

HONG KONG / JUDGMENT

L v. Y

COURT

Family Court

DECIDED

27 June 2007

CASE / FILE NUMBER

FCMC12396/2006

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bjbj IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
MATRIMONIAL CAUSES SUIT NO. 12396 OF 2006

BETWEEN L Petitioner and Y Respondent

Coram : H.H. Judge Bruno Chan in Chambers Date of Hearing : 7 February, 5, 7 9 March, 11 April,
16 & 23 May 2007. Date of Judgment : 27 June 2007.

J U D G M E N T

1. This is the Petitioner Wife s application for ancillary relief against the Respondent Husband, for herself and the only child of the family, a son now 8 years old, upon the dissolution of their relatively short marriage, but the facts of the case are somewhat unusual, as this is the parties 2nd divorce against each other and their 3rd divorce proceedings within the past 10 years. The Background
2. The parties first married each other on 16th February 1997, when the Wife was then a 26 years old university demonstrator studying for her Master degree at the University of Hong Kong, while the Husband was a 32 years old lecturer at Polytechnic Univeristy. After the marriage they cohabited in their property at Ground Floor, Ting Kok, Tai Po, New Territories (the Ting Kok Property) which was part of a 3-storey village house purchased earlier in 1996 together with 2 friends of the Husband, a Mr Chow and a Mr Wong who bought the 1st and 2nd floor respectively. The parties ground floor was paid for \$1.6 million by means of a loan of \$350,000 from the said Mr Chow and a mortgage of about \$1 million from Hang Seng Finance Ltd.

3. In about October 1998, when she was in her 8th month pregnancy with the child of the family, the Wife discovered that the Husband was having an affair with one of his students. As a result she left the Husband and moved out of the Ting Kok Property with the son about one month after his birth on 4th January 1999 to reside with her mother in Tseung Kwan O.
4. In October 1999 the Wife then filed her divorce under FCMC No 9875 of 1999 against the Husband and on 6th September 2000 the parties reached a settlement in which the Wife was granted custody of the son and a maintenance order for the Husband to pay her \$20,000 per month being \$12,000 for the son and \$8,000 for her of which \$4,000 was to cover her rental expenses. At that time he was earning about \$45,000 per month. Subsequently the Husband also transferred his interest in the said Ting Kok Property to the Wife under a new mortgage from the same Hang Seng Finance Ltd, and that she agreed to let the said property back to the Husband, so that he would not have to move, at a monthly rental of \$5,000. In addition the Husband also paid the Wife a further sum of \$2,000 per month as instalment payment for a previous loan, making a total payment of \$27,000 to her per month. The decree of divorce was then made absolute on 27th October 2000.
5. After the divorce the Wife returned to work as a university research assistant, after having obtained her Master degree earlier, while her mother would assist in taking care of her son when she worked, and the Husband remained as an university lecturer.
6. In 2002 the parties agreed to get back together but that they would not inform their respective family of their decision for fear that they would not approve. On 13th March 2002 they registered their 2nd marriage. At about the same time the Wife decided to purchase a property at Park Central, Tseung Kwan O, Sai Kung, New Territories (The Tseung Kwan O Property) which was then a non-completed development, for \$1,774,500 by means of a mortgage of \$1,242,150 from the Bank of China. The Husband was made a joint owner in the purchase so that he would be eligible for housing allowance under his employment.
7. In the meantime and before the completion of the Tseung Kwan O Property in late 2003, the Wife and the son stayed at her mother s home, while the Husband remained in the Ting Kok Property where the Wife found unsuitable for the son due to his skin problem. In June 2002 the Wife quitted her job to take over the full-time care of the son, although there was a time when she would import some small gifts and accessories for sale on the internet such as eBay for some additional income.
8. In late 2003 the family moved into the new Tseung Kwan O Property and hired a domestic helper, but the Husband found the place too small and too inconvenient for him to go to work, he therefore moved back to stay at the Ting Kok Property during weekdays, only returning to the Tseung Kwan O Property on weekends and holidays.

9. In or about October 2004 the Wife discovered a woman residing in the said Ting Kok Property, and suspected that the Husband was having an affair with that woman known by the name of Natasha, which he eventually admitted. As a result the parties had a heated argument in November 2004, and since then the Husband stopped spending any time at the Tseung Kwan O Property.
10. On 16th March 2005 the Husband instituted proceedings for divorce under FCMC No 2518 / 2005 against the Wife, alleging separation between them since February 1999, and sought custody of their son. Shortly thereafter he also moved out of the Ting Kok property to a rental flat in Hung Hom, Kowloon, and reduced his maintenance payment for the Wife to between \$11,000 and \$14,000 per month. Later in the same year in about October he purchased his present property at Hilltop Garden, Tai Po (Hilltop Garden Property) for \$1.5 million by means of a loan and a mortgage from the Bank of China.
11. Not surprisingly, the Wife filed an Answer to the Petition in which she insisted that the parties had only separated from November 2004, but admitting that the marriage had indeed broken down irretrievably. On 14th February 2006 she applied and obtained an order for the Husband to pay her \$21,000 per month as interim maintenance for her and the son, and that in the event of the Husband letting out the Ting Kok Property, for which she agreed to authorize him to do so, he shall increase her interim maintenance to \$27,000 per month.
12. Earlier on 19th January 2006 the Husband also obtained an order by consent for interim visiting access to the son on alternate Fridays and Sundays afternoon pending the outcome of the Social Investigation Report on the issues of custody and access, which was submitted into court about a month later which revealed that the Husband was no longer seeking custody of the son, and that he would be content for him to be under the custody care and control of the Wife as long as he would continue to have defined access, which was subsequently agreed between the parties in September 2006 to be fixed on alternate Sundays from 10 a.m. to 4 p.m.
13. The parties were also able to resolve their dispute over their divorce when they agreed and obtained an order that the proceedings under FCMC No 2518 / 2005 be stayed so that the Wife could issue a fresh petition for a consensus divorce based on their separation since November 2004 but that, to save time and costs, all the other relevant pleadings filed in that proceedings such as the parties Financial Statements be transferred to and used in the fresh proceedings.
14. Pursuant to the agreement on 3rd October 2006 the Wife issued the fresh petition in these proceedings, and on 23rd January 2007 the decree nisi of divorce was granted with the questions of custody / access and ancillary relief adjourned pending the filing of the parties new Financial Statement. Eventually the parties were able to agree that custody of the son was to remain with the Wife and that the Husband was to have visiting access from 10 : 00 a.m. to 6 : 30 p.m. on every Saturday, leaving only the question of ancillary relief in dispute, for which the Wife seeks an outright transfer of the Husband s interest in the Tseung Kwan O

property to her, substantive monthly maintenance for herself and the child in the total amount of \$39,000, and a lump sum of more than \$400,000 to pay off various moneys which she claims that he owes her from an earlier loan, the short-falls in maintenance over the past 2 years, as well as the costs of her former legal representation.

15. The Husband essentially does not dispute the Wife's claim for the Tseung Kwan O property, but suggests that the transfer of his interest therein to her should form part of a clean break settlement of all her financial claims against him, as he believes that either she is already earning to support herself, or at least has high earning capacity to become financially independent of him, in which case he offers a limited period of monthly maintenance of \$8,000 for 1 year to enable her to get back on her feet. As for the child he accepts his obligation towards him and proposes a monthly sum of \$12,000 for his maintenance, in addition to continue to pay for his school fees.
16. It was apparent that the parties were too far apart with their respective proposal to reach any settlement. At about the same time the Husband also made an urgent application for reduction of his interim maintenance for the Wife ordered earlier in the previous proceedings, due to alleged changes in his financial situation, and that he might also have to leave the jurisdiction soon for Australia to complete his Ph.D. thesis, it was therefore agreed that the remaining question of ancillary relief be set down for trial as soon as possible, instead of going through the usual procedure under the Pilot Scheme of Financial Dispute Resolution. The Law
17. In considering the question of ancillary relief, the court is required by s. 7 (1) & (2) of Matrimonial Proceedings and Property Ordinance, Cap. 192 which I set out in full hereinbelow for the benefit of the Wife who is unrepresented : -
 - (1) It shall be the duty of the court in deciding whether to exercise its powers under section 4, 6 or 6A in relation to a party to the marriage and, if so, in what manner, to have regard to the conduct of the parties and all the circumstances of the case including the following matters, that is to say -
 - (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (c) the standard of living enjoyed by the family before the breakdown of the marriage;
 - (d) the age of each party to the marriage and the duration of the marriage;
 - (e) any physical or mental disability of either of the parties to the marriage;
 - (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

- (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.
- (2) Without prejudice to subsection (3), it shall be the duty of the court in deciding whether to exercise its powers under section 5, 6 or 6A in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say -
- (a) the financial needs of the child;
 - (b) the income, earning capacity (if any), property and other financial resources of the child;
 - (c) any physical or mental disability of the child;
 - (d) the standard of living enjoyed by the family before the breakdown of the marriage;
 - (e) the manner in which he was being and in which the parties to the marriage expected him to be educated; and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (a) and (b) of subsection (1), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him .
18. While the section does not state any mandatory objective that the court has to strive to achieve when conducting the s.7 exercise, since the case of *White v White* (2001) 1 AC 596, (2001) 1 All ER 1, (2000) 3 FCR 555, (2000) 2 FLR 981, when the English House of Lords stated that the general objective of the statutory discretion is to achieve a fair outcome, and that fairness requires that there should be no discrimination between husband and wife in the respective roles that they played during the marriage, those principles have been embraced in the main by our courts, and that I shall bear them in mind when conducting the exercise in this case.
19. I shall start with the Wife's financial situation. She is now 36 and still lives with her 8 years old son at the Tseung Kwan O property. She claims to be still unemployed, as she feels that she should be devoting all her time and energy in raising her son, whom she says is a gifted child but has a serious condition of skin allergy, and hence requires her full time care and attention, until perhaps he enters secondary school in 3 or 4 years time, at which time she hopes to go back to work as a research assistant, where her interest lies, earning about \$12,000 per month. In the meantime she claims she will have to be wholly dependent on the maintenance from the Husband, with financial assistance from her brother from time to time. Although she has let out her Ting Kok property for \$6,500 per month, she says it has all gone into meeting the monthly mortgage repayment of that property.

20. While he does not dispute the child's allergic condition, the Husband suspects that the Wife has in fact already been working for her brother in his eBay trading business on electronic goods since September 2003 on the following basis : -
- (a) that she had travelled to Japan on no less than 4 occasions between 2004 and 2005, which he believes were business trips as Japan is the obvious source of her brother's business;
 - (b) that she could not have afforded to travel to Japan so frequently just for pleasure under her disclosed financial circumstances unless they were for business and paid for by her brother;
 - (c) that she did admit under cross-examination that she has been assisting her brother from time to time with some banking dealings such as exchanging currencies, and making phone calls to his customers;
 - (d) that in view of her strong character and aggressive pursuit for maintenance and financial provisions from him over the years, the Husband believes that she would not be content to just sit at home all these years without engaging in some sort of income earning activities, and since she is experienced in eBay trading in the past, it is only natural and normal for her to work in her brother's business, in particularly in view of their good relationship.
21. The Wife agrees that she did go on those trips to Japan and that some of which were paid for or assisted by her brother, but insists that they were purely pleasure trips and that on 2 of those occasions she brought the child along, while the other trips were to release the pressure and unhappiness of the failure of her marriage, all of which have nothing to do with her brother's business and while she did from time to time run errands for her brother, she was only being helpful to him, and denies working in his business or drawing any income from it, in particularly that he has now moved part of his operation into China and hence her service would not be needed there, nor would it be convenient for her under the circumstances.
22. In reply to the Husband's queries over her earning capacity including the possibility of working part-time for the time being, the Wife's evidence is that with her education background, she initially thought she would be able to earn \$10,000 per month, but her recent enquiries revealed that it was not possible to do so as she has been out of the job market for more than 3 years, nor was she able to find any part-time job as a replacement teacher which requires a teaching certificate which she does not have, or any part time tutorial job that would allow her to get home by 3:30 p.m. when the child returns from school. She also rejects the possibility of returning to her previous eBay business because in addition to fierce competition, there is not enough space in her home to store the stocks, and that it would not be good for her son's skin problem.
23. There is no question in my mind that the Wife has an earning capacity, not just because she had worked as university research assistant or taught in various schools earning between \$10,000 and \$20,000 per month since her graduation from university, and for a period when she was studying for her Master degree, but also because I found her to be a highly capable

and intelligent person in these proceedings, both in the drafting as well as the presentation and argument of her case while acting in person, as described by Ms Cheung for the Husband in her closing submission : The Wife s performance in the hearing and the documents she prepared for the hearing shows that she is well-organised, thoughtful, having good memory, active, diligent, fluent in Cantonese speaking and Chinese writing, and able to work under pressure and to which I wish to add, fluent in English as well.

24. While I can understand the Wife s concern over the child s skin allergy, the current situation is not so serious that he needs to be under her watchful eyes at all time to the extent that she cannot work at all, as the child is essentially out of her care for some 8 hours each day in school, and there was a time that with the assistance of her family, she was able to go out to work when the child was much younger.
25. As aforesaid there is no dispute that the child has a skin condition associated with atopic eczema which, according to the medical report by Dr David Luk of United Christian Hospital produced by the Wife in September 2005, affected his hands, neck and scalp when he was an infant. It however appears from the report that with proper medication and regular follow-up medical attendance, the condition seems to have been brought under control, and there has since been no other or further evidence from the Wife to the contrary. It has certainly not prevented the child from attending school and other normal activities, and while one can understand the Wife s concern for her child, it should not in my view prevent her from engaging in some form of employment, part time at least, if not full time for the time being.
26. The Wife of course no longer has the use of a domestic helper, and if indeed the care of her child does put a constrain on her working hours, and with the assistance of her family I do not think it should, it would be obvious, as pointed out by the Husband, for her to either go back to her eBay business at home, or better still, to work for her brother in his trading business in which she is experienced and no doubt, given her good relationship with her brother, would allow her to work in flexible hours.
27. The Husband in fact believes that she has already been working for her brother, relying as aforesaid on her several trips to Japan in recent years as evidence. While accepting that in some of those trips she did bring along the child and were probably for pleasure and, as she insisted, to get away from the emotional strain of a failed marriage, I do agree with the Husband that the facts that some of them were paid for or funded by her brother, their frequency within such a short time and that Japan also happens to be the sourcing country of the brother s business, are just too much of a coincidence for them to be just pleasure trips wholly unrelated to the business.
28. The Wife has of course offered that the move of part of her brother s business, specifically the storage of stocks, to China as one of the reasons why she could not be working in her brother s business, but the evidence is that her brother still runs his business in Hong Kong and has an office here where the Wife used to hang around .

29. Granted that electronic goods are not what the Wife used to trade in her former eBay business, but given her education background, her ability and intelligence, I have no doubt it is something which she is well capable of handling or assisting her brother, and given the nature of such business which can be easily run at home with a computer, and with the strong personality and determination of the Wife as pointed out by Ms Cheung for the Husband, I just find it difficult to believe that she would indeed not work for the time being in order to improve on her financial position, until some 3 4 years later as she proposed when her son starts secondary school.
30. There is of course no evidence of how much she would be earning from working for her brother, nor for that matter the size or profit of that business, other than the bare fact that it involves importing electronic consumer goods mainly from Japan for sale in China, but given the past earning records of the Wife, it would not be unfair to put her earning capacity at between \$10,000 and \$20,000 per month.
31. She is still the joint owner of the Tseung Kwan O property with the Husband which she estimates to be worth about \$1.8 million but with a combined mortgage and bank loan of about \$1.5 million, its net equity is therefore only about \$300,000. The situation is similar with her Ting Kok property which is solely owned by her, with a estimated market value of \$1.45 million but an outstanding mortgage of about slightly over \$1 million, hence a net equity of about \$410,000. As aforesaid it has been let out to a tenant and fetches \$6,500 per month in rental income, all of which has gone to meet its monthly mortgage repayment. She says she has no other valuable assets. The total value of her interest in these 2 properties therefore amounts to about \$560,000, which is not disputed by the Husband.
32. The Wife s alleged liabilities, which she claims to be quite substantial and in fact in excess of the total value of her assets, are however much more controversial. Leaving aside the mortgages of the 2 said properties, the Wife claims that she owes her family, mainly her brother, \$380,000 from borrowing from them from time to time for her living expenses, possible costs contribution to the Legal Aid Department for legal representation in her 2 previous proceedings of about \$87,000, and a potential liability to pay damages to the other 2 owners of the 3-storey village house in which her Ting Kok property is located, all of which are disputed by the Husband.
33. I propose to first deal with the simplest and least controversial one : the costs owed to the Legal Aid Department. The arrangement between the Wife and the Department was, as I understand it, that those costs will be charged against whatever lump sum or assets she may obtain in those proceedings, which have, as noted above, already been discontinued and months have passed without any news from the Department. It seems quite unlikely that the charge will be enforced.
34. As for the alleged money owed to the brother, as pointed out by the Husband, other than the Wife s own words, there is no evidence from either the brother or documents of such loans, and the Husband questions their necessity when he says he has all along been paying

maintenance for the Wife and the child. While she may have good reason not to involve her brother in these proceedings by asking him to file an affirmation to verify the loans, and that it was never necessary for there to be any loan agreement or IOU between them in view of their good relationship, I agree with the Husband that the Wife could have easily produced other documentary evidence such as her bank statements showing deposits of such loans. The fact that there is none is hardly convincing at all, while her explanation given in court that she intentionally did not deposit these loans, which she said regularly at about \$20,000 per month, into any of her disclosed bank accounts because she did not want them to arouse the Husband's suspicion should there be litigation between them, will unfortunately just go to fuel his suspicion that they might well be her income for working for her brother.

35. The remaining issue over her potential liability to a claim by the other owners of the Ting Kok village house is somewhat more complicated. The undisputed evidence is that in 1996 when the parties and the 2 friends of the Husband aforesaid decided to purchase the 3-storey village house for \$5.2 million, with the parties taking the ground floor for \$1.6 million, Mr Chow the 1st floor for \$1.75 million and Mr Wong the top floor for \$1.85 million, the village house also included a garden and a roof top, and it was also agreed that all the owners be allowed to use and enjoy both but for the purpose of conveyancing the properties, the garden would be included in the title for the ground floor (the parties) while the roof top in the title of the top floor (Mr Wong), and that in the event of the sale of either the ground floor or the top floor to a third party, that owner will have to compensate the other 2 owners for the loss of the use and benefit of the garden or the roof top accordingly.
36. It is now the Wife's case that upon the conclusion of these proceedings and in the event that she is allowed to retain her interest in her Ting Kok property, i.e. the ground floor, she intends to transfer it to her brother in settlement of her said debt owed to him. When this was disclosed to the other 2 owners, the subject of compensation was raised with the Wife and her evidence is that they have now threatened to sue for more than \$130,000 in compensation.
37. It is not entirely clear in what form was the alleged agreement amongst the owners to share the garden and the roof top and to pay compensation in the event of a sale to third party, but the law on the enforcement of such agreement is clear, as no action shall be brought upon any contract for the sale or other disposition of land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person lawfully authorised by him for that purpose (s. 3 of Conveyancing of Property Ordinance, Cap. 219).
38. In other words, if the alleged agreement to pay compensation was not in writing, it cannot be enforced by any action, and the Wife therefore needs not be concerned. In any event, as referred above, I have reservation over her alleged debt owed to her brother and hence there does not appear to be any cogent reason for her to transfer her interest in her Ting Kok property to her brother.

39. I shall next consider her needs for herself and the child, upon which her claim for monthly maintenance is based. In her Financial Statement filed on 15th December 2006, the Wife put her total expenditure at about \$35,000 per month, which she updated to \$39,000 per month at the trial, the most substantial item of which is undisputedly the mortgage repayments of her 2 properties, totalling more than \$18,000, while most of her other expenses appear to be normal or insignificant, and were generally not disputed by the Husband, save for some of the expenses of the child such as extra-tuition lessons and activities, of which I accept the Wife's explanation as reasonable and necessary. Of the mortgage instalment payment of the Ting Kok property, it is currently being met by the rental income of \$6,500 per month, hence the Wife's net needs should accordingly be brought down to about \$30,000 per month, which of course represents the basis of her claim against the Husband.
40. In addition the Wife also claims that the Husband owes her 2 separate sums : \$328,047 being the balance of a loan from her for their wedding expenses as well as setting up their matrimonial home of their first marriage, plus accrued interest thereon, and another sum of \$79,000 being arrears of maintenance accrued over the past several years.
41. For the former sum, Ms Cheung for the Husband argues, rightly so in my view, that it was not an issue at the time of parties first divorce when they were both legally represented and reached an overall settlement of all matters of the ancillary relief which was eventually made an order of the court on 6th September 2000, and therefore the Wife should not be allowed to make that claim again years afterwards in this their 2nd divorce. I agree that as the loan was made in the first marriage, it should have been claimed in the first divorce and would have been resolved, expressly or impliedly, under the terms of their settlement.
42. As for the 2nd sum, from the chronology prepared by the parties respectively of the Husband's maintenance payments during the 2nd marriage, it is true that there were variations as to the monthly sum at different periods of time, but the evidence is not clear as to why there were such variations, perhaps compounded by the fact that the Wife did have her own income at some stage, nor was the matter raised at the time of the hearing of the Wife's application for maintenance pending suit in February 2006, I agree it would not be appropriate, nor would it be practical, to deal with this claim of the Wife.
43. I now come to consider the Husband's financial situation, which is more straightforward, at least as far as his income is concerned. He is still a lecturer at Hong Kong Polytechnic University on contract renewable every 2 years, and is currently in his 6th contract with the university. His basic monthly salary is \$51,870, plus housing allowance of \$10,480 and education allowance of \$1,500, hence a package of \$63,850 per month. In 2006 he also received an additional teaching allowance averaging \$11,000 per month, but his evidence is that for this year, such allowance is going to be reduced substantially and in fact he now receives only \$6,800 per month on average, bringing his total monthly income to just about \$70,000.

44. While the Wife did express some reservation over the alleged reduced amount of the teaching allowance, there was in the main not much dispute over the Husband's current monthly income which was generally borne out by his bank statements, although it was also pointed out that his tax return for previous years show a total income in excess of \$800,000 per annum, and that in the event of him obtaining his Ph.D., he stands to be promoted to be a professor with a much higher income of well over \$100,000 per month. It is however his alleged expenses, which he says have well exceeded his income, that was in effect one of the main issues between the parties in these proceedings.
45. Before I come to deal with that issue, it is worth noting from his Financial Statement filed on 18th December 2006 the Husband disclosed that his MPF then stood at slightly over \$230,000 but not realisable until end of 2029 which by then will no doubt become much more substantial, and that apart from his joint interest with the Wife in the said Tseung Kwan O property, and his sole interest in his Hill Top Garden property which he claimed to have no net equity, he disclosed no other assets or property, not even savings in his bank accounts all of which he said were in overdraft deficit.
46. In his same Financial Statement the Husband put his total monthly expenditure at slightly over \$100,000, some \$30,000 over his monthly income, which he says has been met only by borrowing from bank and credit card companies but cannot continue as he is already in debts of more than \$500,000.
47. On 24th January 2007 the Husband followed up with an affidavit giving further details of his various expenses with supportive documents, in which he also adjusted his tax provision to a lower figure at \$14,266, but otherwise maintained that all his other personal expenses were necessary and reasonable, and that the total monthly amount at \$92,700 would still be some \$20,000 over his monthly income.
48. Of these expenses, 2 items in particular came under strong criticism and scrutiny from the Wife : the monthly mortgage instalment of the Hill Top Garden property of \$14,322.50, and his various loan repayments under the general item of Others in the total sum of \$23,695 per month.
49. Of the former item, it is in fact not the quantum of the mortgage instalment that was the subject of the Wife's criticism, but rather its necessity, as she believes that both the manner and the timing of the purchase of his property by the Husband would show that he was deliberately trying to increase his total liability so as not to have to pay so much maintenance to her.
50. The Hill Top Garden property, i.e. 2nd floor and rooftop of a 3-storey village house in Tai Po, was purchased on 3rd November 2005 for \$1.48 million by means of a loan of \$500,000 from the Bank of China by using a fixed deposit of the Husband's sister as security, and a mortgage of \$1,041,100 also from the same bank, at a total monthly repayment of \$14,332.50 at the current interest rate. The Husband explains that since leaving the Wife's Ting Kok Road property, he needed a place to stay, and in order to take advantage of his housing

allowance, it was only natural and sensible for him to purchase his own home than to rent.

51. The Wife however does not agree. She argues that after leaving the Ting Kok Road property, the Husband moved into a rented apartment in Hung Hom at a monthly rental of only \$6,600, just slightly over what he used to pay for occupying the Ting Kok property and well within his monthly budget, it therefore does not make any sense for him to incur another huge liability at that stage for which he would have to spend more than twice as much as before on mortgage payments, and some 40% in excess of his housing allowance.
52. Furthermore, the Wife argues, the Husband never disclosed his plan to purchase the Hill Top Garden property in his Financial Statement filed on 13th October 2005 in his previous divorce proceedings, even though the mortgage documents disclosed by him subsequently in these proceedings revealed that he was by then clearly already applying for the mortgage from the Bank of China. She suspects he did all these only after they were unable to agree on the amount of maintenance for her and their child when she insisted that he continued to pay them \$27,000 per month.
53. There is no question that the Husband had always wanted to be eligible for the housing allowance to which he was entitled under his employment. It was in fact the reason, or one of the reasons, why he became the joint owner with the Wife in their purchase of the Tseung Kwan O property. With the breakdown of the marriage in 2005, I can understand why he wanted to purchase another property in order to continue to be eligible for the allowance, as in the long run that benefit would, in his words, no doubt outweigh the smaller amount of rental expenses payable if he were to rent.
54. Although it is true that the Husband was already contemplating purchasing the Hill Top Garden property when he filed his Financial Statement in October 2005, it seems that the assignment was only signed on 3rd November 2005, hence strictly speaking he was not being dishonest when he failed to mention about the property in his Financial Statement. In any event in his 2nd Affirmation filed 2 month later in January 2006, he did disclose in details of his purchase of the property.
55. The Wife's argument, however, is not entirely without merits, as the Husband, by purchasing a property with a mortgage repayment which exceeds his housing allowance by 40%, did thereby increase his monthly expenditure and financial burden in the long run, of which the Wife is certainly entitled to question, and quite rightly so, the necessity for purchasing such a property or entering into such a financial arrangement at a time when he was already complaining of heavy debts and financial difficulties.
56. The other item of expenses that is in major dispute can be generally divided into 3 parts : -
 - (a) monthly loan repayments to bank and credit card companies of about \$16,000;
 - (b) repayment to Mr Chow, one of the owners of the Ting Kok Road property of about \$2,475 per month for the loan made to the parties for the purchase of the said property;

- (c) tuition fees for his Ph.D. programme of \$4,200 per month.
57. As aforesaid the Husband did in his Affidavit of 24th January 2007 try to explain these various expenses in further details, of which I do not need to deal with the latter 2 items as being necessary and uncontroversial in particular that the repayment to Mr Chow was for the benefit of Wife's property. As to the various loan repayments to bank and credit card companies, the Husband's evidence is that apart from his normal living expenses, they were also for the necessary furniture and household appliances for his Hill Top Garden property.
58. The Wife however looks at such expenses more cynically and believes that they were the result of the Husband's extravagant lifestyle and in particular his womanizing, citing examples of his providing financial support for the said Natasha and his various pleasure trips with his girlfriend.
59. There is no question in my mind that the Husband has since the parties' separation been quite socially active, which is no doubt one of the reasons for the high level of his credit card expenses. Since the end of his affair with Natasha, the Husband has admitted of having another girlfriend who now lives and works in Taiwan but it would be his intention for her to come to join him in Hong Kong when they plan to get married.
60. While he is entitled, like all divorced persons, to enter into new relationship and perhaps eventually form new family and hence take upon new financial obligations, the general principle is equally clear that such claims or obligations cannot rank higher than those of the wife or the child of the former marriage. The issue here, however, is that these expenses of the Husband had already been incurred and if he failed to make repayments to the credit card companies, no doubt he would be subjected to further litigation with possible dire consequences to his job or career.
61. This is of course not to say that the court should then ignore the just claims of the Wife because the Husband has taken on himself other obligations, as it was stated in *Cockburn v Cockburn* [1957] 1 WLR 1020, 1025, CA per Hodson LJ, and applied in *Roberts v Roberts* [1970] P 1, 9, Div Ct : - although the courts have to take into account those obligations as involving a reduction in the capacity of the man to pay for the upkeep of his first wife.
62. No doubt some of the instalment payments for the Husband's household and electrical appliances will soon be paid off given the fact that his Hill Top Garden property had already been purchased for some 1 1/2 years, while the tuition fees for his Ph.D. programme must have already been paid at the beginning of the school terms rather than on an ongoing monthly basis, therefore the picture of the current deficit of his monthly expenditure may indeed not be as bleak as painted by the Husband after all. Furthermore, in the event of the Husband marrying his girlfriend, as he has indicated more than once in his evidence, it is likely that his new wife will be working and hence sharing his expenses, thereby lessening his burden.

63. This is a case in which the parties had in effect lived together for relatively very short period of time, lasting only 2 years in their 1st marriage and only slightly longer in their 2nd marriage, and hence their respective contribution to their family during the marriage were essentially limited, but with the Husband's career already quite established by the time of their marriage, and no doubt will be further enhanced when he receives his Ph.D., the Wife argues that she was never able to launch any career because of the marriage and in particular of the birth of the child, for which she was no doubt, I believe, content to switch her role from a co-breadwinner to a full time housewife and mother, but which has now of course been affected by the breakdown of the marriage in particular when the Husband now argues that his long term financial obligation is only towards the child, and that she should return to work to support herself, which leads to the remaining major issue between the parties, or as far as the Wife is concerned, i.e. her argument that the Husband's conducts should be taken into account when considering her financial claims, including his allegedly tricking her into their 2nd marriage for financial reasons, and his subsequent conduct in causing the breakdown of the marriage again, after so short a time.
64. It is the Wife's allegation that the Husband married her not for love but for the ulterior motive of obtaining various financial advantages from her, and she believes that it was the case not just in their 2nd marriage, but also in their first when he had borrowed money from her on various occasions including for purchasing a car and paying his income tax, while he married her the second time so that he would not have to continue to pay her the maintenance under the terms of the first divorce, and at the same time to become eligible for housing allowance from his employer as well as to lay his hands on her Tseung Kwan O property. When all these were achieved, the Wife argues, the Husband then reverted back to his old habit of womanizing by having an affair with the said Natasha, thereby destroying the marriage again, as he did to their first marriage, and as a result she has suffered the emotional trauma twice within just a few years, hence she argues that such conducts of the Husband must be expressly disapproved by the court and taken into account when considering her ancillary relief application.
65. Whilst conduct of the parties, together with all the circumstances of the case are amongst the many factors which the court is required by s. 7 (1) of the MPPO to take into account but which do not fall within any of the categories in (a) to (g) of that section, the reference to them is so general in nature that it allows the court flexibility in dealing with each case on its own facts, as the words in what manner in the section must in my view imply.
66. The need to have regard to the conduct of the parties does not of course mean that the court has to entertain the parties mutual recrimination as to their respective responsibility for the breakdown of the marriage. The guidance was laid down in *Wachtel v Wachtel* [1973] Fam 72 at 90, [1973] 1 ALL ER 829, CA, when Lord Denning said at 835 : - When the judge comes to decide these questions, what place has conduct in it ? Parliament still says that the court has to have regard to their conduct ; see s. 5 (1) of the 1970 Act. Does this mean that the judge in chambers is to hear their mutual recriminations and go into their pretty squabbles for days

on end, as he used to do in the old days ? Does it mean that, after a marriage has been dissolved, there is to be a post mortem to find out what killed it ? We do not think so. In most cases both parties are to blame or, as we would prefer to say both parties have contributed to the breakdown. It has been suggested that there should be a discount or reduction in what the wife is to receive because of her supposed misconduct, guilt or blame (whatever word is used). We cannot accept this argument. In the vast majority of cases it is repugnant to the principles underlying the new legislation, and in particular the 1969 Act. There will be many cases in which a wife (although once considered guilty or blameworthy) will have cared for the home and looked after the family for very many years. Is she to be deprived of the benefit otherwise to be accorded to her by s. 5 (1) (f) because she may share responsibility for the breakdown with her husband ? There will no doubt be a residue of cases where the conduct of one of the parties is in the judge's words both obvious and gross, so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered. But, short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so would be to impose a fine for supposed misbehaviour in the course of an unhappy married life. Counsel for the husband disputed this and claimed that it was but justice that a wife should suffer for her supposed misbehaviour. We do not agree. Criminal justice often requires the imposition of financial and indeed custodial penalties. But in the financial adjustments consequent on the dissolution of a marriage which has irretrievably broken down, the imposition of financial penalties ought seldom to find a place.

67. Following the amendments to the English Matrimonial Causes Act 1973 upon which our s. 7 (1) of the MPPO was based and with identical wordings as to conduct but which did not follow suit with similar amendment to the MCA 1973 by the English Matrimonial and Family Proceedings Act of 1984, the English court is now required to have regard to the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it. While it has been said that the amendment to the relevant s. 25 of the English Act, which as aforesaid is not in our s. 7 (1), may give a broader discretion to the court that envisaged hitherto under the authorities as per *Purchas LJ in Kyte v Kyte* [1987] 3 ALL ER 1041, CA, nevertheless as a matter of both language and logic, according to Rayden and Jackson on Divorce And Family Matters, 18th Edition, Cap. 16.76, it would seem inequitable to disregard conduct which is both obvious and gross. Accordingly, the cases in which that was to test are still relevant and, therefore, it is necessary to examine the approach the courts took in those cases when considering conduct according to the old Wachtel guidelines.
68. Following Wachtel, in the case of *Armstrong v Armstrong* (1974) 118 SJ 579 Stephenson LJ gave the meaning of the words obvious and gross when he said : The question we have to ask ourselves to me to be : Would it offend a reasonable man's sense of justice that this wife's conduct should be left out of account in awarding her maintenance by a lump sum out of the

proceeds of this sale and that it should have no effect on the financial provision which the husband ought to be ordered to pay ? Would it be inequitable or unjust to disregard her conduct ?

69. In the next year Sir George Baker P in *W v W* [1976] Fam. 107 said at P. 110 C : - in some cases it is necessary for the court to inquire into the facts in order to discover whether the conduct is of the kind described conveniently in *Wachtel* as gross and obvious or of the kind that would cause the ordinary mortal to throw up his hands and say Surely that woman is not going to be given any money or is not going to get a full award .
70. In 1977 in *West v West* [1978] Fam. 1 in the Court of Appeal, Sir John Pennycuik said at P. 711 H : - I do not think the word gross really carries any sort of moral judgment. I think it means no more than of the greatest importance .
71. In *Robinson v Robinson* (1983) 4 FLR 521 where the Court of Appeal considered *Wachtel*, *Armstrong*, and *West* and approved the tests applied in those decisions. Slade LJ said at P. 528 F : - The guide-lines essentially amount to this : the past conduct of a wife should cause the court, in the exercise of its statutory discretion, to reduce or eliminate the amount of maintenance which it would otherwise have awarded to her only if it has been shown to be such that it would offend a reasonable person s sense of justice to disregard such conduct .
72. It was also said in *J (HD) v J (AM)* 1 ALL ER 156 that in assessing the gravity of a party s conduct in the context of financial provision, a party s conduct is of sufficient gravity to affect the issue if the facts are that, after making all allowances for his disabilities and for the temperament of both parties, the character and gravity of his behaviour are of such a nature that it would be repugnant to anyone s sense of justice to ignore it in deciding the provision to be made by one for the other or what should be their appropriate share in the family assets.
73. On the other hand, it is said in *Rayden*, that while a finding that one party has significantly contributed to the breakdown of the marriage may be relevant on the issue of financial provision, that does not mean that the party whose conduct is so described loses his or her right to provision, or indeed even loses his or her right to ample provision : that must depend upon all the circumstances of the case, and if there is misconduct of an obvious and gross character, the conclusion is pretty clear, if however it is less than that, then a difficult value judgment is required of the court, which may lead to different result.
74. Hence there are a number of examples of conduct found to be obvious and gross , such as *Jones v Jones* [1975] II ALL ER12, CA where the husband attacked wife with razor causing serious injuries with wife s right hand permanently disabled and unable to work as a nurse. Held, by CA, whole of matrimonial home to be transferred to wife; or *Bleazard v Bleazard* and *Mul* [1978] 1 FLR 253 CA where the conduct of leaving one s spouse to set up home with another was said to be of the greatest importance; or *Hall v Hall* [1984] FLR 631, where after parties separated, wife s conduct of stabling husband was taken into account.

75. There are also equally number of examples of conduct which have been found fall short of being obvious and gross as in *Trippas v Trippas* [1973] 2 ALL EF 1, CA where wife s lump sum was increased despite the fact that she was living with another man, or *Harnett v Harnett* [1973] 2 ALL ER 593, upheld [1974] ALL ER 764, CA where wife s affair with a youth half her age to whom the parties had given occasional hospitality when he was a schoolboy and who was staying with them because his work was near fell far short of being gross and obvious, certainly in comparison with that of the husband .
76. It seems not all the cases can be reconciled with one another, as according to Rayden, there is inevitably an element of subjectivity in the concept, and behaviour of a given sort may be obvious and gross in the context of one marriage, and fall short of that concept in another . Moreover it was said in *Griffiths v Griffiths* [1974] 1 ALL ER 932 at 937 938, CA, that it is dangerous to make judgments about the causes of the breakdown of a marriage without full inquiry, since the conduct of one spouse can be measured only against the conduct of the other, and marriages seldom break down without faults on both sides.
77. While more recent authorities have developed different categories of conduct, namely according to Rayden, marital conduct which takes place during the marriage, financial conduct which is the deliberate or reckless dissipation or waste of marital assets, and litigation conduct which concerns conduct during the proceedings often seen in the form of a failure to comply with orders or the duty to make disclosure, the court s approach has remained the same in that what constitutes marital conduct which it is inequitable to disregard is inevitably a subjective issue, although objectively appraised, and that as a matter of practice, the courts do not encourage the parties to litigate on such matters, the conduct complained of has to be to a significant degree for the appropriate finding to be made that the conduct should influence the award, and the approach of the court is still to evaluate all relevant factors in the round rather than deduct a penalty from the award otherwise found to be appropriate . (See *H v H* (financial relief : conduct) (1999) 1 FLR 971); *Clark v Clark* [1999] 2 FLR 498, CA).
78. In the present case the Wife s argument that the Husband tricked her into marrying him again for financial reason or motive, sort of marrying her for her money is in my view too far-fetched and not supported by the evidence before me. Firstly, while he might have borrowed money from her from time to time after the marriage, she could not possibly be described in any way as wealthy or financially well-off for that to become the sole or main reason for him to marry her in the first place.
79. Secondly, although it is true that it was the Husband who proposed that his name be included in the title of the Tseung Kwan O property so that he could then become eligible for housing allowances, it would be incredible to say that it was his motive for marrying her, as there is simply no evidence to suggest that he must be married before he would be entitled to housing allowance. The simple fact is that the terms of his employment would entitle him to housing allowance if he were to purchase a property, which has nothing to do with his marital status. In other words, he did not have to marry the Wife, or anybody else for that

matter, to get the housing allowance.

80. Thirdly, although it is not disputed that the Husband never made any financial contribution towards the initial purchase of the Tseung Kwan O property, he did, and as I understand still does, pay the Wife maintenance or household money every month to enable her to, inter alia, meet the mortgage instalment of the property, so it is not the case that the Husband has made absolutely no contribution at all towards the property, and while he did propose in his Financial Statement that the Tseung Kwan O property be sold with half of the sale proceeds to be given to him, he has since indicated in both his evidence and his final submission that he would not object to the Wife retaining the property so as to provide a home for his son. For the reasons aforesaid and having heard the Husband in his evidence in court, I do not agree with the Wife that the Husband tricked her into the 2nd marriage for financial reason.
81. What remains of the issue is whether the Husband's said affair with Natasha that led to the breakdown of the marriage is one obvious and gross conduct that I should take into account. While it is clear that in principle adultery per se, even if it is the sole cause of the breakdown of the marriage, is normally not the kind of marital conduct that the court should have regard, it may in my view be relevant in the context of the particular circumstances of the case, such as its impact on the other party's health or earning capacity.
82. I have no doubt that the Husband's affair with Natasha in this case did have a terrible emotional impact on the Wife in view of the historical background and the events that led to their 2nd marriage, but there is no evidence to suggest that her situation is more severe than any other wife, or husband for that matter, in similar circumstances when the element of conduct has come under consideration. I do not for a second belittle such emotional impact on the Wife, in particular of the way the affair was discovered by her, but there is simply no evidence before me to suggest that the impact or effect on her emotional health or her earning capacity has been so significant or serious that it ought to be taken into account.
83. In conclusion, as I have noted earlier in this judgment, this has been a fairly short marriage and hence the parties' respective contribution thereto is essentially limited, but with a small child between them, the Wife's future contribution in caring and raising him will no doubt continue for years to come, and the same can be said of the Husband's financial responsibility towards him, which may last even longer and beyond his age of 18 as it is quite clear of the parties' expectation for him to receive education up to tertiary level.
84. As between the parties, both of whom are still relatively young and of good health, and each with good educational background and earning capacity, I believe it would both be fair and appropriate in the circumstances of this case for there to be a clean break situation by allowing them to respectively keep their own assets, i.e. the Ting Kok property and the Tseung Kwan O property by the Wife, the latter of which the Husband should transfer his share and interest to her absolutely, whereas the Hill Top Garden property as well as his retirement pension by the Husband, but given the Wife's comparatively not so favoured earning capacity, I agree that the Husband should continue to pay her some maintenance, as

he has proposed, for a limited period of time for 12 months to assist her to get back on her feet, in case she has not already done so, as both reasonable and necessary.

85. As I have put her total monthly expenditure at just below \$30,000, and given my earlier findings of her current earnings or earning capacity, I believe a monthly sum of \$10,000 for her for the next 12 months should serve the purpose. As for the child, while his monthly personal expenses may be just slightly over \$6,000, his share of the accommodation, household and food expenses should also be taken into account, which would take his total expenditure to about \$17,000 per month, for which I believe the Husband should shoulder up the major portion in view of his much higher earnings, at the rate of \$14,000 per month.
86. My order is therefore as follows : -
 1. The Respondent Husband shall pay to the Petitioner Wife \$10,000 per month for her maintenance commencing from 1st July 2007 and payable therefore on the 1st day of each month for a period of 12 months whereupon the maintenance for her shall cease.
 2. The Respondent Husband shall upon the decree absolute transfer all his share and interest in the Tseung Kwan O property to the Petitioner Wife absolutely and at his costs and expenses.
 3. The above terms shall be in full and final settlement of the parties financial claims against each other which claims shall upon the implementation of these terms be dismissed.
 4. Upon his undertaking to continue to pay for the child s school fees, the Respondent Husband shall pay to the Petitioner Wife \$14,000 per month as maintenance for the child of the family commencing 1st July 2007 and payable thereafter on the 1st day of each month until the child reaches the age of 18 or ceases full time education whichever is later.
 5. There be no order as to costs including any costs reserved. This is an order nisi to be made absolute at the expiration of 14 days.
 6. Section 18 declaration. (Bruno Chan) District Judge The Petitioner Wife in person. Ms B Cheung of Messrs Yuen & Partners for the Respondent Husband. PAGE - PAGE - &`#\$ ~! P] ,f@- sy \$ he~"Td c(#\$ 0kJ\$\$ @P\$\$ :!L- E{k' XW(\$ s ` (-3*\$ 43*\$:p . {^2\ (\$p2\$ 4g3\$ 4QQ4 0b50p M|;\$ wzO?p= H#@ \$ 3i@\$ nSDH lEFE kxL\$ /eNH S\$O\$ c;R\$ G%9UT C:~W x% X\$ x8Y\$ L} YH (Yq[*n\T #b2^ \$ Q^f Y6xc\$ e>tD ?Dep= ZJg\$ hx;r N)/h vCip= TCn\ gsTu\$ 4xv\$ xDs\ *y\$ __z4w C? } R\$ ~\$ f!\$- C:~W N)/h E{k' 4QQ4 lEFE C? } wzO? gsTu x% X (\$p2 0kJ\$ #b2^ Y6xc R\$ ~ he~" G%9U (Yq[:p . s ` (@\\Hc-oa-ws-656\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \\Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B|gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B|gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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