HONG KONG / JUDGMENT

L v. C

COURT
Court of Appeal

DECIDED
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bjbj cacv 169/2006 & cacv 181/2006 in the high court of the hong kong special administrative region court of appeal civil appeal nos. 169 of 2006 and 181 OF 2006 (on appeal from hcmc NO. 5 of 2006) BETWEEN Petitioner and Respondent And cacv 182/2006 in the high court of the hong kong special administrative region court of appeal civil appeal no. 182 of 2006 (on appeal from hcmc NO. 1 of 2003) BETWEEN Petitioner Respondent Before: Hon Stock JA, Yuen JA and Hartmann J in Court Dates of Hearing: 5-9, 12-13 February 2007 Date of Handing Down Judgment: 25 May 2007 J U D G M E N T Hon Stock JA: Introduction and issues The parties to this case cohabited for about thirty years prior to their separation, although it was late in the piece that they married. There are no children of the union. In the course of their life together and by their joint efforts they acquired substantial assets. In 1999 they parted and in January 2002 the wife secured a decree nisi of divorce, made absolute in March that year. There followed lengthy proceedings for ancillary relief before Lam J and we have before us appeals from the orders made. The judge also found that the marriage was bigamous, set aside the degree of divorce and made an order nisi of nullity, from which order the wife appeals. The assets accrued by this couple during their marriage were, by any standards, vast. In 2004 their joint wealth was said to stand in the region of between about $1 billion to $1. 3 billion. However, this case differs from many of the large-asset ancillary relief disputes with which the courts in this and other jurisdictions have had to grapple, in that this case is unencumbered by the type of issues that frequently beset such disputes. This is not a case in which assets were acquired during a marriage in which the parties have played different roles, that of breadwinner, and that of homemaker. It is not a case of a short union where one party has brought substantial assets into the marriage; nor a case in which one of the parties has on the occasion of the marriage relinquished a potentially remunerative career. In terms of the roles played by the parties and of the acquisition of assets this case is relatively simple, for it is common ground that throughout this lengthy relationship, this couple commenced cohabitation with no assets of which to speak, and worked together to accumulate substantial wealth; that none brought into the picture inherited or independently acquired assets; and that such was the length of the marriage and the respective contributions that it is a case that called for an equal division of their combined wealth. That said, there crept into the exercise of dividing that wealth a number of complications with which these appeals are concerned, namely: the fact that at about the time of the institution of the divorce proceedings

the parties entered into two written agreements for the division of a significant portion of their assets. An important question arose in the proceedings as to the effect of those agreements. What the judge did was to say that the allocation of assets under those agreements should be respected, but that in disposing of the remainder of the assets he was entitled to take into account the fairness of the agreements, by which he meant any significant disparity in the value of the assets thereunder allocated, and to reflect that disparity in the distribution of the remaining, non-agreement, assets. He determined that there was an imbalance in the value of the assets covered by one of the two agreements to an extent he classified as unfair and, therefore, in the division of the non-agreement assets, he made adjustments in favour of the wife to correct that imbalance. The issue before us in this regard is whether the judge erred in principle in examining the fairness of these agreements by reference to asset values and whether he ought instead to have ignored these assets and their values in his determination of the fair allocation of what remained; the fact that the wife has been guilty of serious non-disclosure. The judge made an adjustment against her for that. The issue before us in that regard is whether that adjustment was adequate; and the finding by the judge that the marriage was bigamous. He determined that the wife has previously been married and that that marriage had not been dissolved when these parties went through a ceremony of marriage in 1991; yet he made no adjustment to the financial dispositions on account of that bigamy. The issues in this regard are whether the judge erred in his finding of bigamy and, if he did not err, whether he ought to have refused the wife relief or awarded her less by reason of the act of bigamy. History

(1) The beginning Despite the finding of bigamy it is convenient to refer to the parties throughout as husband and wife. The wife was born in 1935; the husband in 1941, so that by the time of the divorce in 2002, they were aged 67 and 61 years respectively. During her formative years, the wife s family ran a business selling bedroom accessories and she helped in its running. An accountant engaged by the family in that business was a man named Lo Woon. When the wife was aged about 16 years, that is in about 1952, she was, so the judge found, married to Lo and between 1953 and 1960, she bore him four children. The wife s family s business declined and so did the fortunes of Lo and the wife. In 1962 Lo left her and the children, and there is no suggestion that she has seen him since. After that desertion, her circumstances became sufficiently dire to relegate her to work in beauty parlours. The husband came to Hong Kong from Guangzhou in 1962 and worked as a casual labourer in the construction industry. In about 1965 he established a beauty parlour. In that year he met the wife, and they started their cohabitation. They rented living premises in Happy Valley and they operated one or more beauty parlours. She worked with the husband in operating those businesses and they shared the profits equally. In 1974 they bought a property in Happy Valley which was their home. In 1976 they closed a beauty parlour and with the proceeds of sale of the Happy Valley property they commenced a nightclub business, Club Yodo, which they opened in Nathan Road. They both ran that business and the profits were divided equally between them. They jointly purchased a property in College Road and they each bought a property in their own name at City One, Shatin. The flavour of the relationship is thus sufficiently introduced. Throughout the relationship they worked hard at

building up their businesses, sold properties when it was necessary to finance those businesses, and made their own individual investments. The parties effected substantial personal drawings over the years and there was no co-mingling of assets. Each emerges from the long history that has been placed before the court below and before us as astute business individuals, whose lives have been dedicated to the acquisition of wealth, first in Hong Kong and later on the Mainland.

(2) Club Bboss Featuring large in this business history is the opening in Hong Kong of a Club called Bboss in December 1984. Club Bboss was held by a company called Tanfory in which the husband owned 42.67%, the wife 23%. The College Road property was sold to finance the Club. Each invested their own monies into this business which became highly successful and was the seed for much of the enormous wealth that followed. The profits of the Club were shared equally. In 1996 the couple acquired the premises in which the Club operated in New Mandarin Plaza, through a company called Excellence Properties in which husband and wife each held 50% of the shares.

(3) Residential properties In 1987 the wife bought a property in London and in 1989 others in California. In 1989 the husband purchased two Hong Kong properties in his own name, one of which, 4 Beacon Hill Road, Kowloon Tong is a sizeable asset and was the matrimonial home, in which the wife continued to reside after the separation in 1999. It is subject to a mortgage raised by the husband in March 2004, with the consent of the wife, in favour of Citic Kawah Bank Ltd, to finance the Laira project to which I will shortly refer. The other property purchased by the husband was a unit in Village Garden, where he now lives with a lady and their child.

(4) Mainland developments In the early 1990s the couple ventured into new territory by pursuing business opportunities on the Mainland. The following are the Mainland projects acquired whilst the parties were cohabiting: Metroplaza. Metroplaza is a building in Guangzhou that is the result of a development project undertaken as a joint venture between a Mainland company called City Construction and a company called Guangzhou Excellence. Guangzhou Excellence was wholly-owned by a company in which husband and wife held a 93% stake. The building was completed in 1996 and gave rise to substantial profits some of which were ploughed into the acquisition in 1996 of Bboss operated in New Mandarin Plaza. HKBTRT. Beijing Tong Ren Tang (BTRT) is a well-known Mainland organization that has for long produced Chinese medicine. In 1991 a joint venture agreement was concluded for the licensing and establishment of BTRT shops in Hong Kong. The joint venture company is called Beijing Tong Ren Tang Medicine Restaurant (Hong Kong) Limited (HKBTRT) 65% of which belonged to a company called Kerrisdale owned by the husband and wife. A number of HKBTRT shops have opened in Hong Kong and, through an associated company, one in London. The licence agreement expired in 2005 but the shops continue to operate. The Laira project. This is a real estate development at Lin He West Road, Guangzhou. A joint venture contract was concluded in December 1993 for the acquisition of the land and the construction upon it of a commercial complex. The parties to the contract were Guangzhou

City Construction, the same company involved in the Metro Plaza project, and Laira Properties Limited, a BVI company owned as to 46.5% each by the husband and wife and 7% by a Mr Leung, a Hong Kong solicitor. The name of the joint venture company is China Shine Estate Development Limited (China Shine). By the terms of this agreement, City Construction undertook to make the land available for the development. The site is close to Metro Plaza. The project encountered difficulties and construction commenced only in 2003. Four Seasons Garden. This is primarily a residential development in Guangzhou acquired by the parties in 1993. A company called Law and Chan was formed in which the husband and wife each held 45% of the shares and 10% by Mr Leung, and Law and Chan owned the Chinese company called Guangzhou Four Seasons Property Development Limited. At the time of trial some of the project was completed, some in the course of construction. Other assets. There were other assets acquired including properties and bonds in the UK. At the time of trial, the husband owned a number of properties in Hong Kong as well as in Singapore; the wife held properties in Hong Kong and Guangzhou, paintings and jewellery, as well as her investment in a medicine factory called Kanghe. This was situated in Pun Yu near Guangzhou. There is a question to which I shall later return as to the date upon which she first acquired land at Pun Yu for another medicine factory called Si Qiu which merged with Kanghe. The marriage The parties married on 12 April 1991. There was an issue between them at trial as to what prompted this course after so many unmarried years. The judge preferred the wife s account which was that the husband had entered upon a relationship with another woman by whom he had a child, and that the 1991 ceremony was an act of supposed commitment or repentance by him when the fact of that liaison was revealed to the wife. By the date that this ceremony of marriage was conducted, the 1952 marriage to Lo Woon if marriage it was had not been dissolved. The separation and its aftermath There was an incident in August 1999, the details of which are of no significance to this case, as a result of which the husband left the matrimonial home at 4 Beacon Hill Road, to which he has since not returned. By a petition dated 12 June 2001, the wife sought a decree of divorce praying in aid of her assertion that the marriage had irretrievably broken down the husband s suggested desertion in August 1999. An Answer and Cross-petition was filed by which the husband denied desertion and sought a decree of divorce on the basis of alleged unreasonable conduct by the wife. Both husband and wife sought ancillary financial relief. A fresh petition was filed by the wife in September 2001 seeking a decree based upon a continuous period of separation of at least two years. A decree nisi was granted on this petition on 23 January 2002. That decree was made absolute on 16 March 2002. The applications for ancillary relief were transferred from the District Court to the Court of First Instance. In February 2002, Lo Woon passed away. It is not contended that there had been any contact between the wife and Lo since their separation in the early 1960s. The March 2000 agreement By letter dated 14 February 2000, that is to say, six months after the separation, solicitors acting for the husband put the following proposition to the wife so that the party s financial position [may]be resolved in an amicable manner . What they proposed was that all properties standing in the husband s name, whether in Hong Kong or elsewhere, shall belong to him and that all properties standing in the wife s name, save for the UK

Treasury bonds, shall belong to her and that she should move out of 4 Beacon Hill Road. There then followed a proposal as follows:

3. You shall choose one of the following two group of properties and businesses. Our client shall transfer all his interest in the group of businesses and companies chosen by you together with all its assets, benefits and liabilities. Likewise, you shall transfer all your interest in the remaining group of businesses and companies to our client together with all its assets, benefits and liabilities. Group I was then listed and it comprised: New Foundation Development Limited held in almost equal shares and which owned a property in Sha Tin; HKBTRT; Denwa Ltd held jointly which owned shop premises in Happy Valley; Kerrisdale Investment Ltd, held jointly; a property in Portland Place London, held jointly; UK Treasury bonds registered in the husband s name though purchased jointly; the balance of an account with Bank of East Asia; the benefit of certain debts; and, the sum of HK$60,000,000.00 to be paid by the party choosing Group II . (emphasis added). Group II comprised: Club Bboss (the trading name of Tanfory Company Limited); Excellence Property Limited that owned the Club s premises; the benefit of certain debts; and payments to the party choosing Group I the sum of HK$60,000,000. (emphasis added). A time frame was set for the implementation of the agreement. The wife had the benefit of solicitors acting for her and, through them, she chose the first group of assets, the husband to take the second group and to pay her $65 million, instead of the $60 million that had been proposed. That is the extent of the agreement that was concluded on 21 March 2000, and then put into effect. As to the $65 million, the agreement provided that the wife was to sell to the husband all her interest in Bboss and Excellence to the total price of HK$65,000,000. 00 payable by [the husband] to [the wife] on the completion date and in consideration of the sale by [the husband] to [the wife] of his interests in New Foundation, BTRT, Denwa and the other assets in the first group. The $65 million was funded by an additional mortgage taken by the husband on the Club Bboss premises. That mortgage was serviced by payments from the income of Club Bboss, from a personal bank account and through a loan. The July 2001 agreement In 2001 there was a second agreement. This agreement dealt with Laira and Four Seasons Garden. It too was concluded when each party had the benefit of legal advice. By virtue of this agreement, the wife s interest in Laira was transferred to the husband, leaving him with 93% of that company, and therefore of the Lin He West Road project; and the husband s interest in Four Seasons Garden was transferred to the wife. The agreement provided that upon the shares exchange Madam Chan shall compensate Mr Law in the sum of RMB 20 million, to be paid by four equal instalments over a period of eleven months. This agreement too was put into effect. The agreements: the parties approach The questions that arise are these: Was it intended by the parties when they concluded these agreements that the value of the assets distributed thereby would not be taken into account in any court-adjudicated distribution of the remaining matrimonial assets? If so, were the agreements concluded in circumstances that permitted of their re-opening by a court in ancillary relief proceedings, or had circumstances arisen after the contracts were concluded that properly enabled the court to reopen them? Conversely, were these merely agreements as to how the assets identified by

the agreements were to be allocated as between the parties but no more, so that in any future ancillary relief claim the value of the assets thus distributed were to be, or could be, taken into account? In the course of the proceedings in the court below, the approach of the parties as to the effect that should be given by the court to the two agreements changed with the ever-shifting winds of valuation. It is evident from studying the affirmations, such of the oral testimony to which we have been taken, and the judgment itself, that not a great deal can be said in favour of either of the parties in terms of their credibility on any single issue. Therefore the fact that at one stage or another the husband or the wife, as the case may be, asserted that the intention of the agreements was for ever to isolate the assets covered by them from any future claim or, if not, should be so interpreted alternatively, that the asset allocation was assumed by them not to affect future ancillary claims, so that that allocation would be taken into account when dividing the remaining assets, is of little present consequence. So, for example, the husband s assertion on appeal that the judge erred in not according to the agreements an isolating effect is to be contrasted with his assertion at the outset of the trial that such was the unfair pressure to which he was subjected that the agreements ought to be accorded no weight. By the end of the trial, the husband s position had changed to one close to that now adopted. Conversely, in her first affirmation , the wife asserted that the agreements were reached at arms length ; emphasised the fact that they were concluded with the benefit of proper legal advice ; rejected the suggestion that the deals were inequitable; and asserted that the husband must have satisfied himself that the exchanges were of equivalent value, a stand that she almost immediately eschewed at trial and a stand quite at odds with that which she now seeks to uphold. The only common ground held by the parties was that there should be no redistribution of the agreement assets. The judge s approach At a late stage of the trial the judge raised an important question, which was whether there was any reason in principle, despite the fact that this did not represent the position at that point taken by the parties, why the court should not conclude that the effect of the agreements was to treat the assets thereby distributed as of equal value and to look then only to the remaining assets for the purpose of the claims before him. The question he asked was this So looking at these from that angle, to upset this agreement at a later stage, particularly when there are some aspects which are not that satisfactory in terms of valuation, should not the court be entitled to say well, if that is the position taken by the parties and having regard [to] the fact that [the] parties have in fact acted upon these agreements, it would be inequitable now to revert the position ... so what the court would do is say, well, you have to take this agreement, I find nothing inequitable to give effect to those in the sense that they are sufficient quid pro quo. But I will deal with the rest of the assets. It seems to have been accepted by the parties that the judge was entitled to travel a route not taken by them and Mr Mostyn on the husband s behalf, at the adjourned hearing three months later when the valuation figures had moved, embraced the judge s suggested approach. That approach was one that would leave intact the distribution under the agreements, evaluate the left out assets and distribute them between the parties as was just, without regard to the agreement assets or their values. Assets acquired as a result of the parties endeavours after the marriage would be left alone, to lie where they had accrued.

The judge was entitled to adopt an approach that was independent of either that had been advanced by the parties: The quasi-inquisitorial role of the judge in ancillary relief litigation obliges him to investigate issues which he considers relevant to the outcome even if not advanced by either party. Equally he is not bound to adopt a conclusion upon which the parties have agreed. per Thorpe LJ in Parra v Parra . The judge commenced his analysis by directing his mind to the key question, namely, the effect of the two agreements. He found that: the agreements did not purport to be in full and final settlement of all possible claims for ancillary relief; at the time the agreements were concluded the husband and wife had the benefit of legal advice; the parties had acted upon the agreements and had arranged their affairs accordingly; the agreements had been concluded after the parties had separated; the wife had been given the choice of assets within the groups provided; there had, by agreement, been no valuation of the assets; the arrangements were intended as a clean break ; the agreements were not intended as a mere interim measure but that rather at the time of the agreements, the parties intended the arrangements under the agreements to be irreversible and permanent. ; despite the husband s contention of duress , there was nothing unfair in the circumstances leading to the conclusion of the agreements a conclusion that is, in my judgment, of vital importance to this appeal; and that it would be unfair to redistribute what had been allocated under the agreements. He noted as well that regardless of any findings he might make in respect of disputed valuations, both the wife and the husband currently own assets much more than she or he would require to maintain a high standard of living for the rest of their respective [lives] ; and that neither party had presented evidence of any disability that might affect the question of ancillary relief. It was also acknowledged, he said, by both parties that each had made equal contribution to the accumulation of family wealth. Despite all that, the judge then examined what he termed the inherent fairness of the agreements. The question of fairness of the agreements themselves, as opposed to the circumstances in which they were negotiated and concluded or circumstances attaching to the parties since they were made, is a recurrent theme of the approach adopted. So, for example, at paragraph 109 he said: In the circumstances it would not be right to assess the fairness of the 2000 agreement on a strict net asset value approach. At paragraph 123, he said: On the other hand, for the purpose of assessing the inherent fairness of the 2001 agreement, I have reservations about the valuation of the contractual right [of Laira to develop the land at Lin He West Road] ; at para 126 he said: I do not think the inherent fairness of the agreement should be decided only by reference to the monetary values of the two projects as the experts put on the same ; and at para 184, he referred to a particular approach to the valuation of HKBTRT and said that it was not in his view the correct approach to adopt in comparing the value [of] HKBTRT with that of Club B to assess the fairness of the 2000 agreement. (Emphasis added). The judge then entered upon an analysis of the values of the properties under each agreement. For immediate purposes it suffices to say that in relation to the 2000 agreement he came to the following conclusions: that the husband s assets distributed under the 2000 agreement were: the Club Bboss premises valued, after deduction of the mortgage due, at $146.8m; a property owned by a company called LSH valued at $6m; a total of $152.8m, from which was to be deducted the

monetary consideration , as he termed it, of $65m, payable by the husband to the wife under the 2000 agreement. That left the sum of $87.8m. that the wife s assets distributed under the 2000 agreement were: the New Foundation development site: $5.4 million; UK assets : $45.3 million; shops in Hong Kong: $18.1 million; a total of $68.8 million, which is $19 million less than the valuation of the husband s assets under the agreement, ignoring however such value as might attach to the business of Club Bboss and to that of HKBTRT. The experts assessed the value of Club Bboss then to be nil: it had been sustaining losses for some time. The financial statements for HKBTRT showed a profit in 2004 of $4.7 million increasing significantly in subsequent years, the judge commenting that no one could have predicted at the time of the 2000 agreement that HKBTRT s position would transpire to be so much better than that of Club B. He concluded his analysis of the effect of the 2000 agreement by saying In a crude sense, the parties themselves in effect put a figure of $19 million as representing the difference in value between the business of HKBTRT and Club [Bboss]. The parties had run the businesses and they must have had some idea as to the worth of the same. Given the inherent uncertainties as to the prospect of these businesses and the lack of reliable evidence on valuations, I am not satisfied that such a price tag give[s] rise to unfairness to either party. The judge then put the assets covered by the 2000 agreement to one side and moved to examine what he termed the fairness of the 2001 distribution. The judge noted that at the time this agreement was concluded there remained problems in relation to the Laira site, that is to say, disputes between City Construction and China Shine about the site area and about encroachment on part of the site. A significant reason, he found , for the delay affecting the development was the insufficiency of funds. Although until 21 October 2001 (the date of a memorandum of understanding between Laira and City Construction) there were uncertainties, there were no insuperable difficulties. As he himself expressly put it , he was now engaged upon an exercise of assessing the inherent fairness of the 2001 agreement. (Emphasis added). He then said this : However, I do not think the inherent unfairness of the agreement should be decided solely by reference to the monetary values of the two projects as the experts put on the same. There were other considerations like the financial sustainability and the other risks pertaining to the projects that simply cannot be quantified in monetary terms.

127. Even so, if I were required to consider the 2001 agreement in isolation, the prima facie discrepancy in monetary value of the two projects (at about $100 million according to the figures of Mr Tam [the wife s expert]) plus the RMB 20 million payment did trouble me. In the end I come to the conclusion that on proper construction of section 7 [of the Matrimonial Proceedings and Property Ordinance], in deciding the weight to be attached to the agreements of the parties, the court should not examine the agreements or one of the agreements without taking into account of the other factors on a broadbrush basis. Like other options, in deciding whether to adopt the no order approach, all relevant circumstances have to be taken into account. The difference of $100 million to which reference was there made, was the difference between the value attributed to the Lin He West project of $136 m, and the value of $36 million attributed to the Four Seasons project.

The RMB 20m payment was the payment to be made under the 2001 agreement by the wife to the husband. On this basis, the judge proceeded on the footing that there was a disparity of $120 million in the husband s favour and that this was a disparity that troubled him. He then remarked as follows I have also considered two further points before deciding what weight I should give to the Agreements.

(a) The disparity in the values of the assets distributed: it is quite clear from the authorities that disparity by itself cannot be a ground for disregarding the Agreements. This is particularly so in the present context as the valuations of businesses are problematic and the businesses have changed much on account of efforts of the parties after the Agreements. On the evidence, I am not satisfied that there was such a large disparity that the court is driven to conclude that unfair advantage had been taken of a party under the 2000 agreement. As observed in the authorities, the benefit derived from an agreement of this nature should not be measured purely from a monetary angle. Further as regards the discrepancy in terms of the 2001 Agreement, I think a fair way to deal with it is, in the present circumstances, to treat whatever discrepancy there might be as being set off by various assets held or to be transferred to the wife. (Emphasis added).

(b) The lack of comprehensive valuations before the Agreements: this might have a bearing on the adequacy of knowledge of the parties before entering into the Agreements. However, it would defeat the purposes of settlement if one must have left no stone unturned in the valuation of assets before an agreement can be regarded as binding. Under the law, parties are free to settle even though there was no valuation by either or both parties. It is a question of balance. Valuation exercises can be costly. Parties should decide for himself or herself whether he or she should go through such exercises before settling or waiving the same. In the present case, the evidence shows that it was a deliberate decision on the part of the parties not to obtain comprehensive valuations. Ultimately, it ties in with the disparity point. Without valuations, the risk of a large disparity between two groups of properties is higher. It may also be easier for the court to discern unfair advantage being taken by one side. However if the court concludes that the overall justice of the case does not require the agreed distribution to be disturbed, I do not think the mere lack of valuations should dictate otherwise. Having considered significant non- disclosure of assets by the wife, he said that it would not be possible to put a precise figure on the amount of undisclosed assets. He then moved to what he called: The equation and said this : Taking a broad overview, I think the following equation represents a fair distribution of the assets involved in terms of giving effect to the Agreements plus compensation to the Wife for the discrepancy under the 2001 Agreement (on pure monetary reckoning a difference of $120 million, subject to what I said above as regards non-monetary considerations). (Emphasis added). Under this disposition, he determined that the wife should retain Four Seasons and BTRT and that from the property not covered by the agreements she was to have her investment, derived from undistributed assets, of about $20.5 million into Kanghe, jewellery and paintings estimated at about $5.5 million, and 4 Beacon Hill Road estimated in December 2004 at $69 million; a total in the undistributed asset category of $95 million. The balance of the $120m, a sum of

$25 million, was thus notionally assigned to the amount of the wife s undeclared assets, and to a discount in the value of Laira at the time of the 2001 agreement to be attributed to such element of uncertainty that then attached to the development at Lin He Road West. In relation to the remaining assets, he engaged in a straightforward equalisation process. The husband's assets were valued at $42.478 million and the wife s at $64.516 million. The result was that there was due from the wife to the husband a sum of the $11.018 million which he ordered to be paid by her to the husband. As a result of his compensatory approach to the 2001 agreement, he ordered the husband to transfer the title of the Beacon Hill Road property to the wife. The status of agreements Section 4 of the Matrimonial Proceedings and Property Ordinance (the Ordinance) empowers a court upon the grant of a decree of divorce or of nullity to make financial provision by way of periodical payments and lump sums; and by sections 6 and 6A to make transfer of property orders and orders for the sale of property. In deciding whether to exercise such powers in relation to a party to the marriage and if so in what manner, the court is enjoined by section 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. In this case it has been common ground that the conduct of the parties throughout their relationship entitles them to an equal share of the financial fruits acquired during that relationship and it is further common ground that there is no mental or physical disability affecting either party that should affect that divide. Their respective incomes and earning capacity and other financial resources are such that there is no adjustment required to enable one party or the other to attain any specified standard of living. As for conduct of the parties and of the circumstances of the case , the fact that in relation to a significant part of the assets under consideration the parties concluded an agreement is recognized as part of the conduct and circumstances to which, by reason of this provision, the court is to have regard. When parties who are sui juris freely enter upon a bargain for the division of matrimonial assets

then, absent unfair or unconscionable factors attaching to the circumstances in which that agreement came to be concluded and absent unforeseen circumstances arising after the conclusion of the agreement such as to cause manifest prejudice to one of the parties, the courts will hold the parties to their bargain. 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. In matrimonial matters, the courts have a particular role in ensuring protection for parties to a marriage that has broken down. The fact that there has been an agreement for the division of assets is not of itself determinative of an application, for the statute enjoins the court to have regard to all the circumstances that prevail at the time the court is required to make its determination for ancillary relief, and an agreement is but one of those circumstances, though it may transpire to be an important one. Precisely because agreements for the division of assets tend to be concluded against an emotionally charged backdrop, steeped in present and future uncertainty, the courts will take particular care to examine an assertion that an agreement should be accorded no or little weight because of this or that unconscionable aspect to the circumstances in which it was concluded. So too, because of the way in which the statutory duty is framed, it is incumbent on a court, even though there exist no circumstances surrounding the making of the agreement that should vitiate it, nonetheless to examine the present condition of the parties to determine whether justice demands a different dispensation. The subject matter is peculiarly fact-sensitive. Many questions will arise: the availability of legal advice at the time of the negotiations and conclusion of the agreement; whether those negotiations and the conclusions reached were attended by undue pressure, including self-induced pressure; whether there is some factor in the relationship between the parties, such as the exploitation of a dominant position, or the use of children as a weapon wielded against one of the parties; whether judgement has been impaired by emotion or fear or misapprehension of the factual or legal position; whether the parties have acted upon the agreement reached; and whether there has arisen since the making of the agreement a fresh unforeseen event by reason of which it may be unconscionable to hold the parties to the strict letter of the agreement. If one or more such circumstances are shown, then the court in the exercise of its supervisory jurisdiction might well interfere with the dispositions effected under the agreement. Yet there is a starting position, which is also born of policy considerations. It is that the court should uphold agreements between husband and wife concluded before or at the time of divorce and should allow one of the parties to depart from the agreement only if that party demonstrates good and substantial grounds for so doing (Edgar v Edgar) . That policy consideration is one that itself recognises the considerable trauma that attends prolonged and costly matrimonial disputes, and the obvious advantage in settlement rather than in the litigious cauldron that stirs bitterness, prolongs uncertainty, and is the enemy of the clean break that enures to the advantage of husband, wife and children. Matrimonial law is a flexible tool, precisely because the personal element is at its centre and because personal and family

circumstances and needs are complex, varying from setting to setting and from individual to individual. To this fact the statute gives due recognition by the wide discretion it confers, but the courts have articulated principles within which that discretion is to be exercised, else the certainty and finality that serves the interests of the family and the autonomy that should be accorded to individuals to organise their lives as they see fit and to pursue their own sense of what is mutually acceptable in their own individual circumstances (Miglin v Miglin) are rendered much more difficult to attain. In other words, whilst the circumstances in which spouses find themselves at the time, and after the breakdown, of a marriage are such as to demand a uniquely sensitive and a discretionary approach to questions that fall for the court s determination in respect of the parties, their children and their assets, there must nonetheless be a relatively predictable framework in which that discretion operates so that the parties may, if they so wish, organize their affairs in such a way that, as soon as is practicable, they may move on with their separate lives unburdened by the debilitating tension, and the cost, of litigation. The need for such an approach is now made more manifest by the growing emphasis on mediation in family matters, an emphasis that finds its origin and its momentum in experience and common sense, that the avoidance of litigation in favour of less prolonged, less costly, and less stressful resolution of family disputes is an imperative. The inexorable growth of this form of dispute resolution would, save where there is powerful reason to do so, sit incongruously with the unravelling of concluded agreements. The point has been made generally thus by Baroness Hale in Miller v Miller My Lords, there is much to be said for the flexibility and sensitivity of the English law of ancillary relief. It avoids the straitjacket of rigid rules which can apply harshly or unfairly in an individual case. But it should not be too flexible. It must try to achieve some consistency and predictability. This is not only to secure that so far as possible like cases are treated alike but also to enable and encourage the parties to negotiate their own solutions as quickly and cheaply as possible. Given the personal and sensitive context in which these issues are decided, it is no surprise that the same approach is adopted in different jurisdictions. So in Canada, for example, it has been said that: we believe that the approach that will provide both negotiating spouses and, failing agreement, courts with a principled and consistent framework is not that proposed by either party. The test should ultimately recognize the particular ways in which separation agreements generally and spousal support arrangements specifically are vulnerable to a risk of inequitable sharing at the time of negotiation and in the future. At the same time, the test must not undermine the parties right to decide for themselves what constitutes for them, in the circumstances of their marriage, mutually acceptable equitable sharing. Our approach, for example, takes greater account of the parties subjective sense of equitable sharing than the objective unconscionable circumstances standard proposed by counsel for the appellant. in searching for a proper balance between consensus and finality on the one hand, and sensitivity to the unique concerns that arise in the post-divorce context on the other, a court should be guided by the objectives of spousal support listed in the Act. In doing so, however, the court should treat the parties reasonable best efforts to meet those objectives as presumptively dispositive of the spousal support issue. The court should set aside the wishes of the parties as

expressed in a pre-existing agreement only where the applicant shows that the agreement fails to be in substantial compliance with the overall objectives of the Act. These include not only those apparent in section 15.2 but also, as noted above, certainty, finality and autonomy. The Act there referred to is the Divorce Act 1970 and it is noteworthy that section 15 of that Act requires a court in making an order for financial provision to have regard to any order, agreement or arrangement relating to support of either spouse , a provision absent from the Ordinance, but a difference of no consequence to the present point, not least because it is well-established in our law that in making an order for financial provision under section 6 of the Ordinance, an agreement between the parties must be taken into account. This tension between, on the one hand, the need to encourage settlement and certainty and, on the other, the need to retain a supervisory discretion in the court as a case-sensitive insurance against injustice has been said by Lord Hoffman in Pounds to lead to the worst of both worlds: In our attempt to achieve finely ground justice by attributing weight but not too much weight to the agreement of the parties, we have created uncertainty and, in this case as no doubt in others, added to the cost and pain of litigation. Yet it seems to me that that uncertainty is lessened to a degree that is acceptable and manageable if one proceeds on the basis that an agreement is presumptively dispositive , the burden being on the party seeking to achieve a different disposition to show good and substantial cause why the compact should not be respected, and in recognizing that the scope for so doing is one directed at an injustice in the circumstances in which the agreement came to be concluded or in clear injustice occasioned to one of the parties by reason of events unforeseen at the time of the agreement were the agreement to be enforced to its letter. The courts should be reluctant to second-guess the initiative of the parties in reaching an agreement, particularly so where they had the benefit of independent legal advice, and especially so where there is no evidence suggesting that they did not appreciate the ramifications of what they were doing: see Hartshorne v Hartshorne ; and the courts should be slow to undermine such agreements simply because it may be said with the benefit of hindsight that they should have done it differently : Miglin . If this approach is adopted, then, so it seems to me, the agreement is given the respect it deserves and the notion that one accords it not too much weight becomes an inappropriate one. The courts must be astute in this field to guard against the manipulative litigant who seeks to undo an agreement and the approach of the parties in this particular case carried much of that manipulative character and to bear in mind the factors, quite clear now as a result of developed authority, which might go to vitiate such an agreement: see, albeit in the context of consent orders, Xydhias v Xydhias . It is to such factors that I now turn. Agreements by which parties to a marriage conclude a settlement for the distribution of their assets and for periodical payments in the event of a divorce have been referred to in these proceedings as Edgar agreements, after the decision by the English Court of Appeal in Edgar v Edgar . In that case, the wife entered upon an agreement with the husband that if she obtained a divorce she would not claim lump sum or property transfer orders. There was no pressure exerted by the husband on the wife to accept the terms although the wife, being anxious to separate, pressed for a concluded separation deed even though advised by her lawyers that a better settlement was likely in

divorce proceedings. The case was decided against the background of section 25(1) of the Matrimonial Causes Act 1973 which contained a provision markedly similar to section 7 of the Ordinance. Reference was made by the Court of Appeal to the judgment of Sir Gordon Wilmer in Wright v Wright in which Sir Gordon had said I think for my part, approaching it de novo and in the absence of authorities, that the proper view is to say that this was an agreement entered into with full knowledge of all the circumstances and with the advice of both parties legal advisers. It is, therefore, something to which considerable attention must be paid. I accept that it would not be right to say that it has to be construed like a statute, or that it absolutely forbids any possible award of maintenance, except on the strictest proof of the existence of the circumstances mentioned. If and insofar as the learned judge so decided I would not agree wholly with his conclusions; but I do not think that he did go so far as that. I think that he was thinking along the same lines as I myself think, namely, that the existence of this agreement, having regard to the circumstances in which it was arrived at, at least makes it necessary for the wife, if she wants to justify an award of maintenance, to offer prima facie proof that there had been unforeseen circumstances, in the true sense, which make it impossible for her to work or otherwise maintain herself. The approach suggested by Ormrod LJ in Edgar in 1980 is an approach that has since regularly been applied and it is this To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties leading up to the prior agreement, and to their subsequent conduct in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. I pause to note the advice sounded by Ormrod LJ against an overly legalistic approach, advice with which I respectfully agree. In this regard our attention was drawn to the decision of the Court of Appeal in Hong Kong in Gray v Gray . That case concerned an application for variation of a consent order for the payment of a lump sum and child maintenance. The question there arose whether there was jurisdiction in the court to vary an order and the judge at first instance was satisfied that there was and added that: in the absence of circumstances which make the agreement voidable due to duress, mistake, fraud or the like, it seems to me that this should only be done where there has been a material change of circumstances so drastic and unforeseen as to make it only fair to vary. The Court of Appeal, by reference to Edgar, approved this approach in relation to consent orders but, with respect, I take the view that such an approach is overly rigid, and that it is inappropriate in the context of the matrimonial setting to think in the language of vitiation of contracts. Edgar itself warned against it, and it is a warning that has been repeated since . The principles which Ormord LJ articulated, as guiding the approach to such agreements, were endorsed in Edgar by Oliver LJ, as he then was. Given the use by Lam J in our present

case of the phrase unfair advantage as a test by which to measure the proper standing of the agreements , I think it desirable to note the context in which the same phrase was addressed by Oliver LJ, in Edgar If, by those references, [to equal bargaining power and disparity of bargaining power] the judge meant no more than that one must look in every case at all the circumstances to see whether there was some unfair or unconscionable advantage taken of some factor or of some relationship between the parties which enables the court to say that an agreement was not truly entered into by one party or the other as a free agent, then I have no quarrel with them. If however he meant that the court must engage in an exercise of dissecting the contract and weighing the relative advantages and bargaining position on each side in order to ascertain whether there is some precise or approximate equilibrium, then I respectfully disagree. Men and women of full age, education and understanding, acting with competent advice available to them, must be assumed to know and appreciate what they are doing and their actual respective bargaining strengths will in fact depend in every case on a subjective evaluation of their motives for doing it . One may, of course, find that some unfair advantage has been taken of a judgment impaired by emotion, or that one party is motivated by fear induced by some conduct of the other or by some misapprehension of a factual or legal position, but in the absence of some such consideration as that, and these are examples only, the mere strength of one party s desire for a particular result or the mere fact that one party has greater wealth than the other cannot, I think, affect the weight to be attributed to a freely negotiated bargain. (Emphasis added). In this regard it is worth adding that recognition that divorces are accompanied by emotional stress should not without more be elevated to a presumption that parties in such circumstances are incapable of assenting to a binding agreement : see Miglin . We have been taken to three cases in which the courts have been prepared to undo such agreements, which is not to say that there have not been others. They are worth examining not only to provide contrast with the circumstances in which the parties to the present case entered upon the agreements, but also because they give colour to the suggestion that the unfair advantage to which the courts look is directed primarily at the circumstances in which the agreement was reached and not, as the learned judge in this case seemed to conclude, at suggested disparity in value of assets distributed, unless it be that the disparity is itself evidence that supports an assertion of unconscionable circumstances. I suggest that absent the type of vitiating factors to which Edgar alluded, the courts will not intervene, unless a compelling case is made out based on unforeseen circumstances by reason of which a change to the agreement is shown to be necessary, and that will likely be a case of hardship. The point was made by Oliver LJ in Edgar that: the court must, I think, start from the position that a solemn and freely negotiated bargain by which a party defines her own requirements ought to be adhered to unless some clear and compelling reason, such, for instance, as a drastic change of circumstances, is shown to the contrary. In Camm v Camm (1983) 4 FLR 577, an agreement was reached by which the wife would not seek periodical payments for herself. The husband had taken an entrenched position that he would provide her with no maintenance though he would provide generously for that of the children. The wife, under extreme pressure and with her main concern resting upon the welfare of the

children, and acting upon legal advice, accepted the proposed arrangement. After the divorce, the relative financial circumstances of the parties changed and the wife sought periodical payments for herself. The arrangement was described by the Court of Appeal as an unfortunate agreement and there was evidence as to her state of mind at the time she accepted it. The court also took the view that the legal advice that she had received had been far from satisfactory. Sir Roger Ormrod said In my judgment, those two letters indicate as clearly as anything could the state of mind of the wife and the state of mind of her solicitor. In other words, she was proposing to accept an arrangement which was most disadvantageous to her on any view. Whether either of them at that point realised that there was no question of coming back if circumstances changed or not, I do not know. it [the abandonment of future claims for periodical payments] is an extremely serious matter for any woman to accept, unless she has either ample means of her own or a definite earning capacity or a sufficient capital settlement to compensate for giving up was very valuable right to apply for periodical payments. those letters indicate the sort of thing I had in mind [in Edgar v Edgar] when I talked about undue pressure. Without meaning to criticise anybody, the fact is, and it is obvious from the wife s letter, that she was under extreme pressure, coming partly from herself and partly from the fact her husband was refusing to concede anything about periodical payments, and so she accepts, in a position of great stress, an arrangement which is manifestly unsatisfactory from her point of view. On the facts of this case it was even more obviously unsatisfactory than in most cases because her earning capacity must, if anyone had thought seriously about it at that time, have been very modest and speculative." Beach v Beach was a case in which the circumstances of one of the parties changed dramatically after the agreement in question. The husband owned a farm in which the wife held an interest and an agreement was reached whereby the wife was to receive a lump sum from the proceeds of sale of the farm, a sale that was to be effected by the husband. The husband did not press ahead with the sale but thereafter he was adjudged bankrupt and the farm was sold. The wife received less, though not a great deal less, than the lump sum agreed and the husband, now bankrupt, applied for a lump sum payment. An order was made that the wife pay him a lump sum of 60,000 to provide him with a home. Thorpe J, as he then was, distinguished this case from the classic Edgar case in which a litigant seeks to depart unreasonably or capriciously from a fairly negotiated formal settlement. Here, in February 1990 both the husband and wife conceded that the net proceeds of sale left to the husband after paying the wife 450,000 would be some greater sum. Here I am not concerned with the contracting party who wilfully or capriciously seeks to depart from a formal agreement, freely negotiated. Here I contemplate circumstances which are totally different from the circumstances contemplated by the contracting parties. Though the judge had been minded to dismiss the husband s claim, he said that the disparity between the present position of the husband and wife was so great as to render dismissal of the claim an unfair application of the statutory criteria. Smith v Smith requires no detailed analysis. It suffices for present purposes to say that the wife had relinquished her life in South Africa, including her pension rights to marry an Englishman and live in the UK where the marriage proved short-lived and the wife, having signed an agreement for a modest

lump sum, returned to South Africa, a return that was described as fraught with difficulty and misfortune. The wife succeeded in her claim for ancillary relief. It was a case in which the wife had not received legal advice before the agreement and upon her return to South Africa had found herself in straightened circumstances. Thorpe LJ commented that had the wife had the benefit of specialist advice she would have been warned against the agreement and that at the time she entered upon it she was under extreme pressure. She succeeded in her claim, the judge remarking that though counsel for the husband had said that the judge s task was to ask whether the agreement was just at the date it was made: That is a fallacy. The duty of the judge was to adjudicate upon the wife's entitlement to financial provision under the statute and particularly to reach a determination that applied all the relevant [statutory] criteria to the circumstances of the case. Of course, the agreement was within that range but it was no more than one ingredient within a complex equation. There is a useful distillation of the authorities and their effect in X v X (Y and Z intervening) [2002] 1 FLR 508, a distillation that I would respectfully endorse. The facts of the case are of no moment for present purposes. Having conducted a detailed analysis of the cases, including of course Edgar, Munby J said

- In exercising its duty under section 25 the task of the court is to reach a just result ..
- The fact that the parties have made their own agreement is a very important factor in considering what is the just and fair outcome. The amount of importance will vary from case to case.
- The court will not lightly permit parties who have made an agreement between themselves to depart from it. The court should be slow to invade the contractual territory, for as a matter of general policy what the parties have themselves agreed should, unless on the face of it or in fact contrary to public policy or subject to some vitiating feature of the type referred to by Ormrod LJ, be upheld by the courts.
- A formal agreement, properly and fairly arrived at with competent legal advice, should be upheld by the court unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to it (I adopt Ormrod LJ s formulation in preference to that of Thorpe J [in Smith v McInery [1994] 2 FLR 1077]: his references to the most exceptional circumstances and overwhelmingly strong considerations seem to me, with respect, to put the matter perhaps a little too high).
- The mere fact that one party might have done better by going to court is not of itself generally a ground for permitting that party to resile from what was agreed.
- The court must nonetheless have regard to all the circumstances. The circumstances are to be judged in their totality and with a broad perspective rather than individually one by one.
- In particular the court must have regard to the circumstances surrounding the making of the agreement, the extent to which the parties themselves attached importance to it and the extent to which the parties themselves have acted upon it.

- The relevant circumstances are not limited to the purely financial aspects of the agreement: social, personal and, I would add, religious and cultural considerations, all have to be taken into account.
- The court should bear in mind the undesirability of stirring up problems with parties who have come to an agreement.
- On the contrary the court should if possible, and consistent with its duty under s 25, seek to bring about family peace and finality. (Emphasis added). I have there emphasised the phrase the circumstances surrounding the making of the agreement because, save in respect of cases where unforeseen circumstances later arise such as to render adherence to the agreement clearly unjust, what the courts look to are the circumstances in which the agreement in question was concluded. The courts look to circumstances personal to the parties, most particularly in the context of marital disruption, at the time of the agreement or at the time of the court assessment, by reason of which it would clearly be unjust to hold the parties to the agreement made. These, in my judgment, are characteristics quite different from a mere evaluation of the agreement assets conducted for no purpose other than to ascertain whether there is a disparity, for such an exercise goes merely to the question whether the parties might have struck for themselves a better bargain. Part Edgar agreements This particular case is unusual on its facts in that the assets covered by the two agreements were part only of the matrimonial assets. The question that arises is whether the Edgar principles nonetheless hold good. I see no reason why those principles should not in such circumstances apply. The effect of that application will depend on the nature of the particular agreement. So, for example, if the agreement is one that deals merely with allocation of certain assets with no intention to treat them for all future purposes as of equal value then, unless there be shown good and substantial reason to do otherwise, the court will respect that allocation, without prejudice however to a valuation of those assets as part of the valuation of all matrimonial assets to enable a just disposal of the balance. It may well be that the exigencies of family circumstances at the time of separation will dictate the allocation of, say, two assets, one to each party, so that each may be utilised unencumbered by the interference of the other party; yet that is not necessarily an agreement that when the content of the matrimonial pot comes finally to be divided, the values of the assets thus allocated are to be ignored. Where however the agreement amounts to one which the court can safely treat as intended by the parties not merely to be a convenient allocation of certain assets at a given time, but also an isolation for future purposes of those assets from the matrimonial pool, then the Edgar principles will apply to that extent. It would appear that the parties accepted that position at trial and the judge proceeded on that basis. Where however, in my respectful judgment, he went wrong was in the application of those principles to the agreements in question. This case The judge expressed the view that the agreements were intended to achieve a clean break and he said: 151. I see nothing unfair in the circumstances leading to the conclusion of the Agreements that justify either party to completely reopen the terms thereof. On the other hand, I can see the unfairness if this court were to redistribute what had been allocated under the Agreements . 152. on the

balance of probabilities, I find that at the time of the Agreements, the parties intended the arrangements under the Agreements to be irreversible and permanent. They were not interim measures. What the judge at that stage appeared to be saying was that there was no justification for any adjustment to the agreed allocation of the agreement assets. But that did not deal with the kernel of the issue, which was whether the agreements were intended to treat the allocated assets as of equal value and to isolate the value of those assets from any future disposition of the remaining assets. That the judge had this in mind, though, is evident in the course of the exchange late in the trial to which I refer at para [REF _Ref161547124 \r \h] above. He talked then in terms of the exchange of assets as constituting a sufficient quid pro quo and said, albeit as a proposition rather than as a finding, that: As far as these assets are concerned, they should be treated as an equal division between them The judgment itself seems to suggest a finding that the parties intended more than mere allocation; that they intended that for all future purposes the agreements assets were to be placed outside the matrimonial pool: the wife testified that the arrangements under the Agreements were meant to achieve clean break. I rejected the husband's evidence as to the interim nature of the Agreements. There cannot be any clean break unless the arrangements were not to be re-opened. That is sufficient, in my view, to support a partial Edgar . It would be too legalistic to prescribe that the parties had to show that they had specifically addressed their mind to the question whether the assets distributed would be subject to the court s adjustive power and whether they would be excluded from the family pool. To a lay person, the concept of clean break already has these connotations. (Emphasis added). With these intimations I agree. It cannot, in my opinion, be gainsaid but that the effect of the agreements between the parties went beyond mere allocation and constituted agreements by which the parties in each case paid what counsel at trial referred to as equalisation money , namely, such consideration as was thought fair to achieve parity in respect of the assets allocated. That consideration, $65 million in one case, and RMB 20 million payable over eleven months in the second, otherwise makes no sense. These were agreements concluded by the parties at a stage when, in the case of the first agreement, they had separated and, in the case of the second, a petition for divorce had been presented. For each party there lay specific attractions in a clean break as regards these assets and the wife, who now seeks to uphold the judge s approach, herself asserted in her first affirmation in these proceedings that the groups of assets were treated as of equal value . That being so, what could be the justification for interfering with the intention thus expressed? That there was jurisdiction in the judge to effect a redistribution of wealth taking into account the value of the agreement assets is not in question. The question that is posed is whether in exercising that jurisdiction in this case he did so in accordance with established principle. If he did, then this court would be constrained by the further principle that dictates respect for the exercise of discretion so long as that discretion has been deployed within acceptable bounds. In my judgment, there was in the circumstances of this case no proper basis in accordance with established principle that justified a finding of unfairness in respect of either agreement. With respect, I cannot agree with the learned trial judge that there was any unfair advantage taken by one party over another. The mere fact of a disparity in value

is not the taking of an unfair advantage. These were agreements entered into, and thereafter acted upon, voluntarily by mature and astute business people well attuned to the mind-set of the other, who were thoroughly familiar with the assets in question, and who acted at their own pace and each with the benefit of independent legal advice. Such suggestions as were made at trial that the agreements were entered into in circumstances of undue pressure were rejected by the judge and there is no appeal against that finding. There was no suggestion of an impaired judgment of which an unfair advantage might have been taken, no question of any misrepresentation, no exploitation of a dominant bargaining position, no children in the background whose welfare might be the cause of partisan or self-induced pressure, no suggestion of a misapprehension of the factual or the legal position, no hint of hardship or indeed of circumstances unforeseen or of lives unfolding in an unexpected manner, and the party in favour of whom the judge has made the adjustment, namely, the wife, herself asserted at trial that the agreement was equitable and entered into by her because she wanted a clean break. In such circumstances: Where, as in the present case, the parties have anticipated with accuracy their personal and financial circumstances at the time of distribution, and where they have truly considered the impact of their choices, then, without more, a finding that their agreement operates unfairly should not be made lightly. Harsthorne v Harsthorne . There was more to these agreements than mere monetary valuation, as the judge himself at various points in the judgment recognised. Certain of the assets, such as the medical business for the wife, carried their own particular and subjective attractions. The agreements evidenced what those parties considered a just and fair division of the assets and, with the benefit of their experience and legal advice, they were content to reach agreement on the basis of what they assessed were the values to them of the assets. To them, each of the developments which were the subject of the 2001 agreement had its own attraction and although it transpired in the event that the Four Seasons project was less valuable in monetary terms then the Laira project, the Four Seasons project was at the date of the agreement in the process of development and, significantly, it was a project unencumbered by the necessity of a joint-venture partner, an unusual and significant plus for a non-Mainland developer. By contrast, Laira did not at the date of the 2001 agreement hold the land upon which the development was to take place and there were, as between Laira and City Construction, outstanding issues that were not resolved until after the conclusion of the 2001 agreement and there were potential problems with raising finance. These were parties who were apply[ing] their own values and purs[ing] their own objectives in reaching a settlement as to the assets covered by the agreements and exercising their autonomy in pursuing their own sense of what [was] mutually acceptable in their individual circumstances and there was in this case no good and substantial ground for upsetting the well considered subjective intentions of the parties and for substituting the court s own view for what constitute[d] equitable sharing . It is my judgment therefore that the learned trial judge erred in principle in his approach to the effect of agreements. There was not in these agreements any inherent unfairness. The finding that the disparity in value of the 2001 agreement assets constituted an unfair advantage is not one that can be supported, and the mere fact of the disparity upon which he alighted assuming for present purposes that the

figures he reached were correct did not constitute sufficient cause for placing those assets into the pool for the purpose of the claims for ancillary relief. Those assets ought, in my judgment, to have been ignored and the judge ought to have restricted his division of assets to the remaining, or non-agreement, assets. The figures It is in any event common ground that there were some errors in or omissions from the judge s calculations as to the values of the assets allocated under the two agreements. In a case of this unusual complexity and with the position of the parties changing as frequently as it did, the creeping in of occasional error is understandable. The judgment of Yuen JA devotes itself primarily to the figures and I respectfully agree: that if one takes the judge s assumed value for BTRT of $19 million, and makes an appropriate adjustment for the failure of the judge to credit to the wife the payment to her of $65 million, plus an agreed error of $2 million, there is a disparity in the wife s favour under the 2000 agreement of $67 million, rather than the equality found by the judge; that the discount that Mr Mostyn would have us attribute to the uncertainties attendant upon the Laira project is too high; that Laira was not liable to pay the additional land premium, but that if it were, then this would be outweighed by the premium payable in respect of Four Seasons; and that the company loans should be ignored. It is an open question what attitude the judge may have taken to a disparity of $67 million in the wife s favour in respect of the first agreement; in other words, whether he would therein have perceived an inherent unfairness or the taking of an unfair advantage. But in any event, assuming for the moment that this exercise in comparison was justified, there appears to me to have been no justification for examining the disparities separately rather than globally. That global exercise has been undertaken by Yuen JA and, taking a more realistic view of the value of BTRT and according value to the relative attractions and disadvantages of the two projects, Laira and Four Seasons, one doubts that the judge would have been troubled by resulting disparity. I had at one stage been of the view that it was inappropriate for the judge to have in the first place embarked upon the mathematical exercise of comparing the asset values under the two agreements, unless undertaken to test assertions of, say, undue pressure. That view transpires to be misplaced because the Edgar route had never been the position of the parties before the judge save for the stance adopted by counsel for the wife on the first day and, by inference, by the wife in her first affirmation. It was understandable in those circumstances that these valuations were undertaken. Where I disagree with the learned judge is in his application of principle to the facts. It follows, in my judgment, that such of the judge s award to the wife as was intended to compensate her for the asset disparities under the 2001 agreement should be set aside, and that this court s attention must focus on the remaining assets and a just disposal of them in accordance with section 7 requirements. It is common ground that against the history of the relationship of these parties, those assets ought equally to be divided, subject however to an appropriate adjustment to reflect the wife's non-disclosure of assets, and to the question whether her claim is adversely to be affected by bigamy. The remaining assets (1) Si Qiu What non-agreement assets remained for the purpose of the applications before the judge below were agreed subject only to two issues: whether Si Qiu, to which I refer at [REF _Ref161549395 \r \h REF _Ref161549380 \r \h] above, was a matrimonial asset or acquired after the separation;

and the extent of the wife s non-disclosure. As to the first question, that of Si Qiu, I agree with the analysis of Yuen JA at paras ([REF _Ref167159580 \r \h] and [REF _Ref167159599 \r \h]) below that Si Qiu falls to be treated as part of the matrimonial assets. (2) Non-disclosure The judge held the wife guilty of material non-disclosure. In a lengthy run-up to the trial the wife had had ample opportunity in which, as well as the resources with which, to make full disclosure of her assets. She chose not to do so. The judge canvassed at length the history of that conduct, and there is no point in itemising here all the instances of prevarication and non-disclosure. A few examples will do. It started as early as her first affirmation on 17 December 2002 which the judge described as clearly deficient . She was completely reticent about the details of Kanghe and failed to mention a London property. Questions raised by the husband were met with obfuscation. In April 2005 the wife through her solicitors provided belated disclosure of certain documents relating to Kanghe, one of which was a business licence showing an authorised capital of RMB 130 million. Yet on 27 October 2004 the board had passed a resolution for the increase of authorised capital to RMB 230 million, a resolution not disclosed until the tail end of the proceedings. There was reason to believe that she had spirited assets away in Liechtenstein, a trip she made with one of her sons which she sought to pass off as a trip for sightseeing and the purchase of stamps. It became clear through cross-examination that she owned a number of companies that she had failed to reveal. And so it went on right up to and in the course of the trial, leading the judge to conclude as follows: I regret to say that having regard to the way in which the wife had given disclosure of her means throughout the course of these proceedings it is clear to me that she [has] deliberately chosen not to give meaningful disclosure of her means. This is a poor state of affairs. That this kind of conduct in matrimonial ancillary proceedings is not unique is well understood but what seems not well to be understood is the actual consequence of such conduct, namely, the drawing of adverse inferences, and a further potential consequence of such conduct: there can be little doubt but that in cases of this kind questions of perjury may arise and although each case will no doubt be approached with suitable sensitivity, the option of referring papers to the appropriate authority is an option that judges will bear in mind and which legal advisers would do well to draw to the attention of their clients. The effect of the authorities has been summarised thus: The importance of the duty of both husband and wife to make disclosure of their assets which is full, frank and clear cannot be over emphasised. Unless a court is provided with correct, complete and up-to-date information on the matters to which it is required to have regard, it cannot lawfully or properly exercise its discretion in the manner ordained by [the statute]. The duty of each party is absolute, and it must be discharged regardless of whether the application for ancillary relief is adjudicated upon by the court after full evidence has been heard, or settled after an exchange of financial information between the parties leading to a consent order. The duty is also a continuing one; a party must not mislead the other party and the court into assuming that his financial situation is unchanged if it [in] fact has changed. A party who seeks to negotiate and secure a settlement without informing the other party about a material change in his or her financial circumstances runs the risk that, if a settlement is reached and a consent order is made, the

consent order will be set aside by the failure to provide full, frank and timely disclosure. Shortcomings in disclosure will be visited by orders for costs against the offending party, often on the indemnity basis. Furthermore, deviation from the standard of disclosure required may be visited by the court drawing adverse inferences against the party in default. Rayden and Jackson on Divorce and Family Matters, 18th ed., para 17.28 The point was emphasized in Baker v Baker by Otton LJ that what was under attack by such deliberate, as opposed to inadvertent, conduct was the very integrity of the legal process, and in F v F by Thorpe LJ that if in consequence of conduct designed to obscure the court s vision an order is made that is unfair to the culpable party, better that than an order that is unfair to the innocent party. The figure accorded by the judge to undisclosed assets in this case and the appeal points taken are addressed by Yuen JA at [REF _Ref167159859 \r \h] to [REF _Ref167159894 \r \h] below. I agree with her analysis and conclusion that the figure assumed by the judge for undisclosed assets should be taken as $25 million and that figure should stand. (3) The remaining assets Yuen JA has set out at para REF _Ref167159894 \r \h] of her judgment the remaining, that is to say the non-agreement, assets and I respectfully agree with her conclusion that with an equal division of those assets taking into account Si Qiu and non-disclosed assets there is a balance to be paid of $10,133,799 by the wife to the husband. I agree too for the reasons given at [REF _Ref167160297 \r \h] below that the order for transfer of 4 Beacon Hill Road should be set aside and that the husband s claim for rent for the wife s use of the matrimonial home, an unattractive claim if ever there was one, should be rejected. Subject to the question of bigamy, to which I shortly turn, this is the disposition that ought to replace that made by the judge. Profit sharing Put briefly, the wife registered a lis pendens against the property at 4 Beacon Hill Road but the husband wished to raise funds through a mortgage on that property to finance the Laira project and the wife signed a deed of subordination in the bank s favour to enable him to do so; wherefore, by a respondent s notice and cross-appeal, the wife now suggests that she is entitled to a share in the profits of Laira. This is a new assertion, not raised below. The mortgage facility thus granted was but a small proportion of the borrowing effected for Laira; the property was then registered in the husband s name; and the wife had been accorded use of the property pending the ancillary relief proceedings on his undertaking to remove the mortgage if the property was transferred to her. By reason of this judgment the property remains with the husband and, in any event, I agree with the reasons given by Yuen JA at para REF _Ref167160361 \r \h] below why it should not be open now for the wife to raise this issue. Bigamy There are two questions : Was the judge s finding of bigamy justified? If so, did the fact that the wife was still married to Lo at the time of the 1991 ceremony of marriage constitute conduct that should deprive her of ancillary relief or, if not deprive her altogether, result in a reduced award? (1) Chinese modern marriages The judge held that in the early 1950s the wife was lawfully wed by Chinese modern marriage to Lo with whom she had not cohabited since at least 1971. Prior to the enactment in 1971 of the Marriage Reform Ordinance, Cap. 178, it was permissible in law to contract a marriage that accorded with such Chinese custom as existed and was recognized in 1843 (a Chinese customary marriage), or that conformed with certain articles of the Chinese Civil Code, 1930 (a Chinese modern marriage): see Pegg,

Family Law in Hong Kong. After 1971, such marriages continued to be recognized but only if contracted before enactment of that Ordinance . A Chinese customary marriage was one contracted by the heads of two families and was attended by certain rites or stages, the hallmarks of which have been said to comprise the bringing of gifts by a go-between, agreement of the two families, and an act of welcome of the bride into the groom s family. A modern marriage was defined by that Ordinance as one celebrated as a modern marriage and in the presence of two or more witnesses . The requirements for such a marriage were the subject of discussion by District Judge Power, as he then was, in Lui Kit-chiu v Lui Kwok Hin-chow : the main requirement was celebration in an open but undefined ceremony in the presence of at least 2 unspecified witnesses. Some form of ceremony, though not defined, was required and an open ceremony was, according to a book by Dr Vermier Y. Chiu a ceremony so held that it is known and can be seen by all those who are not particularly invited to participate. (2) The evidence The issue in this case was whether the wife ever married Lo. Her contention at the hearing was that she lived with Lo as husband and wife but that there had never been a ceremony of marriage. The contrary contention however had come from her own evidence. What happened was this. In the introductory part to his first affirmation in these proceedings dated 21 June 2002, the husband said that whilst living with her he knew little of her life before they had met but that he knew that she had been engaged in a previous relationship with a man called Lo [which] relationship had broken down before our meeting in 1965 but with him the Petitioner had four children. Her first affirmation dated 17 December 2002 contains a subheading, My first marriage , in which she said as follows: My first husband is a man named Lo Woon. He was originally an accountant employed in my father s business. My paternal grandmother married me to him when I was about 17 or 18 because she was worried that I would not be well treated by my step-mother. In those days it was not unusual for young persons to get married not as a result of any real romantic feelings but because they were ordered or told to do so by the elders. My father objected to the marriage as he thought that I was too young, but my grandmother called the shots and at her insistence, I married Lo Kar Woon. Thereafter in that affirmation she regularly referred to Lo as her husband, whereas in relation to the period before the 1991 ceremony of marriage, she referred to Mr Law, the husband in this case, as her de facto husband . She returned to the theme somewhat emphatically later in the same affirmation. In seeking to brush aside the impact on the wife of his relationship with another lady who fell pregnant by him, the husband had asserted in his first affirmation that the Petitioner did not seem too upset by this news and, I believe, saw it as some way justified by virtue of the fact that she had children from a previous relationship. To this the wife responded as follows: find it positively offensive (and disappointing) when Law Cheuk said that I did not seem too upset about the news of his affair with [the lady in question] because I saw it as some way justified by virtue of the fact that [I] had children from a previous relationship . My children were all born within wedlock and conceived with a man with whom I was married at the time. Thus was presented the can of worms that the husband was not slow to exploit. To his second affirmation dated 17 July 2003, he exhibited a copy of the 1991 marriage certificate in which the wife was described as spinster and he said that the

significance of all of this had only recently been explained to him. It may well be, he said that the Petitioner was not in fact divorced on the date of our marriage. I have asked the Petitioner to produce evidence that she was free to marry by way of production of either a decree absolute or a death certificate for Lo Woon. If she cannot supply such evidence then she will be open to a charge of bigamy. That of itself, I am advised, will constitute serious misconduct. Further I find it quite impossible to say how I would have conducted myself at the breakdown of our relationship if I had known that we were not truly married. If there was a ready answer to the contention there raised, one might have expected it swiftly to be presented; yet it was not until November 2004 that an answer came. Before that, in May 2004, the wife provided a Reply to a Request for Information that the husband had, under the Rules, tendered. In answer to a request for the supply of a copy of a decree of divorce or death certificate, the answer was: The Petitioner does not have such a copy of decree of divorce but she did produce a copy of Lo s death certificate. The husband s solicitors pressed the matter. By letter dated 27 September 2004, they remarked, correctly in my view, that the answer thus given was deliberately evasive and that they required clear evidence that in 1991 the wife was free to marry. By their reply of the same date, the wife s solicitors said that she would respond in her forthcoming affirmation. In her affirmation of 2 November 2004 she asserted that it was precisely because her father had objected to the marriage that she and Lo had merely lived together but without any marriage ceremony, dinner or formality. They were referred to as husband and wife in the same way as she and Mr Law, the husband in this case, had been referred to when they were living together but not married. In the course of her cross-examination on this issue, she conceded that she knew the difference between mere cohabitation on the one hand and, on the other, lawful marriage. She came from a middle-class family and Mr Lo was the accountant to the family s business. But she insisted that there was no celebration when she went to live with Mr Lo. Her attention was drawn time and again to the terms of her first affirmation in which she had described herself as married and she was asked, time and again, why in that affirmation she had not told the story she was now telling. To that significant question, she gave no satisfactory answer. Not surprisingly, the trial judge did not find convincing her attempts to explain the contradiction between her oral testimony and that in her first affirmation. He remarked that there had been offered no explanation for the fact that the wife had not, immediately the matter was first drawn to her attention by the husband's affirmation of July 2003, proferred the account now advanced. He concluded that she had indeed married Lo. (3) The presumptions There are said by counsel acting for the wife, to operate two presumptions: a presumption of marriage where a couple cohabit and describe themselves as married; and, so it is put, a presumption of validity of a later marriage where the earlier suggested marriage is of doubtful validity; and the judge proceeded on the basis of these two suggested presumptions. The wife s case, in appealing against the finding of bigamy, is that the judge failed to accord any or sufficient weight to the presumption of validity of the second marriage given, it is said, that the validity of the first was in doubt. It is argued that there was no positive evidence as to the first marriage save for the wife s early affirmation which was devoid of any reference to those acts, most particularly a ceremony, that made up a Chinese

modern marriage, as that has been defined and explained. There is a presumption, said to apply to the suggested marriage to Lo, that flows from cohabitation and reputation: Where a man and woman have cohabited for such a length of time, and in such circumstances, as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed, though there may be no positive evidence of any marriage having taken place, particularly where the relevant facts have occurred outside the jurisdiction; and this presumption can be rebutted only by strong and weighty evidence to the contrary." Rayden and Jackson on Divorce 18th ed., para 7.11. It is material to note, first, that the presumption comes into play only if there is insufficient proof that the parties underwent a ceremony of marriage ; and second, that many of the cases in which the issue arises are cases where the parties have died or where records have been lost, the most typical of which concern rights of succession , whereas in the present case there is evidence from a party to the suggested marriage, asserting, if the judge s interpretation of the evidence is correct, an actual act of marriage. A distinction is to be drawn between cases which address mere cohabitation on the one hand and those, on the other, where there is evidence of a ceremony said to have been defective. In the case where there is evidence of a ceremony of marriage plus cohabitation, everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary . This latter category of case is one in which there is presented some credible testimony that suggests a gap in the formal requirements. So, for example, in Chief Adjudication Officer v Bath there was some evidence that the Sikh temple in which the marriage ceremony took place had not been duly registered. In Russell v Attorney-General , there had clearly been a ceremony of marriage but there was, in the absence of documentary evidence, some doubt whether the full period of notice had been given to the registrar: it was held that in the absence of decisive evidence to the contrary the validity of the marriage should be presumed. Pazpena de Vire v Pazpena de Vire , upon which the husband relied before us and in the court below, is an unusual case in that the parties to the marriage, although both alive at the time of the proceedings, were nonetheless not able to speak as to the facts of the marriage ceremony. At the moment of the suggested marriage, the parties were in Switzerland and the wife heavily pregnant, and they granted to notaries a special power of attorney authorising a nominee to celebrate a proxy marriage in Uruguay on their behalf. A marriage certificate was produced in due course purporting to show that a civil marriage had been contracted. When the wife sought a decree of divorce, the husband resisted on the basis that there had been no valid marriage, claiming that he had forged the marriage certificate and that no ceremony had taken place. There was no record of the marriage in Uruguay and there were serious defects in the certificate. However, the petitioner relied upon the presumption of marriage, and the judge there held that there was insufficient evidence to rebut the strong presumption of marriage arising from lengthy cohabitation as man and wife and public recognition as such. The husband relies on this presumption but, as we shall see, the evidence that gives rise to the presumption is not the only evidence upon which he relies to establish the validity of the earlier marriage. The wife on the other hand contended that in the face of an earlier marriage of doubtful validity, there is a presumption of validity in favour of a subsequent

registered marriage. The assumption that is necessary to support this line of argument is that the former marriage was of doubtful validity, and to this important premise I shall return. For the proposition that the court should lean in favour of validity of the later marriage, counsel for the wife relied on a number of decisions, amongst them Taylor v Taylor. In Taylor, the wife went through a ceremony of marriage with D-L in 1928, another with K in 1931 from whom she then obtained a decree of divorce; and she married Taylor in 1942 but from whom in 1961 she sought a decree of divorce, alternatively a decree of nullity. The husband too sought a declaration of nullity on the basis that at the time of the celebration of marriage between them, the wife was already married to D-L. Evidence was produced that D-L had told the wife that he had once before been married, and included correspondence from a solicitor, deceased at the time of trial, suggesting that the marriage to D-L was void. The evidence was such as to leave the judge in a state of doubt as to what his status was in 1928: he may have been a bachelor: he may have been a widower or a divorced man: he may have been a man with a living wife. There was no doubt in that case but that there had been proved a ceremony of marriage in 1942 plus many years of cohabitation thereafter. That being so, there came into play the presumption enunciated in Russell v Attorney- General , cited by Cairns J in Taylor that: Where there is evidence of a ceremony of marriage having been performed, followed by cohabitation of the parties, the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary. Cairns J decided that there was no decisive evidence that the 1942 marriage was invalid because such evidence as had been presented to him about the 1928 marriage was doubtful in its effect. He said in this regard that: If there was no evidence other than that from which the presumptions arise, I think that the presumption in favour of the earlier marriage would necessarily prevail because the validity of the 1942 marriage must be tested by inquiring whether the 1928 marriage was valid and was still subsisting. I have, however, indicated earlier that I am in doubt about the validity of the marriage to Dale-Lace. I have formed the opinion that the existence of a doubtful earlier marriage is not sufficient to displace the presumption in favour of the wife's marriage to the husband. The analogy that the wife seeks to draw in our present case is in the suggestion that the 1950s marriage to Lo was of doubtful validity and that therefore the 1991 marriage prevails. The approach in Taylor was followed in Hong Kong in Ives v Ives, a decision of the Full Court. There, the doubt was whether a marriage ceremony in India, albeit performed in accordance with Muslim law, was a valid marriage according to the law of India, alternatively whether the Talak divorce that had been pronounced was valid according to the law of India. The same approach in principle was taken by Trainor J in Kao Yeung Lun-yuk v Kao Cho a case in which the petitioner sought dissolution of a marriage contracted in 1966 in the registrar's office in Hong Kong; whereas the respondent husband alleged that at the time of that contract she was still lawfully married to a man in China. The evidence of the petitioner, which was accepted by the court, was that there had been no ceremony of marriage in China so the husband was dependent upon the presumption, to which I have earlier referred, of cohabitation and repute. However, expert testimony was led to the effect that by the law of China, registration was considered an essential of marriage. Against this background, Trainor J said If the only

question for me to answer in this case was the marital status of the petitioner at the time she arrived in Hong Kong and in 1966, there is no doubt that the presumption of a marriage between herself and Mr Chan would indeed be very strong despite Article 6 of the Matrimonial Laws of the People's Republic of China [the article that required registration]. But there is another presumption that has to be taken into consideration and that is the validity of a marriage evidenced by all the formalities prescribed by law. Here we have a case where the petitioner and the respondent went through a ceremony of a marriage before a registrar in Hong Kong which complied with all the requirements of the Laws of Hong Kong. He then cited Ives, with its reference to Taylor and continued : In the present case I have before me evidence in the form of the marriage certificate issued by the registrar in Victoria of a valid marriage and I am constrained to accept it as a valid marriage until there is decisive evidence to the contrary. The question is: is there such decisive evidence to the contrary? Clearly the answer is no; what has been presented to the contrary was far short of being decisive. It has been alleged that there exists a marriage according to law of the People's Republic of China but the very first requirement of Chinese law is missing. That is, that both the man and the woman should register in person with the People's Government of the district or township in which they reside, and subsequently, attain a certificate of marriage. The only evidence as to what took place in China was that of the petitioner and that was that she lived with Mr Chan for some years commencing before she was 18 and had two children. She has said that no ceremony ever took place. It is my opinion that there never was a former marriage. But even taking the position at the most favourable to the respondent it was at the best a doubtful marriage and its existence as such does not displace the presumption of the validity of the marriage of

1966. I hold that was and is a valid marriage. Mostyn argues that the test in Ives is too stringent and was a test reached per incuriam the decision in Monckton and another v Tarr upon which he relies for the proposition that the burden is in this case on the husband upon the balance of probabilities (rather than decisive evidence) that there was an earlier valid marriage, or that the two presumptions cancel each other out. Monckton was a case in which employers of the deceased opposed an application for compensation on the contention that the applicant was not married to the deceased. The applicant produced a marriage certificate showing her marriage to him in 1911. There was thus raised a presumption of validity of that marriage. The employer met that by producing another certificate of marriage, this time showing that he had married one Alice Jane in 1895, thus undermining the validity of the 1911 marriage. The burden therefore shifted to the applicant to show that the 1895 marriage was not valid. She sought to do this by evidence that in 1882 Alice Jane had married one Cripps, and that Cripps was alive in 1895. She failed however to prove that Cripps was alive in 1895, the court expressing doubt that there was in the circumstances a presumption that Cripps was alive but that: however that may be, assuming that there was some presumption that Cripps survived until 1895 in the absence of evidence of his death, there is a counter presumption in favour of the validity of the marriage of 1895. Those two presumptions, one being on one side and one on the other,

being considered of equal weight we get rid of presumptions altogether. and the question then turning on whether Cripps death had been proved, it was held that it had not; so the judgment below against the applicant was upheld. The learned judge was referred to a passage in Keane The Modern Law of Evidence under the sub-heading: Conflicting Presumptions that carried the suggestion that where there are conflicting presumptions one answer would be the solution adopted, it is said, in Monckton of cancelling each other out, and the judge cited the learned author s suggestion that: [The approach in Taylor] suggests that the strength of a presumption may be gauged by reference to the comparative likelihood of the two presumed facts, or even to general considerations of public policy, as opposed to the nature of the burden placed on the party against whom it operates. Inherently imprecise, such an approach has the obvious advantage of flexibility compared to any set formula. There is no implication there of an irreconcilable difference between the two cases, and I note that in Monckton the two conflicting presumptions related to the same suggested marriage, whereas in Taylor and Ives what is said to have conflicted are presumptions relating to different acts of marriage. In any event I do not see that Taylor and Ives are concerned with conflicting presumptions, but rather with the quality or sufficiency of the evidence put forward to rebut a particular presumption. I do not think that it helps on the facts of a case such as the present to talk in terms of conflicting presumptions. A presumption arises as a matter of law in the light of a fact or facts established giving rise to a procedural consequence as to the duty of production of other evidence by the opponent. That being so, each presumption must be dealt with as it arises: Presumptions are sometimes spoken of as conflicting but in the sense above examined, presumptions do not conflict. The evidentiary facts, free from any rule of law as to the duty of producing evidence, may tend to opposite inferences, which may be said to conflict. But the rule of law which prescribes this duty of production either is or is not at a given time upon a given party. If it is, and he removes it by producing contrary evidence, then that presumption, as a rule of law, is satisfied and disappears; he may then by his evidence succeed in creating another presumption which now puts the same duty upon the other party, who may in turn be able to dispose of it satisfactorily. But the same duty cannot at the same time exist for both parties, and thus in strictness the presumptions raising the duty cannot conflict. There may be successive shiftings of the duty, by means of presumptions successively invoked by each; but it is not the one presumption that overturns the other, for the mere introduction of sufficient evidence would have the same effect in stopping the operation of the presumption as a rule of law. This shifting of the duty of production of evidence, by reason of the successive invocation of different presumptions, may create a complicated situation difficult to work out; but it can more properly be spoken of as a case of successive presumptions and of conflicting presumptions It is not therefore a question of how one deals with conflicting presumptions but one of applying the relevant presumptions in each instance and then examining the sufficiency of such evidence as may be advanced to rebut the particular presumption applied at a given time. That is precisely the exercise in which Cairns J was engaged in Taylor when he said that the existence of a doubtful earlier marriage is not sufficient to

> displace the presumption in favour of the wife's marriage to the husband. (Emphasis added). Because marriage is of such social significance, the courts will require cogent evidence to displace a presumption of marriage or of validity of the marriage and it is true that, for policy reasons, the courts seem to lean in favour of the later marriage, but that is hardly to say that in the face of cogent evidence of an existing valid marriage the courts will nonetheless hold the later ceremony to constitute a valid marriage just because it is a later marriage . The simple question in this case is this: whether the evidence adduced as to the validity of the earlier marriage was sufficiently cogent. If so, then that is the end of the matter. (4)

Analysis

One starts with the fact that there was proved the celebration of a registered marriage in 1991 between the husband and wife. There is a presumption that that is a valid marriage. It was for the husband by strong or, if you will, decisive, evidence to rebut that presumption. He sought to do so by proving an earlier marriage to Lo and that Lo was alive at the date of the 1991 ceremony. It was proved that Lo was alive in 1991. As to the fact and validity of the earlier marriage, the husband relied not merely on the undisputed evidence that the wife lived for some years with Lo and that they were known as husband and wife which of itself would give rise to a presumption of marriage but, further and importantly, on the testimony of the wife herself that she was in fact not just living with Lo as husband and wife, but that she married him; that, in the face of her father s objection, she married Lo at the insistence of her grandmother; that her children were born in wedlock by a man to whom at the time she was married. That was evidence that the judge accepted. He accepted, in other words, that there was cogent evidence of an earlier validly celebrated marriage that subsisted at the date of the 1991 marriage. In this conclusion I think the judge was correct, and the wife s evidence seeking to undermine the validity thus shown was disbelieved. The argument upon which the wife s case depends is that the later marriage prevails over a doubtful earlier one; or put another way, that the rebuttal evidence was not sufficient in its quality. One has therefore to ask: what is doubtful about the validity of the earlier one? In what way was the rebuttal evidence insufficient? There is not, as in Bath, evidence that the Lo marriage lacked a required formality; or, as in Pazpena, defects in a certificate or credible allegations of forgery; or, as in Taylor, evidence suggesting that the husband might have been a bachelor but equally might have been a man with a living wife at the date of the impugned marriage; or, as in Ives, doubt as to the effect of the law of the place of the earlier marriage s celebration; or, as in Kao, clear evidence that there was no registration as required by the law of China. And unlike so many of the cases in which doubt exists, this is a case where one of the parties to the marriage is still alive and has presented evidence to the court asserting a valid marriage. It is to be recalled for present purposes that such testimony as was adduced by the wife seeking to cast doubt upon the fact of marriage was rejected. So it is said by those acting for the wife that nonetheless there is an absence of evidence as to the form of ceremony: how is one to know, it is asked, that such ceremony as the judge inferred must have taken place was one that accorded with those requirements that went to make up a Chinese modern marriage? The

absence of such evidence arises solely because the only person who could provide details of that ceremony was the wife who chose not to do so, and that is because she had decided to proffer a false new story. The indicia of a validly celebrated marriage to Lo are several: her clear assertions, her insistence, that she was lawfully married to Lo; the strong inherent improbability that the eldest daughter of a middle class family would at the age of about seventeen years be permitted by that family to live with a man who was the family accountant, and to have four children by him, without ensuring that the proper formalities were observed; the fact that when faced with the suggestion that she had been lawfully married but that that marriage had not lawfully been terminated, she did not forthwith, as one would expect if she knew the assertion to be incorrect, put forward an alternative case; and the fact that she conceded in evidence that she was aware at the time of her affirmations of the distinction between a contracted marriage and a relationship where the parties merely lived together. (5)

Conclusion

On the basis of her evidence and these indicia, the judge was satisfied that there had been contracted an earlier lawful marriage with Lo, and I am of the view that that conclusion was a safe one for the judge to reach. That being so, there did not attach to the earlier marriage any doubt as to its validity and, accordingly, the validity of the later marriage was properly impugned. I would therefore not disturb the judge s nullity decree. The effect of bigamy The same right to ancillary relief that is available on the grant of a decree of divorce is available on the grant of a decree of nullity: see section 6 of the Ordinance. However, by virtue of section 7, the court, in deciding whether to exercise its power under section 6 and, if so, in what manner, is enjoined to have regard to the conduct of the parties and to all the circumstances. That one of the parties has entered upon the ceremony of marriage with the other whilst still married is no doubt a type of conduct and a circumstance to which the court will have regard. The husband s case was and is that the wife has been guilty of a blatant act of deception that for public policy reasons will not be countenanced by the courts and that she should as a result be deprived of all relief, failing success of which argument her entitlement should be reduced on account of her conduct. She should not be permitted, it is argued, to benefit from her crime or, if for some reason a crime is not made out, from her tainted conduct. Mr Mostyn relies first on Whiston v Whiston. In that case, a lady had married in 1962 in the Philippines but, fully aware that she was still lawfully married, entered upon a bigamous marriage in 1973 in England with the appellant who was unaware that she was already married. The appellant secured a decree of nullity on the ground of bigamy and the wife applied for ancillary relief and was awarded, at first instance, a lump sum. She was at all material times well aware that her lawful husband was alive in the Philippines. Ward LJ put the issue thus The stark point in the appeal is, therefore, whether or not that doctrine of public policy which ordains that one should not benefit from one's own crime is available to the appellant and whether or not the respondent should be debarred from pursuing her claim because ex turpi causa non oritur actio. A question arose whether the rule fell to be applied when the right asserted was one derived from statute, but a review of the authorities and consideration of principle illustrated that the entitlement was nonetheless subject to the dictate

of public policy that none should benefit from his crime , though not every type of crime would operate as a bar since it is the nature of the crime which has been committed which in the end will dictate whether public policy demands the court to drive the applicant from the seat of justice. : Reg v Chief National Insurance Commissioner, Ex parte Connor. As to the seriousness of the offence of bigamy, Ward LJ remarked that although it was not treated as seriously as once was the case, it nonetheless was serious conduct that was capable of causing keen distress as had happened in that case . He concluded with the remark that the respondent had sought to profit from her crime and that without her having entered into this bigamous ceremony she would not have got to the judgment seat at all. She should now, in my judgment, be prevented from going any further, and her application for a lump sum was dismissed. Henry LJ was of the same mind, and said that the bigamy in that case was of such gravity that the court should not lend her aid. There has in the subsequent decision of Rampal v Rampal (No been a partial retreat from the apparent strictness of the rule in Whiston. The court in Rampal did not read Whiston as excluding every culpable bigamist, concluding instead that what had to be examined were the facts of the case, the nature of the crime and all the surrounding circumstances. That, with respect, must be correct else the court is not performing the statutory duty entrusted to it, namely, to have regard to the conduct of the parties and all the circumstances of the case. The circumstances in which a marriage might be rendered bigamous will vary greatly, as will the culpability of the party already married and the knowledge of and the impact upon the other party. Cited in Rampal was a passage from the judgment of Sir Brian Neill in S-T (Formerly J) v J [1998] Fam 103, in which Sir Brian had said that: Public policy which can be invoked to bar a claim depends on the establishment of a serious crime by the claimant. In many cases, as it seems to me, a decision as to whether or not a particular crime has crossed the threshold of seriousness may involve an investigation of all the circumstances, including the effect on the other party and any mitigating factors which may reduce the degree of blame. to which Thorpe LJ added The crime of bigamy can surely not be said to be so serious as to suspend the general rule that whether or not the principle of public policy can be invoked to bar a claim depends upon an appraisal of the seriousness of the crime in all circumstances. As Dr Cretney pointed out in his commentary on the decision in Whiston , Professor Kenny followed his colourful description of the crime by saying that it, like manslaughter, is peculiarly elastic in its range. He noted then that the difference between S-T v J on the one hand and Whiston on the other was that in the one (Whiston) it was the (second) marriage itself that was the crime whereas in the other (S-T v J) it was a crime (perjury) collateral to the marriage. Nonetheless, he said that does not preclude distinguishing Whiston in the case of another bigamous applicant whose culpability measures so much lower on the elastic scale. And added that: Accordingly it is important, in my opinion, that the width of the court s proportionate judgment is proclaimed in all cases where the applicant's entitlement to statutory relief is challenged by a criminal step in the entry into marriage. Unless there is such latitude unfair or bizarre outcomes are risked. In this case, the judge held that the crime of bigamy had not been made out, and that was because of the proviso to section 45 of the Offences against the Person Ordinance, Cap. 212; the section that makes bigamy a statutory offence: Any person who, being married, marries any other person during the life of the former husband or wife shall be guilty of an offence triable upon indictment, and shall be liable to

imprisonment for 7 years: Provided that nothing in this section shall extend to any person marrying a second time whose husband or wife has been continually absent from such person for the space of 7 years then last past, and has not been known by such person to be living within that time, or to any person who, at the time of such second marriage, has been divorced from the bond of the first marriage, or to any person whose former marriage has been declared void by the sentence of any court of competent jurisdiction. Mostyn suggests that there was evidence that the wife knew that at the time of the 1991 ceremony that Lo was still alive. I do not think that that is the effect of the evidence to which he points . What she said was that she did not know that he had died, and the effect of section 45 is summarized in Blackstone s Criminal Practice 2007 in its reference to the English provision to the same effect: if the accused honestly believed his spouse to be dead after a shorter period than seven years the proviso defence is not necessary. On the other hand, if the conditions of the proviso are satisfied, it does not matter whether the accused really believed his first spouse to be dead at all. The spouse s continuous absence (combined with the absence of any news of his being alive) is a sufficient defence in itself. I do not think that the judge s finding in this regard can successfully be criticized. But that is not the end of the matter, because the argument goes that proof of a crime is not a condition precedent to the proper invocation of the principles underlying Whiston and Rampal, for it is said that the wife has nonetheless been guilty of deceitful conduct, a deceit that enabled her to acquire a status by reason of which she gained entitlement to financial relief. It seems clear enough to me that the decisions in the cited cases were directed at conduct constituting criminal offences. If conduct constitutes a crime it might well, depending on the nature of the crime and all the circumstances of its commission, bar relief. That said, in the exercise of its powers under section 7 of the Ordinance, the court must have regard to the conduct of the parties and to the circumstances as a whole, and it must follow that if there has been deceitful conduct by one party, even if not a crime, that has resulted in placing that party in a position that he or she would but for that deceit not enjoy, that is a matter to which the court must have regard to an extent warranted by all the circumstances, and it is to the circumstances of this case to which I turn. The judge below said that whilst the wife ought to have taken steps to dissolve that marriage before the 1991 ceremony, he took into account the long cohabitation between the parties, her contribution to family wealth, and the fact and terms of the agreements, and he was not prepared to diminish the award to the wife on account of the fact that she went through the 1991 ceremony of marriage when her marriage to Lo had not been dissolved. He added that the husband was as reckless as the wife in the matter, for the husband was aware of the earlier suggested marriage and had not himself ensured that it was dissolved; and the judge found that in the circumstances that prevailed in 1991, when the husband s affair had been discovered, he, the husband, did not care, in his anxiety to pacify the wife by marrying her, whether or not the relationship with Lo had been a proper marital one. The judge s approach and findings in this regard are unimpeachable. The husband s stance in relation to the bigamy issue and its consequences is opportunistic, and not a little hypocritical. He was at all times well aware of the former relationship with Lo and the fact that there were four children of that union. He was prepared to live with the wife for about 25 years before he offered to marry her. He even asserted in evidence that he tried to ensure that the 1950s marriage to Lo was properly dissolved, but the judge found that the husband cared not one

way or the other in 1991 about the current status of the wife s relationship with Lo; he was intent on a pacification exercise with the wife and anxious for that reason to marry. That has the ring of reality in this case. More particularly, though, since the husband, whether truthfully or not, now asserts that he knew of the marriage to Lo one is bound to retort that, if that is so, it was as much his responsibility as the wife s to satisfy himself that he was free to marry her in 1991. There is in this case none of the deception evident in Whiston. In Whiston, the wife was well aware that the first husband was alive; here, as the judge found, the wife did not know. In Whiston, there was outright deceit by the wife; here there was none. In Whiston, the wife lied to the husband when he broached the subject; here there is no such suggestion. In Whiston, the husband was unaware of the existing marriage; here the husband was aware or at least put on notice. In this case there is no question of the wife entering upon the 1991 marriage in order to secure for herself a benefit that otherwise she would not have; and by the time of the 1991 marriage ceremony the parties had through their joint efforts already accumulated the bulk of their wealth. Any suggestion that the husband was keenly distressed, or distressed at all, by the fact that the earlier marriage had not been dissolved would be fatuous. The 1991 ceremony of marriage took place because of his infidelity and because he wished to placate the wife. Against this background, the contention that the wife s claim should be affected adversely by the finding of bigamy is one that should be given short shrift. C C Much material was placed before the court below and before this Court designed to elicit guidelines for the future resolution of ancillary relief applications, particularly in cases of substantial wealth. The law is at present governed by the 1990 decision of the Court of Appeal in C v C by reason of which there is an evaluation of the wife s reasonable requirements, a quantification of needs, rather than the approach adopted in England by the House of Lords in the landmark cases White v White and Miller v Miller , that sets its face against gender discrimination, against favouring the money earner over the homemaker and child carer and, whilst purportedly eschewing a presumption of equal division, departs from equal division only if good reason is shown for so doing. The approach in C C, which was followed in F with evident reluctance because it was binding on the Court of First Instance, also sits ill with that set in Australia in cases such as Mallet v Mallet and Figgins v Figgins which, though insisting on respect for gender equality, rejects equality of division as a starting point, and emphasizes the danger and possible injustice that can result from such an approach. In Figgins it was said , in a passage that highlights the problem with C C, that: the lesson to be learned from White is that it is a major error to approach these cases upon the basis that one arrives at a figure that is thought to satisfy the needs of the wife and give the balance to the husband. We were told that members of the legal fraternity in Hong Kong who practise in the field of matrimonial law perceived that this case would set the template for the approach to be adopted in such cases but, said Mr Mostyn, he had suggested to those who had that expectation that they should not hold their breath because this case did not squarely raise the issues addressed. Counsel proffered the question for the court s consideration because of the profession s desire to see the law in this jurisdiction resolved. Indeed, in the grounds of appeal it is put on the basis that The Court of Appeal may wish, in the interests of supplying a measure of guidance to the profession to deal with the issue. Mr Mostyn s recognition that this was not the case for such an exercise was realistic, for this case does not begin to raise the issues raised by C C and by White and the Australian cases; and that is because

it was always common ground in this case that the parties intended an equal division of assets, and it will be seen from the judgment thus far that the issues raised by this appeal only go to unusual factual developments that could be said to affect that agreed starting point. There is little value in adding substantially to this judgment by a determination of the approach to be adopted in each of various factual situations a breadwinner- homemaker case; a case of inherited wealth; a case of a short union; a case where one party has abandoned a career none of which here arises, and in respect of each of which factual situations one would require extensive argument. I well understand the profession s frustration at the present state of the law, for C v C is no longer a satisfactory approach. It is outdated and may well work to the unjust disadvantage of one party or the other, most often in practice the wife. C v C itself recognized that the legislative intent in the context of the Ordinance was to follow developments elsewhere, and the law in this field is peculiarly suited to adaptation with changing concepts of fairness. That is particularly so when the law in this jurisdiction is now much more informed by respect for gender equality than it was at the time of C C; and by gender equality, I mean that the female is not to be put at a disadvantage by reason of the role that wives often perform, a role not directly concerned with wealth development, but indirectly so, making such contributions to the family welfare that are symptomatic of marital partnership. In the exercise of the type of discretion that is conferred by this Ordinance, there is a need to take into account the human outlook of the period in which they make their decisions and [a] need to remember that the law is a living thing moving with the times and not a creature of dead or moribund ways of thought. C was a decision before rights-based awareness was solidified by human rights legislation in Hong Kong and by the extension to Hong Kong, as a matter of international law, of the Convention on the Elimination of All Forms of Discrimination against Women, and it seems to me that a current interpretation of the statutory requirement in question must, where possible, accord with Hong Kong s international obligations as extended to it by the Central Government. Whilst therefore this is not the case in which this court can appropriately embark on an analysis of the contending issues and examine the approaches in England and Australia as one or the other might here be applied to the various factual scenarios which arise in such cases, the nettle must be grasped in the first appropriate case, and there is ample room in my judgment for now distinguishing the present social and rights-based setting from that which prevailed at the time of C C. Experts A significant part of the judgment in the court below is devoted to the unsatisfactory quality of evidence by the experts. There were valuations in which the judge could not be confident ; one expert was described as having adopted a blinkered approach in assessing the wife s assets ; another, a pharmaceutical expert, as not being a reliable expert, in respect of whom the judge had great reservations as to whether [the expert] had a proper understanding as to the duty of an expert ; and yet another as one whose impartiality the court had cause to doubt. This is not good enough. Although there are of course many experts who come before the courts knowing full well the proper duty of an expert, the courts here, as elsewhere, are too often encumbered in the performance of their duty by experts who do not assist. An expert stakes his reputation on the assistance he gives a court, regardless of the fact that he or she is engaged by one of the parties; and the expert who does not assist in as impartial and professional a manner as he is able does little more than waste judicial time and add to the expense of litigation. It is evident to me that the job of the judge below was

made markedly more difficult by the matters of which he complains. The task of a single judge in a case of this complexity is onerous enough, much more onerous than that of an appellate court, and it is unacceptable for it to be made even more complicated by anything less than clear and impartial assistance. The courts must take a firm hand. The overriding duty of an expert is to the court: it overrides, in other words, any obligation to the person from whom he has received instructions or by whom he has been paid . His opinion is to be uninfluenced as to the form or content by the exigencies of litigation. Where such a breach is clearly threatened, or becomes manifest, the court may if necessary appoint, at the parties expense, an assessor pursuant to the provisions of section 53 of the High Court Ordinance, or disallow the relevant costs of the party that puts forward the defaulting expert. The result In the result, I would: set aside the judgment of Lam J whereby he ordered the husband to transfer 4 Beacon Hill Road to the wife, the orders consequential thereto, the order for the payment by the wife to the husband of the sum of $11,018,799, and the order for costs in those proceedings; substitute an order on the applications by the husband and wife for ancillary relief that the wife pay to the husband a lump sum of $10,133,799; and would dismiss other claims for ancillary relief; dismiss the wife s cross appeal for a share in the profit of the property development known as China Shine Plaza, Lin He West Road, Guanzhou; and dismiss the wife s appeals against the judge s finding of bigamy and against the decree of nullity. I agree with the costs order nisi proposed at [REF _Ref167073790 \r \h] below by Yuen JA. Hon Yuen JA: I have had the benefit of reading in draft the judgment of Stock JA and agree for the reasons he has stated that the Husband s appeal should be allowed and the Wife s cross-appeal dismissed (save in respect of one issue). I only wish to make some comments of my own and to discuss the figures which have been examined in the course of the appeal. The parties approach at the hearing before the judge The irony of the appeal is that at first instance, the judge s initial, perhaps instinctive, approach was to leave the Agreements as they were and deal only with the remaining assets (what the judge called the mid-way house approach), and yet both parties through leading counsel argued that the judge should open up the Agreements for the assets to be distributed equally. The Wife s position Although the Wife said in her affirmations that the Agreements were meant to be a clean break , and Mr Kotewall briefly advocated this on Day 1 of the hearing before the judge, that position was expressly disavowed the next day. When the judge ventilated the mid-way house approach again on Day 25, Mr Kotewall acknowledged that that approach was open to the judge, but he did not advance it. The Husband s position The Husband s initial position was made crystal clear in his 1st affirmation where he said (para. 91): I do not know whether the Petitioner will seek to assert that this is an agreement which should stand and/or influence the exercise of the Court s discretion within these ancillary relief proceedings. Whilst ultimately a matter for legal argument, I am advised that there is no prospect of this bargain being treated as an Edgar agreement ... . When the judge proposed the mid-way house approach on Day 22, Mr Mostyn s position was similar to that of Mr Kotewall. It was virtually in the last throes of the hearing that Mr Mostyn referred the judge to Parra v Parra, which he said supplied some authority for that approach, as he had a duty to address that view and indeed to help the court to give numeric expression to it . All in all, it would be fair to say that the mid-way house approach was clearly not the Husband s focal target at the hearing before the judge. The Judge s final approach It is therefore entirely understandable

why the judge recorded the parties position in his judgment in the following way: Further, subject to the contentions by Mr Mostyn QC on bigamy and adjustments on the basis of negative contribution, it is common ground that equal division is appropriate on the facts of the present case 6); In the present case, as I said at the beginning of this judgment, both sides primarily embraced equal division as the fair distribution of the family wealth although the Husband said he should get slightly more than half on account of negative contribution by the Wife 92); Against this background, subject to what I have to say on the effects of the agreements and the allegations of negative contribution and bigamy, I see no reason why I should not endorse the position adopted by the parties that equal division is a fair distribution in the present case 95). Mr Mostyn now argues that the judge s mid-way house approach was the only right approach, despite both leading counsel primarily having eschewed it. Mr Shieh has not objected to Mr Mostyn s argument on appeal as he (Mr Mostyn) had not specifically disavowed the approach when the judge put it to him and had addressed the judge on it (albeit nearly at the eleventh hour). In any event, the peculiar quasi-inquisitorial role of the judge in ancillary relief litigation is such that he is not bound to adopt a conclusion upon which the parties have agreed (Parra v Parra, 22). However in my view, the near-complete reversal of the Husband s position between hearing and appeal should be reflected in an appropriate costs order. C v C It is clear that the judgment in C v C is not binding on this court because it does not apply to a case where both parties were equal financial contributors to the family pool. It is therefore unnecessary and inappropriate for us to say whether we would consider C v C binding if the parties in the present appeal had not been equal financial contributors. Having said that, I can only express the hope that C v C will be revisited soon in an appropriate case so that proper consideration can be given to the issue whether that decision should still be regarded as correct given the changes in the law in England after White v White and in light of the prevailing socio-economic circumstances in Hong Kong. Approach to the Agreements I agree with paras. 35 - 54 of Stock s judgment in respect of the approach the courts should take in ancillary relief proceedings to agreements for the distribution of family assets when the parties are about to separate or have separated in contemplation of divorce. This is a paradigm case where the court should leave well alone the parties agreements for distribution of assets. Both parties here were astute business people. They had built up and run the businesses together and so they would have known more than anyone else each business s advantages and drawbacks, and its potential and risks. Some of the businesses were particularly difficult for outsiders to value as they were in effect work in progress and the judge also found the expert retained by each party to be of little assistance to the court. The judge found that neither party was under any undue pressure when he/she made the Agreements. Each had the benefit of independent legal advice. The anxiety of each party to protect his/her own financial interests may be shown by the fact that neither had any qualms in changing positions regarding the Agreements when it suited his/her financial interests to do so. In considering the right approach, the judge expressly acknowledged that disparity in the division of assets was by itself not a ground for disregarding the agreements. However he found that there was such a large disparity in the 2001 Agreement that it troubled him, and as a result he did in a sense disregard the 2001 Agreement by making orders (including a substantial property transfer order) in favour of the Wife to compensate for the disparity in that Agreement. However if we look at the 2000 and 2001

Agreements together, there was in fact not such a large disparity as the judge perceived. Purpose of calculations Therefore although I have indicated earlier why I think the Agreements should not be disturbed, I have also undertaken the exercise of considering the values (insofar as they are available) of the assets distributed under the Agreements. In undertaking this exercise, I do not suggest that it should be done in all cases where the court is presented with an agreement for the distribution of assets. However, if reliable valuations are available, a broad brush comparison by the court may help it to assess the parties allegations on relevant issues. For instance, a party s allegation of undue pressure may find some support evidentially from the fact that the agreement was obviously unfair to him/her. The 2000 Agreement The essence of the distribution under the 2000 Agreement was that: the Husband took the Club Bboss business and premises (both the club and the office), and had to pay $65 million to the Wife, whilst the Wife took the HKBTRT business and premises, a company holding property in Sha Tin, the UK assets and received $65 million from the Husband. The judge s assessment of this Agreement is set out in 103 - 116 of his judgment. He calculated the values of the assets distributed to both parties and considered that the Agreement was fair.

- Omission of $65 million paid to Wife However, with respect to the judge, he fell into error in two main respects. First, in his tabulation of what each party derived from the 2000 Agreement, he failed to include the sum of $65 million cash going to the Wife. The judge did deduct $65 million from the Husband s side of the tabulation, but that sum should have been not only subtracted from the Husband s side but also added to the Wife

s. That sum did not come from the global pot of family assets but was paid by the Husband from a mortgage on the Club Bboss premises (Robinson, Report 31 January 2005 para. 7.12) which he paid off with rents paid by the Club Bboss business (which belonged to him exclusively after the 2000 Agreement). Accordingly the sum of $65 million should have been added to the Wife s side of the tabulation. Mr Shieh has conceded this.

- Valuation of HKBTRT Secondly, the judge s approach in fixing a price tag of $19 million to HKBTRT (which he then accepted as fair) appears with respect to be circuitous. As far as this company was concerned, the valuations provided by the two parties were grossly disparate, the Wife s expert s valuation being $5 million and the Husband s expert s valuation being more than $75 million. Although different methodologies were used, which may perhaps account for part of the difference, the judge did not feel confident in accepting either valuation. Faced with such difficulties posed by the parties experts, in an appropriate case perhaps a judge might have to consider appointing an assessor or a single joint expert. In the present case, it is clear from the judge s comments that the evidence simply did not enable him to arrive at a conclusion on the value of HKBTRT. As it was, the price tag of $19 million was reached by the judge by a process of elimination: on the assumption that the 2000 Agreement was an equal apportionment by the parties, and after taking into account the value of the other assets distributed, the balance left in the Wife s favour was calculated at $19 million, and this was then taken by the judge as the parties agreed price tag for HKBTRT which the judge accepted as being fair. However, this conclusion was flawed, not

only by the omission of the $65 million cash the Wife received from the Husband but also because it was premised on the Agreement being an equal apportionment, which was the very issue which the judge was examining. Without a proper valuation of HKBTRT, I take the view that there was insufficient data for the judge to have concluded that the 2000 Agreement taken on its own was fair or unfair. If however one reads into the judgment a finding that the judge accepted that a price tag of HKBTRT of $19 million was a reasonable valuation, then there would have been a disparity in the Wife s favour to the tune of $67 million (being the sum of $65 million and an agreed error of $2 million, as the net value of the Club Bboss premises was $144.8 million and not $146.8 million as the judge had recorded). The 2001 Agreement As far as the 2001 Agreement is concerned, essentially the Husband took the Laira project and received RMB 20 million from the Wife, whilst the Wife took the Four Seasons project and had to pay RMB20 million to the Husband. The judge s assessment of the Agreement is set out in 117 - 127 of his judgment. Disparity found by the judge After the judge valued the Laira and Four Seasons projects, he estimated that there was a disparity in the Husband s favour of $100 million. On top of that, the Wife was obliged under the Agreement to pay RMB20 million to the Husband. At the then rate of conversion, RMB20 million was equivalent to $18.86 million, but it was taken by the judge to be $20 million. Consequently the judge found the total disparity in favour of the Husband to be $120 million subject to what he called non-monetary considerations (by which he meant the risks attendant upon the Laira project : 213). The Husband has challenged the judge s valuation of the assets distributed under the 2001 Agreement. I shall discuss this later in this judgment. Orders made for equalization The judge held that the disparity of $120 million (subject to the non-monetary considerations) was such as to cause injustice to the Wife, but since he did not wish to dismantle the Agreement, he made various orders in an attempt to equalize the disparity (including the transfer of the Husband s Beacon Hill property - valued at $69 million - to the Wife, allowing the Wife to keep jewellery and paintings said to be worth $5.5 million, and allowing the Wife to keep her investment in Kanghe which was made with family assets and which was valued at $20.5 million). He also took into account the fact that the Wife had failed to disclose all her assets, although he was not prepared to put a figure to the undisclosed assets. Judge s order for division of remaining assets The judge then divided the remaining assets equally (after making adjustments for the other orders). The adjustments made by the judge to the figures in the table Summary of Assets not covered by the agreements in para. 23 of Mr Mostyn s Final Written Argument are shown below. Since the value of the remaining assets (as adjusted) in the Wife s name exceeded those in the Husband s name by $22,037,598 ($64,516,545 in the Wife s name - $42,478,947 in the Husband s name), he ordered the Wife to pay the Husband half of that sum, being $11,018,799 (see following page). Summary of Assets not covered by agreements (with the judge s adjustments) H(assets in his name) Value ($) Judge s adjustment (214) 4 Beacon Hill Road 69,000,000 Transferred to Wife Flat B G/F 67 Fa Po St 10,700,000 Flat D 9/F City One 3,400,000 Flat D 12/F Rhapsody 6,600,000 Ma Tin 2,060,000 Flats 403 & 404 Gz 1,393,285 Flats D & G Gz 2,734,555 Singapore 3,277,431 Banks 9,726,000 Other assets 2,587,676 less sum payable to W (46,154,000) Covered by equation 65,324,947 42,478,947 W(assets in her name)

Value ($) Judge s adjustment (215) 60 St John s Wood Ct 6,124,550 Injected into Kanghe, so covered by equation Banks 13,830,000 Securities 45,503,000 less 750k (9,180,000) Written off under 2001 Agrmt, so covered by equation less 112k (1,366,400) Written off under 2001 Agrmt, so covered by equation Rm 1513 Metro Plaza 2,459,403 Flat A GITIC Gz 2,315,231 Flat B GITIC Gz 408,911 Other assets 5,518,000 Incls jewellery & paintings, so covered by equation Add undisclosed assets 115,000,000 Covered by equation 180,612,685 64,516,545 $64,516,545 - $42,478,947 = $22,037,598 $22,037,598 2 = $11,018,799 Order for payment by W to H Disparity under the 2001 Agreement? Mr Mostyn s first point is that the judge took the sum paid by the Wife of RMB20 million to be $20 million when, at the then rate of conversion, RMB20 million would have been only $18.86 million. This has been conceded by Mr Shieh. Mr Mostyn has also challenged the judge s findings on certain aspects of valuation which led to his conclusion that there was a disparity of $100 million. First, he says the judge failed to discount the value of the Laira project to account for risk due to title problems , its dispute with its co-venturer City Construction and the difficulties in obtaining finance. Secondly, he says the judge failed to deduct the additional land premium of $15 million that he had found was payable by Laira (and not by City Construction) to the National Land Bureau for increased plot ratio. Even though as a quid pro quo, the judge would also have to deduct additional land premium payable for the Four Seasons project, that was a smaller figure of $9.7 million, so in this respect there was a difference in the Wife s favour of $5.3 million. Thirdly, he says the judge failed to take into account the respective directors loans owed by Laira and Four Seasons, which resulted in a further difference in the Wife s favour of $23.1 million ($34.5 million - $11.4 million).

- Unquantifiable discount for risk in Laira project As for the first argument, Mr Mostyn suggested a discount at the rate of 33.3% for the risks attendant upon the Laira project. I am not prepared to accept this figure which Mr Mostyn has candidly admitted was picked arbitrarily. The evidence does not support the argument that the project had title problems. There was nothing to suggest that the National Land Bureau (the landowner) would have refused to grant China Shine a land use rights certificate in the normal course. As for Laira s dispute with City Construction, they had been co-venturers in the successful Metro Plaza project, and the judge found City Construction was sincere in wishing to settle the dispute. Although lawyers had been consulted on both sides regarding a dispute over area, they were involved in negotiations and there was no pending threat of litigation. In my view it was material that a Memorandum of Understanding settling the matter was signed between Laira and City Construction only 3 months after the 2001 Agreement was signed between the Husband and the Wife. There was no evidence that there had been an unexpected turn of events for the better during those 3 months. The reasonable inference that follows is that negotiations with City Construction had been progressing steadily at the time of the 2001 Agreement. The judge found however that there were risks attendant upon the Laira project by reason of the large amount of funds required. The financing difficulties were such that the Husband had, as it were, to importune the Wife to subordinate her lis pendens over the Beacon Hill property so that CITIC Ka Wah Bank could obtain the first charge over the

property which it demanded as part of the security for its loan. Mr Shieh for the Wife does not deny the financial difficulties the Husband faced in the Laira project - indeed it forms part of his argument that the Wife should obtain a share in the profits of the Laira project, which will be discussed later. Accordingly I accept that the risk attendant upon the Laira project was greater than the Four Seasons project by reason of its scale and the corresponding need for large-scale finance but I am not persuaded that the judge was wrong in refusing to apply a discount of the magnitude suggested by Mr Mostyn. It would be irrational for a court to pluck an arbitrary figure out of the air. In my view the appropriate approach is to remind ourselves that the valuation of $136 million for the project is not an unqualified, absolute figure and that the bottom line will need to be reviewed in that light.

- Laira not liable to pay premium for plot ratio larger than 6.6 As for the second argument, I do not think Laira is liable to pay additional land premium for the additional floor area due to increased plot ratio. This formed one of the topics of the Wife s cross-appeal. Under the Joint Venture Contract between City Construction and Laira, City Construction s contribution to the project was set out in Clause

9. This included, amongst other things, the provision of the right to use national land and it was recorded that the fee for the right of use of national land [land premium] has been put in by City Construction. In other words, as far as the National Land Bureau was concerned, the liability to pay premium rested with City Construction. Laira s contribution to the project was set out in Clause

10. It was to provide the capital for the project, including payment of the land premium to City Construction (impliedly by way of reimbursement). If the contract had stopped there, one might have further implied into the agreement a term that if any additional land premium were payable to the National Land Bureau, Laira would be liable to reimburse City Construction for it as well. However the following clause, Clause 11 is significant. In this clause, the parties agreed that included in the capital provided by Laira was a lump sum (guarantee fee) it was to pay to City Construction. This lump sum was to be calculated as follows:

- site area designated by the authorities x - a notional volumetric percentage (a notional plot ratio) of 6.6, whether the actual plot ratio approved by the Town Planning Bureau was smaller or greater x - $2,800 per m2 of construction area. The premium payable by Laira to City Construction was expressly agreed to be subsumed in this lump sum. The clause then went on to provide: If the volumetric percentage approved by the Bureau of Town Planning is larger than 6.6 times, the First Party [City Construction] shall charge a miniature area auxiliary construction fee of 360.00 RMB per m2 for the increased area instead of HKD2,800.00 per . (Emphasis added). I agree with Mr Shieh s interpretation of Clause 11 which is that the parties agreed that if the approved plot ratio was smaller than 6.6, then Laira would still have to pay the lump sum on a notional plot ratio of 6.6. However if the plot ratio was greater than 6.6, then Laira would still pay the lump sum on the notional plot ratio of 6.6, but for the additional floor area due to the greater plot ratio, Laira would pay City

Construction RMB360 per instead of HKD2,800 per (notably not in addition to HKD2,800 per). The rate of $2,800 per m2 is a clear reference to the lump sum payable by Laira to City Construction (which as we have seen incorporated the reimbursement of premium payable by City Construction to the National Land Bureau). In other words, in respect of the increased floor area achieved from a plot ratio greater than 6.6, Laira would pay City Construction RMB360 per m2 only, instead of having to reimburse the premium payable by City Construction to the National Land Bureau by paying the lump sum rate of $2,800 per m2. In my view, the above conclusion is clear from the express words of clause 11. I have considered the other clauses referred to by the judge in his judgment (36 -

45) and they do not detract from that conclusion. With respect to the judge, the factual matrix cannot be used to contradict the clear language of the agreement. The fact that eventually the National Land Bureau charged a premium of more than RMB500 per m2 (so that City Construction made a loss charging Laira only RM360 per m2) is neither here nor there. Mr Mostyn accepts that the rate of more than RMB500 per m2 was only known to the parties in 2004-2005, well after they made the commercial decision to agree to RMB360 per m2 in the Joint Venture Agreement in 1993. The fact that City Construction has now indicated that it did not agree with the interpretation in the preceding paragraph is irrelevant when the contract is clear, although it does serve as evidence showing that the Laira project was more complicated than the Four Seasons project. But I do not agree with the Husband s argument that the judge should have reduced the valuation of the Laira project by the amount of the additional land premium. If however the additional land premium ($15 million) were to be deducted, then an additional land premium should also be deducted from the value of the Four Seasons project which also enjoyed an increased plot ratio which was applied by the Single Joint Expert when he performed his valuation. As for the quantum of this additional land premium, there has been some disagreement over whether premium is payable for floor area used for certain public purposes. In my view, premium for those public areas should not be included as the floor area set aside for those purposes had not been included by the Single Joint Expert in his valuation of the Four Seasons site. The quantum of the additional land premium for the Four Seasons project would therefore be only $9.7 million, in which case the disparity in favour of the Wife would be reduced to $5.3 million ($15 million - $9.7 million). However as I understand it, Mr Shieh has not contended that the premium of $9.7 million should in any event be deducted from the value of the assets distributed to the Wife, but only if the Husband insisted on deduction of additional land premium for the Laira project (96(4) Written Submissions for the Wife, 17 January 2007). This is confirmed by the Respondent s Notice which does not assert that in any event there should be a deduction for the Four Seasons project.

- Loans to companies from Husband and Wife As for the third argument, I agree with the judge (108 -

110) that loans previously made by the parties to the companies distributed under the Agreements should not fall to be considered at all. In the 2000 Agreement drafted by solicitors, there was a mutual assignment of directors loans but the amounts of the loans were not even stated or referred to, the agreement merely stating X company is indebted to Mr Law a loan Y company is indebted to Madam Chan a loan , etc. In the 2001 Agreement which was a brief document in Chinese, clause 5 recorded that after the exchange of shares, all loans (regardless of the nature) made by Law to Law & Chan and Four Seasons Garden shall belong to Madam Chan. All loans (regardless of the nature) made by Madam Chan to Laira and China Shine shall belong to Mr Law . It is clear that this was intended to have the same effect as the mutual assignment of loans under the 2000 Agreement, suggesting that the parties agreed that all loans previously made by them to the projects were to be ignored. Combined value of the distributions under 2000 and 2001 Agreements If therefore one had to do a comparison of the assets distributed under the 2000 and 2001 Agreements, one would arrive at the following table: Assets distributed under 2000 and 2001 agreements To Husband HK$ (million) (2000 Agreement) Club Bboss club premises (net) 144.8 Club Bboss office premises 6.0 (less money paid to Wife) (65.0) Sub-total: 85.8 (2001 Agreement) Laira 136.0* Money paid by Wife 18.86 Sub-total: 154.86 Total to Husband under both agreements : $85.8 m + $154.86 m = $240.66 m* * (before discount for risk) To Wife HK$ (million) (2000 Agreement) New Foundation site 5.4 UK assets 45.3 HK shops (net) 18.1 Money paid by Husband 65 HKBTRT ? if 19 Sub-total 133.8 152.8 (2001 Agreement) Four Seasons 36 Money paid to Husband (18.86) Sub-total: 17.14 Total to Wife under both agreements: (assuming $0 for HKBTRT) $133.8 m.+ $17.14 m. = $150.94 m. or (assuming $19 m. for HKBTRT) $152.8 m. + $17.14 m. = $169.94m No substantial disparity Looking at the figures above, if we assume a value of $19 million for HKBTRT, then the total value of the assets distributed under the 2 Agreements would have been $410.6 million ($240.66 million + $169.94 million). On the face of it, the assets distributed to the Husband would make up 58% and to the Wife, 42%. However it must be remembered that the disparity of 8% from equality is not an unqualified, absolute figure because one must factor in the unquantifiable benefits inherent in the Four Seasons project, where the Wife was the single developer and where the straightforward nature of the development enabled the Wife to devote more time to other business projects such as HKBTRT, as opposed to the more complicated and ambitious Laira project which as we have seen severely stretched the Husband s financial means. Further as I have said, the value of HKBTRT presented a substantial obstacle to a reliable valuation of the assets distributed under the 2000 Agreement. Both experts accepted that this business had a positive value. They were divided between a valuation of $5 million by the Wife s expert and a value of $75 million by the Husband s expert. If one had to split the difference down the middle and adopt a valuation of say, $40 million, then the assets distributed to the Wife would have been $190.94 million out of a total which would then have become $431.6 million. Of this sum then, the assets distributed to the Husband would make up 56% and to the Wife, 44% and if one further took into account the risk factor for Laira, then that is an indication that the parties had in a rough and ready way, come close to financial parity. This may be compared with the judge s perceived disparity of $120 million (subject to the non-

monetary considerations) under the 2001 Agreement which dealt with assets valued at a total of $172 million ($136 million for the Laira project, subject to the non-monetary considerations + $36 million for the Four Seasons project, assuming the Wife paid the equalization money of RMB20 million out of her own assets in the same way as the Husband paid the equalization money of $65 million under the 2000 Agreement). On those figures, the assets distributed to the Husband would make up 70% and to the Wife, 30% and it was this that troubled the judge. Issues remaining in distribution of remaining assets Once it is accepted that the court should not disturb the distributions made by the parties under the 2000 and 2001 Agreements, the only task left would be the division of their remaining assets. As a matter of principle, both parties agreed that the remaining assets should be equally divided. However two issues remain. First, was the Wife was still married to Lo Woon at the time of her marriage to the Husband in 1999? If so, should bigamy completely disentitle her to ancillary relief? And even if not, should the court in the exercise of its discretion take that into account and reduce the quantum of assets to be distributed to her? The second issue is, what was the true quantum of the remaining assets? Bigamy I agree with paras. REF _Ref167533380 \r \h REF _Ref167533408 \r \h of Stock s judgment. I would only add that even if the presumption of validity of the second marriage trumped the presumption of marriage to Lo Woon (to use Mr Shieh s language), in my view there is decisive evidence that in fact the Wife s relationship with Lo Woon was a marriage and there was no evidence that it had been dissolved at the time of the marriage to the Husband. In the absence of evidence to the contrary, the Wife was presumed to have been married to Lo Woon from her long period of cohabitation with him and the fact that she bore him 4 children who bore Lo s surname. Mr Shieh argues that the fact that she entered into a subsequent marriage with the Husband provided evidence contradicting the presumption of marriage to Lo Woon. Whether that is so or not, what is significant in the present case is that the evidence did not stop there. The evidence before the judge went beyond the presumption of marriage to Lo Woon from cohabitation and children - the evidence included the Wife s clear evidence in her affirmation that Lo Woon was her husband and that her children by him were born in wedlock. There was also evidence that he died only after her marriage to the Husband. She adduced no evidence of a dissolution of her marriage to Lo Woon. Whilst I understand that the Wife made her affirmation in order to answer the Husband s comparison of his liaison and the consequential birth of his child to the Wife s relationship with Lo Woon and the birth of her children, that was only the trigger for her to make the statements in her affirmation clarifying her relationship with Lo Woon. The fact remains that she has stated on affirmation that he was her husband and her children by him were born in wedlock. That was consistent with the Wife s station in life at the time of her union to Lo Woon. She had been born into a middle-class business-owning family. As the daughter of Lo Woon s employer, it would have been unlikely that she would just have been given to him other than in marriage. The Wife s evidence was that her grandmother (the matriarch of the family) had made the decision so that Lo Woon could look after her, as the grandmother was concerned for her well-being after her death. If the Wife had simply been given to Lo Woon other than in marriage, her lack of status would have meant that she would have no financial

security whatsoever and that would have completely defeated the grandmother s purpose. Although the Wife tried to neutralize the impact of her evidence once the Husband charged her with bigamy, the judge was in the best position (after seeing and hearing her give evidence in the witness box) to judge whether her attempts were successful or not. He found that her evidence strained credulity 235). I do not think that the judge was obliged to analyse the evidence to see if there had been a ceremony of marriage. The present case is not one where parties take issue with whether certain acts described by witnesses constitute a valid ceremony of marriage (or where a party who has admitted a prior marriage is mistaken as to whether certain acts constituted a ceremony, as in Pan Oi Lin), nor was any significance placed on the judge s finding of a modern marriage as opposed to a Chinese Customary marriage. The present case is one where a person has asserted categorically that she was married, and then - when it no longer suited her interests to say so - sought to say that she could not remember what events had taken place. The judge was in the best position to assess her truthfulness and he was not satisfied that she was telling the truth when she tried to recant on the evidence of her previous marriage to Lo Woon. Approach to bigamy I agree with Stock JA that the approach that this court should take is the liberal one advanced by Thorpe LJ in Rampal v Rampal, that bigamy does not disentitle a party to ancillary relief in limine, but is one of the factors to be taken into account when the court considers all the circumstances of the case under s.25. The case of Rampal provides a striking example of how a bigamous relationship does not necessarily mean a black and white scenario where the bigamist is guilty and the other party is innocent. It is a reminder that in matrimonial cases, there may be many fine shades of grey. Application to present case Applying this approach to the present case, I do not think that the finding of the Wife s bigamy should have any effect on the court s decisions on ancillary relief. This was not a case where the Husband had been deceived into entering into the marriage with consequential effects on ancillary relief. Here the parties had lived together for a long time, the Husband was aware that the Wife had a previous relationship with Lo Woon and he had accepted their children as part of their household. Having said that, in my view the evidence did not justify a finding that the Husband was reckless in entering into marriage with the Wife. On the judge s findings of fact, the Husband simply did not make any inquiries and since it was the Wife who proposed marriage, his adoption of an uninquisitive attitude (which may be described as tactful) was in my view not unreasonable. Further the fact was that during their many years of cohabitation, irrespective of their shareholdings in individual companies, the Husband had shared dividends equally with the Wife. That stemmed from his recognition of the Wife s contribution to the success of their businesses. The registry marriage merely formalized a long relationship that both parties were obviously satisfied with it was a union of equals. The marriage did not change the way the parties conducted their financial affairs. Except for the joint acquisition of assets in the UK (which was for immigration purposes in 1996), both of them simply carried on dealing with their financial affairs exactly as before. On the facts of this case, it is therefore artificial to suggest that the Wife s bigamy should have any effect on the court s decisions on ancillary relief. Quantification of remaining assets The next issue is the quantification of the parties remaining matrimonial assets in

order that there may be an equal division. First, was Si Qiu a matrimonial asset? Secondly, the Husband has alleged that the Wife has failed to disclose all her assets. It appears common ground in this case that only those assets acquired prior to separation would be identified as matrimonial assets (an assumption made by Lord Mance in Miller v MacFarlane 174). The parties physically separated in August 1999 but the separation of the matrimonial pool of assets occurred in 2000. Issues on remaining assets The first issue concerns Si Qiu which was a medicine factory business acquired by the Wife which was then merged with Kanghe, another, larger medicine factory business which she later acquired. If the Wife had acquired Si Qiu in 1999 before the parties separation of the family pool, then it should be put into the family pool for division. However Mr Mostyn argues that even if she acquired it after the parties separation, the evidence regarding Si Qiu/Kanghe is relevant in revealing that she must have had sources of funds at separation that she had failed to disclose to the court, which is the second issue. As for this second issue, there are different figures as to how much the Wife had invested in Si Qiu/Kanghe. Applying some of the figures, Mr Mostyn argues that the Wife must have failed to disclose some $115 million. The judge accepted that there had been failure to disclose assets but he did not think that the evidence justified a finding of a figure of that magnitude. As a matter of completeness I should record that neither party spent any time before this court on the value of the Wife s paintings and jewellery. Si Qiu acquired in 1999 The Wife has presented different dates for the purchase of Si Qiu, in 1999 and 2001. First, on 13 December 1999 an assets transfer contract was signed by the Panyu City Shi Qiao Economic Development Group Company ( ) as assignor, transferring for RMB 16,677,218 the enterprise known as the Shi Qiao Pharmaceutical Factory (Si Qiu) to a Liang Chengtian as transferee. Then, on 4 July 2001 another assets transfer contract was signed by the same EDG this time together with Si Qiu (Liang being its legal representative) as assignors, transferring for RMB 15 million all the assets of Si Qiu to the Wife as assignee, for the renaming of the factory as Guangzhou City Si Qiu Pharmaceutical Company Ltd . The Wife said in cross-examination that Liang signed the 1999 contract on her behalf and that that was the contract by which she purchased the Si Qiu factory (Day 6). To some extent that may be supported by the documents. If Liang was her agent, then one can understand that the 2001 assets transfer agreement might have operated as a vesting of Si Qiu assets in her favour (with a reduction in the valuation of the assets) in some sort of corporate reconstruction. If however Liang had not been her agent and EDG had sold Si Qiu to him outright in 1999, then it is difficult to see why EDG would have been involved in the 2001 agreement at all. This seems to point towards 1999 as the date when the Wife first acquired Si Qiu for about RMB16.68 million. Undisclosed assets The second issue is the Husband s assertion that as the Wife was able to inject large sums into Si Qiu/Kanghe between 2001 and 2004 and has not satisfactorily accounted for their source, she must have had substantial undisclosed funds. The judge accepted that the Wife has failed to disclose all her assets but could not find on the evidence that the figure was as large as the $115 million suggested by the Husband. The Husband s methodology was to compare the Wife s cash, property and securities as at July 2001 ($115.8 million) and as at December 2004 ($18.8 million), obtaining a shortfall of $97 million, and add to that a bank borrowing of $47

million, arriving at the conclusion that she had a total of $144 million to spend during those 3 years. He then considered what she actually spent during those years, which he calculated as $259 million (according to the figures put before the judge which have been revised on appeal). The difference between $259 million and $144 million i.e. $115 million was then asserted as the quantum of the Wife s undisclosed assets, which the Husband argues she must have had as at July 2001. Like the judge, I am not persuaded by that methodology. I deal first with the calculation of what the Wife had available to spend . One cannot simply take two snapshot dates and assume that the difference in the value of holdings between the two dates was all that was available to the Wife during that period. To take one example, in July 2001 the Wife had securities worth $16.5 million, all of which securities she sold by December 2004 (a period of 3 years). However that does not mean that $16.5 million was all that she had received by way of proceeds of sale. To see what funds were available to her from the sale of her securities during those 3 years, one should see what proceeds she received, at what time and what she did with them. Similarly no account has been taken of income earned on the cash figure of $92 million. Another example of the difficulty with the methodology is that the sum of $97 million did not include sums available to the Wife through her companies and their subsidiaries, e.g. by way of dividends. It is also by no means clear what the Wife in fact spent . According to the audited accounts of Kanghe, the total sum of her capital injection into Kanghe was RMB113 million, not RMB 170 million as the Husband alleges. However the Husband has challenged the accuracy of the audited accounts. On the penultimate day of the hearing before the judge, the Husband referred to a figure in the cash flow report. This led to a statement (submitted by the Wife after the hearing had concluded) of Kanghe s apparently unqualified assistant finance manager saying that she had made an error in the cash flow report. The Husband said the statement raised more questions than answers and that the error in turn reflected badly on the auditors. Be that as it may, the point was raised very late and the answer (and riposte) were provided after the hearing had concluded. If the point had been raised earlier, there may or may not have been a better, proper explanation, but irrespective of that, the judge would at least have been able to come to a reasoned view having taken all matters into account. As it was and is now, the unsatisfactory state of the matter shows how unsafe it would be for the court to accede to the Husband s suggestion to turn its back on audited accounts simply by reason of the finance manager s statement. Faced with the Husband s arguments at that late stage of the proceedings before the judge, the Wife produced a schedule to show the source of funds for the capital injections into Kanghe. The schedule showed that the funds came not only from proceeds of sale of the Wife s securities and cash paid to her by the Husband under the 2000 Agreement, but also from sales proceeds and other income of her companies and also sales proceeds of her son s property in England (which were not included by the Husband in the sums he said the Wife had available to spend). In my view in a case involving complex financial dealings such as this, before a court is asked to make a finding of fact that one party has failed to make full disclosure and to put even a ball-park figure on the extent of the undisclosed assets, the point should have been clearly made well in advance by way of detailed questions, so that relevant documents could have been made

available and the matter explored fully by examination of the party and relevant witnesses (e.g. did the son hold the property as the Wife s nominee? Or had she given it to him as an advancement?) The Wife s expert was asked questions on the point but this only came at the tail end of the proceedings before the judge. The expert was unable to assist as he would only have been able to provide answers after undertaking a cash-tracing exercise which had not been included in his terms of reference. Documents were then put together (Bundle) which were produced after Mr Mostyn s submissions and were subjected to commentary by him. That provoked further materials which were sent to the judge after final submissions had concluded and the judge had reserved judgment. That was what the judge had to contend with (and this court has only had arguments on the cover sheet of that bundle without having been given the documents within). In my view this was an unsatisfactory way of proceeding and the judge s caution in refusing to put a ball-park figure to undisclosed assets was in my view entirely justified. Remaining assets

(1) On the basis that the court does not interfere with the assets distributed under the 2000 and 2001 Agreements, adopts the judge s figures for investments in Kanghe and does not put a figure to the undisclosed assets, the matrimonial assets would appear to be as follows (see following page): Remaining matrimonial assets In name of Value (HK$) Husband 4 Beacon Hill Road 69,000,000 Village Garden 10,700,000 City One 3,400,000 Rhapsody 6,600,000 Ma Tin 2,060,000 Flats 403, 404 Blk 1, GZ 1,393,285 Flats D & G, GZ 2,734,555 Singapore 3,277,431 Banks 9,726,000 Other assets 2,587,676 Sub-total: 111,478,947 (H) Wife Paintings 5,000,000 Investments in Kanghe 20,500,000 Banks 13,830,000 Securities 45,503,000 1513, Metro Plaza 2,459,403 Flat A, GITIC, GZ 2,315,231 Flat B, GITIC, GZ 408,911 Investments in Si Qiu 15,730,000 (RMB16.68m) Flats 403, 404 Blk 2, GZ 1,000,000 Sub-total: 106,746,545 (W) Total: $111,478,947 (H) + $106,746,545 (W) = $218,225,492 (H +W) If divided equally (H + W

2) = $109,112,746. Therefore, balance to be paid by Husband to Wife ($111,478,947 - $109,112,746) = $2,366,201.

(2) However although the judge could not accept the Husband s methodology, he was satisfied that the Wife had failed to disclose the entirety of her assets, and it can be inferred from the judge s order that he was prepared to accept a figure of $25 million (i.e. $120 - $95 million). In arriving at $120 million discrepancy in the Husband s favour, the judge accepted that he should apply a discount to the valuation of Laira but it was so uncertain that he could not put a figure to it. If a discount were applied, then the discrepancy in favour of the Husband would be less than $120 million. Can the Wife argue that consequently the figure for undisclosed assets should be correspondingly reduced? In my view, where a party has been guilty of failing to make full disclosure, she cannot complain if uncertainties are determined against her favour. I would not therefore be inclined to reduce the figure of $25 million that the judge has taken to be the extent of her undisclosed assets. In conclusion, the figures would be as set out in the following table (see following page): Remaining matrimonial assets (assuming undisclosed assets of $25 million) In name of Value (HK$) Husband 4 Beacon Hill Road 69,000,000 Village Garden 10,700,000 City One 3,400,000 Rhapsody

6,600,000 Ma Tin 2,060,000 Flats 403, 404 Blk 1, GZ 1,393,285 Flats D & G, GZ 2,734,555 Singapore 3,277,431 Banks 9,726,000 Other assets 2,587,676 Sub-total: 111,478,947 (H) Wife Paintings 5,000,000 Investments in Kanghe 20,500,000 Banks 13,830,000 Securities 45,503,000 1513, Metro Plaza 2,459,403 Flat A, GITIC, GZ 2,315,231 Flat B, GITIC, GZ 408,911 Investments in Si Qiu 15,730,000 (RMB16.68m) Flats 403, 404 Blk 2, GZ 1,000,000 Sub-total: 106,746,545 + undisclosed assets 25,000,000 131,746,545 (W) Total: $111,478,947 (H) + $131,746,545 (W) = $243,225,492 (H +W) If divided equally (H + W

2) = $121,612,746. Therefore, balance to be paid by Wife to Husband ($131,746,545 - $121,612,746) = $10,133,799. No profit sharing I agree with para. REF _Ref167533617 \r \h of Stock s judgment. Before the order was made for subordination, the Wife never asserted a claim to a profit share in the Husband s Laira project, nor did she advance it at the hearing before the judge. If she had asserted such a right before the order was made, the Husband may or may not have proceeded with it, or the judge may have been prepared to lift the Wife s lis pendens on the Beacon Hill property in exchange for other or a lesser form of security. Nor did the Wife assert such a right at the ancillary relief hearing before the judge. If she had done so, the judge may well have declined to make the property transfer order in her favour because the addition of the profit share would be tantamount to increasing the value of that property well beyond the Single Joint Expert s valuation of $69 million. There is no evidence of any prejudice suffered by the Wife as a result of the subordination. In my view it would not be fair to allow the Wife to raise this claim now. Beacon Hill property The Beacon Hill property was the parties home for many years and the Wife did say in one of her affirmations that she felt attached to it. However Mr Kotewall did not assert that that by itself was the ground for the Wife s wish to have this property transferred to her in any event (Day 2, Transcript p.32). Rather, it was put on the basis that if the judge were to order the Husband to pay her equalization money , then she would take the property in lieu of the sum of $69 million. The judge did not find that the Wife did in fact have any particular entitlement to this property and I see no reason why the property transfer order should not be set aside now that the Husband has succeeded in overturning the judge s orders based on the perceived disparity in the 2001 Agreement. Occupational rent Although we will be setting aside the order that the Husband transfer the Beacon Hill property to the Wife, I see no reason why she should be ordered to pay occupational rent. This is not a land dispute where one party has trespassed on the land of another. Before the hearing, the Wife was staying in the property as the former matrimonial home and after the judgment, she was staying there pursuant to the judge s order. At no stage has the Husband sought vacant possession of the property and it would have been difficult to see what grounds he would have had for making such a claim. Interest In this type of litigation, I see no grounds for awarding interest, let alone at the compound rate sought by the Husband. Costs order nisi We have not heard the parties arguments on the appeal from the costs order made by the judge, nor have we heard arguments on costs of the appeal, but in light of our proposed order, I would make an order nisi that there should be (1) no order for costs before the judge, (2) no order for costs of the Husband s appeal but (3) an order that the Wife pay the

Husband s costs in her cross-appeal. My tentative views are as follows. As for (1) i.e. the proceedings before the judge, it is clear from the judgment that he had not been impressed by either of the parties or assisted by their experts. There was a great deal of prevarication in the parties testimony, late disclosure and changes of position. As for (2) i.e. the Husband s appeal, whilst he has ultimately been successful, the substantive ground was not one that he had impressed on the judge so I do not think he should be given the costs of the appeal. I would add that he failed in his attempt to secure an adjustment to the award on the ground of the wife s bigamy. As for (3) i.e. the Wife s cross-appeal, she has been unsuccessful (save in respect of the sole issue of liability for additional land premium for the Laira project) and she should therefore pay the Husband s costs of meeting that cross-appeal, to be taxed if not agreed. Hon Hartmann J: I have had the advantage of reading in draft the judgments of both Stock and Yuen JJA. I am in agreement with those judgments. Taking into account their exhaustive nature, I do not think that there is anything I can usefully add. Hon Stock JA: Accordingly: the husband s appeal CACV 169 of 2006 is allowed and paragraphs

[1] and [2] of the order of Lam J dated 28 April 2006 whereby he ordered the husband to transfer 4 Beacon Hill to the wife, and the wife to pay the husband the sum of $11,018,799 are set aside; those orders are substituted by an order that the wife shall pay to the husband the sum of $10,133,799; paragraph

[7] of the order of Lam J dated 28 April 2006, the order as to costs of those proceedings, is set aside; the wife s cross-appeal in the same proceedings is dismissed; the wife s appeals CACV 181 and 182 of 2006, that is to say against those orders by which the judge set aside the decrees nisi and absolute of divorce and declared the ceremony of marriage of 12 April 1991 to be null and void, are dismissed; there will be an order nisi that: there be no order as to the costs of the ancillary relief proceedings before Lam J; there be no order as to the costs of the husband s appeal in CACV 169 of 2006; the wife shall pay the husband s costs in the wife s cross-appeal in CACV 169 of 2006; and the wife shall pay the husband s costs in the bigamy appeals CACV 181 and 182 of 2006, including those of the respondent s notices therein. (Frank Stock) Justice of Appeal (Maria Yuen) Justice of Appeal (M.J. Hartmann) Judge of the Court of First Instance Nicholas Mostyn, QC & Ms Anita Yip instructed by Messrs Bough & Co. for the Husband Mr Paul Shieh, SC & Mr Bernard Man instructed by Messrs Joseph S Chan & Co. for the Wife dated 17 December 2002. Day 25, page 3.

[2003] 1 FCR 97, 105 para [22]. para 96 judgment. para 149. para 149. paras 151 and 152. para 98. para 151. para 95. para 116. para 119 para 122 para 123 paras 126 and 127 para 153 para 211 para 212

[1929] AC 601 at p 608, per Lord Hailsham L.C.

[1994] 1 FLR 775, 791 C-D. [1980] 3 All ER 887, at p 893d.: formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. See also Oliver LJ in Edgar 896a-d; Miglin 224 DLR (4th) 193, para

[78] and Xydhias Xydhias [1999] 1FLR 683. 224 DLR (4th) 193, para [55]. [2006] 2 WLR 1283, at 1310, para [122]. Miglin, above, paras

[73] and [78]. page 791. Miglin, para [78]. Edgar, page 893. 236 DLR (4th) 193 at 223-224 para [67]. para [45]. [1999] 1 FCR 289. [1980] 3 All E R 887.

[1970] 3 All ER 209. at page 214. page 893b. [2001] 1 HKC 148. see Miglin at para 82 : There is a danger in borrowing terminology rooted in other branches of the law and transposing it into what all agree is a unique legal context. ; and Xydhias, above, in the rejection by Thorpe LJ of the application to ancillary relief proceedings of ordinary contractual principles in determining whether a compromise agreement has been reached. judgment, para 153. page 896. One notes the comment in Miglin at para 73 suggesting that the approach whereby an agreement is presumed to be dispositive of claims for relief, is one that takes greater account of the parties subjective sense of equitable sharing than the objective "unconscionable circumstances" standard proposed by counsel for the appellant. para [82]. page 899a-b. page 582G. page 583G.

[1995] 2 FLR 160. page 168. [2000] 3 FCR 374 at page 383d. At pp 536 537. paras 148 and 150 judgment. para 149. Day 22, page 53. para 149 judgment. paras 128 and 137 affirmation 17 December 2002. at para [46]. See Miglin, paras 55 and 56. See para [REF _Ref161548760 \r \h] above. referred to at paras [REF _Ref167159347 \r \h] and [REF _Ref167159392 \r \h] to [REF _Ref167159426 \r \h] below. paras [REF _Ref167071409 \r \h] to [REF _Ref167071386 \r \h] below. para 197. [1995] 2 FLR 829, 837.

[1994] 1 FLR 359, 367. 3rd ed., p 19. section 8. Kwan Chui Kwok & another v Tao Wai Chun & others [1995] 1 HKC 364. section 2.

[1976] HKDCLR 51. Marriage Laws and Customs of China. para 71. para 113. para 3 f. see Taylor v Taylor [1961] 1 WLR 9 where the test for rebuttal is said to be evidence clearly showing there was no marriage at all. Also Pazpena de Vire [2001] 1 FLR 460, at p 465. See Borkowski. The Presumption of Marriage [2002] 14 CFLQ 251, 252. See Borkowski above at 256. Rayden and Jackson 18th ed. para 7.12.

[2000] 1FLR 8.

[1949] P 391.

[2001] 1 FLR 460.

[1967] P 25. pp 31-32.

[1949] P 391, at p. 394. at p. 37E. at p. 37C-D.

[1967] HKLR 423.

[1975] HKLR 449. pp 456 457. pp 458-459. (1930) 23 BWCC 504. per Romer LJ at pp 511-512. now 6th ed., p 705. para 234. Wigmore on Evidence 3rd ed., Vol 9, para 2491. Wigmore, para 2493. A point made by Wigmore at para 2506, that: In issues of bigamy and of legitimacy, there is a special temptation to aid the later marriage . I note in this regard that none of the cases discusses whether that temptation might be tempered by the existence of children of the earlier marriage whose legitimacy may be affected by the decision.

[1995] Fam 198. see page 202 B. page 202 E. See however Rampal v Rampal No 2 [2001] 2 FLR 1179, at 1183 where it is suggested that a less rigid rule apples to statutory claims.

[1981] QB 758, 765, cited in Whiston at page 203. page 205 page 207F. page208 A.

[2001] 2 FLR 1179. The editors of Rayden and Jackson 18th ed refer to the court in Rampal as rowing back from an absolute rule. page 1188, para [31]. page 1186. pages 155-156. page 1187 para [27]. page 1187 para [27]. page 1188 para [29]. Day 5, page 45. para B 2.96. paras 240 to 244.

[1990] 2 HKLR 183. [2001] 1 AC 596. [2006] 2 WLR 1283.

[2003] 1 HKLRD 836. [1983-1984] 156 CLR 605.

[2003] 2 FLR 299. para 133. para 23. Figgins para 113 citing Sachs LJ in Porter v Porter. See to the same effect White at p 605. para 113. para 156. para 164. para 166. This is the phraseology of Civil Procedure Rules, in England and Wales, rule 35.3; and of rule 119 of the proposals in Hong Kong for Civil Justice reform. National Justice Compania Naviera S. A v Prudential Assurance Co Ltd (The Ikarian Reefer) [1993] 2 Lloyd s Rep 68, 81. PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H; < ni? ,|QI jFen 6cq~ ,|QI & 6" Flora-template-ABC-Final (fair)1.dot setup Microsoft Word 9.0 l9x l9x Judiciary Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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