

HONG KONG / JUDGMENT

LCC v. LTLA

[2024] HKCA 406

COURT

Court of Appeal

DECIDED

30 April 2024

CASE / FILE NUMBER

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CACV 281/2022, [2024] HKCA 406

On appeal from [2022] HKCFI 1922

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 281 OF 2022

(ON APPEAL FROM HCMC NO. 4 OF 2019)

BETWEEN

LCC

Petitioner

and

LTLA

Respondent

Before: Hon Chu VP and Au JA and B Chu J in Court

Date of Hearing: 21 March 2024

Date of Judgment: 30 April 2024

JUDGMENT

The Court:

INTRODUCTION

This is an appeal of the respondent husband against an ancillary relief judgment handed down on 24 June 2022 by Au-Yeung J (“Judge”) after a trial of 8 days (“AR Judgment”). Notwithstanding that a Decree Nisi of divorce has been granted, for convenience sake, the petitioner and the respondent will be referred to herein as “W” and “H”.

Pursuant to the AR Judgment, and upon certain undertakings given respectively by H and W, the Judge ordered H to pay a lump sum of HKD 292 million to W by the following instalments (“AR Order”):

HKD 10m (if H had not yet done so since the trial) within 14 days of the AR Order;

HKD 94m (if H had not yet done so since the trial) within 14 days of the AR Order;

HKD 94 m by 19 October 2022 (12 months from end of trial);

HKD 94 m by 19 April 2023 (18 months from end of trial) which would include the value of the former matrimonial home;

H applied for a stay of execution of the AR Order pending his appeal against the AR Judgment. His application was dismissed by the Judge on 10 October 2022 (“Stay Decision”). On 16 March 2023, upon H’s renewed application, this Court (Au JA and B Chu J) granted a stay of execution pending the determination of the appeal on condition that he was to pay to W a lump sum of HKD 218,416,000 by 6 instalments, with the final instalment on or before 31 July 2024 (“CA Stay Order”).

By the time of the hearing of this appeal, H had already paid W a total of HKD 221,300,000, being cash in the total sum of HKD 185,000,000 plus transferring to her the former matrimonial home where she was living, namely House 15 and car parking space no 93, free of encumbrances (valued at HKD 36,300,000). The balance payable under the AR Order is now HKD 70,700,000, of which 33,416,000 shall be payable on or before 31 July 2024 under the CA Stay Order.

BRIEF BACKGROUND

The family background has been set out in the AR Judgment. The parties were married in April 1984 in Taiwan. According to W, theirs was H’s 3rd marriage. H was born in January 1951 and W was born in December 1955, and they were respectively about 71 and 66 years old at the time of the ancillary relief trial. They have a daughter and a son who were respectively about 35 and 34 years of age at the time of the trial.

It was W's case that throughout their marriage, H had had extra marital relationships with various women and H has a son born out of one of his relationships. H moved out of the matrimonial home in 2014 after an incident which was reported to the police. Some three years later in August 2017, W issued a divorce petition based on the parties' two years' separation since about 2014. Decree Nisi of divorce was pronounced on 10 October 2017. By the time of the closing submissions at the trial, there was no dispute that the duration of the marriage was of 30 years.

W came from a humble background in Taiwan. On the other hand, H grew up in a wealthy family in Hong Kong with a high standard of living.

In 1974, after his graduation from university in the United States, H joined two companies set up by his father as executive director, one was in the cold storage business (WEL) and one was in the frozen meat distribution business (MIL). He took over the running of the two companies when his father retired in 1975. H and his brother became 50-50 shareholders and directors of the two companies and they have remained the same to date.

W has been a full time housewife after the marriage. In the early years of the marriage, H had used money generated from his interest in the two companies for the family and to finance the purchase of the matrimonial home and later in 1999, H started a restaurant business with seed money from MIL.

The chain of restaurants has been run under a company (now called SEHL). W was appointed as a director of SEHK in August 1999. At its height, there were some 44 restaurants under SEHL but by the time of the ancillary relief trial, the number had dwindled to 2. Throughout, H held 50.01% of the shareholding of SEHL, W 49.9% and OW (a loyal accountant and employee of H's) 0.09 %.

After the issue of the divorce proceedings, W had sought financial disclosure from H for the period since 1 January 2014. The schedule of joint assets and liabilities agreed at trial was based on the parties' respective 3rd Form E dated 14 July 2021 ("Schedule of Assets"). This showed the net worth of their assets to be about HKD 500m on H's version and about HKD 582m on W's version. At the trial, W sought 50% of the joint assets being a lump sum of HKD 300m to include the amount of the former matrimonial home, which was to be conveyed to her mortgage free, with the balance of the lump sum payable in 3 tranches over 18 months. H sought a 60:40 split, with each party keeping his/her residence as part thereof, and that H would liquidate the joint companies and pay the creditors and divide the net amount as to 60% for H and 40% for W.

One of the parties' major disputes was whether certain assets should be added back to the matrimonial pot before division. H had sought an add-back of 2 Taiwan properties transferred by W to the parties' son when she was ill, and HKD 2m in the joint account of W and the parties' daughter said by W to belong to the daughter. On W's part, she sought an add-back of H's gambling loss as alleged by her ("Gambling Loss"). The other major dispute concerned whether W should be liable over H's post-separation shareholder's loans from SEHK ("SEHL Loans").

THE DISPUTED ISSUES AT TRIAL

The disputed issues were summarised by the Judge and set out in the AR Judgment. It was agreed that Steps 2 and 3 in LKW v DD (2010)¹³ HKCFAR 537 did not have to be considered.

Under Step 1, the assets had been identified and the parties' disputes, as set out by the Judge, concerned (1) valuation of the "Insolvent Companies", (2) sale of the frozen meat, and (3) "add-back" of assets which W gave to the children.

Under Step 4, there were 3 major issues set out by the Judge, namely:

Whether any or all of the assets were non-matrimonial in nature ("Matrimonial Property Issue");

How H's Gambling Loss should be reckoned and how much ("Gambling Loss Issue"); and

Whether the HKD 90m SEHL Loans taken out by H post- separation should be shared between the parties ("SEHL Loans Issue").

Under Step 5, apart from the proper percentage split to apply, (1) H invited the Court to order certain companies to be liquidated to realize their net value; (2) H did not agree a lump sum to be adopted, and argued that if it was to be adopted, a higher than 50% figure should be adopted for him to take account of his responsibility to monetize the assets; (3) H asked for 2 years to pay and the W suggested 18 months counting from the last day of trial.

THE JUDGE'S FINDINGS IN THE AR JUDGMENT

Under Step 1

Under Step 1, the Judge agreed with W that the parties' interest in the "Insolvent Companies" should be valued at "nil". As for the valuation of the frozen meat stock, the Judge took the view that any difficulty with marketing the frozen meat stock was something that the valuer should have been informed before the valuation and that it was too late to question the agreed value at trial. The Judge declined to add back to the matrimonial pot the money in the joint account of W and the daughter, and the 2 Taiwan properties given to the son.

Under Step 4

Under Step 4, on the Matrimonial Property Issue, the Judge found that all 3 companies, namely MIL, WEL and SEHL were matrimonial assets.

Whilst under cross-examination, H had prepared and produced Exhibits R1, R2, and R4 to explain the alleged Gambling Loss and the SEHL Loans, with Exhibit R3 prepared by H's solicitors. The Judge found that H's evidence was particularly unreliable over the Gambling Loss Issue and the SEHL Loans Issue.

In relation to the Gambling Loss Issue, W asked for a sum of about HKD 96.59m to be added back to the matrimonial pot. H disagreed. His case included that (1) W had condoned his gambling; (2) he did not accept there was a net loss at all and certainly not in the sum claimed by W, and

according to H, the loss was about HKD 20.687 m; (3) he invited the Court to deduct a total amount of HKD 24,039,689 as set out by the Judge in a table ("Table 1") from the amount of the Gambling Loss alleged by W. Suffice to say at this stage, the Judge found against H on the disputed issues and ordered the addback sought by W of about HKD 96.59m.

As for the SEHL Loans Issue, the Judge found that W was not liable unless H had good reasons for the SEHL Loans. During the trial, H provided explanations for 10 items of expenditure set out by the Judge in a table based on Exhibit R2 ("Table 2"). In the end, the Judge accepted H's explanations for only 2 items, namely Items 6 and 9 in the total sum of HKD 14,101,846, and the SEHL Loans were found to be HKD 89,115,753 (i.e. HKD 99,005,753 - HKD 9,890,000). The Judge accepted W's version of the total joint assets and found the total value of the matrimonial assets with the add-back of the Gambling Loss to be HKD 589,876,935.98.

Under Step 5 – Form of award

There were 3 options proposed on behalf of H:

Option 1 – to liquidate the joint companies and divide the proceeds of sale 60:40

Option 2 – to award a lump sum to W together with the properties that she requested with the mortgage to be discharged later and H would raise the lump sum by monetizing the assets and the lump sum be discounted

Option 3 – there be a "make whole" provision whereby OW was compensated for the loss of value in her shareholding caused by the removal of the properties from the companies and that liability should be shared as to 60:40 between H and W.

The Judge dismissed Option 1 as she took the view that the Court was not sitting in its winding up jurisdiction. With regard to Option 2, W was willing to accept a lump sum subject to 2 caveats, namely (i) the properties should be transferred to her free from mortgage; and (ii) there should be no adjustment to the lump sum on account of H having carriage of the monetization of the assets. The Judge agreed with the 1st caveat. For reasons set out by her, the Judge rejected the 2nd caveat. As for Option 3, the Judge took the view that as OW's shareholding in the companies had not been included in the Schedule of Assets, there was no need to make special provision for her.

The Judge ordered H to pay HKD 292,000,000 to W which was a split of 49.5 (for W) to 50.5 (for H), and this would mean that H would get HKD 297,876,935.98. She allowed the payment to the W to be paid by instalments as set out earlier.

GROUND OF APPEAL

There are a total of 7 grounds of appeal set out in the re-re-amended notice of appeal ("Notice"). The grounds of appeal have also included various submissions. As this Court has constantly reminded practitioners, this is an unsatisfactory practice which should be desisted from.

H's grounds evolve essentially around the notional add-back of the Gambling Loss and the Judge's errors on the alleged Gambling Loss. H complained that the Judge erred in failing to cross-check against equality and the hardship caused to H by the notional add-back. In H's Skeleton Submissions, the grounds were grouped under 4 sections as follows:-

Inherent implausibility - Grounds 3(1) and 4

In search of fairness – Grounds 1 and 6

“\$96,590,486 not the right figure – Grounds 3(2), 4 and 5

Other plain errors – Grounds 2 and 7

THE ADD-BACK JURISPRUDENCE

The line of cases in England on “add-back” or reattribution of assets stretches back to *Martin v Martin* [1976] Fam 335, [1976] 3 All ER 335, followed by amongst others *Norris v Norris* [2002] EWHC 2996 (Fam), [2003] 1 FLR 1142 and *Vaughan v Vaughan* [2007] EWCA Civ 1085, [2008] 1 FLR 1108.

The above 3 authorities were among those considered by our Court of Appeal in *ARAV v VP* [2011] 3 HKLRD 759, CACV 246 of 2010 and *MKKWH v RKSH* (Ancillary Relief: Addbacks and Claw Backs) [2013] HKFLR 540, CACV 197/2012.

In *ARAV*, the wife appealed against the Family Court judge's failure to order an add-back of HKD 32.5m secretly transferred by the husband from the parties' family business to a company formed by the husband without the knowledge of the wife. The judge accepted that the wife did not know and found this seemed “rather underhand” of the husband but she declined to add back the sum into the matrimonial assets and instead, the judge departed from equal division with the wife retaining over 60% and the husband receiving under 40% of the matrimonial pot of a total of about HKD 128.2m.

The wife argued on appeal that the division was incorrect because of the misconduct of the husband and that the HKD 32.5m frittered away by the husband should have been added back to the matrimonial pot before division. Cheung JA had referred to section 7(1) of our Matrimonial Proceedings and Property Ordinance (Cap 192) (“MPPO”) which expressly provides that in the exercise of the court's power in relation to financial provision, the court is to have regard to the conduct of the parties and the circumstances of the case and stated as follows:

“6

In *LKW v DD* [2010] 6 HKC 528 the Court of Final Appeal (per Ribeiro PJ) held that:

‘[104]

Conduct, or more accurately, negative conduct, is therefore only to be regarded as a material factor if it is “obvious and gross” in the sense explained in *Wachtel v Wachtel* or, which comes to the same thing, if it is such that it would be in the opinion of the court be inequitable to disregard it’.

7

The conduct may be in many forms. The wife relied on financial misconduct of the husband. If conduct (which must be obvious and gross or inequitable to disregard) is one of the factors to be taken into account, then obviously the Court is not hamstrung in the precise way in which it will recognise this factor. Where the misconduct involves the wastage of the matrimonial assets, one way is to order the wasted funds to be added back to the joint assets before the Court makes the distributions.... However, in my view, that is not the only way to give recognition to misconduct. Another approach which is consistent with the Court’s power to achieve what is fair to the parties is to depart from the yardstick of equal division and equal sharing principle as explained by Ribeiro PJ in *LKW v DD*...”

Upon reviewing the line of cases including *Martin v Martin*, *Norris v Norris*, *Vaughan v Vaughan* and also *C v C* [1990] 2 HKLR 183, Fok JA (as he then was) concluded that:

“58.

It does not therefore follow that there is a unitary concept of misconduct that inexorably leads to the conclusion that expenditure made by a spouse guilty of any type of misconduct must inevitably be added back to the pot of assets for the purposes of ancillary relief proceedings. Moreover, in *Vaughan v Vaughan* [2007] 3 FCR 533 at §14, Wilson LJ (as he then was) noted that the re-attribution of assets by way of add back:

... has to be conducted very cautiously, by reference only to clear evidence of dissipation (in which there is a wanton element) ...

59.

Further, it is not the case, in my opinion, that a finding of misconduct on the part of a spouse must inevitably lead to a re-attribution of assets. In *Morgan v Morgan* [2006] 2 FLR 1253, for example, the judge found the husband had been guilty of compulsive gambling and channelling funds to his new partner. However, instead of adding back the monies spent, the judge took the husband’s conduct into account in arriving at a division of the proceeds of the couple’s joint assets: see para 96(d).”

Fok JA did not accept the wife’s argument that the judge’s exercise of discretion was vitiated by error of law in that, having found misconduct, she erred in not having added back the HKD 32.5m. He was of the opinion that it was open to the judge to decline to add back the HKD 32.5m and to decide to take the husband’s conduct relating to that sum into account at the stage of determining the parties’ respective proportions of the matrimonial assets. The wife’s appeal was dismissed. Her application for leave to appeal to the Court of Final Appeal was later dismissed.

ARAV was followed two years later in September 2011 by MKKWH v RKSH (Ancillary Relief: Addbacks and Claw Backs) [2013] HKF:R 540, CACV 197/2012. The wife's appeal in respect of the add-back was dismissed. As summarised under Holding (1) at 541, it was held (per Lam VP, as he then was) that:

“(1)

There are two alternative ways to achieve a fair result in dealing with non-marital expenses: (a) adding back of specific sums as in Norris ... and Vaughan ...; (b) departure from equal distribution as in ARAV v VP. No matter which route one pursues, the ultimate goal is to achieve fairness. In the context of ancillary relief, only conduct which is so obvious and gross that it would be inequitable to disregard may require adjustment on account of fairness. Thus, not every item of non-marital expense can be added back even though it could be said that such expense was a depletion of the matrimonial pot and as such it reduces the share of the spouse who has not benefitted from such expenditure.”

Pausing here, it is clear from the above authorities whether a spouse's conduct in relation to financial matters after the separation is relevant is a conduct issue under section 7 of our MPPO, and for the courts to have regard to such conduct, the conduct has to be obvious and gross and that it would be inequitable to disregard. It is not the case that a finding of misconduct must inevitably lead to a re-attribution of assets to the guilty spouse, and not every item of non-marital expense can be added back even though it could be said that such expense was a depletion of the matrimonial pot and as such it reduces the share of the spouse who has not benefitted from such expenditure, and any re-attribution must be conducted very cautiously by clear evidence of dissipation in which there is a wanton element. The ultimate goal is to achieve fairness.

Thereafter, there have been a number of reported cases in England on “add-back”, with some recent ones reported only after the ancillary relief trial.

In GS v L [2011] EWHC 1759 (Fam), [2013] 1 FLR 300, the wife had amongst other things, sought an add-back of £56,000 in relation to alleged overspending by the husband since separation. Eleanor King J, as she then was, declined to add back the amount after reviewing the two leading authorities Norris v Norris and Vaughan v Vaughan, and she had said, at [91], 320-321:

“In the reported cases the courts have, therefore, taken into account the extent, timing and nature of the alleged wanton dissipation and set it against the backdrop of its general assessment of the overspending party. Against that backdrop the courts have then moved on to consider to what extent fairness requires there to be a degree of “addback” and in doing so exercised considerable caution, bearing in mind that fictional money cannot be used to meet a party's housing or other needs.” (emphasis added)

In BJ v MJ (Financial Order: Overseas Trust) [2011] EWHC 2708(Fam), [2012] 1 FLR 667, the wife sought an add-back of various monetary gifts made by the husband post separation which were said to be a wanton dissipation. As pointed out by Mostyn J, referring to the technique of “add-back”:

“[51]

Although intellectually pure, the problem with this technique is that it does not re-create any actual money. It is in truth a process of penalisation, and that it should be applied very cautiously indeed and only where the dissipation is demonstrably wanton” (emphasis added)

In *BJ v MJ*, although Mostyn J found that the timing was suspicious, he found no evidence that the gifts were anything other than bona fide and declined to add the gifts back to the pool.

Moylan J, as he then was, had again emphasized in *Evans v Evans* [2013] 2 FLR 999 that, in relation to an add-back, a notional reattribution has to be conducted very cautiously by reference only to clear evidence of dissipation (in which there is a wanton element) and that re-attribution must be justified in the context of the case. Moylan J had pointed out:

“[107]

There is, therefore, an evidential element – is there clear evidence of wanton dissipation – and a legal/discretionary element – would it be inequitable to disregard it, or to put it another way, is notional reattribution required in order to achieve an outcome which is fair?”

In *MAP v MFP* (Financial Remedies: Add-back) [2015] EWHC 627 (Fam), the parties were married for 40 years. In approximately 2007, the wife became aware that the husband was using cocaine and abusing alcohol and they separated in 2012. She issued her divorce petition in 2013 and obtained a decree nisi in December 2013. Later in 2014, she discovered the husband’s activities with prostitutes. The wife sought an addback of £1.5m for dissipation allegedly undertaken by the husband over his drugs and prostitution during a 2 year period, from 2 January 2013 to 20 December 2014. The wife argued that this was a proportionate period commencing some 6 months after separation and many years after the husband’s addiction commenced.

Moor J pointed out again that the argument in the area of “add-back” is essentially an issue of conduct, namely “conduct that it would be in the opinion of the court be inequitable to disregard”, and for such conduct to bite it has to be “gross and obvious”, and that for the court to add back assets that have been spent, the court has to be satisfied that there has been “wanton dissipation of assets”.

Moor J then went on to say at [69], 81:

“I am going to have to determine whether or not there was dissipation with a wanton element that justifies intervention by the court. Findings as to motivation are clearly very important. I do, however, accept that a spouse cannot take advantage of all the good characteristics of his or her partner whilst disavowing the bad characteristics. To put it colloquially, you have to take your spouse as you find him or her.” (emphasis added)

Moor J found that the husband had overspent. He however found that the husband did not overspend to reduce the wife's claim. Moor J held that while the husband's over-spending, particularly in relation to drugs and prostitution, was morally culpable, "it was not deliberate or wanton dissipation within the meaning formulated in the authorities and it would be wrong to add it back. He had not overspent to reduce the wife's claim. It was due to his flawed character, a spouse had, as it were, to take his or her partner as he or she found them".

MAP is an interesting case in that (i) Moor J took the view that the spouse's overspending has to be with an intention to reduce the other spouse's claim in order to be for it to be regarded a deliberate and wanton dissipation to justify an "add-back" and that findings as to motivation are clearly very important; and (ii) he also took the view that one has to take one's spouse as one finds him/her.

More recently, in *OG v AG (Financial Remedies: Conduct)* [2021] 1 FLR 1105, [2020] EWFC 52, Mostyn J identified 4 situations where conduct is relevant in financial remedy cases, and they are, briefly, (i) there is gross and obvious personal misconduct meted by one party against another, and this can extend to economic misconduct; (ii) there is the " 'add-back' jurisprudence" which arises where one party has wantonly and recklessly dissipated assets which would otherwise have formed part of the divisible matrimonial property and that this will only be in a clear and obvious, and therefore rare, case that this principle is applied; (iii) there is litigation misconduct; and (iv) there is the evidential technique of drawing inferences as to the existence of assets from a party's conduct in failing to give full and frank disclosure.

In *ARQ v YAQ* [2022] 4 WLR 112, [2022] EWFC 128, Moor J again decided to ignore all the add-back arguments on both sides and dealt with the case on the basis of actual assets rather than notional ones. In *ARQ*, the parties had each been married previously and had their own children. One of the issues was the wife's very high level of expenditure including expenses of one of the parties' children but apart from what the wife had accepted, Moor J found that H's counsel was unable to put his finger on any item of the wife's expenditure that could truly be described as wanton dissipation, even though he accepted that the wife had spent at a remarkable rate which might have in part motivated by a wish to enhance her financial claims. Moor J further observed that:

"72

.... In many cases, it is possible to show wanton dissipation: Examples would be giving money away to a new partner; or to friends and family; or spending huge sums on gambling, drugs or prostitution. I have encountered examples of all of these types of dissipation. Sometimes, it is necessary to say that you must take your spouse as you find them; in other words, the applicant cannot seek to benefit from the successes of their spouses but not share equally in their failings. I do not even need to consider that here as, despite the very high level of expenditure, there is nothing of that sort established".

In a recent case in July 2023, Tsvetkov and Khayrova [2023] EWFC130, Peel J reiterated the 4 situations identified by Mostyn J in *OG v AG* where conduct is relevant and he then set out a two stage approach for a party asserting conduct in paragraphs 43 and 44 of his judgment (“Two Stage Approach”). Peel J also set out in paragraph 46 the procedure which should normally be followed when there are, or may be, conduct issues. In particular, conduct being a specific [section 7] factor must always be pleaded as such and that usually, if relied upon, the conduct allegations should be clearly set out in the relevant box in a party’s Form E.

We find the Two Stage Approach helpful in cases where conduct is an issue in ancillary relief claims and we set out the Two Stage Approach (slightly modified) as follows -

Stage (1)

A party asserting conduct must prove:

the facts relied upon; and if established,

those facts meet the conduct threshold, which has consistently been set at a high or exceptional level; and

that there is an identifiable (even if not always easily measurable) negative financial impact upon the parties which has been generated by the alleged wrongdoing. A causative link between act/omission and financial loss is required. Sometimes the loss can be precisely quantified, sometimes it may require a broader evaluation, but it is doubtful that the quantification of loss can or should range beyond the financial consequences caused by the pleaded grounds.

Stage (2)

If Stage(1) is established, the court will go on to consider how the misconduct, and its financial consequences, should impact upon the outcome of the financial remedies proceedings, undertaking the MPPO section 7 exercise which requires balancing all the relevant factors.

The most recent case cited to us by Ms Yip SC for H is *O v O* [2023] EWFC 161 in which the parties separated since August 2022. The wife had alleged various forms of financial conduct on the part of the husband, most significant of which was the husband’s net losses of some £406,820 between March 2020 and May 2023 via a spread betting account. The wife had initially invited the court to “add-back” the losses of £406,820 to the husband’s side of the balance sheet, which by the end of the trial, was reduced by £60,000.

Recorder Laura Moys reviewed the cases on “add-back”, including *BJ v MJ*, *GS v L* and *MAP v MFP* and observed that there was some level of ambiguity in the “add-back” jurisprudence about the level of “intention” required for the over spending. She was satisfied that the husband in *O v O* did not place money in the spread betting account to try to put it beyond the wife’s reach and that the vast majority of the deposits into spread betting account were made prior to separation and in circumstances where she was satisfied that he was desperately trying to make money (in large part) to maintain the lifestyle of himself and the wife.

In the end, Recorder Laura Moys found at [121] that the husband's decision to deposit £40,000 into the spread betting account after separation and at a time when he had already incurred significant losses was reckless in the extreme, particularly given that he had not been able to pay the school fees since January 2023 and the wife had to take out a loan to pay them, and decided it would be inequitable to disregard the £40,000 deposited by the husband between December 2022 and March 2023 but not the earlier amounts. Ultimately, the order made was that out of the total assets (excluding the husband's Natwest personal loan balance), after paying the parties' debts and meeting their housing needs, the wife would be left with just under £ 240,000 and the husband just over £220,000 with the husband having to pay the balance of his Natwest personal loan of £38,000 because of her findings in respect of the spread betting. Recorder Moys was of the view that her order adequately marked the husband's conduct in view of all the other balancing factors identified by her.

In the present case, the Judge had stated in paragraph 114 of the AR Judgment that indulgent gambling or speculation is an "archetypal form of reckless dissipation" that would attract an add-back order and the Judge cited 3 cases as examples, namely *C v C*, supra, *Vaughan v Vaughan* [2008] 1 FLR 1108, and *A v A* [2018] 7 WLUK 147.

C v C was not cited by counsel in this appeal. It is a decision of this Court. The appeal essentially concerned the construction of section 7(1) of MPPPO in assessing the reasonable requirements of Mrs C. Suffice to say, *C v C* was pre *LKW v DD*, ie before the "yardstick of equal division" on distribution of matrimonial assets between spouses was brought in. So far as the ascertaining of the matrimonial assets in *C v C* was concerned, much had been agreed before the trial judge. The challenges on appeal were mainly in relation to the computation of values of some missing jewellery and also of the principal jewellery. During the 12 months post-separation, the wife had lost HKD 1m gambling in Macau, and between HKD 0.5m and HKD 1m on futures which was described as financial irresponsibility. The judge had taken into account the gambling loss in arriving at the total assets but not the futures loss. On appeal, HKD 0.4m of the futures loss was brought in. Eventually, Hunter JA allowed the husband's appeal and added back a total of HKD 5m to the parties' assets. There was no challenge over the gambling loss and the amount of the futures loss added back on appeal by Hunter JA was by comparison a small one. The wife had also admitted misconduct in the course of the proceedings. There was no reference to any of the then "add-back" authorities as the wife's conduct was not an issue on appeal, or that there should be "add-backs" and the question was only what items should be added back.

As for *Vaughan v Vaughan*, following the breakdown of the marriage, the husband suffered a serious depressive illness and between the separation and the ancillary relief proceedings, the husband dissipated a large sum by his own account by gambling. The case was first heard before the district judge who found the husband's conduct "bizarre and inexplicable and objectively, profoundly irresponsible" but did not reattribute any sums to the husband, on an apparent error in law. On appeal, the circuit judge allowed the appeal and estimated the dissipated money to be over £100,000 and £175,000. On further appeal to the Court of Appeal, the circuit judge was found to have failed to survey the effect of the original order in light of all changes needed and to assess

the comparative effect on the parties of the district judge's order for capital provisions. The Court of Appeal held that.

"It was appropriate to reattribute a sum to the husband in view of his dissipation. No doubt there were cases in which the mental incapacity of the dissipating spouse was such as to render reattribution unfair, but I agree with the circuit judge that the husband's problems were not of that severity. A notional reattribution had to be conducted very cautiously, by reference only to clear evidence of dissipation (in which there was a wanton element) and the fiction did not extend to treatment of the sums reattributed to the spouse as cash that could be deployed in meeting needs, for example in the purchase of accommodation. Because he had failed to survey the effect of the original order, the circuit judge had never found it necessary to identify the sum to be attributed to the husband by reason of dissipation. The court would adopt the circuit judge's minimum figure of £100,000".

It would thus appear that the husband had accepted his own conduct of gambling and that the failure to add back was due to the legal error of the district judge, and ultimately the amount added back by the Court of Appeal was of the minimum figure within the estimated range.

In *A v A* [2018] 7 WLUK 147, the parties were married in 1994 and separated in 2015. Both parties had argued that certain assets should be added back to the assets of the other. Insofar as Mrs A's case on add-backs was concerned, she alleged that Mr A had either removed money that should be available for distribution or had hidden it with relatives and business associates or gambled it away. Mr A's case was that in 2012, as a way to make easy money, he began to indulge in spread betting and had immediately lost money. In 2014 and into early 2015, he lost a substantial proportion of over £1 million.

Booth J found that Mr A had struggled to explain why he should have been spread betting in the first place and his account was found to contain internal inconsistencies. Mr A was found to have lost more than £600,000 from the parties' joint account, part of which was criminal money. Although Mr A's case was that he gave up spread betting in 2015, it was found by the judge that he could not explain entries in documents showing money being transferred to the spread betting company in 2017.

In *A v A*, Booth J found Mr A was "more than happy to lie to the court" and the judge found it very difficult to accept at face value anything Mr A told him. Booth J found Mr A had lied and was dishonest. Ultimately, Booth J drew adverse inferences against Mr A. What Booth J said of the gambling losses was as follows:

"66.

As for the gambling losses, he is entitled to gamble his own money. He is entitled to gamble money lent to him specifically for the purpose. As far as the criminal money is concerned that can be discounted from the losses but when added to the lies he told on the betting account application forms and the dishonesty I have found all adds support to the adverse inferences I have drawn above.

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Most of the money ‘lost’ by Mr A had been raised by taking further borrowings on the property portfolio and in the case of the Hyde Project on the family home. The burden of servicing that borrowing will have to be met. That will inevitably increase the pressure on Mrs A if she tries to run a rental business.

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I therefore attribute to Mr A several hundred thousand pounds to lie on his side of the balance sheet. ...”

The approach Booth J took appeared to be the 4th situation of conduct mentioned by Mostyn J in *OG v AG*, namely he drew adverse inferences against Mr A and attributed to Mr A several hundred thousand pounds as a result of the adverse inferences drawn. Insofar as we can see, there was no “add-back” of any specific sum.

The facts of each case are different. Whether indulgent gambling or speculation will attract an add-back order must depend on the circumstances of each case. In *Fok JA’s* judgment in *ARAV* (see [31] above), the case of *Morgan v Morgan* was referred to. In that case, although the husband was found to be guilty of compulsive gambling, there was no notional add-back and only a departure from equal division of the matrimonial assets. *Morgan v Morgan* was cited to the Judge at the trial but not to us in the appeal.

To summarise, following *GS v L*, the line of “add-back” cases in England has consistently set the threshold for the conduct for the court to have regard to for the section 7 exercise at a high or exceptional level, namely so gross and obvious that it is inequitable for the court to disregard it. In cases where one spouse alleges the other spouse of misconduct of over-spending, there must be clear evidence of dissipation in which there is a wanton element. In considering whether there has been wanton dissipation, the court has taken into account matters including (i) the extent, timing and nature of the alleged wanton dissipation; (ii) the general assessment of the overspending party; (iii) the motivation for the overspending such as whether the overspending was with the intention to reduce the other spouse’s financial claims, and/or whether it was bona fide; and (iv) the negative financial impact upon the parties. Upon the misconduct being established, the court will then consider how the misconduct and its financial consequences should impact upon the outcome of the financial award having regard to all the relevant section 7 factors. “Add-back” is ordered in very limited circumstances even though it is recognized as an option, and the courts in England appear to be moving away from this option, with at least one judge pointing out that this technique does not re-create any actual money and is a process of penalisation. What is clear is that, there has been a constant reminder that the add-back has to be conducted very cautiously. No matter which route one pursues, the ultimate goal is to achieve fairness.

IN SEARCH OF FAIRNESS AND WHETHER HKD 96,590,486 WAS THE RIGHT FIGURE FOR THE GAMBLING LOSS

We will first consider the grounds under the above two sections.

The grounds under “In Search of Fairness”

Under Ground 1, H complains that the Judge failed to realise that the concept of “notional add-back” is only an adjustment technique and there are no real monies and that the Judge’s failure to cross-check has led to an unfair and unjust provision to H under the AR Order.

Under Ground 6, H complains that the Judge failed to give appropriate credit to H’s alleged Gambling Loss as entertainment expenses commensurate with his standard of living, in that she erred in notionally adding back H’s gambling loss as (1) there is no wantonness in the gambling loss and (2) even assuming a certain degree of wantonness is shown, the Judge ought to have by a broad brush approach, (a) allowed a credit of HKD 2m a year as reasonable entertainment spending or (b) alternatively adopted a 2 % departure from equal distribution.

The grounds under “Whether HKD 96,590,486 was the right figure for the Gambling Loss”

Under Ground 3(2), H argues that the Judge ought to have held that the alleged Gambling Loss was calculated by an unreliable and arbitrary method by W and must be plainly wrong. H also complains under Ground 4 that there were wrongful computations on the part of the Judge, and further under Ground 5, the Judge wrongfully refused to sufficiently reckon H’s and W’s living expenses in accepting H’s Gambling Loss of HKD 96,590,486.

Discussion

As pointed out by Peel J in the Tsvetkov case (which we note was reported after the trial), conduct being a specific section 7 factor usually, if relied upon, the conduct allegations should be clearly set out in the relevant box in the Form E. W’s case on H’s conduct of indulgent gambling was first set out in Part 5.2 of her 1st Form E filed on 17 October 2017, and her allegations of H’s conduct were, briefly, that (i) H had indulged in gambling within the last 10 years or so before the divorce petition was issued and he went to Macau to gamble on average 3 to 5 times each week; (ii) H had taken out loans from SEHL in order to pay off his gambling debts despite W’s objection; and (iii) as at 6 September 2017, the SEHL Loans amounted to about HKD 61m and H signed a letter on 6 September 2017 addressed to the directors of SEHL agreeing not to borrow more money from SEHL prior to the finalization of the parties’ divorce (referred to in the AR Judgment as the “2017 Promise”). In the same box under Part 5.2 of her 2nd and 3rd Form Es, W repeated her allegation in her 1st Form E and went on to allege that despite the 2017 Promise, she verily believed (subject to further discovery), H had thereafter still been using funds from the family companies to fund his gambling habits and to repay his gambling debts. W sought an add-back of the family assets depleted by H’s gambling activities.

In short, as set out in her Form Es, the conduct or misconduct of H alleged and relied on by W was (i) H indulged in gambling; (ii) he used the SEHL Loans to pay his gambling debts without W's consent; and (iii) he did not keep the 2017 Promise and used loans from the family companies for his gambling. H's case set out in his Form Es under Part 5.2 was simply "not applicable.

H's conduct was clearly a disputed issue at trial and as also set out by Peel J in the Two Stage Approach, it was for W to prove H's conduct alleged and relied on by her under Stage (1).

The Judge's approach in dealing with the Gambling Loss Issue was to first set out W's case in paragraph 99 of her judgment that H's gambling conduct was wanton and reckless dissipation and that HKD 96.59 million should be added back. The Judge then set out H's case in paragraph 100 as follows:

W should take him as he is. Gambling had been his pastime since the age of 20 and W actively went along with it, shared the winnings and perks and condoned his gambling, both during the marriage and post-separation.

H did not accept that there was a net loss at all and certainly not in the sum claimed by W.

H invited the Judge to deduct certain amounts from the alleged Gambling Loss set out by the Judge in Table 1 of her judgment.

There was a dispute on cash transactions and whether cash winnings had been expended on luxury items or daily use.

After setting out H's case, the Judge then proceeded to consider H's case on the Gambling Loss Issue. First of all, the Judge's approach would appear to give an impression that she had already accepted W's allegation that H's gambling conduct was wanton and reckless dissipation. Second, insofar as Item (1) in relation to condonation was concerned, whether W had condoned H's gambling conduct and whether W had condoned H's level of borrowing from SEHL (and family companies for gambling) were in our view two different things. The Judge's finding of no condonation in paragraphs 126 -130 appeared to be in respect of the latter and this can be seen from our discussion below.

The Judge had earlier accepted that H had been a risk taker - in gambling, property investment and even setting up the restaurant business, and that H's gambling had taken place for a significant number of years before the parties' separation. In other words, H's indulgent gambling was clearly not a post-separation conduct and on W's own case, such had been going on since 2007. Further, although the Judge found it was difficult to conclude from W's occasional visits to casinos that she condoned H's gambling, the fact was that the parties had agreed that H often gave W cash (including winnings) to spend and W had visited casinos occasionally with H.

The Judge's finding of no condonation on the part of W appeared to be mainly based on the 2014 WhatsApp Message (as defined in the AR Judgment) and the 2017 Promise which indicated W's express disapproval of H's drawings by way of loans from SEHL, a company of which W was a

49.9% shareholder and director. The 2014 WhatsApp Message and the 2017 Promise only demonstrated that W's main concern was over H's increased SEHL Loans which she alleged was for his gambling activities and for paying his gambling debts. The conduct which the Judge found W had not condoned is in fact H's increased withdrawal of funds from SEHL, and this was then said to have been allegedly dissipated through his gambling activities.

As for the Judge's one-sentence finding in paragraph 129 of the AR Judgment that H's gambling stakes raised considerably post separation, although she has not set out the basis of this finding, this appeared to be based on H's own evidence in the witness box that, before 2014, he had not lost millions per year at casinos or else he would have gone bankrupt.

The transcript of the trial shows that in H's cross-examination, it was first put to him that it was only around 20 years into the marriage namely in the late 2000s that he started to indulge in gambling at high stakes. H's answer was he did not agree. In fact, prior to this question, H was saying he was a very big high-roller in Las Vegas long time ago and he had always been a big roller. He was later asked whether it was right that before 2014 it was certainly not the case that he was losing millions or even over 10 million per year, to which H answered that he lost a lot of money in foreign exchange and that foreign exchange was a gamble. The question then asked of H was that it was not H's case that before 2014 he was losing millions or over HKD 10m per year at casinos, and H's answer was he was not or he did not think he was because he would be out of funds and would be bankrupt, but he maintained he lost millions and millions – tens of millions of dollars in foreign exchange and that he was always gambling. It was then suggested to H that the reason why he was not losing millions or 10m per year at casinos before 2014 was he was not playing at such high stakes as after separation and whether that was correct. H seemed to have missed the point of the question and did not give any direct answer. He said he remembered losing a lot in foreign exchange and his accountant and even W had commented on him losing so much, that it must be about 20, 30 million dollars, but he made money on property or maybe business investments and in frozen meat and he balanced out. He also said he took positions a lot and did not consider himself as a gambler but a "position-taker" when opportunities came.

Having read the transcript and the context of the above questions and answers, even though H did not answer some questions directly, the answers he gave cannot be taken as indicating or admitting that before 2014 he had not lost millions per year at casinos or that his gambling stakes raised considerably post separation.

Also, although H accepted in the witness box that as a gambler he knew he would always lose with no way to win in the long run, this answer had to be viewed in the context of the line of questions put to him and his answers. H had reiterated that definitely he was not losing every time, otherwise he would be bankrupt and yet between 1984 to 2020, he had increased his family asset at least 50 times and therefore he could not have been a big loser all the time.

Whether the gambling stakes and/or gambling loss had increased considerably post separation is in our view all relative. There appeared to have been no evidence produced by W as to the amount of H's gambling stakes at casinos during the period between 2007 and 2014 and the

period after separation in 2014. There was also no evidence as to the amount of H's winnings or losses during the period between 2007 and 2014. There was no analysis or comparison of H's gambling stakes or losses at casinos before and after separation. We are unable to see sufficient evidence to support the Judge's finding that H's gambling stakes raised considerably post separation, and/or that H's gambling losses increased sharply post separation since 2014, as opposed to pre-2014. As said, the 2014 WhatsApp Message and the 2017 Promise only indicated W's concern over the increase in the amounts of H's shareholder's loans from SEHL after 2014.

Mr Man SC made the point that it was not a ground of H's appeal that the Judge had made a wrong finding of fact in paragraph 129. In response, Ms Yip SC pointed out that this was covered by Ground 6 in that it was part of H's appeal and submissions thereunder that there was absolutely no evidence to establish wantonness. In our view, this part of the judgment is relevant to, and has to be considered, when deliberating on whether the Judge's decision to add back the Gambling Loss can be supported in light of the authorities and principles discussed above.

Items (2) to (4) of H's case set out by the Judge in paragraph 100 of her judgment concern the amount of the Gambling Loss or the amount of funds allegedly dissipated by H through his indulgent gambling post separation.

W relied on a schedule in relation to H's gambling outflows and inflows which was first produced in December 2018 ("Gambling Schedule"), and initially showed a net debit of HKD 102.4m.

The Gambling Schedule was compiled from (i) H's Supplemental Answers to W's 1st Questionnaire, and (ii) H's Answers to W's 2nd Questionnaire, by deducting the amounts in the cheques from various casinos in Macau to H (described by H to be "gamble gains") from the amounts in the cheques from H to the casinos (described by H to be "gambling expenses") during the period from 2014 to 3 April 2018. The total net amount was revised to HKD 96,590,486 by the time of the trial, which according to W, was the Gambling Loss from 10 February 2014 to 3 April 2018.

The Judge proceeded on the basis that the Gambling Schedule was agreed by H with a disclaimer that any cash transactions had not been accounted for. There appeared to have been a misunderstanding as to what was agreed by H. As pointed out by Ms Yip, what was agreed by H was only that the transactions in the Gambling Schedule were payments either from him to various casinos or vice versa and throughout the trial, H did not agree that the net debit in the Gambling Schedule, ie the HKD 96,590,486 represented his net loss from gambling at casinos since separation until 2018, or that this amount had been wantonly dissipated by him. H's own computation of the Gambling Loss was about HKD 20.687m and such computation was done by him under cross examination when he was trying to explain the whereabouts of the SEHL Loans.

The Judge found that H could not contradict the contents of the Gambling Schedule and that H's explanations for the amount of the Gambling Loss of about HKD 96.59m were not credible (at paragraphs 131-147).

The Gambling Schedule was clearly no more than a record of transactions in one of H's bank accounts with HSBC ("996 Account") between H and various casinos during a period of about 4 years 3 months from 2014 to 3 April 2018. There was no information as to when exactly the parties separated in 2014 and no information on what funds or assets the parties had at the time of their separation in 2014. In fact, according to W, even after 2014, the parties were amicable. W did not issue her divorce petition until 2017 some 3 years after separation, and there was no sufficient evidence before us that H knew she would file for divorce at the time of their separation in 2014. The date of the agreed valuations of the assets and liabilities in Schedule of Assets was 14 July 2021, which was some 7 years after separation in 2014. As for the SEHL Loans, the post separation increase was said to be accepted by W at the end of the trial to be HKD 89,115,753 since 2015. There was no alignment of the respective period covered by the Gambling Schedule and the SEHL Loans. There was also a gap of some 3 years and 3 months between 3 April 2018, the last date in the Gambling Schedule and the agreed date of 14 July 2021 for the valuations in the Schedule of Assets (which included the SEHL Loans). It is not quite clear whether there were gambling losses or winnings during the 3-year gap period.

Having considered the above, we agree with Ms Yip's submission that the Gambling Schedule was only a "snap-shot" of the transactions over those 4 years and 3 months, which would not show whether there was any major bank or cash deposit of gambling wins before or after the snap-shot period. In our view, it is not really possible to identify the financial loss caused by H's conduct of indulgent gambling, if any, between 2014 and 14 July 2021, or whether the parties' assets had been depleted or dissipated by HKD 96.59m between 2014 and 14 July 2021, by simply relying on the Gambling Schedule.

As mentioned earlier, W's allegation of H's conduct in the boxes under paragraph 5.2 of her 2nd and 3rd Form E was that he had used the SEHL Loans for his gambling activities and paying off his gambling debts notwithstanding the 2014 WhatsApp Message and later the 2017 Promise. W's allegation was that up to 6 September 2017 (the date of the 2017 Promise) H had used the SEHL Loans to pay off his gambling debts, and after the 2017 Promise, H had used loans from family companies for his gambling. Whether H had used loans from family companies other than SEHL to pay for gambling debts did not appear to be an issue any more during the trial as there was no finding by the Judge on this. The only findings the Judge made were in relation to the expenditure or whereabouts of the SEHL Loans. The unaccountable whereabouts of the SEHL Loans between 2014 and 14 July 2021 would in our view have been a more reliable basis for assessing the amount of assets alleged by W to have been lost or depleted or dissipated by H.

According to the Judge's findings on the SEHL Loans, the increase post separation was HKD 89,115,753 of which W accepted HKD 36m was for a loan from OCBC for buying shares the value of which was reflected in the Schedule of Assets. During the trial, H gave explanations for the whereabouts of the balance of HKD 53,115,753. The Judge accepted H's explanations for a total of HKD 14,101,846 out of the HKD 53,115,753, but the Judge then found there was nothing to show that those items totalling HKD 14,101,846 came out of the SEHL Loans as opposed to the "Alleged Other Sources of Fund". In other words, the Judge found no sufficient evidence that the sum of

HKD 14,101,846, or any other expenses in Table 2, were paid out of the SEHL Loans, save the OCBC Loan. It would seem based on her findings, the Judge could have drawn an adverse inference against H that the unaccountable sum of HKD 53,115,753 was all lost in gambling. However, even so, there is no clear evidence that such loss is wanton or reckless dissipation and/or to reduce W's claims.

In light of all the above, we have come to a different conclusion to that of the Judge. In our view, W has not been able to establish by clear evidence that there has been wanton or reckless dissipation by H and/or H's conduct is so obvious and gross that it will be inequitable to disregard it under Stage (1) of the Two Stage Approach.

Without clear evidence of wanton or reckless dissipation, and bearing in mind the repeated reminders from authorities that a notional add-back has to be conducted very cautiously, we are of the view that a notional add-back of HKD 96,590,486 cannot be justified and will not achieve a fair result between the parties in the present case. We will therefore allow H's appeal on Ground 1 and Ground 3(2) and set aside the notional add-back made by the Judge.

As for Ground 6, as set out earlier, we have accepted that there is no clear evidence of wantonness in the gambling loss. There is no need for us to consider the rest of the submissions under this ground.

As for the remaining grounds under the section that HKD 96,590,484 was not the right figure, Ground 4 concerns the Judge's alleged wrongful computations of the "Alleged Other Sources of Fund" and there were two errors alleged. Insofar as the first of these alleged errors, we accept that there was an arithmetical error in paragraph 151(c) of the AR Judgment, in that the addition of the total amount of dividends from SEHL and another company GAPHL, ie HKD 10.102m plus HKD 5.6m, should be HKD15.702m instead of HKD16.9m. This error would not affect the total amount of W's version of the Joint Assets in the Schedule of Assets as found by the Judge. As for the second alleged error, we do not find any error on the Judge's part in computing or accepting the SEHL Loans to be HKD 89,115,753 as from 31 December 2014 instead of from 31 December 2013, as the former was all along the date accepted by the parties for the computation of the increase in the SEHL Loans.

As for the Judge's wrongful refusal to sufficiently reckon H's and W's living expenses under Ground 5, Ms Yip SC submits that in determining how much H might have gambled away, the Judge erred in failing to sufficiently deduct other reasonable living expenses of H and W as well as one-off family expenses since 2014 from the "Available Fund". These amounts of family expenses were set out in paragraph 7 of the Notice and consisted of items (a) to (g) thereunder which totalled HKD 49,399,000.

Those items (a) to (g) were part of the 10 items of H's explanations set out in Table 2 by the Judge in her judgment in considering the whereabouts of the SEHL Loans. The disputed issue over the SEHL Loans during the trial was whether W should be liable for the post-separation loans. W's case was she should not be liable for 2 reasons: (i) they were all incurred post-separation, not proved to be for family purposes and not for reasonable amounts; and (ii) she had expressly conveyed her disapproval to H taking out those loans.

For W's reason in (i), the Judge accepted and found that with the amounts available to H from the "Alleged Other Sources of Fund" since 2014, H had not demonstrated the need of those extra amounts of the SEHL Loans. As for W's reason in (ii), although the Judge accepted that W had anticipated further loans to be taken out by H even under the 2017 Promise, that could not be taken as her consent to let H gamble it away or spare H from having to account for the amounts. In short, there was no issue over those amounts available to H from the "Alleged Other Sources of Fund" of about HKD 41million (the adjusted figure) even though they were since 2014, or post separation.

The Judge found that W was not liable for the SEHL Loans unless H had good reasons for those loans. Apart from the OCBC Loan of HKD 36m (i.e. Item 1 of Table 2) which was accepted by W at trial, the Judge accepted H's explanations totalling HKD 14,101,846 (i.e. Items 6 and 9 of Table 2) but pointed out that there was nothing to show that those items came out of the SEHL Loans as opposed to from the "Alleged Other Sources of Fund".

Out of the other 7 items, Items 2, 3, 4, 5 and 7 were all in relation to W's or H's or family expenses. The Judge found there was double-counting for Items 2, 3, 4 and 7 and/or the parties' expenses had in fact came out of MIL or SEHL. As for Item 5, which was for H's monthly expenses in Macau, the Judge found that H's own Form Es did not set out such expenses and that the Macau expenses did not sit in well with the perks he received from high stake gambling.

In short, the Judge did not refuse to reckon H's and W's living expenses, contrary to H's complaint in Ground 5. The Judge had already accepted that H had available to him some HKD 41m from the "Alleged Other Sources of Fund" since 2014. It was for H to explain why in addition to the HKD 41m, he would need to spend another HKD 53m since 2014 (i.e. HKD 90m less HKD 36m OCBC Loan). What the Judge found was there was no sufficient evidence that those items relating to H's or W's or family expenses were paid by H out of the SEHL Loans. This is a conclusion that was reasonably open to the Judge to make based on the evidence.

The complaint under Ground 5 is not made out.

INHERENT IMPLAUSIBILITY

Under Ground 3(1) of the above section, H's complaint is that as the Gambling Loss exceeded the sources of funds set out by the Judge to be available to H since 2014 up to July 2021, it was inherently implausible for H to have gambled away HKD 96,590,486 and the Judge was plainly wrong in finding that H had gambled away HKD 96,590,486 and in adding back the entire sum to the matrimonial pot before re-distribution.

Given that we have allowed H's appeal against the adding back of the Gambling Loss under Grounds 1 and 3(2), it will not be necessary to deal with this ground in depth. It is sufficient to reiterate that there is no information on the amount of the assets or funds the parties had at the time of their separation in 2014. There was also no evidence as to whether there were any funds generated from any sale of assets and if so whether such had been paid into H's 996 Account. We do not find H's inherent implausibility argument in Ground 3(1) has been made out.

OTHER PLAIN ERRORS

We will consider the various errors alleged under Ground 7 first before considering H's complaint on the payment time-table under Ground 2.

Under Ground 7, H complains that the Judge omitted to take into account the assets under W's name (except for the companies' shareholdings which W would transfer to H) when computing the lump sum payable by H. The agreed Schedule of Assets had included W's assets. The omission was accepted by the Judge and by W, that when ordering H to pay W a lump sum of HKD 292,000,000, there was no mention by the Judge of those assets under W's name of HKD 4,204,989.65. The Judge had clarified her intention, pointing out that the figures in the AR Judgment in paragraphs 173 and 190 included monies/assets under W's name, and that had the parties sought clarification she would have amended the AR Order under the slip rule.

It is also H's complaint that the Judge omitted to order W to vacate the registrations of her Form A against the landed properties and omitted to order W to transfer her shareholding in two companies SEL and HTL.

The Judge pointed out in the Stay Decision that this was not an order sought by H at the trial, and that vacating registration should be a consequential order to facilitate implementation of the AR Order. This should not be a matter for appeal. We agree. The same can be said of the Judge not ordering W to transfer her shareholding in SEL and HTL.

In any event, by the time of the appeal, the parties had been able to agree to the Form A registrations on a number of landed properties to be vacated pursuant to consent orders of respectively 21 October 2022 (items 3, 7 and 10 under Part 2.2 (Landed Properties) in the Schedule of Assets), 14 July 2023 (item 12 under Part 2.2) and 3 October 2023 (items 5 and 14 under Part 2.2) (collectively "Consent Orders"). According to Ms Yip, there were only 4 landed properties remaining with W's Form A registrations registered and their net equity was about HKD 118 million.

As of now, H had paid W HKD 221,300,000 including the transfer of House 15 and carpark. W does not need further security of another HKD 118m for the payment of the balance. If the parties are unable to reach agreement on vacating the registrations, H shall have liberty to apply to the Judge for directions on the implementation of our order.

H further complains that the Judge ought not to have accepted W's undertaking to transfer her shares in the companies to H upon H's compliance with all orders and undertakings and upon H's request, as W's undertaking lacks commercial sense in that H is excluded from the option of selling the company shares directly or a certain percentage of the shares and it is an unnecessary over protection to W when she already enjoys the status of a judgment debtor. We accept that this is over protection for W and an undertaking from W to transfer her shares in the companies to H and/or his nominee upon his request should be sufficient.

Under Ground 2, H complains that the Judge had imposed an unrealistic and unreasonably tight payment time-table. H's complaint is not unreasonable. Even though H had been told at the end of the trial that he should start monetizing, there was no evidence as to the progress of such monetizing by the time of the handing down of the AR Judgment. In our view, the payment schedule should not be linked to the end of the trial and in light of the fact that H would need time to liquidate the assets, a better approach is to allow the parties a further opportunity to address the Judge on the progress of liquidation and payment time-table upon the final award being made by the Judge. Further, under section 25(1)(b) of MPPO, no order made under sections 4 and 6 of MPPO shall take effect unless the Decree Nisi has been made absolute. There is before us no information as to whether or when the Decree Nisi has been made absolute.

Under the AR Order, H was given only 14 days to pay a total of HKD 104m to W (or HKD 100m as HKD 4m of which had been paid to W as an advance on 3 September 2021 to cover her legal costs for the trial). It does not appear to us that H could realistically be expected to pay HKD 100m in cash within 14 days of the AR Order. Although H did manage to pay another HKD 6m on 15 July 2022 to make up the 1st instalment of HKD 10m ordered by the Judge, it was not until after the 1st Consent Order of 21 October 2022 and with the Form A registrations against items 3, 7 and 10 of the landed properties under Part 2.2 of the Schedule of Assets being vacated that H eventually managed to pay W another HKD 60m and HKD 45m respectively on 16 January 2023 and 15 February 2023.

It is not W's submission that H had not been taking steps to liquidate the landed properties and/or to raise the cash to pay her, or that he had been deliberately delaying payment, nor was there any evidence to such effect. By 31 January 2024, some 19 months after the AR Order, H had paid W a total of HKD 221,300,000. In light of the property market condition in Hong Kong at the time of the trial and at the time of the AR Judgment, we are of the view that, subject to the granting of the Decree Absolute, a reasonable and fair payment timetable is that set out below.

CONCLUSION

We have held that there be no “add-back” of the Gambling Loss. The total matrimonial assets available for distribution in paragraph 173 of the AR Judgment according to our calculations should be a total of HKD 546,402,203 as follows:

Joint Assets

(on W’s version and including the SEHL Loans at item 85 of the Schedule of Assets of HKD 9,890,000)

LESS the amount agreed by W to be for purchase of shares in OCBC account, i.e. HKD 582,402,202.98 - HKD 36,000,000

= HKD 546,402,203

The Judge had estimated the costs of liquidating the landed properties to be about HKD 3 million, being 1 % agency fees of the value of the landed properties of some HKD 300 million. It was argued by H that the stamp duties should be taken into account. The Table A attached to the Notice set out the amount of stamp duties said to be payable, which was about HKD 667,561. As pointed out by the Judge in paragraph 19 of the Stay Decision, there was in fact no evidence from H during the trial on the transactional costs for liquidating the assets, and that the Judge only applied a common sense approach in paragraph 183 of her judgement by commenting that just 1% of agency fees to sell properties worth over HKD 300m would mean HKD 3m. Table A was not produced at trial and it was not agreed. Further, the stamp duty payable for transfer of W’s shares in SEHL in Table A is for transfer of W’s share of (II) + (III) therein which includes the value of House 15 and carpark but the transfer costs of House 15 and carpark have been separately provided for by H’s and W’s respective undertakings in the AR Order. We will disregard Table A.

It was clearly the Judge’s intention that it was for H to meet the transactional costs, and the Judge had pointed out in paragraph 19 of the Stay Decision, even if the amount of stamp duties was to be taken into account in addition to the HKD 3m, the amount would have been adequately covered by the 1% departure from equality.

H has not appealed against the Judge’s 1% departure from equality. In any event, we see no basis to disturb the Judge’s 1% departure from equality. In light of the amount of Joint Assets now found by this Court to be HKD 546,402,203, W’s share of 49.5% would be HKD 270,469,090 including House 15 and carpark of HKD 36,300,000. W would thus exit the marriage with a secure roof over her head plus cash of some HKD 234m. H’s 50.5% share of the total Joint Assets would be HKD 275,933,113. Although the SEHL Loans of some HKD 53m would fall on H’s side of the balance sheet, there is no evidence of any urgency for the SEHL Loans to be cleared by H. Having regard to all section 7 factors under MPPPO, we are of the view that the Judge’s 1% departure from equality is a fair and equitable distribution of the Joint Assets.

W had assets in her name of HKD 4,204,989.65 (say HKD 4,204,990) and the amount payable by H to W should be HKD 266,264,100 (HKD270,469,090 less HKD4,204,990), which is rounded to HKD 266,264,000. As H had already paid W a total of HKD 221,300,000 including House 15 and carpark, the remaining sum payable by H to W is HKD 44,964,000. HKD 33,416,000 of the remaining sum is at present payable on or before 31 July 2024 under the CA Stay Order. We are of the view that the balance of HKD 11,548,000 should be paid on or before 31 December 2024.

Order

In light of all the above, we allow H's appeal to the extent that the lump sum he should pay W be varied to HKD 266,264,000, which shall be subject to the granting of the Decree Absolute payable as follows:-

HKD 10,000,000 within 28 days of the AR Order (including HKD 4,000,000 paid by H to W on 3 September 2021, i.e. prior to the AR Order);

HKD 141,300,000 (to include the transfer of House 15 and carpark of agreed value of HKD 36,300,000 net of outstanding mortgage) on or before 15 March 2023;

HKD 9,000,000 on or before 15 November 2023;

HKD 55,000,000 on or before 31 December 2023;

HKD 6,000,000 on or before 31 January 2024;

HKD 33,416,000 on or before 31 July 2024;

HKD 11,548,000 on or before 31 December 2024.

Payment of the above lump sum shall be in full and final settlement of the parties' respective claims for financial relief against each other. There shall be liberty to apply to the Judge on the implementation of our order.

COSTS

Even though H has not succeeded in reducing his payment to those options proposed in the Notice and his submissions, he has largely succeeded in his appeal on the add-back issue. We order W to pay his costs of this appeal, to be taxed if not agreed, on party and party basis, with certificate for two counsel.

As for the costs below, H did not succeed on the disputed issues under Step 1, and under Step 4, he did not succeed on the Matrimonial Property Issue and the SEHL Loans Issue, nor on the proposal of 60:40 division of the matrimonial assets under Step 5. In our view, he should pay 80% of the W's costs of her ancillary relief claim.

The above costs orders are on nisi basis and shall become final after 14 days.

We will ask the parties to submit within 21 days from the date of this judgment an agreed draft order to reflect our above orders for our approval.

(Carlye Chu)

(Thomas Au)

(Bebe Chu)

Vice President

Justice of Appeal

Judge of the Court of First Instance

Mr Bernard Man SC and Mr Cristian Tsang, instructed by Chaine Chow & Barbara Hung, for the Petitioner

Ms Anita Yip SC and Ms Lily Yu, instructed by Ip & Heathfield, for the Respondent

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