undergo right glaucoma surgery and bilateral laser surgery, neither of these procedures being trouble free. AUTONUM For financial reasons (the wife no longer being on the husband's medical aid), the wife was referred to the Hong Kong Eye Hospital where she is presently under the care of Dr Barry Yeung. In a report dated 27 May 2002, Dr Yeung said The [wife] was first seen by me on 3 December

2001. She suffered from bilateral glaucoma and had an operation done on the right eye and laser therapy on both eyes. In addition, there was uveitis (inflammation) in both eyes. The right eye vision was poor (0.2) and that of the left remained essentially normal (1.0). The eye condition has been barely controlled with 4 types of medications. In the latest visit, the uveitis was in remission but it might relapse at any time. Psychological stress may be a contributing factor for the relapse. AUTONUM While the wife's left eye appears to have remained essentially normal, the right eye has continued to present problems. In a supplementary report dated 3 September 2002, Dr Yeung wrote The right eye cataract is getting worse and a combined cataract extraction and glaucoma operation is necessary. In view of the history of inflammation and the previous glaucoma operation, the coming operation is going to be difficult and the post operative condition may turn out to be quite stormy. In that case, a prolonged recovery period may be necessary. AUTONUM It is clear that the wife will have to undergo difficult surgery on her right eye, resulting in all probability in a long and perhaps complicated period of recovery. While a full recovery is hoped for, it cannot be assured. Accordingly, there must be a risk how high it is I cannot say that in one eye at least the wife will be left with permanently impaired vision. J's financial welfare AUTONUM s financial future has been secured by the husband. Specifically, he has settled a trust in J's favour in the sum of HK\$15 million. J is also a beneficiary of a trust set up for purposes of estate duty. AUTONUM As to his expenses for now and the foreseeable future, the husband has offered maintenance at the rate of HK\$30,000 per month. In

addition, he has offered undertakings to meet J's following expenses: his education costs (fees, uniforms and required school books); all medical and dental costs and two return economy class airfares per year to enable J to accompany his mother on holidays. These obligations will endure until J is self supporting. AUTONUM In an affidavit dated 27 May 2002, the wife sought maintenance for J in the sum of HK\$19,350 per month. This sum was to cover J's expenses which she listed as follows: school fees (\$4,500); uniforms (\$200); miscellaneous school expenses (\$50); extra curricular lessons (\$3,000); cost of a private tutor (\$3,200); literature and toys (\$800); clothing (\$2,000); health provision (\$300); celebrations (\$100); haircuts (\$200); provision for holidays (\$4,000) and foodstuffs (\$1,000). It will be seen that this does not include what the wife in her affidavit has referred to as common expenses such as a share of household groceries and cleaning material; utilities, domestic help and the like. AUTONUM The wife was unhappy at the husband's offer although quite why was never spelt out. Perhaps she did not wish to have to look to the husband on a regular basis for reimbursement of moneys spent by her on such things as school uniforms, books, clothing, airfares and the like. Perhaps she saw the husband's offer as somehow undermining her claim for a capital sum to provide for an annuity for herself. If it was either, her reluctance was unwarranted. AUTONUM While, as between themselves, the husband and wife will enjoy the benefit of a clean break, that is not possible in respect of J. J is a link between the husband and wife which will require regular communication as to school results, minor health problems, changes in access arrangements and a multitude of other matters. If there is to be regular communication, it does not seem to me that communications as to costs incurred (or to be incurred) for J will add any impossible burden. In any event, the husband has his own staff who, it seems, deal with most domestic matters of finance. AUTONUM I consider, the husband's offer to be reasonable and, in my view, coupled with the undertakings, will ensure that, until J is self supporting, the changing needs of his welfare will be better catered for than in the manner proposed by the wife. AUTONUM If the wife was concerned that the husband's offer was intended somehow to undermine her claim for a capital sum to provide for an annuity, it must be recognised that for many years yet, while J is with his mother, a good many of their expenses will be joined: utilities, domestic helpers wages and the like. The wife therefore will be assisted by the receipt of J's maintenance and J's lifestyle will be that much more enhanced. When J is self supporting and the maintenance falls away, as will be seen, the wife will then have the benefit of a more expensive house than she would otherwise have obtained and will, if she wishes, be able to obtain a smaller residence thereby releasing capital. J has always been central to these proceedings and it is not possible in overall fairness to wrap the mother and son in separate financial cocoons. AUTONUM Accordingly, I will order that, subject to his various undertakings, the husband pay maintenance to the wife for J in the sum of HK\$30,000 per month. The s.7(1) considerations AUTONUM In deciding upon equitable awards for the wife, my primary focus must be the considerations detailed in s.7(1) of the MPPO and, in so far as they are relevant, I now consider each in turn.

- (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 AUTONUM The husband s financial resources are great. A detailed report prepared by his accountants in June 2002, just before the commencement of the hearing, stated the value of his net assets at HK\$418.249 million. The net assets include shares in listed companies (\$1.014 million); cash in the bank (\$67.023 million) and bonds (\$8.791 million). He therefore has substantial assets which are liquid or sufficiently unencumbered to enable him to discharge his obligations under any clean break award that I make. AUTONUM In calculating the husband s wealth, his accountants noted that he has established a trust structure to provide for all his children and they included those assets on the basis that although [the husband] no longer has a legal interest in these assets, he has the ability through revocation to obtain the equivalent economic value into his own hands. AUTONUM The husband s assets generate a very high income, something in the region of HK\$30 million a year. AUTONUM Those representing the wife have referred to the fact that the husband s net assets have been materially reduced in value by a recorded debt to his mother of HK\$119.601 million in respect of which he was servicing interest until about June 2002 since when no further payments have been made. It has been suggested that in reality I should ignore this debt, to the extent at least that the mother will never call up the loan, not when it is due by a son with whom she is on good terms. That may well be the case but next to nothing has been placed before me concerning the mother s position : her intentions , her age, state of health, her obligations to others. In the circumstances, I am not able to make any determination. To do so would be speculation. In any event, in looking , as I must, to the wife reasonable requirements , there is no need for me to determine the matter. The husband s assets, as outlined by his accountants, are more than sufficient. AUTONUM As for the manner in which the husband came into possession of his assets, as I have earlier observed, he inherited a very successful business (or number of businesses) from his late father. The base of his affluence therefore, is inherited. Over the years, he has, of course, built on that base. When the marriage took place, the husband was, therefore, already a very wealthy man. Nor is there any suggestion that during the course of the marriage the wife assisted the husband in any way in his business enterprises. Indeed, when in 1996 the husband made one of the major decisions in his life to dispose of his interest in the company he had taken over from his late father, the wife knew nothing of it until after the event. AUTONUM When the wife came to Hong Kong in December 1992, it appears that, in terms of material assets, she had just C\$50,000 being the net proceeds of the sale of her home in Toronto. Her business, Snug, had been given to her manager. While clearly it must have had some value, equally clearly it could not have been great. There is no suggestion that she gave up a flourishing business. AUTONUM The assets now in the wife s name or held by her are detailed below.
- a) Jewellery AUTONUM Before and during the marriage, the husband gave the wife a number of items of jewellery. Among the gifts were 14 items of significance which have been valued. The wife said that there were other, less significant items of jewellery which were given to her which were not valued. The husband took no objection to that. The wife s valuers

concluded that the 14 items have a market value of HK\$2.138 million. The husband's valuers set the market value at HK\$2.559 million. The difference is HK\$421,000. Both valuations relate to the market value of the jewellery; that is, the amount at which the wife should be able to dispose of the jewellery to a willing buyer. Valuations of that nature are, of course, subject to the vagaries of supply and demand; the proof can only ever really lie in the actual selling. That being the case, although it is somewhat arbitrary, it would be fair, I think, to adopt a valuation that lies approximately mid way between the wife's conservative valuation and the more optimistic one of the husband. I will therefore set the valuation of the 14 items of jewellery at a round figure of HK\$2.3 million. AUTONUM On behalf of the wife it has been suggested that the jewellery should not be placed in the scales. They were gifts by the husband and are essentially to be retained by the wife for their sentimental value. In principle that cannot be right. While, following the dicta of Balcombe J in *Leadbeater v. Leadbeater* [1985] FLR 789, at 795, it would be unreasonable to suggest that all the jewellery should be counted to be at her disposal, I propose to take into account a sum of HK\$1.2 million.

- b) The Ontario cottage AUTONUM In July 2002, the Ontario cottage was valued at C\$475,000. At a current exchange rates of 4.9, that would make for a value of approximately HK\$2.3 million.
- c) Loan to a friend AUTONUM Sometime after the parties had separated, the wife lent a sum of HK\$440,000 to a close friend, the same lady the husband said he met when he went to the Marina Cove residence after Lunar New Year in 1999 and learnt that the wife was separating from him. That friend, I am told, now lives in the United Kingdom. During the course of final submissions, Mr Griffiths said that it was highly unlikely that the wife would be able to recover this money and it should be written off. I cannot agree. There has been no demonstration that it is now a bad debt and cannot even, over a period of time, be paid off. The wife and the lady to whom she lent the money apparently remain good friends.
- d) Cash AUTONUM The liquid capital in the wife's possession has, of course, been depleted by the costs of litigation. The wife hopes to recover her party and party costs which will then of course be added back to her capital. Following the mechanism approved in *Leadbeater v. Leadbeater* (supra) at 794 H, it has been agreed that those party and party costs should at this time be added back AUTONUM Pilbrow, for the husband, has submitted that it was not reasonable for the wife, in addition to a senior counsel, to employ two junior counsel and has said that the costs of one of those juniors should also be added back as otherwise, by a depletion of the capital account amount in her possession, she will be able to benefit from the choice made by her to indulge in unreasonably expensive litigation. That leads to the contentious questions of whether a second junior was reasonable or not and whether this is a matter best left to the taxing master. In order, in the interests of fairness, to accurately reflect the wife's capital, I believe I must grasp the nettle and make the decision, not leaving it to the taxing master. This was a big money case and complex. A good number of issues were raised, including issues of law. But that being said, I fail to see how it can be argued

that this case required more than one senior counsel assisted by a specialist, family law junior. If the wife chose to add a further counsel that was a matter for her and should not, in assessing her capital, be indirectly visited on the husband. The fact that the husband chose to have two solicitors with two junior counsel (while the wife had three counsel and one solicitor) is neither her nor there : it does not alter the husband's capital position.

AUTONUM According to the wife's counsel, adding back her party and party costs, she now has capital of HK\$5.133 million in her possession. To that must be added the stated costs of the second junior in the sum of HK\$761,000. This makes for a total (in round figures) of HK\$5.89 million. AUTONUM In summary, the value of the assets held by the wife for the purposes of deciding upon an equitable division are :

- a) Jewellery HK\$1.2 million
 - b) Ontario cottage HK\$2.3 million
 - c) Loan to a friend HK\$0.44 million
 - d) Liquid capital HK\$5.89 million Total : HK\$9.83 million
- (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 AUTONUM At this time, the husband must pay a substantial sum of maintenance for the three children of his first marriage. They live in California with their mother who has re married. The husband also has his obligations towards J and, up to this time, towards the wife. AUTONUM Although it cannot take precedence over his existing obligations, it should be said that, since the breakdown of the parties marriage, the husband has entered into a relationship with a woman with whom he now lives. A child has been born of that relationship. AUTONUM As for the wife, she remains responsible, together with Mr M, for the welfare of A. However, according to the wife, the money she sent to Canada to enable a home to be purchased in the name of Mr M was effectively a capitalisation of her obligation to support her daughter. AUTONUM The wife's central on going obligation, of course, is towards J. It is a full time obligation which will not be discharged (if such a term can ever be used in respect of a son or daughter) until J, who is now 7, is able to stand on his own two feet.
- (c) The standard of living enjoyed by the family before the breakdown of the marriage AUTONUM As I have made clear earlier in this judgment, before the breakdown of the marriage the parties enjoyed the very highest standard of living. The lifestyle, however, was not that of the glitterati : endless parties, dinners, shopping sprees, and the like. To the contrary, the lifestyle was more restrained, centred on family and friends, weekend entertaining at home or on a yacht and regular use of holiday homes. The wife did not want to be what she has called a tai tai . She and the husband sought a more private life. Yes, there were several cars available for use by the family but they were invariably second hand and, while a number were high prestige vehicles, others were not. They travelled frequently, but not always first class. On the evidence, I gained the impression that there was financial restraint. The wife, for example, worked each month to a household budget, generous but

not unlimited. Great wealth does not have to equate to unbounded extravagance and it did not equate to it in this marriage.

- (d) The age of each party to the marriage and the duration of the marriage AUTONUM The husband is now 51, the wife is 49. As I have explained earlier in this judgment, if the wife is to be J's full time mother for the next eight or nine years, by then she will be too old to re-establish a career and become self supporting. The wife's age is therefore a matter of importance because that, taken with her responsibilities to J, means that she must look to the husband for support on a permanent basis and not just for a limited period. For the husband, of course, I must take into account that at 50 years of age, as an entrepreneur and financier, all being well, he still has many years of productivity ahead of him. AUTONUM But that being said, I cannot ignore the fact that the marriage was a short one. The wife cannot therefore expect, within the criteria of s.7(1), to be accorded the same recognition as a spouse who has over a long period of time indeed, the greater part of her life contributed to the welfare of the family. That principle is clear.
- (e) Any physical or mental disability of either of the parties to the marriage AUTONUM I have already spoken of the wife's eye problems. Hopefully, future surgery will be successful and she will be restored to full sight. But the prognosis is not certain. Because of her medical condition, the wife is at present unable to drive and enjoys the services of a driver, his salary being met by the husband. AUTONUM What happens if the wife is fully restored to health? She has claimed a capital sum to meet the on going cost of a driver for the rest of her life. Will that need then fall away? Potentially, the uncertainty of the wife's prognosis presents a problem. I say potentially because, in fact, I am satisfied that the wife's reasonable requirements will include two domestic helpers, certainly for the next 10 to 11 years when J can be expected to be living at home on a permanent basis, and little turns on whether one acts as a driver or both are in the home. Thereafter, when J is fully independent, the wife's increasing age will point to a need for greater assistance. In short, I see no reason, in looking to the wife's requirements, to restrict her to one domestic helper. During the marriage she had the help of several domestic helpers. They are, for the affluent, a fact of life in Hong Kong.
- (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 AUTONUM The wife brought no material assets of relevance into the marriage. The husband's wealth meant that at all times she was able to look to him to ensure a very high standard of living. During the course of the marriage, the husband continued to operate his various business and investment enterprises. The wife's essential contribution was that of a caretaker of the home, a companion to her husband and as a mother. In looking to the family's domestic responsibilities, she not only entertained at home but, whenever the husband's children by his first marriage were with their father, played her part in caring for them and generally ensuring their welfare. AUTONUM The husband complained, albeit in a fairly muted way, that the wife did not give to him the support that he needed in his public life. But it must be

remembered that the parties married on the understanding that the wife valued her privacy and would be with the husband to support him in his public life only when necessary. The wife said that she did her best to fulfil her side of the bargain and I am satisfied that, until real difficulties fell upon the marriage, that is correct. AUTONUM In summary, I am satisfied that, as the parties desired to so order their responsibilities within the marriage, during the course of that marriage, the wife made a full contribution. The wife reasonable requirements AUTONUM Having considered the criteria detailed in s.7(1) of the MPPO, I move now, by taking into account the effects of those criteria, to assess the wife reasonable requirements . For convenience, I shall do so by considering each of the awards that she seeks.

- (i) Provision for a Hong Kong home AUTONUM It was never disputed that the wife should be awarded a sum of money in order to purchase a home in Hong Kong. But there was considerable disagreement as to what, by way of her reasonable requirements , the amount of that award should be. The wife sought about HK\$25 million, the husband proposed about HK\$12 million. In deciding upon an award, I have taken the following into account :
 - (a) The wife wishes to purchase a home on the south side of Hong Kong Island reasonably close to J s school. It is the area where the wife has lived since early 1998 and where no doubt J now has friends. The wife s wish as to location should be honoured and prices in that area taken into account.
 - (b) In order to avoid too high a recurring cost in maintaining her home, the wife wishes to purchase a property that is not too old. That, in my view, having regard to the nature of my awards, is sensible.
 - (c) Of importance is the fact that any home will not only be for the wife but will be for J too. While J will spend time with his father, his day day base will be his mother s home and, pursuant to s.7(2) of the MPPO, I am obliged, having regard to what is practicable, to ensure that, in respect of his accommodation, J is placed in the position in which he would have been if the marriage had not broken down. Consequently, taking J s legitimate interests into account, the award will be materially higher than it would otherwise have been.
 - (d) J has grown up in spacious, elegant homes and, in so far as possible, should be able to continue living in a home of character. It cannot be ignored that J s father himself lives in a residence of some distinction on the Peak. AUTONUM Naturally, when the hearing commenced in June 2002, the evidence of property prices was that of contemporary sales. As expected, the prices covered a broad spectrum. For a property of over 2,000 feet, they ranged upwards from about HK\$11 million. But having said that, within that relatively confined geographical area, the choice was not great. It was apparent, however, that for a sum of between HK\$18 million a reasonably modern property of distinction, without being vast or overly lavish, could be obtained. It would be unrealistic not to take into account that since April of last year, notoriously, prices have slipped. But I cannot compute the percentage in respect of individual properties. Some hold their value better than others;

some may be actively sought after despite the depressed market. AUTONUM Taking all matters into account as best as I can and I confess that it has been a difficult task I am of the opinion that for a sum of HK\$20 million (including costs of transfer and provision for refurbishment) the wife will be able to obtain the sort of property which I have attempted earlier to describe. I accept that it is a relatively generous figure but I have been guided by the domestic surroundings which, over the next nine or 10 years while he is completing his schooling, J is entitled to enjoy. (ii) Provision for a motor vehicle AUTONUM For the foreseeable future, the car will not only be for the daily use of the wife but J too. A new car of quality, a safe car, is therefore required. The wife seeks HK\$750,000 for a Lexus saloon. The husband offers \$450,000 which he says will purchase an appropriate vehicle. In my view, HK\$500,000 would be an appropriate sum, this to include costs of licensing and the like. It may not purchase a prestige range Lexus saloon but it will purchase a high quality saloon that is safe and reliable. (iii) The Ontario cottage AUTONUM Fairness dictates that the wife should be able to retain this holiday home. During the course of the marriage, both parties laid emphasis on their homes away from home. The wife, as I have said, has her roots in Canada and is greatly attached to the cottage. (iv) A club debenture AUTONUM It has not been disputed that for herself and J the wife should have access to a recreational club. The wife has said that in the past she and J have enjoyed the Aberdeen Marina Club. The husband has agreed to transfer a club debenture to her. That, in my view, would meet the dictates of fairness: either the transfer of a debenture or the purchase of one. In these times of economic slowdown, it is difficult to assess the market value of a debenture for the club. During the course of the hearing a newspaper article was brought to counsels attention giving details of the market price of debentures. Doing the best I can, I would value a debenture in the club at this time at HK\$700,000. AUTONUM During the course of submissions, it was suggested that a larger provision should be made for entry to clubs. As I understood it, this was based essentially on comments made by the Court of Appeal in Li

- v. Li (supra). But, of course, those comments were made having regard to the particular lifestyle of the appellant (the wife) in that case, a keen sportswoman and club member. Each case must depend on its own facts. There is no set menu for big money cases. Looking to all relevant criteria in s.7(1), I am satisfied that a debenture for the one club an establishment of considerable reputation with many facilities accords with the wife reasonable requirements.
- (v) Jewellery AUTONUM The wife should be entitled to retain the jewellery. That is agreed. (vi) A capital sum to provide for an annuity AUTONUM The basis for assessing the wife's future annual expenditure requirements must obviously be the nature and level of her expenditure during the course of the marriage. An assessment so based was made for the wife by her accountant, Mr Michael Grimsdick of Ernst & Young, who, in a letter dated 20 September 1999, set out the method of approach in the following terms Our overall approach to this assignment was to analyse [the wife]'s expenditure during the two year period from 1 April 1997 to 31 March 1999 based on [the wife]'s various bank statements, her Amex and Visa statements. We then made a number of adjustments to these historic figures based on

anticipated levels of future expenditure. We have also taken into account various categories of expenditure that have been funded by [the husband] in the past and have again estimated the level of expenditure that [the wife] is likely to have in the future in relation to these categories. Our analysis does not take into account any expenditure on rent. However, it does take into account expenditure to refurbish the accommodation, replace the car and replace the furniture on a periodic basis. We have relied on the information provided by [the wife], and except where stated have not verified it independently. We calculated her annual expenditure requirements and then applied various assumptions to determine the lump sum figure which is achieved under a Duxbury calculation. AUTONUM On this basis, the wife's future assumed expenditure was assessed at a figure of HK\$211,717 per month. In June 2002, however, Mr Grimsdick adjusted this figure to take into account local deflation, the assumed expenditure being reduced to HK\$193,400 per month. AUTONUM During the course of final submissions, counsel for the wife made a number of amendments to Mr Grimsdick's assumed figure for expenditure, the result being an increase to HK\$206,958 per month. That was the final figure. AUTONUM It is not for me, in considering the detailed items of monthly expenditure, to adopt a budgetary approach. That has been disapproved by our Court of Appeal in *Li v. Li*. In any event, in a case of this nature where I must take into account a good many factors including the shortness of the marriage and the fact that the substance of the husband's wealth was inherited, it would be a sterile exercise. Nevertheless, I have had to traverse the figures in order broadly and equitably to assess the wife's reasonable requirements as to future expenditure. In so doing, without in any way imposing what I may describe as a bourgeois approach or a budgetary one, I have arrived at a figure of HK\$110,000 per month which, I believe, would enable the wife to meet her reasonable requirements not only in respect of recurring expenses but in respect also of setting monies aside to make provision for new cars and the like. AUTONUM In arriving at this figure, I have taken into account the fact that over the next 10 years or more J will be permanently living with his mother and the maintenance of HK\$30,000 per month which the husband pays for his son will inter alia go towards meeting J's share of such things as the utilities, domestic salaries, use of the car and the like. Taking into account the husband's undertaking to meet J's education costs and the like, HK\$30,000 per month will realistically be far more than will be required directly for J. When J is self supporting and that maintenance (or any remaining portion of it) falls away then the wife can arrange matters to take that into account. I do not see that in any way as an unfair burden, not in light of the awards that I will make in her favour. AUTONUM To descend to an analysis of each of the many items detailed by the wife in her future expenditure account will not advance matters, especially as it is wrong in big money cases of this kind to adopt a budgetary approach. But a few items do require comment. I have not included any provision for A. In addition, inter alia, I have found the following assumed estimate, to be excessive : HK\$25,000 per month for refurbishment of the Hong Kong home (in addition to HK\$3,000 per month for repairs), totalling HK\$1.5 million every five years for the remainder of the wife's life. HK\$8,500 per month for upkeep of the Ontario cottage in respect of which a good deal has already been spent on improvements and the like. HK\$3,600 per month for use of a mobile telephone.

HK\$12,500 per month for purchasing a new car every four years. HK\$8,646 per month for grooming and HK\$6,500 for a personal fitness trainer. HK\$8,333 per month for eating out. HK\$19,500 per month for travel expenses. HK\$10,000 per month to purchase jewellery, there being no evidence that the wife was used to purchasing her own jewellery and bearing in mind the award I have made in respect of her existing jewellery. In this regard too, I repeat that there is no set menu for big money cases. The wife, a person who values her privacy and does not seek the glamorous life, never spoke of any reasonable requirement to purchase more jewellery on a regular basis. In my view, in principle, it cannot be right simply to add it because other wives in big money cases have been awarded such a provision. The Duxbury calculation AUTONUM Having assessed the wife reasonable requirement for future spending at HK\$110,000 per month, I move now to consider the capitalisation necessary to enable the wife to finance those requirements over the remainder of her life. AUTONUM In *Preston v. Preston* (1981) FLR 331, the Court of Appeal directed that, when a lump sum payment is ordered to meet a spouse's future needs, in meeting those needs the spouse is expected not only to draw from the income earned on the capital but from the capital itself. That led to the computation, by way of mathematical models, of lump sums which would earn an income but would be fully exhausted, both as to the earnings and capital, at the end of the spouse's life. The Duxbury calculations, as they are called, have been accepted by family courts in both England and Hong Kong since the mid 1980s and have been described as the industry standard : see *F v. F* (Duxbury calculation : rate of return) [1996] 1 FLR 833. AUTONUM The Duxbury calculations, as mathematical models, are founded on a great many assumptions as to life expectancy, rates of inflation (or deflation), return on investment, incidence of tax and the like. In respect of a spouse in his or her middle years, such assumptions have to reach out over thirty or forty years. But a study of the past thirty or forty years teaches us that nothing can be predicted with certainty, not in the field of economics. As Ward J commented in *B v. B* [1990] 1 FLR 20 (at 24), when himself considering the limited usefulness of Duxbury calculations and warning against its unblinkered application the only certainty [as to the future] is that it will not happen as we have predicted . Ward J himself cited the observations of Lord Oliver in *Hodgson v. Trapp* [1988] 3 WLR 1281 (at 1298) which I can do no better than repeat the exercise upon which the court has to embark is one which is inherently unscientific and in which expert evidence can be of only the most limited assistance. Average life expectations can be actuarially ascertained, but to assess the probabilities of future political, economic and fiscal policies requires not the services of an actuary or an accountant but those of a prophet. AUTONUM The Duxbury calculations, as mathematical models, may be based on differing notional bases. This was so in the present case, there being argument as to which basis of calculation was the more accurate, that of the husband's or the wife's accountants. But I find no need to decide the issue. In my view, the calculations, however based, must be approached with a degree of caution. As our courts have long recognized, they are a useful tool but no more : per Ward J in *B v. B* (supra) So, in summary, the Duxbury calculation is a means to an end, not an end in itself. AUTONUM The accountants for both the husband and wife were agreed, however, that the real driving force of a Duxbury calculation is the real

rate of return that is to be assumed. The choice of inflation rates and capital growth rates are invariably not critical and were not so in respect of calculations made for this case. Of course, the lower the real rate of return, the greater the capital sum that is required. By way of an illustration, assuming the life expectancy of the wife in the present case to be a further 35 years and assuming both inflation and capital growth will be 4.5% per annum, to ensure an expenditure of HK\$120,000 per month only HK\$20.599 million will be required if the real rate of return is assumed to be 6% per annum while HK\$29.718 million will be required if the real rate is assumed to be 2.5%, a difference of HK\$9.119 million. AUTONUM At this time, the major stock markets in the world have suffered severe setbacks. Against the background of the international bear market and the fragility of other investments, the wife's accountant, Mr Grimsdick, based his Duxbury calculations on a conservative real rate of return of 2.5% per annum. He proceeded on the basis that the wife would be best advised to protect any lump sum she is awarded by investing solely in bonds, essentially United States treasury bonds mixed with other rock solid bonds, giving a slightly highly rate of return. For the husband, however, Ms Friend based her calculations on a real rate of return of 4.5% per annum. She proceeded on the basis that over a prolonged period of time the wife must, in all wisdom, invest in a broad spread of blue chip equities as well as bonds. Both the husband and wife called expert witnesses to support the reasonableness of the differing approaches. AUTONUM The issue of the appropriate rate of return is not a new one. In England, it has been debated on numerous occasions. Manifestly, however, while there may be occasions when a higher or lower real rate of return should be assumed, it assists litigants, practitioners and those responsible for making the Duxbury calculations to know that there is an accepted rate. As Holman J commented in *F v. F* (supra), at 849 Leaving aside special considerations, in my judgment it is not desirable that in case after case time should be taken up and expense incurred in having one (as in this case) or even two (as in many other cases) experts give evidence about an appropriate assumed real rate of return. This is all the more so when, as cannot be stressed too strongly, a Duxbury calculation is merely a starting point or guide to one component of an overall lump sum award upon which all the s 25 considerations impact. Although I am a member of the editorial committee of *At a Glance* (FLBA) I was not the author of *Reflections on Duxbury* to be found at the beginning of the 1995 edition. But I agree with its reasoning and its conclusions. In my view it is important that there should indeed be an industry standard for the purpose of the Duxbury approach and in my experience that standard has already settled at around 4.25%. AUTONUM While I accept Mr Grimsdick's emphasis on ensuring a rate of return in the early years, it seems to me that over a long period of years in the present case 35 years there are bound to be swings in the market, some good, some bad. But with a prudent advisor and a reasonably cautious approach, those can be equalised out and a real rate of return be achieved that is somewhere between the extremes of rigid conservatism and adventurism. In *B v. B* (supra), perhaps in somewhat rosier economic times, Ward J, when comparing the conservative investment of a purchased annuity against a more fluid investment vehicle of equities and gilts, commented In this case there is no evidence at all that the wife would buy such an annuity. Having regard to the realities of life and regard to realities is always something this Division has had

to take into account I would not expect many wives in their middle years to give up all their capital in this way. They are much more likely to invest in a broad spread of equities and gilts which gives them freedom to use the money as and when they think fit. That being the reality, a calculation on that basis is probably the better approach for the court to follow.

AUTONUM Each case will, of course, depend on its own circumstances. For example, there may be cases in which the one spouse's fortune is so great and so well protected against the vagaries of the market that the spouse receiving a capital sum may have no need to be exposed to any risk. In such a case that would constitute the balance of fairness. But the husband in the present case, as a financier and entrepreneur, is in the business of risking capital. If the marriage had subsisted, the wife would have benefited from those risks and, if fortune was bleak, been hurt by them too. The question may therefore be asked: why should the wife now be fully protected while the husband is not? AUTONUM Griffiths, for the wife, submitted that in all instances Duxbury calculations should be made on a conservative rate of return equivalent to that calculated for pensioners or victims of injury. That too has been argued before and rejected: see, for example, the dicta of Thorpe LJ in *Dharamshi v. Dharamshi*, at 741. The victims of tort are in a special category. I do not see how it can be said that the wife in the present case, who is well educated, articulate and fundamentally healthy is to be placed in the same protective category as an injury victim. As Lord Steyn commented in *Wells v. Wells* [1998] 3 WLR 329, when speaking of a typical injury victim With such plaintiff it is not possible to cut back on medical and nursing care as well as other essential services. His objective must be to ensure that the damages awarded do not run out. It is money that he cannot afford to lose. The ordinary investor does not have the same concerns. AUTONUM Holman J explained what is today, I believe, the accepted thinking in ancillary relief cases, as opposed to tort, when, in *F v. F*, he said the premise in personal injury cases as reflected in the passages from the Ogden Working Party and in the judgment of Collins J which I have quoted above, is that a person who has been injured by tort should be put in the same position so far as possible as if the tort had not happened. He should not be expected to have to assume any risk at all. I do not consider that the same premise applies in the typical matrimonial case where, during the marriage, the finances of the parties may usually be at some risk from the vicissitudes of life. AUTONUM Although recently in the United Kingdom, because of the economic climate, consideration has been given to basing future Duxbury calculations on a real rate of return of 3.75%, I believe that the rate which has been used there as the industry standard since 1995 would be the fairest rate to adopt in the present case. That rate is 4.25%. As Singer J commented, in *A v. A* [1998] 2 FLR, at 178, it does not give to the wife an award that is copper bottomed, as it were, from all sides yet, over a period of 35 years, being her life expectancy, nor is it too risky.

AUTONUM I conclude by noting, as Singer J noted in *A v. A* (at 198) that however closely or otherwise merely as a general guide a judge has regard to Duxbury calculations, they are inevitably hypothetical. Indeed by their very nature they pile hypothesis upon hypothesis. That is not to say that they should be regarded as other than the best available tool with which to assist both settlement negotiation and judicial assessment. However, one must no more be blind to the imprecision they represent than the impossibility of accurate

prediction in other areas. AUTONUM On the basis of Mr Grimsdick's calculations, over a 35 year span, assuming a real rate of return of 4.25%, to generate HK\$110,000 per month, a capital sum of HK\$24.796 million is required. I will round up that figure to HK\$25 million. Provision for an additional capital sum to act as a cushion AUTONUM In *Li v. Li*, the Court of Appeal accepted that it may be legitimate to provide an extra sum above the sum calculated to provide a cushion against unforeseen expenses. The provision of such a cushion, however, will depend on the facts of each case. It is not to be added automatically as some sort of value added tax. AUTONUM In the present case, I have stepped back from the individual awards in order objectively to consider their totality and I am satisfied that, viewed as such, they constitute an overall award that, in terms of the criteria detailed in s.7(1), meets the required outcome of fairness. In looking to the circumstances of the case, I see no reason for a further adjustment either up or down and no need, in fairness, for the provision of any further sum by way of a cushion. Would the awards have been different under *White v. White*? AUTONUM Because of my earlier findings as to law, this is essentially a hypothetical question. But, as I said earlier, in my view this has never been a classic *White v. White* case and frankly, even if I had followed the principles laid down by the House of Lords, having regard to the particular circumstances of this case, I do not see that my awards would have been materially different; indeed, really any different at all. I say that in light of the fact that my primary focus at all times has been on the criteria detailed in s.7(1) of the MPPO. Should there be a charge of any kind on the wife's Hong Kong home? AUTONUM I do not believe there should be any charge of the kind suggested on behalf of the husband. Yes, the allowance for the Hong Kong home has been more generous than would have been made if it was for the wife alone. But it must be remembered that the wife will have the responsibility of looking after J on a daily basis for the next 10 or 11 years and thereafter in all probability welcoming him home from college or university in the vacation periods. The Hong Kong home will therefore remain a base for J and be his home for at least the next 14 or 15 years, perhaps longer. After that long period of time, is the wife then to be forced to sell up? In my view, that would not accord with fairness. AUTONUM It may well be, of course, that when J is full self supporting and away from home, and the wife no longer receives maintenance for him, that she will consider a smaller property. But if so, that must be her choice and she must be able to use the moneys to better finance her later years. AUTONUM There is certainly no financial need for a charge on the property. It is not as if the husband himself cannot afford a home until something comes back to him from the moneys paid over to enable the wife to purchase her home. My orders AUTONUM In respect of J, subject to the husband's undertaking detailed in para.145 of this judgment, it is ordered that, from 1 February 2003 and thereafter on the first day of each and every month until J is self supporting or until further order, the husband will pay to the wife, as and for J's maintenance, the sum of HK\$30,000 per month. AUTONUM In respect of the wife, my awards are as follows and the necessary orders so made : Provision for a Hong Kong home to be paid by the husband HK\$20 million Provision for a new car to be paid by the husband HK\$0.5 million Provision for a capital sum to finance a Duxbury annuity to be paid by the husband HK\$25 million Provision for a debenture for the Aberdeen Marina Club, either by

transfer of an existing debenture or payment in cash HK\$0.7 million The wife will also be entitled to retain the following as her sole property : Jewellery given to her during the marriage HK\$1.2 million The Ontario cottage HK\$2.3 million Her liquid capital HK\$5.89 million Loan moneys due to her by a friend HK\$0.44 million Total HK\$56.03 million (HK\$56,030,000) AUTONUM In respect of J, although the question of whether he should be in the joint custody of his parents or the sole custody of the mother has not yet been determined, as arrangements have been agreed concerning care and control, access and his financial security, there will be a declaration made pursuant to s.18 of the MPPO. AUTONUM There will be liberty to apply. AUTONUM As to costs, I am in no position at this time to make a determination. If necessary, I will hear from the parties. (M.J. Hartmann) Judge of the Court of First Instance, High Court Mr John Griffiths, SC leading Ms Corinne Remedios and Mr Jason Pow, instructed by Messrs Hui & Lam, for the Petitioner Mr David Pilbrow and Ms Frances Irving, instructed by Messrs Hampton, Winter & Glynn, for the Respondent - PAGE - "@AB #~p 6<z% vRs&r HHZbr y<0O Zk_UR z`Uf %i?l ZorB r7Fv, 2wx^ x4ah {6=P# %i?l r7Fv Zk_U vRs& y<0O #~p NtqF & 6" user Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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