

HONG KONG / JUDGMENT

HMC v. CWY

[2024] HKFC 87

COURT

Family Court

DECIDED

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bjbj FCMC 3129 / 2021

[2024] HKFC [87] IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO. 3129 OF 2021

BETWEEN HMC Petitioner and CWY Respondent

J U D G M E N T (VARIATION OF CONSENT SUMMONS AND ORDER)

Coram: Deputy District Judge P Barnes in Chambers (Not open to public) Dates of Trial hearing: 10th, 20th October 2023, 1st, 3rd November 2023 Dates of Closing Submissions: 1st December 2023 Dates of Replies: 5th January 2024 Date of Judgment: 10th May 2024 A. Introduction This Judgment follows a Trial heard on 10 & 20 October 2023 and 1 & 3 November 2023 of an application by the Respondent (Wife or) to vary the terms of a Consent Summons dated 6 May 2021 by which terms of the parties financial agreement on divorce were recorded (Consent Summons) and to vary a Consent Order dated 27 July 2023 embodying those terms (Consent Order). The application was begun by a Summons filed 6 September 2022 (First Summons) to vary the Consent Summons and, after the Consent Order was made, a second Summons filed 3 August 2023 (Second Summons) to vary both the Consent Summons and the Consent Order. The Second Summons is now relied upon by the Wife, and she does not seek any order on the First Summons, although it has not at this stage been formally dismissed or withdrawn. There were three principal affirmations on the Summons: the Wife s 6th Affirmation filed 6 September 2022, the Petitioner (Husband or s 5th Affirmation in response filed 4 November 2022, and W s 8th Affirmation in reply filed 3 January 2023. W then supplemented her written evidence with a further (10th) affirmation filed 3 August 2023, and this was followed by one final affirmation, H s

7th affirmation filed 23 August 2023. W chose not to file an affirmation in reply to this 7th affirmation, and advised the Court by letter dated 6 September 2023 that this was because in her view it contained no new facts but with lots of submissions and arguments therein. The parties are both dentists. W (aged 42) was a Dental Officer in the Department of Health at the time of the Consent Summons but resigned and joined the private sector in 2022. She has now moved back to a Government position. H (aged 50) works in a private dental clinic. They were married in February 2017. They have one child, a boy who is 6 years old (the Child). H filed his Petition in May 2020 and the same month W and the Child moved out to rented accommodation. W has care and control of the Child. At the time of the Trial some issues of access remained in dispute. The focus of the Wife s application is a Hong Kong residential property (the Property) purchased by the parties in 2018 and which became their matrimonial home. It is an apartment in Kowloon, on the 15th floor of a 30-storey single tower completed by the developer approximately 9 years ago. There are two flats per floor, units A and B. The Property is Flat B. It is a 3-bedroom flat of some 968 square feet of usable space. It was purchased in January 2018 for a total cost of approximately HK\$22,050,000 with a down-payment of 50% of the purchase price being paid by both parties. It is registered in the Wife s name. This is the only landed property in which the W has an interest. At the time of the Consent Summons, H owned an apartment in Taikoo Shing, acquired many years before the marriage, and which was at the time rented out. He later sold this apartment, in August 2022. As part of their settlement upon divorce the parties agreed the Property should be sold, for a price of not less than HK\$22,500,000 (the Minimum Price) with the net proceeds of sale being divided equally between them. In the lead-up to the settlement, both H and W had filed Forms E July 2020 in which they each estimated the market value of the Property at HK\$22,000,000. Other terms as recorded in the Consent Summons provided for equal sharing of certain expenses relating to the Child (para 2), and for H to pay \$7,500 per month, being of the monthly rental of W s apartment into which she had moved, and for this to continue until W purchased her own apartment (para 3). W and the Child are currently living in an apartment of some 536 square feet of usable space. Paragraph 1 of the Consent Summons provided that upon completion of the sale of the Property, all other claims for ancillary relief they may have against the other shall stand dismissed, i.e. the clean break. The Consent Summons sets out, in the Preambles to the numbered paragraphs, details of the agreed steps to be taken to sell the Property, including for the obtaining of an updated market valuation of the Property with the assistance of a professional valuer in the event the Property could not be sold within 6 months from the Consent Summons: Preamble (J)(ii). Other terms included the option of changing the method of sale to include by public auction. The relevant terms of the Consent Summons will be set out in more detail, below. W s case is that the reason the Property remains unsold now nearly 3 years since the Consent Summons was signed is H s uncooperative and obstructive attitude to its disposal, coupled with the decline in the HK property market. She says that H has less incentive to sell the Property, as he is entitled under the Consent Summons and now Consent Order to remain living in it rent free until it is sold, while paying half of the mortgage. W pays half of the mortgage plus the rent on her apartment. She says that it is now time for alternative orders to be put in place so that the clean break settlement can finally be achieved. W is keen to purchase another property, to take advantage of the current stable income her Government

position provides, as well as the relaxation measures on the loan-to-value ratios for mortgages. She wants to purchase a property closer to the Child's school. The relief she seeks by her Second Summons will enable her to sell the Property largely without the Husband's input. She asks for an Order that:

1. The terms relating to the manner of sale of the property situate at and known as [address] as set out in the Preamble (J), (K), (L), (M), (O), (P), (Q), (S), (T) and (U) of the Consent Summons dated and filed on 6 May 2021 and in the Consent Order dated 27 July 2023 be varied to the effect that :
 - (i) The Petitioner to deliver vacant possession of the Property to facilitate its sale; (ii) The Respondent to obtain updated valuation report of the market value of the Property; (iii) The Property be sold at its market value, or at a price within 10% deviation from its market value, by public auction or private sale; (iv) Any conveyance or other documents necessary to complete the sale be executed by the Respondent;
 - (v) The Respondent be appointed to have sole conduct of the sale of the Property. (vi) Costs be to the Respondent. The Wife's case is that in addition to the Husband's obstructive behaviour, which she says supports the variation of the Consent Order, there has been a material change of circumstances since the Consent Summons was signed. Firstly, she refers to the downward trend in the property market. W says that at the time of the Consent Summons, May 2021, the property market was still trending upwards, and it was not foreseen that it would reverse course. Secondly, she says the Child has been adversely impacted by disputes between the parties on the care arrangements, and which included allegation and counter allegation of child abuse. Again, W says this was not anticipated and has heightened the need for her to purchase a property of her own and establish a stable home for herself and the Child. Both Summonses are resisted by the Husband. He submits that
- (1) In seeking to vary not only the Consent Order but the Consent Summons itself, the application must fail for the reason that the Court has no power to vary a Consent Summons.
- (2) To the extent that the Second Summons relies upon events which took place between the signing of the Consent Summons and the making of the Consent Order, i.e. between 6 May 2021 and 27 July 2023, these events are irrelevant to the application. H says that, in order to succeed on her application, W must demonstrate that there has been a material change of circumstances since the making of the Consent Order i.e. since 27 July 2023. In this respect, H says there have been no material changes or at least none unforeseeable at the time of the Consent Summons.
- (3) The Consent Summons constituted an agreement the parties entered into after negotiation, with the benefit of legal advice and representation, in full and final settlement of their ancillary relief claims. The principle that there should be no radical departure from the original approach taken by the parties includes the agreement as to the minimum price agreed and the mechanism to modify that agreed price, and that W's request for an order

that she be at liberty to sell at a 10% variation from an updated market price is inconsistent with this.

- (4) The Consent Summons/Consent Order provide a clear mechanism: the Property would be marketed at the agreed price of \$22,500,000 for 6 months and if no sale was achieved then the agreement was to obtain a valuation to serve the basis for future efforts to sell.
- (5) He has all along complied with the terms of the Consent Summons and Consent Order.
- (6) There is no need for relief (iv) and (v) as the Property is in W's name, and therefore H's signature will not be needed on any documents effecting the sale. The Trial was originally set down for one day only, but the evidence took much longer and eventually 3 days were required. Subject to the comments I may make in the body of this Judgment, I am satisfied that both H and W gave full and truthful evidence in support of their respective cases. B. The Consent Summons The Consent Summons contains standard recitals of the parties including those acknowledging that the terms contained therein are in full and final settlement of all and any claims they each have for ancillary relief, and that they have both had the benefit of legal advice and are entering into the settlement free of any duress or undue influence: see Preamble (A) and (B). Preamble (G) confirms the acknowledgement of the parties that the Property is equally beneficially owned by them. Preamble (H) records the parties' agreement that it be sold within 6 months of the Consent Summons, i.e. by 6 November 2021 with the net proceeds of sale being equally divided between them. The Consent Summons sets out the following additional provisions relating to the steps to be taken to achieve a disposal of the Property: (I) AND UPON the Petitioner and the Respondent agreeing and acknowledging to the Court and to each other that prior to the sale of the Property: -
 - (i) The mortgage instalment of the Property shall be shared and paid by the parties equally. The Petitioner shall make payment of half of the mortgage instalment within 7 days after receiving the receipt of payment to the Respondent's [bank account] (ii) [Provision for the Petitioner to be responsible for management fees on the Property and to pay them into the Respondent's bank account.] (J) AND UPON the Petitioner and the Respondent agreeing and acknowledging to the Court and to each other that: -
 - (i) The Property shall be sold at the market price or at a price of not less than HK\$22,500,000, whichever is higher. (ii) If the Property cannot be sold within 6 months from the date of this Consent Summons, the Property shall be sold at a reserved price to for which an independent valuation report stating the updated market value of the Property shall be called for and obtained within 7 days immediately after the expiry of the 6 months period and the parties shall agree and accept the same for the purposes of Preamble (L) hereinbelow. (iii) The Respondent shall engage the following estate agencies for marketing the property within 10 days from the date of this Consent Summons and shall be the primary contact point [there then is set out the list of the agencies] (K) AND UPON the Petitioner and the Respondent agreeing and acknowledging to the Court and to each other

that if the Property cannot be sold within the first 4 months from the date of this Consent Summons, the Respondent shall start: -

- (i) to enlist potential auctioneer firms for the Petitioner's consideration and the Petitioner shall confirm the choice of the auctioneer firm within 7 working days from the date of receiving the Respondent's written notice of the list of enlisted auctioneer firms. (ii) to prepare for instructing the auctioneer firm as agreed by the Parties within the 6th month from the Settlement Date to the effect of enabling the property to put up the Property for auction sale within the 7th month from Settlement Date. (L) AND UPON the Petitioner and the Respondent agreeing and acknowledging to the Court and to each other that if the Property cannot be sold within 6 months from the date of this Consent Summons, the Property shall be sold by auction within two months from the expiry day of the first 6 months from the date of this Consent Summons. If the Property cannot be sold at the reserved price referred to in Preamble (J)(iii)* hereinabove within the said two months period, the same shall be continuously arranged for sale both by auction or private sale through estate agent at the market price or such price to be agreed by the parties until the Property is sold. [*Is it accepted by both parties that this is a typographical error and should read (J)(ii)] (M) AND UPON the Petitioner and the Respondent agreeing and acknowledging to the Court and to each other that the Respondent shall be responsible for the sale of the Property and shall provide contact points of the appointed agencies to the Petitioner and the Petitioner agree to make available the following period for appointed agencies bring potential buyer to view the Property, namely, between 2p.m. to 6:00p.m. on every Saturday with reasonable notice in advance. (N) AND UPON the Petitioner and the Respondent agreeing and acknowledging to the Court and to each other that the Property shall be sold on the basis of vacant possession. The parties shall equally contribute and pay the costs for disposal of the furniture and chattels to render the Property in vacant possession status upon completion of the sale thereof. (O) AND UPON the Petitioner and the Respondent agreeing and acknowledging to the Court and to each other that upon finding a purchaser, the Respondent shall provide a copy of the provisional agreement to the Petitioner prior to the signing of the same by the Respondent and the completion of the sale of the Property shall be 2 months from the date of the provisional agreement. (P) AND UPON the Petitioner and the Respondent agreeing and acknowledging to the Court and to each other that in the event that a potential purchaser offers a nearest offering price which is close to the agreed sale price stated in Preamble J(i) above, the parties hereto are at liberty to discuss and agree whether to sell at such nearest offering price. (Q) AND UPON the Petitioner undertaking to the Respondent and to the Court he shall vacate from the Property no less than 14 days prior to the scheduled completion date of the sale of the Property. (T) For avoidance of doubt, either party shall have an option of the first right to acquire the other party's interest in the Property (the Option) prior to the sale of the Property upon the following terms:

- (i) The Option can only be exercised at the agreed sale price for the respective period as stated in Preamble (J)(i) to (ii) for the purpose of calculating the buy-out consideration of the other party's interest in the Property. (ii) The party in exercising the Option shall give 7 working days prior written notice to the other party of his/her intention to exercise the Option and the responding party shall confirm in writing of his/her agreement within 7 working days thereafter. (iii) The completion of the buy-out of the responding party's interest in the Property shall be within two months from the date of acceptance by the responding party of the offer to buy out by the proposing party. (iv) The proposing party in exercising the Option shall be responsible for all the legal costs and disbursements, including but not limited to stamp duty (if applicable), of completing the buying out of the responding party's interest in the Property.
- (v) The responding party shall vacate his or her respective belongings in the property 14 days prior to completion. (vi) The Parties agree to do all things necessary to carry into effect this provision or to give legal effect to perfect the party's beneficial interest in the Property or enable the said party to exercise both legal and beneficial rights over the Property after his/her exercising the Option at his/her own costs, the party not exercising the Option will use his/her best endeavours to execute all such documents and/or provide reasonable assistance to the other party and hereby agrees and undertakes to the same. (U) AND UPON the Petitioner and the Respondent agreeing and acknowledging to the Court and to each other that prior to the sale of the Property and subject to clauses Preamble (I) and Preamble (K) hereinabove, the Petitioner is allowed to enjoy quiet enjoyment, live in and occupy the Property. (W) AND UPON the Petitioner and the Respondent agreeing and acknowledging to the Court and to each other that they will use their best endeavours to do all things necessary and will execute all such documents and/or provide reasonable assistance to the other party to carry into effect or to give legal effect to the sale of the Property. C. The Law C.1 Power to vary, generally Section 11 of the [HYPERLINK "safari-reader://www.hklii.hk/en/legis/ord/192/"](http://www.hklii.hk/en/legis/ord/192/) Matrimonial Proceedings and Property Ordinance [HYPERLINK "safari-reader://www.hklii.hk/en/legis/ord/192/"](http://www.hklii.hk/en/legis/ord/192/) Cap. 192 MPPO) empowers the Court to vary or discharge certain orders for financial relief, including orders for sale of a property under section 6A of the MPPO: section 11(2)(da). One of the Husband's arguments on the law is that recitals or preambles in the Consent Order are not in the nature of an order, but are undertakings given by the parties and forming the conditions upon which orders were eventually made. s Supplemental (Opening) Submissions,
6. He says that it necessarily follows from this that the Court has no power to make an order which would have the effect of varying such recitals/preambles: 8. A recital or preamble to an order is as enforceable as the numbered paragraphs contained within it, where those recitals or preambles could equally be expressed in terms of an order that the act referred to be performed or the step be taken: *BSA v NVT* [2020] EWHC 2906 (Fam) at

38. Each of the parties have proceeded on the basis that the terms of the Consent Summons/ Consent Order are binding upon them, including all of the Preambles relating to the arrangements for disposal of the Property and the division of the proceeds. H repeatedly emphasised this in his communications with W, whether direct or through his solicitors. Further, with one exception Preamble (Q) the Preambles are not worded as undertakings. Preamble (Q) is explicitly an undertaking by H, to vacate the Property no less than 14 days prior to completion of its sale. The Consent Summons was drafted by solicitors. The difference in wording compared with the other Preambles was deliberate. The Court has no power to vary undertakings, only to grant or refuse to release a party from them: *Birch v Birch* [2017] 1 WLR 2950; *Wang Linping v Huang Kebin* [2020] HKCFI 256; *L v C*, FCMC 5952/2012 (unreported) 3 July 2015 at [22]. If I decide that I should make an order that H vacate the Property, either immediately or within a certain period, prior to its sale, it follows that H will have satisfied the undertaking and there will be no need for an order that he be released from it. C.2 Power to Vary a Consent Summons? Counsel for the Wife, Ms. Chan, submitted that the Court's power to vary extended to it being able to vary the terms of a Consent Summons, prior to it being made into an Order. In support of this submission, she referred to the Court of Appeal's decision in *L v C* [2007] 3 HKLRD 819 and in particular this part of Mr. Justice Stock's judgment in that case: For reasons of policy, the courts will not permit the parties by agreement to oust the jurisdiction of the court in matters touching upon matrimonial finance or to control the exercise of the court's jurisdiction once that jurisdiction is invoked (*Hyman v Hyman*), and the courts will be astute in maintaining their supervisory jurisdiction (*Pounds v Pounds*) even in the absence of provisions seeking to oust jurisdiction. This extract is part of the passage in *L v C* in which the Court of Appeal affirmed the principle that agreements made between parties to a marriage cannot oust the statutory jurisdiction of the Court invoked by the commencement of divorce proceedings. The Court retains the power to approve or disapprove of such agreements in whole or in part: *Sharland v Sharland* [2016] AC 871 at 19 (Baroness Hale of Richmond). I do not accept, however, that *L v C* is authority for the proposition that the Court has the power to modify the terms of the agreement itself as formalised in a Consent Summons. The fact that the Court has the power to make orders in accordance with a Consent Summons or to decline to do so as part of its supervisory jurisdiction does not equate to a power to change the terms of the Consent Summons itself. This distinction was described by the Husband's counsel, Ms. Tam, as the fundamental difference between a Consent Summons and a Consent Order. To underline this point, it was submitted by Ms. Tam that it is always open to a party who, upon reflection, does not wish for a Consent Summons to be made an order of the Court, to proceed with his or her application for ancillary relief, and to resist an application, if brought by the other party, to show cause why the terms of a Consent Summons should not be made into an Order. This would be consistent with *L v C*, and with the principle that the Court will allow a party to depart from an agreement if good and substantial grounds exist, justifying such departure. Consequently, I accept the Husband's submissions that the Court has no power to order variations to a Consent Summons, and the Wife's application to vary the Consent Summons must fail. C.3. What circumstances may be considered in

applications to vary Orders? Is the Court confined to considering only post-Order changes in circumstances? The next issue is under what circumstances the Court should exercise the power to vary. Section 11(7) of the MPPO provides that

- (7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates In considering applications to vary Orders, the Court does not take the original Order as its starting point but considers the matter afresh: AEM v VFM [2008] 3 HKLRD 36, per Cheung JA at 14.4. Further, any change in any of the circumstances when the original Order was made is a factor to be considered on an application to vary: AEM 14.5. However, the Court of Appeal in AEM made clear, by reference to MPPO ss 11(7), that the Court must consider all of the circumstances of the case, including but not limited to any change in the matters relevant to the making of the original order. One caveat to this is that the Court is required to consider the basis and intended effect of the original order, and there should not be a radical departure from the approach taken by the parties themselves when they had entered into an agreement embodied in a consent order Cheung JA in AEM at 14.8 citing Boylan v Boylan [1988] 1 FLR 282. The Wife submits that the Court should consider all the circumstances including events prior to the order being made, and that it would be wholly artificial to consider only matters arising since the Consent Order and ignore those which preceded it. She refers to the fact that the Consent Summons was made into an order to facilitate her challenge to its terms, given the doubt about whether the Court had jurisdiction to entertain her First Summons. The Consent Order was made at a hearing before His Honour KK Pang DDJ during which a discussion took place as to whether the best way to proceed was to make the Consent Summons into a Consent Order, and then for the challenge to the terms of the Consent Order to be made. In response, the Husband says that there must be, in all cases, a material change of circumstances since the Order itself. He relies on a recent decision of Her Honour Judge T Kwan, in LEYY v UKWK [2023] HKFC 37, in which Her Honour said that [t]he principles are trite in that there should be some change of circumstances since the previous order was made . In the same passage, Kwan J noted also she was entitled to look at the case de novo, citing AEM as authority for that proposition and the scope of the power to vary generally. H then refers to the judgment of Justice Tang VP (as he then was) in HCTT v TYYC [2008] 5 HKC 86, where the learned Judge noted that almost invariably an application to vary an early periodical payments order will be brought on the ground of a change of circumstances since the order was made, and that otherwise (at [15]) except in exceptional circumstances, the application will, in effect, be an appeal. If an order is not appealed against, or is made by consent, then the presumption must be that the order was correct when made. If it was correct when made, then there will usually be no justification for varying it unless there has been a material change in the circumstances. In the same case, Mr. Justice J. Lam, in agreeing with Mr. Justice Tang s remarks, emphasised that applications to vary should not be pursued when in substance the grounds advanced for variation tantamount to re-argument of the same issues that have been argued before the court before

the making of the original order. If a party is aggrieved by the terms of the original order, the proper course is to appeal against that order. Each of these cases was cited by the Husband in support of the submission that the change of circumstances justifying the variation of the Consent Order must be a change from the time the Consent Order was made. It does not follow that the Court is confined, in considering whether or not to exercise its power to vary an Order, to a post-Order change of circumstances. Further, all of these cases iterate that a change of circumstances is one of the factors for the Court to consider, and the Court is required by Section 11(7) to examine all of the circumstances of the case and, giving due weight to the basis and intended effect of the Order, consider the matter *de novo*. For completeness, I will add that I do not accept that, having allowed the Consent Summons to be made into a Consent Order, the Wife is precluded from relying on events which led up to the making of the Consent Order. One of the key elements of the agreement embodied in the Consent Summons was the intention to sell the Property for at least HK\$22,500,000, subject to any agreement reached between them, including with the assistance of a professional valuer, to accept a lower price, and for the net proceeds to be divided equally between them, to achieve the desired clean break. The Court is now being asked by the Wife to consider whether this intended effect of the Consent Summons and Consent Order, i.e. to achieve a clean break settlement as efficiently as possible by the timely sale of their main asset, has been, and will continue to be, frustrated by what is alleged to be the non-cooperation/obstruction of the Husband. D. W's claim of obstructive behaviour by H I have set out above all the relevant provisions of the Consent Summons relating to the disposal of the Property. The agreement of the parties as set out therein may be summarised as follows:

- (1) Subject to either party exercising the option under Preamble (T) to acquire the other parties interest in the Property, the Property be put on the market with the assistance of named property agents such agents to be engaged within 10 days of the signing of the Consent Summons, at a price of no less than \$22,500,000: Preamble (J) (i), (iii). Any prospective purchaser would be able to inspect the Property on Saturday afternoons between 2pm and 6pm and the Husband, as the occupant of the Property, agreed to facilitate this: Preamble (M).
- (2) If the Property is not sold within 6 months, then to sell at a reserved price with the assistance of an independent valuation report giving an updated market value of the Property, such report to be obtained within 7 days after the expiration of the 6 months: Preamble (J) (ii).
- (3) Further, absent a sale within 6 months, that the Property would be placed in the hands of auctioneering firms for sale by auction for a further 2 months thereafter: Preamble (L). The identity of the auctioneers was, in accord with Preamble (K), to be agreed upon in advance during the last two months of the 6 month period.

- (4) Absent a sale during these further two months, the Property would remain on the market for sale either by auction or private sale through estate agents at the market price or such price to be agreed between the parties : Preamble (L). Preamble (P) underlines this point by recording the parties acknowledgement that, in the event a prospective purchaser offers a price close to the original price of \$22,500,000 they were at liberty to discuss and agree whether to accept such an offer.
- (5) The sale be on the basis of vacant possession, with the Husband being able to remain living in the Property until 14 days before completion: Preamble (N), (U) and (Q). W s complaint of obstructive/unreasonable behaviour is in respect of
- (1) H s response to her buyout offer.
- (2) H s response to the multiple offers to purchase from potential buyers.
- (3) H s non-compliance with the inspection clause of the Consent Summons.
- (4) H s delay/non-compliance with agreeing to a re-valuation of the Property and for it to be put up for auction sale. I will deal with these in turn. My conclusion as to the significance of item 37(1) will be set out in part D1.1 of this Judgment. My conclusions on the other three points 37(2)
- (4) are set out in part E. D1.1 Wife s buy-out offer On 31 May 2021 the Wife wrote to the Husband s solicitors, Kenneth CC Man & Co (KCCM) to give notice of her intention to exercise her option (the Option) to acquire H s 50% interest, at the agreed sale price of HK\$22.5M. On 9 June 2021, KCCM wrote back to say that the figure HK\$22.5M was not agreed and that H observation and belief was that the market price was likely more than HK\$22.5M. The letter asked for particulars of W s proposal, including completion date and whether she would want vacant possession. W wrote back on the same day responding to the points raised in KCCM s letter, and commenting that H s assertion that the market was on the upward trend was unreasonable and unacceptable , especially given the lack of offers at or above HK\$22.5M in the period after the Property was first put on the market. There was then further correspondence back and forth, including in one of the letters from KCCM to W a proposal to appoint a surveyor to provide a valuation for the purposes of the exercise of the Option. Eventually, on 24 June 2021, KCCM wrote to confirm that H agreed in principle to the Option being exercised by W for HK\$22.5M less outstanding mortgage loan x 50%. On 9 July 2021, after further correspondence on the precise terms of the sale of H s interest, KCCM wrote to W attaching a draft Sale and Purchase Agreement. The draft Sale and Purchase Agreement provided by KCCM contained a provision indemnifying the Husband for any Stamp Duty which might be levied on the transaction:
9. All stamp duties (if any) payable under the Stamp Duty Ordinance (Chapter 117) on this Agreement and/or any preceding Agreement (if any) and/or any form of documents (if any) to which the Stamp Duty Ordinance (Chapter 117) applies (the said documents) shall be paid by the Respondent absolutely. In the event of a consideration stated in the said

documents not being accepted by the Collector of Stamp Revenue as representing the true value of the Property hereby agreed to be sold and purchased, the additional Stamp Duties together with interest thereon (if any) charged by him in accordance with his valuation of the Property shall be borne by the Respondent absolutely. The Respondent further agrees to indemnify the Petitioner from and against all actions suits expenses claims demands and proceedings whatsoever made by the appropriate government authority or authorities for the payment of such additional stamp duties and interest (if any). W argues that the inclusion of this clause was unnecessary and that it was unreasonable for H to insist upon it. She said that the exercise of the Option would necessarily have remained private, as there would be no change to the land registration (as the Property is in her sole name), and therefore no stamp duty would be attracted upon the exercise. She points out that none of KCCM's letters preceding the 9 July 2021 letter mentioned stamp duty at all and that, despite the fact that H must have been advised that stamp duty was not chargeable on the transfer, he unreasonably insisted, through his solicitors, on the inclusion of the clause including the indemnification element. This issue was the subject of several emails between KCCM and W which followed the 9 July 2021 letter. On 6 August 2021 W emailed KCCM to confirm her acceptance of the terms but objected to the inclusion of clause 9. KCCM responded the same day confirming that the clause would remain in place and adding that With respect, we fail to understand your arguments on the stamp duty issue. While it is your position and contention that there should not be any stamp duty payable for and on the Settlement Agreement, we do not see that there shall be any prejudice caused to you if such stamp duty clause is included in the Settlement Agreement and that there is any valid reason to support your objection. W was not satisfied with this, and responded on 8th August 2021: Entirely without prejudice to my rights and entitlements, and after seeking independent legal advice on my side. I insist not to include the stamp duty clause in my Settlement proposal to safeguard the interests of both parties in terms of both civil and criminal responsibilities. There was a slight delay, and on 16 August 2021 KCCM replied:

1. Concerning your settlement proposal for procuring our client's abandonment of his interest, benefit and entitlement in the [Property], our client is always entitled to put forward reasonable terms to protect his interest and should not be compulsorily accepted the terms put forward by you. In this regard, our client insists of including a stamp duty clause as per our draft as part of the settlement agreement and would not accept any settlement proposal /agreement without such clause.
2. If your settlement proposal is for exercising your rights of first option referred to Preamble (T) of the Consent Summons to acquire our client's interest and benefit and entitlement in the [Property], to include a stamp duty clause proposed by our client is reasonable in all aspect as it is always your obligation being a purchaser to pay the same. It is not necessary to determine as a fact whether the acquisition by the Wife of the Husband's 50% beneficial interest in the Property by the exercise of her option under Preamble (T) of the Consent Summons would have attracted ad valorem Stamp Duty or would have fallen within one of the exemptions allowed by the Inland Revenue Department. Preamble (T)(iv) clearly

envisaged the possibility that an agreement for transfer of the beneficial interest might attract Stamp Duty, and recorded the parties acknowledgement and agreement that, if it did attract such a levy, the party exercising the option would be responsible for paying it. The Stamp Duty clause in the draft Sale and Purchase Agreement therefore merely reflected Preamble (T)(iv) of the Consent Summons. H's insistence, through his solicitors, that the Sale and Purchase Agreement contain such a provision was not unreasonable.

D1.2 The Offers Offer #1 August 2021 On 1 August 2021, W informed H by WhatsApp message that there was a potential buyer for the Property at a sales price of HK\$21M. He responded with three texts in the space of about 20 minutes, thus: 21 million? Of course not I will only sell at 22.5 million and There is no transaction, then I must follow survivor (sic) report. There is reference value for upper flows only if there is a transaction. The next day the buyer increased the offer to HK\$21.8 million, and H was immediately informed of this by W. On 3 August 2021, H responded by asking W to bear his proportion of the price difference between the minimum price they had agreed and this offer, i.e. HK\$350,000. This was not acceptable to W. On 4 August 2021, W made a counter-proposal that she would pay H on the basis of HK\$22,500,000, but minus half of the remaining balance of the mortgage loan and half of the management fee deposit. There was no reply to this counter-proposal from H. The potential buyer looked elsewhere in the same block and on 18 August 2021 he purchased Flat 25B instead for HK\$21,900,000. The offer of HK\$21,800,000 was the first to be received after the Property had been on the market through estate agents for some 2 months. W argues that H's insistence on maintaining the Minimum Price, or accepting the offer only on the condition that W compensate him for 50% of the difference between the offer and the Minimum Price, was unreasonable, including having regard to Preamble (P), which provided for the parties to be at liberty to discuss and agree whether to sell at a nearest offering price. She adds that the suggestion that she compensate H for the difference is fundamentally inconsistent with the agreement that the net proceeds be equally divided i.e. Preamble (H). Preamble (P) acknowledges that the parties can discuss whether or not to accept a lower price, and in a falling market where an offer close to the asking price might not be repeated, it is a sensible to do so. Preamble (P) does not impose an obligation on either party to accept less than the Minimum Price. At this time H was regularly using online property valuation tools provided by Hong Kong banks to keep abreast of the trends in the property market and, he says, these all indicated the Property was worth in excess of the Minimum Price. At Trial, H accepted that these e-valuations provided indicative values only but he maintained that they were still useful indicators in the absence of an indicative transaction or an updated professional appraisal by a professional surveyor. All of these e-valuation sites contain disclaimers, as would be expected. Hang Seng Bank's, for example, states The information and valuation on any property herein quoted are provided by the service provider of Hang Seng Bank Limited and are for reference only and are not binding on the Bank. The Bank does not warrant the accuracy, timeliness, or completeness of any such information and valuation or whether they are fit for any purposes. The Bank also does not assume any liability for any reliance on such information and valuation by any person. W's counsel put to H that the fact that the potential buyer, who had offered HK\$21,800,000

for the Property, had then purchased Flat 25B for HK\$21,900,000 later the same month, was an indication that the market price for the Property was lower than the use of e-valuations might suggest. He disagreed, saying he knew that the owner of Flat 25B was from Macau, and was in urgent need of money, so wanted to sell the property as soon as possible. It was also put to H that he was being unreasonable in demanding compensation from W as a condition of his agreement to sell the property for \$700,000 less than the agreed price. He explained that he did not wish to sell the Property at a loss, and was proposing a feasible option that would satisfy the needs of both parties.

Offer #2 November 2021 On 28 November 2021, W received an offer of \$21,000,000 for the Property. Again, she immediately texted H and emailed his lawyers, KCCM. About 30 minutes later, H texted back to say that he did not care about the actual selling price so long as he was compensated for the price difference, and followed up with another text saying that this was in accordance with the Consent Summons. W refused and the offer was withdrawn. Again, W says that H's position was unreasonable and inconsistent with Preambles (H) and (P).

Offer #3 January 2022 In January 2022, Midland Realty told W that they had a potential buyer for the Property who had offered \$21,500,000 for it. W communicated the offer to H through solicitors, Kim & Company () by letter of 17 January 2022 to H's solicitors KCCM. This letter referred to the purchase (by the first prospective buyer) of Flat 25B, i.e. a flat with the same configuration as the Property, but on a higher floor, for \$21,900,000, and that as such, the offer of \$21,500,000 reflected the market value of the Property. The letter invited the Husband to accept the offer and to revert urgently, by 19 January 2022. The reply from KCCM referred to another transaction, the sale of Flat 28A on 21 October 2021 for \$27,000,000, and that their client considered to refer to only one transaction, i.e. for Flat 28B, without also noting the sale of Flat 28A, was misleading and unfair. The letter enclosed copy records of online valuations of the Property obtained from Standard Chartered Bank and Hang Seng Bank, both showing an estimated value of the Property at \$23,240,000. The letter then concluded by rejecting the offer of \$21,500,000. The Wife says that the reliance on e-valuations was misleading and she pointed to an e-valuation she obtained on 21 August 2021 for Flat 25B suggesting a market value as at that date of \$24,260,000, compared with its sale, less than a month later, for \$21,900,000, a difference of some 10%. Each of these three Offers, and the Husband's rejection of them, was prior to the formal reappraisal of the Property by Dudley Surveyors, to which I will come. In short, the Husband's position in the 8 months from May 2021 to January 2022 was that he would not accept anything less than the Minimum Price for the Property, and that if W wanted to sell it for less, she would have to compensate him for his share of the difference.

Offer #4 May 2022 In late May 2022, a client of Billions Property Services (Agency) Limited offered \$20,000,000 for the Property. By this time, the updated valuation report had been obtained, from Dudley Surveyors, dated 24 February 2022. The Wife asserts that there was a delay in obtaining this and that this was the fault of the Husband this will be dealt with below. The Dudley Report gave a revised market value of \$21,100,000 and a suggested reserve price for public auction of \$19,000,000. By the time of Offer #4, there had been three unsuccessful attempts to auction the Property, on 6 April 2022, 20 April 2022 and 11 May 2022. No bids had been received during any of the attempts. By May 2022, W had instructed

solicitors TC Wong & Co (). On 19 May 2022 TCW wrote to KCCM to say that the parties had agreed to put the Property for sale at HK\$19,800,000 and asking that this be confirmed. On 23 May 2022, KCCM responded by saying there was no such agreement, and that H agreed to put it up for Dudley Surveyors appraised market price of HK\$21,100,000 and that he would consider any offer for HK\$20,000,000 if made within 3 months. On 20 May 2022, a few days before Offer #4, H had sent W a text to say he was willing to accept \$19,800,000 for the Property. On 23 May 2022, having learned of the offer for \$20,000,000, he confirmed by another text to W that he would accept it. On 24 May 2022 W's solicitors wrote to KCCM confirming the offer of \$20,000,000 and asking for an immediate response confirming that H agreed to the sale of the Property for that price. On 25 May 2022 W sent a text to H asking that he get his solicitors reply as soon as possible, as the buyer could not wait. H immediately replied, saying that he had already told them. However, KCCM did not reply until 27 May 2022 (a Friday), when they wrote in these terms: Having taken into account of the market value of the [Property] estimated by Dudley Surveyors and having considered the recent active property transactions in the market, we are instructed that our client requests your client to make a counter-offer of HK\$21,000,000 to the potential buyer in order to bargain a higher selling price in the interest of both parties. In cross-examination, H was asked why he refused to sell the Property at HK\$20,000,000 just 16 days after the last failed auction, at which time he had expressed a willingness, admittedly reluctantly, to accept any offers over HK\$19,000,000. His response was that the offer was lower than Dudley's valuation of the current market value and he was not willing to bear the loss. He added that as parents, he and W should keep more of the assets for the future use of the Child. It was then suggested to him that he was taking a wait and see approach to try to sell the Property at a higher price. His response was In the past two years, the property market did go up. Of course in hindsight we can see the market is going down. Therefore I hope that the Property can be sold at the price we bought it. No gain/no loss, or just a small loss. The deal was lost and the buyer went elsewhere. Offer #5 August 2022 In August 2022 a Centaline client offered \$19,000,000 for the Property. W's solicitors wrote on 1 August 2022 to KCCM asking that they take urgent instructions from H on the offer. They responded on 2 August 2022: As the offer of HK\$19,000,000 is far below the estimated market price of the [Property], we are instructed that our client does not accept such offer. The letter did not propose the making of a counter-offer. In re-examination, H said that he was at this time very busy with issues relating to the Child including whether he should apply to the Court to make an application to change the terms of access. Offer #6 August 2022 Offer number 6 was received in August, again from a Centaline client, for \$19,500,000. W's solicitors wrote to KCCM on 12 August 2022 asking for an urgent response. Their letter expressed the view that this was a reasonable price given the auction reserve of \$19,000,000 suggested by the Dudley Surveyors Report, and it warned that in the event the Husband refused to cooperate reasonably in achieving a prompt sale of the Property, an application to the Court would be made for directions. The letter sought a reply by 15 August 2022. On 15 August 2022 KCCM wrote back, repeating the view of the Husband that the estimated market price of the Property was much higher than \$19,500,000 and that he disagreed to sell it for that figure. Offer #7 February 2023 On 1 February 2023, W

received an offer from a client of Hey Home Property, again for \$19,500,000. The same day her solicitors wrote to KCCM to ask that they take urgent instructions on the offer, and that H should accept it. Once again, reference was made to the reserve auction price of \$19,000,000. This time, KCCM had instructions to accept the offer, and they wrote back on 3 February 2023 to confirm this. Unfortunately, by the time they did, the offer had been withdrawn.

D1.3 Alleged non-compliance with inspection provision Preamble (M) provides for H to make the Property available for the appointed agents to bring clients to view it between 2pm 6pm every Saturday on reasonable advance notice. W argues that H seldom accommodated deviation from this schedule to allow potential buyers, who preferred other times, to inspect the Property. Requests to inspect on 22 May 2022 (a Sunday) and on the evening of 29 June 2022 (a Wednesday) were refused, and a few potential purchasers were lost. Further, H was late for an inspection arranged on 31 July 2021 and on another occasion when he could not be contacted. H did make the Property available for inspection on a few occasions outside the agreed Saturday hours, but equally he refused several requests for viewing at other times. He explained in the witness box that one of the reasons for the set times on Saturday was the Covid-19 pandemic; that it was not possible to leave a key with the management office, as he has a large dog and was concerned it might attack any visitors, and that his refusal was either because he had to take care of the Child during his Sunday or other access times, or his work commitments at the dental clinic.

D1.4 Alleged delay in responding to proposed auctioneers/delay in instructing valuer/surveyor The Consent Summons provided for two things to happen if the Property remained unsold 6 months after it was signed, i.e. by 6 November 2021. First, according to Recital (J)(ii) that the parties would sell it at a reserved price determined by reference to an independent valuation report stating the updated market value, such report to be called for and obtained within seven days of the expiry of the six months, and secondly, that they would try to auction the Property for two months after the six months as another method of sale: Recital L. Recital K provided for the parties to agree on the auctioneer by discussion within the last two months of the six months period, so as to be ready to attempt sale by auction when it expired. W says that each of these steps were substantially delayed, and deliberately so, by H, and that this hampered the efforts to sell and was contrary to the terms of the Consent Summons, now Order. By August 2021, only one offer had been received for the Property, and this was below the Minimum Price. Anticipating the possibility that no offers at or above the Minimum Price would be received before the end of the 6 month period, W began to look for auctioneers and valuers. On 15 September 2021 she obtained quotations from 3 auctioneers, C S Auctioneers Limited, AA Property Auctioneers and Memfus Wong Auctioneers Limited (Memfus Wong). On 5/6 October 2021 she obtained quotations from 3 valuers, Centaline Surveyors Limited, Dudley Surveyors Limited and Citiland Surveyors Limited. On 6 October 2021 she sent the quotations by email to KCCM stating her preferred auctioneer and preferred valuer. No reply was received by W from KCCM within the 7 days provided for in Preamble (K)(i). She sent reminder emails to KCCM on 20, 26 (x2), 27 October and 3 November 2021. KCCM finally replied on 3 November 2021 a full four weeks after W's letter: We are instructed to inform you that having considered all information and/or quotations

obtained by you from various Auctioneers, our client proposes to instruct and engage Dudley Surveyors. If you agree to our client's proposal, please instruct Dudley Surveyors and provide us with copy all correspondence, emails, documents and information exchanged or obtained from Dudley Surveyors for this matter." This response did not comply with Preamble (K)(i) of the Consent Summons in confirming the choice of auctioneer and doing so within 7 days of W's letter of 6 October 2021. On 4 November 2021 W replied by email pointing this out: that Dudley Surveyors were not auctioneers, and that the letter did not indicate H's choice of auctioneers. She objected to using Dudley Surveyors as the valuer given their quote was higher than the other two surveyor firms. During his evidence, it was put to H that he had deliberately delayed in responding to W's proposal. Although he accepted the letter was written on his instructions, he said that it was a misunderstanding, and that in any event it did not cause any delay. I reject this evidence. As pointed out by his solicitors on several occasions in correspondence with W and her solicitors, the terms of the Consent Summons now Order, including Preamble (K), are clear. If there was a misunderstanding of what Preamble (K) required, it was his fault or the fault of his solicitors. And the delay is obvious. On 8 November 2021, KCCM by letter proposed on behalf of H the appointment of Dudley Surveyors to provide the updated valuation, and Memfus Wong to handle the auction. As for the fees of the auctioneer and surveyor, the letter said that as Preamble (H) already provided for the expenses for the sale to be deducted from the sales proceeds, and therefore shared equally, there was no need for a specific further agreement to share the fees equally. On 10 November 2021 W replied, confirming her agreement for Memfus Wong to be engaged, but disagreeing with the choice of Dudley Surveyors, who had provided the highest of the three surveyor quotes. She objected to having to pay the fees of the surveyor and auctioneer up front, and that both parties should equally contribute to the fees payable at the time of appointment. On 26 November 2021 W wrote to KCCM noting the absence of a reply and said she would be forced to seek assistance from the Court if necessary. There was no response to either of these letters by KCCM. On 9 December 2021 W filed a Summons (December 2021 Summons) seeking directions from the Court with respect to the Consent Summons, setting out in a supporting affirmation the events including H's delayed response to, and non-response to her letters. About a week later, H filed his own Summons seeking to vary the custody order, alleging that the Child had been physically abused by W and W's sister. W says that this was a calculated effort by H to get her to backdown and withdraw her Summons. I should add that at a Multi-Disciplinary Case Conference on 6 January 2022, it was concluded that H's complaint against W for alleged abuse of the Child was not established. W had prepared and filed the December 2021 Summons herself. After receiving H's Summons she sought legal advice from KC, and she withdrew the Summons (leave to withdraw was granted by this Court on 27 January 2022 with costs to H) and agreed to appointed Dudley Surveyors to prepare an updated valuation report for auction sale by Memfus Wong. On 21 January 2022 KC wrote to KCCM to confirm this. This letter noted that she had agreed to the appointment of these surveyors/ auctioneers, notwithstanding H's breach of Preamble (K)(i). KCCM replied on 21 January 2022 disputing that their letter of 3 November 2021 had caused any delay to put the Property

up for auction, and that it was W's refusal to accept H's choice of surveyor and auctioneer which was to blame for the delay, and went so far as to say that it was obvious and clear that whether a reply given by our client within 7 working days from the receipt of her proposal is simply irrelevant given that even if a response had been given within 7 days, there was no suggestion that W would have accepted it. By letter dated 21 February 2022, W's solicitor wrote to Dudley Surveyors asking that their report should contain

- a) Current Market value and b) Value for Sale by Auction. On 24 February 2022, Dudley Surveyors provided their report giving an updated market value of HK\$21,000,000 and reserved price for sale by auction at HK\$19,000,000. I should note, at this point, that there is nothing in the Consent Summons which seems to allow for two different values to be given for two different methods of sale. W accepted this when she gave evidence. On 28 February 2022, W's solicitors engaged Memfus Wong. Due to the uptick in Covid-19 cases at the time, the first auction did not take place until 6 April 2022. Three auctions were held: on 6 April, 20 April and 11 May 2022. No bids higher than the reserved price were received. On 12 August 2022, W proposed to appoint Citiland Surveyors Limited to prepare an updated valuation report for the market value and repossession value for private sale and auction. After KCCM sought clarification of the term repossession sale, and W's solicitors spoke with Citiland, they replied to KCCM to say that repossession value was a reference price commonly adopted for sale by auction. Thereafter, W continued to market the Property through agents, and Offers #4 to #7 were received, with the results already noted. During this time, H was also dealing with an allegation that he had abused the Child, arising from a Summons filed by W on 31 January 2022 asking for an order that access be suspended. The police began an investigation into the allegations and an MDCC was convened. Ultimately, the MDCC concluded that the allegations were not substantiated and the police closed their investigation in August 2022. After Offer #7, W proposed through her solicitors to re-engage an auctioneer firm AA Property Auctioneers Limited for sale by public auction at a price of HK\$19,000,000: letter TCW to KCCM dated 23 February 2023. KCCM's response came on 27 February 2023, saying that they had been proposing on behalf of H to do exactly that to auction the Property, but that this had been objected to by W. The letter went on to assert that a sale by auction for a reserve price was misconceived and inconsistent with the terms of the Consent Summons, and that the parties had agreed to sell at the market price, including an updated market price as obtained through a re-valuation of the Property. The letter again referred to H having done his own research using e-valuation tools, and that these showed the estimated current market value of the Property in the region of HK\$22,590,000 to HK\$22,810,000 and that therefore the proposed selling price of HK\$19,000,000 was too low. The letter proposed to re-try public auction on a market price of HK\$21,000,000, but that, having regard to the fact that it was a year since the re-valuation report, the parties should agree to obtain an updated valuation report from Dudley Surveyors before instructing an auctioneer. No further updated valuation report has been prepared including because there is now a disagreement as to whether the valuer should give an opinion on the market value alone or on some other reserved value basis. As such,

no further attempts to auction the property have been tried. The level of disagreement is illustrated by correspondence between the parties solicitors in mid-2023, in the lead-up to the hearing in July 2023. It had been agreed by this stage that an updated valuation would be obtained, and that it should be provided by Citiland Surveyors and that thereafter further attempts to sell should be made. The dispute was whether the Property should continue to be offered in private sale or further attempts to auction should be made, and at what price for the Property the offer/auctions should be pitched. On 15 May 2023, TCW wrote to KCCM, in these terms: In our view, if the Property is to be put for public auction for sale at the level of Current Market Value, it is inherently improbable that the Property can be successfully sold. It defies logic and common sense that any bidder attending the auction will bid for the Property at the Current Market Price and not for the parties to put a Reserve Price for auction sale, above which the Property shall be sold when the parties cannot agree on both the Current Market Price and the Reserve Price. Taking into consideration the decline in the Centa-City Leading Index () of 7.4% since the last valuation report date of 24/2/2022 obtained from Dudley up to the latest available date of 7.5.2023 (copies of CCL for the period from 21 to 27 Feb 2022 at 179.1 and for the period from 1 to 7 May 2023 at 165.87 are enclosed herewith), our client is of the view that the Current Market value of the Property shall depreciate at the same rate. Hence, our client reasonably proposes to put the Property for private sale at a Market Value of \$19,538,600 and for auction at a Reserved Price of \$17,594,000 with reference to the 7.4% market downward adjustment from Dudley's valuation on 24.2.2022. (Emphasis in original) KCCM replied on 16 May 2023, reiterating the position that H had always complied with the terms of the Consent Summons, and in particular that the Property would be continued to be marketed at the market price or at such price to be agreed and that to include any other price for auction purposes was wholly unnecessary and our client has never been agreed for so doing. The letter continued:

6. The Centa-City Leading Index is irrelevant and cannot show or reflect the updated valuation of the Property. Each property has its own value and has condition and criteria different from the other. Our client fails to understand how such Index can advance your client's arguments or can reflect the updated market value of the Property and sees no reason why your client does not seek e-valuation report from banks in Hong Kong for direct estimation of the updated market value of the Property.
7. Your client apparently choose to deliberately ignore the e-Valuation Reports of various banks in Hong Kong which were provided to her on 27th February 2023 and 29th March 2023 in our previous letters showing the updated value of the Property. The e-Valuation Reports provided to your client, which have never been challenged by your client, show and evidence the market of the property is much higher than that alleged by your client. Copy e-valuation reports of the Property obtained from Citibank, Hang Seng Bank and the Standard Chartered Bank on 16th May 2023 showing the updated market value of the Property of HK\$22,810,000 are enclosed for your client's attention. (Emphasis in original) E. Discussion and Conclusion I have already referred to the nature and intended effect of the agreement embodied in the Consent Summons now Consent Order: it was designed to achieve a clean

break, by disposal of the Property, being the principal asset, for as high a price as possible, and the division of proceeds. The Property remains unsold 3 years after the Consent Summons. Consequently, the clean break has not been achieved. The Decree Nisi, pronounced 2 December 2022, has yet to be made Absolute. Inspections Preamble (M) W says that H's failure to comply with Preamble (M) and willing to allow some flexibility in permitting inspections of the flat is one of the reasons for the non-sale. I am not convinced by this. For the most part, H complied with and facilitated viewings during the scheduled Saturday times. The reasons he gave for not allowing the flat to be viewed at other times are not, having regard to the circumstances at the time, unreasonable. Nonetheless, I will add that, now that the Covid-19 pandemic is largely behind us (this being one of the reasons for the limited inspection times) it seems sensible for the Property to be able to be inspected at other times during the week. I am sure that H can make arrangements for his dog to be properly secured or moved elsewhere during the inspections, and arrange either for a duplicate key to be provided or for him to be present at additional inspection times other than the relatively narrow Saturday window in the current Preamble, which may not be convenient to potential buyers. Indeed, the fact that H was willing to enable one or two inspections at other times of the week demonstrates that this is not beyond his ability and schedule. Other inspection times should be arranged, and a key left with, e.g. the management office of the building, with the dog being appropriately secured or removed from the flat to enable inspections to be carried out smoothly. Re-valuation and auction Preambles J(ii) and K(i) I have considered carefully whether the delay in obtaining an updated valuation of the Property has been caused or contributed to by misconduct or unreasonable behaviour on H's part. I have found that H did not comply with Preamble K(i), and I have rejected the explanation he put forward, i.e. the supposed misunderstanding. I have found that this resulted in at least a 3-week delay. However, his delay in responding was not the only reason why the Property was not put up for action until 2022. For several months W objected to H's choice of Dudley Surveyors, but then finally relented, after which Dudley promptly provided an updated market value and reserved price for auction. The difficulties with selling the Property have been compounded by the current dispute over whether the Consent Summons/Consent Order enables essentially different estimates to be provided for the purposes of sale through an agent or sale by auction. Whatever the origins for the dual values proposed by the Wife she suggests that the idea of repossession value was suggested by someone at Citiland when she contacted them nothing in the Consent Summons/Consent Order supports the obtaining of an updated valuation providing two different prices, one for the purposes of private sale and the other for auction. Rejection of Offers downturn in the market The main reasons the Property has not been sold by now is that the parties have differing views of the value of the Property in the current market and differing opinions as to whether to sell it as soon as possible, accepting a lower price, and waiting for the market to recover. W was keen to accept each of the 7 Offers. H was only prepared to accept the last Offer, which was unfortunately withdrawn. In his direct communications with W and through solicitors, he has repeatedly insisted that the Property is worth much more than the Offers presented. During the nearly 3 years since the Consent

Summons there has been a downturn in the local property market. This has most recently been reflected by the Government's decision announced on 28 February 2024 that it would cancel various measures previously introduced to curb the rise in property prices. This downward trend has impacted on the market value of the Property. This is clear from the sequence of declining offers and from the Dudley Report. W quite clearly accepts that the Property is now not worth the Minimum Price but considerably less. H is more reticent. The history of the attempts to sell have shown that H has, at times, accepted that the Property may be worth less than the Minimum Price. He was only prepared to accept the first Offer (in August 2021, for HK\$21,800,000) on the basis that W recompense him for 50% of the difference between that and the Minimum Price, but would have accepted the last (February 2023, for \$19,500,000) had it not been withdrawn, without any request for W to compensate him for his loss. However, it is also clear from the evidence including at Trial that H is still hopeful of obtaining a sale for the Minimum Price or as close as possible to it, and he maintains that this is achievable. This is seen in his repeat reference to and reliance upon online valuation tools. Despite acknowledging that actual sales records and valuations are more reliable indicators of the true market value of the Property, he has persisted in his view that the indicative values obtained using online valuation tools provided by various banks are representative of the market value of the Property. He has maintained this stance despite all indications to the contrary: the gradually declining Offers; the complete lack of any offers for or above the Minimum Price over the best part of 2 years during which the Property was marketed; the Dudley Valuation. This view has been maintained despite all of these indicators, including as seen in KCCM's letter of 16 May 2023. To be entirely fair to H, I accept that in response to the earlier offers, in 2021, that it may not at that time have been unreasonable of him to use as a reference the values given by these online tools, in arguing that the Property should command a higher price, and at least at the level of the Minimum Price agreed. I also acknowledge that many of KCCM's letters are referencing the e-valuations in support of the argument that the Dudley valuation of \$21,100,000 remains a reasonable and achievable price. However, H's fluctuating views have contributed to the difficulty in achieving the long-delayed sale. It is, for example, inconsistent for H to tell W on 3 February 2023 that he would accept an offer of HK\$19,500,000 for the Property (KCCM's letter of that date) and another letter written in the same month (KCCM's letter dated 27 February 2023) refusing to confirm that the Property should be marketed at HK\$19,500,000 to see whether other potential buyers might be tempted at that price; instead maintaining that the Property should be auctioned or sold for \$21,000,000 based in part on e-valuations showing it to be worth in excess of the Minimum Price. Given the declining offers following Dudley's report through to the 7th offer in February 2023, H must have appreciated that the e-valuations were presenting an optimistic and quite unrealistic estimate of the value of the Property as it was at that time. I am not unsympathetic to his wish for the Property price to bounce back, so that the loss can be minimised, but the mutual intention underlying the settlement was for a sale of the Property at the best possible price within a reasonable time. It is contrary to the purpose and intended effect of the Consent Summons and the Consent Order to make some efforts to sell, and if unsuccessful, then to ride out the downturn and

wait for better times, repeatedly relying upon information which paints an unrealistically optimistic estimate of the Property's value. Sales of properties as a result of a divorce settlement or judgment are in some respects, forced sales, where the luxury of waiting for the right buyer at the right price is often not present. In my judgment, H's responses to the first three offers were not unreasonable, however frustrating H's responses were to W, and how good these offers, with the benefit of hindsight, now appear to be. H's responses to the later Offers are more concerning. This is particularly so in respect of Offer #4. Having confirmed with W on 23 May 2022 by text that he would accept Offer 4, i.e. \$20,000,000, H changed his position and insisted through his solicitors that they try for \$21,000,000, resulting in the loss of the sale. H's text to W on 25 May 2022 said nothing about having instructed his solicitors to refuse to accept \$20,000,000 and instead counter-offer \$21,000,000. As a result of this the deal was lost. H's responses to Offers #5 and #6 were unhelpful in simply refusing them without suggesting any counter-offer. H's response to Offer #7 was not unreasonable he accepted it although a more urgent response might have achieved a sale. In my view H has been inconsistent, and the changeability of his position one minute accepting the need to be pragmatic and accept a lower offer, the next insisting on a higher price is a relevant and material factor which supports W's application. Although I accept the submissions of the Wife that the entitlement of H to remain in the Property until 14 days before completion of its sale, rent free, provides him with significantly less incentive to sell compared with her, this is not something which she did not know at the time she signed the Consent Summons. Nor do I accept W's submissions that the downturn in the property market could not have been foreseen. Hong Kong's residential property market has in the past several decades seen significant fluctuations, and both rises and falls in prices have been experienced. Further, the provision of the Consent Summons enabling a re-valuation of the Property if unsold for six months, itself recognised the possibility that the Minimum Price would not be achievable and the parties should set their sights lower. What was unanticipated, as I have said, is that the Property would remain unsold for several years. One of the key reasons for this, I find, is the Husband's reluctance to accept that the Property is worth considerably less than the Minimum Price, and likely (as indicated by the Offers), less than the Dudley Revaluation. Everything points towards H being less keen to sell the Property, and to maintain his position that the parties should continue to seek a higher price to minimise the loss. I have not ignored the events which have occurred since the Property was last on the market: both parties have been engaged in back-and-forth over their disagreements in on interpretation of the provisions in the Consent Order, and W must take some of the blame in insisting on obtaining an updated valuation not simply at market price but also repossession price. An updated valuation could and should have been obtained before now. Nonetheless, I accept the Wife's submissions that the Husband has less incentive to sell compared with her he is staying in the Property rent free, paying half of the mortgage, while W is paying her rental (with some contribution by H towards this rent). She wants to acquire her own flat, moving closer to the Child's school. These are relevant matters to be taken into account. In all the circumstances, I am satisfied that the Consent Order should be varied to provide further directions for the sale of the Property so that the

clean break can finally be achieved. An updated valuation will be obtained, from Dudley Surveyors or, if they are not available, from another Surveyor to be agreed between the parties and absent agreement to be decided by the Court, with the costs to be shared equally. Instructions are to be given within 14 days of the Order I will make. That valuation should give an updated market price for sale through estate agents as set out in the Consent Order. If no offers are received for or above the updated market price within 3 months, a further updated valuation is to be obtained by the parties. I accept the submissions that in the circumstances there should be some flexibility to enable negotiations to take place. I do not accept that W should have the latitude she asks for i.e. to depart 10% from the revised market value. If the revised valuation is say \$20,000,000, this would enable W to accept an offer at \$18,000,000. That is too much leeway. In my view 5% is reasonable. This does not depart from the meaning and intent of the original agreement embodied in the Consent Summons, it reaffirms the need for the clean break to be achieved, without further delay. It is a needed change, in my view, having regard to situations where W received an offer within that sort of range i.e. within 5% less than the asking, only for the sale to be lost. I have in mind in particular, what happened with Offer #4, where H agreed to the price, then changed his mind. It goes without saying, but is worth emphasising, that of course W should (and the instructed agents should) use her best efforts to obtain a sale as close as possible to the updated market price. The Husband has had the benefit of the property for far longer than anticipated, and this was not the original intent of the parties. I modify the Order to the extent that he is to move out of the Property within 6 months of this Judgment, unless the Property is sold within that period of 6 months with completion to take place after the 6 month period, in which case he may remain living in the Property and vacate it the Property no later than 14 days prior to sale. Either way, he must comply with his undertaking under Preamble (Q). If H is able to remain in the Property for a further 6 months, he will have lived there for 3 years since the Consent Summons was signed. If the Property is still unsold after this 6 months period, and the parties cannot agree on what should happen to it, including whether it should be rented out and the rental be applied towards the outstanding mortgage, or should remain vacant to enhance the sale prospects, the parties may need to seek further directions. For the avoidance of doubt, W is to be responsible for all formalities relating to the sale. F Order I therefore make the following Orders. The First Summons is dismissed. I will deal with costs below. On the Second Summons there be an order that the terms of the Consent Order dated 27 July 2023 be varied to the extent that

- (1) The parties do obtain an updated report of the market value of the Property from Dudley Surveyors, the costs to be shared equally.
- (2) If Dudley Surveyors are not available to provide the updated report, then another firm of Surveyors by agreement between the parties, failing which they are to write to the Court within 7 days nominating one (1) Surveyor each and the Court will appoint the Surveyor.
- (3) Instructions to the Surveyor are to be sent within 14 days of this Judgment/Order, and the report to be made available within 14 days thereafter.

- (4) Upon the updated Surveyor's report being obtained, the Property is to be placed for sale within 7 days of the report being provided, for the updated market value. The same number of agents are to be engaged as provided for in the Consent Order.
- (5) W is to be at liberty to negotiate a sale of the Property and accept offers within 5% of the updated market value.
- (6) All offers to purchase received by the Respondent are to be promptly conveyed to the Petitioner.
- (7) For the avoidance of doubt, the Respondent is at liberty to accept the offer at or above the updated market value or within 5% of such updated market value, provided she promptly informs the Petitioner of the same.
- (8) In the event that the Property remains unsold 3 months after it is placed on the market, there be a further Surveyor report to be obtained, and the Property is to be marketed for the further updated market value. Additional updated reports are to be obtained every 3 months until the Property is sold.
- (9) The costs of the updated valuation reports be shared equally.
- (10) The Husband is to vacate the Property within 6 months from this Order, save that in the event a Sale and Purchase Agreement is signed within the period of 6 months with completion to take place after the 6 months period expires, H is entitled to remain in the Property until 14 days prior to completion. Either of these events will fulfil H's undertaking pursuant to Preamble (Q).
- (11) There be liberty to apply generally, including in respect of the implementation of these orders, by letter to the Court copied to the other party. Given that the Property is in the name of the Wife, there is no need for an order in terms of paragraphs (1)(iv) or (v) of the Second Summons. Costs normally follow the event, and I have dismissed the First Summons, and have granted, with some changes, the relief sought by the Respondent on the Second Summons. H expended considerable costs in defending the First Summons, and resisting the Second Summons which also seeks a variation of the Consent Summons. However, I must bear in mind that a significant proportion of the written evidence filed in support of the First Summons was relevant to and supported the Second Summons insofar as it sought variation of the Consent Order, not simply variation of the Consent Summons. It would be unjust in these circumstances simply to make a costs order which follows the event i.e. the dismissal of the First Summons, as this would be to award H his costs of several of the affirmations which were relevant also to the Second Summons and to deny W her costs of the same. Having said this, in my view W did not adopt a reasonable procedure by seeking to challenge the Consent Summons in the way that she did. It is clear to me, and I have found, that the Court has no jurisdiction to vary a Consent Summons. W could have conceded this point, but did not. A significant proportion of the written submissions are devoted to this issue. Exercising my discretion, I have decided that the fairest and most

appropriate Order on both Summonsses should be No Order as to costs including all costs reserved. This will be a costs order nisi. If, having regard to the Orders made on the Summonsses and the relief granted/refused, either party wishes to vary this costs order nisi, they should write to the Court within 14 days i.e. by no later than 5pm on 24 May 2024, setting out brief reasons for such variation (the letters should not be more than 3pp in length and provide a summary of what is contended). The party opposing may write to the Court within 7 days thereafter with their response. The Court will then give directions for the application(s) to be dealt with on paper including for the filing of written submissions in the usual way. Both parties should assist the Court in their letter(s) by proposing such directions. The Court will likely limit the length of the written submissions and the number of authorities to be cited in support. This has not been an easy matter and I acknowledge the very able and comprehensive manner in which both teams conducted this case on behalf of the parties. (Peter Barnes) Deputy District Judge Ms. Isabel Tam instructed by Kenneth C.C. Man & Co, for the Petitioner Ms. Amy Chan instructed by T.C. Wong & Co, for the Respondent - PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V h#Dy h#Dy h#Dy h#Dy h#Dy h#Dy h#Dy h#Dy gd#Dy gd#Dy gd#Dy gd#Dy gd#Dy gd#Dy gd#Dy |rkaZNZNZNZ h8Yl h8Yl h8Yl h8Yl h8Yl h#Dy h#Dy h#Dy h#Dy h#Dy h#Dy h#Dy h#Dy gdnq gd#Dy gd#Dy ~shjh)s h6I! h8Yl h8Yl h8Yl h8Yl h8Yl h8Yl h8Yl gd3G gd_q gdwa\ gdnq hwa\ hwa\ hwa\ hwa\ h8Yl h6I! hwa\ hwa\ hwa\ h8Yl ~v~n~ gdcX& hwa\ ho#J {sk{ ho#J hwa\ ho#J hwa\ hwa\ gdwa\ gdwa\ ho#J hwa\ gdo#J gdo#J gd[p gdcX& wlalXO ho#J wqwh h`E\_ h`E_ gdo#J gdo#J gd02 gdo#J n_M? c[SKS[K[K ho#J hXP. h+aF ho#J gduF gdo#J ho#J ~wpw hi&k ho#J hi&k ho#J hI U gd}{ gd}{ gduF gdo#J hi&k hi&k ho#J gdo#J gduF gd}{ gd}{ gd}{ gd}{ ho#J hK+F ho#J ho#J ho#J ho#J ho#J hK+F ho#J hK+F hK+F ho#J gd4\$D gdK+F gdo#J gdK+F gdo#J h+aF h+aF hK+F h+aF hK+F ~vncn[ScH h4\$D ho#J ho#J gdp" gdo#J ho#J ho#J gdo#J gdK+F gdp" h| hUcc ho#J gdK+F gdo#J ho#J rg\NF gdo#J gd\$N gdK+F gdK+F h>]4 ho#J gd:\$ ho#J ho#J gdK+F gd*p hgF\ hgF\ h`GV gdo#J gdK+F gDMco gdgF\ gdgF\ hMco hgF\ h\$RJ hgF\ hgF\ hgF\ gdgF\ gdVYD gdK+F hgF\ hgF\ hVYD hVYD hVYD hVYD hMco g_Wg hgF\ gdT> ho#J ho#J ho#J ho#J hwa\ ho#J gdwa\ gdo#J ho#J ho#J gdMB gdK+F gdo#J h'Wk hfp(hfp(gdMB gdK+F gd.t gd[p gdMB gd'Wk gd'Wk gd'Wk gd'Wk gdyf gdfp(hfp(hfp(hfp(hfp(hfp(hfp(h'Wk h'Wk h'Wk h'Wk h'Wk gd[p h7Gx h7Gx h7Gx h5Nl h7Gx h7Gx h7Gx gd5Nl gd5Nl gd7Gx h5Nl h5Nl h7Gx h5Nl h5Nl hfp(hfp(h~ e h5Nl h~ e h5Nl h5Nl h5Nl h7Gx h5Nl gdq~ gdq~ gd~ e gd5Nl hfp(hfp(hfp(hfp(h~ e h~ e hfp(h8=' h8=' h8=' h8=' h8=' h8=' h8=' h8=' gd d hwa\ gdTm_ gd-u gd-u hTm_ gdTm_ gd-u hTm_ hTm_ hTm_ gd|s gd|s gdTm_ gd d gd d hTm_ hTm_ hcX& gd#Dy h9b` gd#Dy mH <nH sH <tH mH <sH <tH mH <sH <tH mH <sH <tH mH <sH <tH ph`^ \ mH <sH <tH mH <nH sH <tH [Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O} Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@!j!Q_ jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r ~*P(5 .}x E /EE\} theme/theme/_rels/themeManager.xml.rels 5 6? \$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://

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