

HONG KONG / JUDGMENT

LWF v. WST**[2021] HKFC 164****COURT**

Family Court

DECIDED

20 August 2021

CASE / FILE NUMBER

FCMC5380/2019

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bjbj FCMC 5380 / 2019

**[2021] HKFC 164 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NUMBER 5380 OF 2019**

BETWEEN LWF Petitioner and WST Respondent

Coram : Her Honour Judge Grace Chan in Chambers (not open to public) Date of hearing : 9 10
February 2021 Date of petitioner s written closing submission : 5 March 2021 Date of respondent s
written closing submission : 8 March 2021 Date of respondent s written closing submission in
reply : 17 March 2021 Date of petitioner s written closing submission in reply : 24 March 2021
Date of oral closing submission : 31 March 2021 Date of judgment : 20 August 2021

JUDGMENT

(Ancillary relief : sharing of assets/liabilities; conduct)

Overview This is the cross claim for ancillary relief of the parties following the breakdown of their 29-years of marriage for sharing of their matrimonial assets, the major components of which include the matrimonial home registered in their joint names worth of \$12,000,000, a car park registered in the sole name of the respondent (husband) worth of \$1,800,000 and various insurance policies held by the parties in the total sum of over \$2,500,000. Aside the matrimonial assets, the parties have dispute over 26 loans taken out by the husband during the marriage in the total sum of about \$1,970,000 (capital plus interest) which the petitioner (wife) says he had no valid reason or necessity to borrow, and thus she suspects that he has taken away and concealed the money obtained under these loans, thereby should be added back into the pot and be treated

as his debts to her. The husband, however, claims that these loans were made with the consent of the wife to cover, among other things, her lavish spending since 2006 and their son's overseas study in the UK (foundation course and university) from 2010 to 2014. On the other hand, the husband avers that he has retired since 2011 and since then, the wife has been the main breadwinner of the family but has cut her financial support to him since separation in 2018, as a result of which he has to borrow various personal loans in the total sum of \$709,200 from his elder brother to cover his legal costs and personal expenses. He asks the wife to share out such debts. Further, since their separation, he has used his limited source of funds to pay off some of the monthly repayment of the 26 loans, amounting to \$215,090, which should be shared out by the wife as well. This is vehemently objected by the wife, who proffers that she has no responsibility to shoulder any liabilities of the husband. According to the wife, the family pot has roughly \$20,500,000, after adding back of the 26 loans in the sum of \$1,970,000. In addition to adding back this sum, she also seeks a departure of equal sharing of the assets, due to the financial conduct of the husband. Her open proposal, expressed in a rather convoluted manner in my view, is essentially this: She should get 70% of undisputed assets of the parties, ie the matrimonial home, car park, bank balances, stock, value of insurance policies, valuable personal items, and debt to be collected by husband from Madam Wong, his girl-friend (Girl Friend); The 26 loans made by the husband in the sum of \$1,970,000 shall be treated as his debts due to her, and be added back to the family pot for sharing, with 70% to be received by her; Each party shall keep their own pension/MPF; Each party shall bear his/her own debts and/or liabilities, including the husband's debts owed to his elder brother; To achieve the above, she offers to pay the husband a lump sum of \$2,230,741.79, whereas he should transfer all his interest in the matrimonial home to her, with transfer costs to be shared equally between them; No order as to costs of the ancillary relief matters between the parties, including all costs reserved. Put in figure terms, the wife will keep more than 70% of her claimed size of the family pot, whereas the husband will share less than 30% of it. According to the husband, the total size of the pot is about \$19,639,275, and that he should be entitled to 50% of it, ie \$9,819,638. His open offer, however, is that he would get less than 50% of the family pot as follows: Both parties do share equally the value of the matrimonial home and the car park. This may be realized by selling the matrimonial home and the sale proceeds be shared equally between them, with the husband paying the wife the equalization money for him to keep the car park; Subject to (1) above, each party do retain all other assets held in their respective names, such as their MPF or insurance; Each party do bear their own debts and liabilities; No order as to costs of the entire proceedings, including the costs of the main suits under the old or new petitions and ancillary relief and all costs reserved. There is consensus that upon sharing of the assets, there shall be a clean break between the parties. The issues that call for determination are thus broadly these: What is the size of the matrimonial pot, in particular whether the 26 loans in the sum of \$1,970,000 taken out by the husband should be added back under his ledger? Whether there should be a departure of sharing of the parties assets, due to the conduct of the husband? There are only 2 witnesses in this trial, namely the wife and the husband themselves. They have not called any other witness to give evidence on their behalf. Background facts The wife was born in 1966 and is now 55 years old. She holds a master degree in training and human resources management and is now working as an executive

assistant with an income of around \$68,000 per month. The husband was born in 1959 and is now 62 years old. He has retired since 2011 at the age of 52. The parties were married in 1990. A daughter and a son were born within their wedlock in 1990 and 1992 respectively. They are now adults and independent. When they were young, the parties nurtured them in music and hired private piano tutor(s) to train them, spending sometimes a few thousand dollars per month merely on piano lessons. After their marriage, the parties lived in a flat purchased under the sole name of the husband in 1988 (ie 2 years before the marriage). The husband sold this flat in 1996 for \$2,988,000 and the parties purchased their 2nd matrimonial home which was registered in their joint names in Kornhill at \$4,000,000. In the same year, the husband also bought the car park in his sole name in Kornhill at a price of \$370,000, and he is still holding this car park. Two years later in 1998, they sold their 2nd matrimonial home and purchased a bigger flat in Mount Parker Lodge under joint tenancy. This is also the matrimonial home involved in this ancillary relief trial. When purchased in 1998, the parties obtained a mortgage of \$650,000 with the American Express Bank Limited. In 2009, they re-mortgaged the matrimonial home with China Construction Bank and obtained a re-mortgage loan of \$1,000,000, of which about \$185,000 was applied to pay off the mortgage with American Express Bank Limited. The husband used to operate a business trading in electronic parts (GK Co). GK Co was set up in 1993 under the sole proprietorship of the wife. Despite her allegation that she had never taken part in the daily operation of GK Co which suggested that it was not a family business, I think the overall evidence is abundantly clear that the contrary is true. GK Co provided the source of income/fund for the husband who did share out the family expenses before its closure in 2011. Due to the downturn of the business of GK Co, the income/fund that the husband was able to receive from the business dropped and he had more free time at home and became taking care of the finances of the family since late 1990s or early 2000s. Naturally, the family's reliance on the wife's income grew heavier. And with the closure of GK Co, the only source of income of the husband is the rental income of the car park standing at gross level of about \$3,300 - \$3,400 per month. As to the wife, she started to work for X Group as an executive assistant since 2006. X Group is a retailer of a number of branded and luxurious consumer products. She had a very busy work schedule since joining X Group, working until 9 pm or so, and had to fly out of the town on business trips constantly, especially in the first few years of her employment. A lot of the wife's relatives and friends would ask her to buy branded products at X Group on their behalf, as she is entitled to staff discount. According to her, there were on average over 10 such relatives or friends who would ask her to do such favour for them each month. She would purchase the products for them by using her credit cards (she holds over 10 credit cards as can be shown from her Form Es). They would then repay her by either paying into the HSBC joint account in the joint names of the parties (HSBC Joint Account) or by cash directly to her. Between 2012 and 2017, the husband took out 26 loans in the total sum of \$1,970,000. It is indisputable that the loan amount was paid into the HSBC Joint Account before they were defrayed for various purposes. The wife's monthly salaries were also paid into this HSBC Joint Account, from where the monthly repayment of the 26 loans were settled. The relationship of the parties broke down in 2018 when the wife found out that the husband has an affair with the Girl-Friend. He moved out of the matrimonial home in January 2018, and the parties separated since. In January 2019, the wife filed her petition relying on the

unreasonable behaviour of the husband (FCMC 1061 of 2019). She later changed the ground of divorce to one-year separation under the present case. Decree nisi was granted in August 2019. This is thus a long marriage of about 29 years. Applicable Law The law relating to the distribution of family assets in ancillary relief matters are set out in section 7 of the Matrimonial Proceedings and Property Ordinance (MPPO), Cap 192, which states:

- (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- 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; the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; the standard of living enjoyed by the family before the breakdown of the marriage; the age of each party to the marriage and the duration of the marriage; any physical or mental disability of either of the parties to the marriage; 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; 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. The Court of Final Appeal in its landmark judgment of *LKW v DD* [2010] 13 HKCFAR 537 has enunciated 4 guiding principles as to how section 7 of MPPO should be approached, namely (i) objective of fairness, (ii) rejection of sex or role discrimination, (iii) yardstick of equal division, and (iv) rejection of minute retrospective investigation. It has further laid down 5-step approach as follows: to ascertain the financial resources of each of the parties calculated as at the date of the hearing; to assess the financial needs of the parties; to apply the sharing principle to the parties total assets (if surplus assets would remain after the parties needs have been catered for); to consider whether there is/are good reasons for departing from the principle of equal division; to decide the outcome. Identification of assets The parties have prepared a simplified joint list of agreed and/or disputed assets and liabilities dated 9 February 2021 on the 1st day of the trial. Of dispute are the following items: Whether the wife's 2 Manulife policies in the total sum of \$280,814.04 should be put into the pot? Whether the 26 loans obtained by the husband between 2012 and 2017 in the total sum of about \$1,970,000 (capital plus interest) were with the consent/knowledge of the wife for the purpose of defraying family expenses? And whether it should be added back into the family pot under the ledger of the husband? Whether the loan repayment in the sum of \$215,090 made by the husband after the separation in relation to the 26 loans should be regarded as family debt and thus be shared by the parties? Whether the personal loan from the husband's elder brother to the husband in the sum of \$709,200 be regarded as family loans and thus be shared by the parties? The wife has withdrawn the claim that her credit card loan in the sum of \$200,000 should be added back into the pot to be shared out by the husband. The wife's policies The policies in issue are (i) Manulife policy (numbered 288-XXXXX) now worth \$240,279.78; and

(ii) Manulife policy (annuity) (numbered 380-XXXXXX) now worth \$40,534.26. According to the wife, the policy numbered 288-XXXXXX should not be put into the family pot because it was paid with her own money at the beginning of the marriage for the benefit of the son. At that time, the husband was not keen in getting insurance for protection of the family. The policy numbered 380-XXXXXX was contracted on 18 June 2019, which is about 1.5 years after the separation, and is thus post-separation asset. I shall reject the wife's contention straight away for the following reasons. First, it should be borne in mind that in respect of the 1st step undertaken by the court, Riberio PJ in LKW explains that the financial resources of each of the parties should be calculated as at the date of the hearing. Further, there is no need at this stage to distinguish between matrimonial and non-matrimonial assets. His Lordship says these:

72. At this stage, the court need not attempt to distinguish between matrimonial and non-matrimonial property, that being an exercise best undertaking (if necessary) when considering distribution of the assets. Second, in so far as the policy numbered 288-XXXXXX is concerned, the fact that it was contracted during the marriage is *prima facie* a family asset. Importantly, this marriage lasted for about 29 years and the evidence is overwhelmingly clear that the parties have intermingled their finances. Third, the policy numbered 380-XXXXXX, though purchased about 1.5 years after the separation, is of a trivial amount in the light of the long history of the parties intermingling of their finances over 29 years of marriage, which in my view, should not and will not affect the overall sharing of their assets under the principle of fairness. The husband says that these 26 loans in the sum of \$1,970,000 (capital plus interest) are all family loans or debts to cover the following: The son's 4-year's education in the UK in the total sum of about \$1,100,000 between 2010 and 2014; Making up the deficit of the family, caused partly by the wife's purchases of extravagant/luxurious branded items, such as handbags. The wife, on the other hand, denies that she has an extravagant lifestyle. She avers that the husband unilaterally chose to close GK Co and retire in 2011 at the stage of 52. He assured her that the family finances would be in his good hands and that their assets would be sufficient for them to live on. She thus entrusted the family finances entirely with him. She had no prior knowledge nor had she given prior consent to take out these 26 loans. She suspects that the husband utilized the loans to buy securities (which he has pocketed or concealed), but he applied her hard-earned salaries to repay these loans. She thus advocates that the said \$1,970,000 should be added back to his side of the balance sheet. The parties have heated dispute as to the necessity of these 26 loans and whether the wife was aware and/or approve of such loans. I would say straight away that there is no doubt in my mind that these loans were family debt and that the wife was aware of these 26 loans at the material times, and I reject her allegation that she only comes to know about these loans during these proceedings. There are good reasons for me to so conclude, such as: It cannot be disputed that the business of GK Co was shrinking and was not making profit since about 2000, such that the husband was spending more and more time at home. Since 2011, GK Co was closed with full knowledge of the wife, and he has not worked since then. The wife thus has become the sole bread winner

of the family since at least 2011. The average monthly income of the wife was then about \$53,990 per month; I tend to accept that the wife did buy branded items, such as handbags and watches, and spent on her personal grooming such as facial treatment or massage on a regular basis. She told during cross-examination that spending more than \$10,000 a month for her personal expenses was just normal. This means that her personal spending already took up about 20% of the family income each month; Against this backdrop, the wife conceded in her oral evidence that the family expenses soared up as the children grew older. For example, the parties needed to spend around \$200,000 for the daughter's foundation course and university in Hong Kong. The son went to study in the UK from 2010 to 2014, which according to the wife needed around \$800,000 to \$1,000,000, whereas according to the husband taken up \$1,100,000 of the family assets. No matter which version on the amount of the son's UK study is correct, and even taken into account the subsidy given by the husband's father, the wife conceded in her oral evidence that the family expenses soared up to \$70,000 - \$80,000 per month in the years when the son studied in the UK; Notably, the family had to pay for insurance premium of various policies in the total sum of over \$20,000 per month; Merely the wife's own personal expenses and the parties insurance premium alone had already taken up over \$30,000 of the wife's income then standing at over \$53,990, leaving only about \$20,000 for the family to cover the family daily expenses (including maid's salaries), the education of the children and above all, the tax payment of the wife. It is obvious that the said \$20,000 per month was far from sufficient to cover the family expenses at least during the years when the son studied in the UK; Looking at the matter from another angle, the wife has done a loan analysis (in table format) in relation to these 26 loans, setting out the loan amount, drawdown date and repayment schedule of each loan. It shows that of these 26 loans, 5 of them were in a sum of over \$100,000, each ranging from \$114,000 to \$243,000; the remaining 21 loans were less than \$100,000 each, ranging from \$15,000 to \$96,500. The total monthly repayment ranged from as low as \$3,270 per month (as in March 2020 to February 2021) to as high as over \$51,000 to \$67,706 per month (as in January to June 2016). The wife's income there and then was not able to pay for the total monthly repayment at its hey time. The family finance thus fell into a vicious cycle of applying the new loans for paying up the old ones; If the above matters are considered in their totality, it would not be surprising to appreciate that the family did have cash flow problem, especially since 2011 when the husband ceased to work and earn any income; Further, contrary to what she said in her affirmation evidence, the wife conceded in her oral evidence that she was informed by the husband in 2012 that there was cash flow problem in the family. She then asked him why this was the case, and he explained that it was because of the son's expenses to study in the UK and the need to pay her income tax. In September or October 2013, the husband told her again that there was cash flow problem in the family, and asked her to take out another loan. Since 2012 up to the breakdown of the marriage, she says that the husband has made her or arranged her to take out 5 loans, which made her very angry; It is indisputable that the money received under these 26 loans were all credited into the HSBC Joint Account, the bank statements/records of which were accessible by the wife for her to read and cross-check if the family really had cash flow problem. Her allegation that she had not read the

bank statements of the HSBC Joint Account because the husband did not show them to her is not believed by this court. It flies high in one's face for the wife to proffer on one hand that she felt angry about the husband's making her to borrow on the explanation of cash flow problem of the family, but on the other hand did not suggest or even insist to have sight of the bank records of the HSBC Joint Account, so that she could cross-check if the family finances were that bad as suggested by him; Above all, even Mr Enzo Chow, counsel for the wife, accepts in his written closing submission that by the time of the alleged retirement of the husband in 2011, there was insufficient liquidity in the assets of the family. Due to the matters aforesaid, I reject the wife's case that the 26 loans are not family debts. I find that they are and that the wife was fully aware of the necessity to obtain such loans. Personal loan of \$709,200 The husband says that since the separation in January 2018, he borrowed on divers dates between 6 February 2018 and 23 October 2020 a total sum of \$709,200 from his elder brother (who is a retired civil servant) to cover his legal fees and his expenses such as rental expenses. He has agreement with his elder brother that once when this ancillary relief trial is over and the assets shared, he would repay the loan immediately. The wife does not dispute that these personal loans are bona fide loans advanced by the elder brother to the husband. She has not suggested that the husband borrowed the money and then parted it somewhere or with somebody else. As a matter of fact, the most updated Form H of the husband shows that his estimated legal costs up to this trial is \$650,000. It is said that he has already made payment of \$620,000 of these legal costs, leaving him only the balance of \$89,200 for his expenses after separation. She has to accept that the husband is not working after separation, and thus does not have a regular salary, because that is what she herself says in her 2nd affirmation,

57. In contrast, [the husband], after separation with me, is still not working. He is keen on continuing to borrow money and after that from his brother. Upon considering all evidence, I accept that the said personal loans from the elder brother were bona fide loans reasonably taken out by the husband to cover his legal costs and other living expenses, which shall be included as his liabilities to be considered by the court in the final distribution of the family assets. The loan repayment of \$215,090 The husband says that after the separation, he continues to pay outstanding loan repayment which are part and partial of the 26 loans. Of the total sum of \$215,090 that he has paid since separation, he asks that the wife be shared 50% of it, ie \$107,545. To this, I have the following to say. First, I have already found that the 26 loans in the total sum of \$1,970,000 is a family debt, which means that both parties, but not just the wife alone or the husband alone, have the obligation to repay such family debt out of and according to their respective financial means. Second, according to the husband, he applies his own money to pay the said sum of \$215,090. In my view, unless he has other undisclosed source of income (which is not his case), his source of fund after separating from the wife can only be (i) his bank balance, (ii) the rental income of the car park (which after taking into account the management fee of \$250, stood at a net sum of \$3,050 per month before March 2020 and at \$3,150 per month after March 2020) , (iii) the money he encashed from his insurance policies, or (iv) the personal loans he obtained from his elder

brother. In my view, apart from the personal loans from his elder brother, all of the other sources of fund mentioned in the preceding paragraphs are indisputably either derived from a family asset or accumulated out of the joint effort of the wife (bearing in mind that the husband has retired since 2011) which she is entitled to share. That being the case, I cannot see why this sum should be added back as a family debt to be shared out by the wife. If this argument can stand, does it mean that the previous repayment of these 26 loans by the wife out of her monthly income should also be added back in this trial? The answer is clearly in the negative. Third, the personal loan of the elder brother is already accepted by the court to be put into the pot as a liabilities of the husband. It would be prone to double counting if this sum of \$215,090 is added back into the pot as a separate item. In conclusion, I am of the view that there is no need to add back this sum for sharing out of this liability with the wife. MPF It is noted by the court that counsel for respective parties have not made any submission on the illiquidity of the MPF of the wife. However, the court has the duty to take into account all the circumstances of the case under section 7 of the Ordinance, and thus cannot overlook what the wife has said in her 2nd affirmation: 59. the MPF is my retirement fund that I have earned for my continued hard work during my career. I am not able to use them until I have retired The illiquidity nature of pension or MPF was discussed by HHJ Ivan Wong in his judgment in *SSLT v SMFC*, FCMC 11056/2017 [2019] HKFC 250. There, the husband argued that due to their illiquidity and the UK tax liabilities in the region of 20% to 45% upon withdrawal, there should be a 50% discount of the present face value of these assets. The learnt judge accepted the argument and explained (which I concur),

44. It is not in dispute that the pensions and the retirement accounts could only be realized upon the parties retirement, probably when they reach the age of 65. Both are now 43 years old; there are still more than two decades to go before the money could actually goes into their pockets. It must be correct that a distinction must be drawn between an asset, which can be realized for cash and thus freely available and one, that is not realisable and non-transferrable. Regardless of whether it is in the form of a provident fund or a pension (ie a lump sum or an income stream), the money that the parties would receive on retirement is not an available capital asset.
45. It is thus necessary for the court to have regard to the extent to which an asset is freely available or whether it is attended by a particular handicap or risk. If the full value of these assets are taken, given that the husband has far more assets of this nature than the wife; in all likelihood he would end up of having more illiquid assets. I agree with Ms Chan that this would be unfair to the husband. A similar case can be found in *Martin-Dye v Martin-Dye* [2006] 1 WLR 3448.
46. In *DGB v SDGK*, FCMC 12078/2013 (unreported, date of judgment: 12 March 2014) where the husband in that case was 47 years old, I gave a discount of 40% on the face value of the husband s MPF.

47. In another case *S v S*, FCMC 6574/2003 (unreported, 14 March, 2005) Deputy Judge C.K. Chan (as he then was) accepted the husband's case that his pension fund is illiquid and the judge included a nominal 10% of the present value of the pension into the calculation.
48. It is of course axiomatic that the facts of every case are different and so the two cases cited in the foregoing paragraphs are for reference purpose only. It is rather unfortunate that the parties, in particular the husband, have chosen not to adduce any professional actuarial assessment. However, for the reasons that I have elaborated and bearing in mind Riberio PJ's advice that a broad brush approach is all that is required at this stage: *LKW v DD*, at [72], I consider it is not unreasonable that a 50% liquidity discount should be applied. I would give a 50% discount across the board on assets of this nature). (the underlined is my emphasis) Looking at the facts of this case, the wife is now 54 years old, and she is regarded as a devoted working lady all her life. In my view, she would probably work until say 65 years old, if her employer would so allow, which means that her MPF would not be liquidated until 11 years later. Taking into account all the circumstances of the case, I shall give a discount of 30% on the face value of her MPF. The husband is now 62 years old, and thus will have only 3 years to go (which is in shorter period of time than the wife) before he is notionally able to receive his MPF. But in all fairness, I shall also accord a 30% discount on the face value of his MPF. Hidden assets of the husband During the course of the trial and in the closing submission of Mr Chow, the wife suggests that the family had total income of over \$2,456,249 between 2012 and 2017, but the overspending and the son's UK study accounted for \$2,100,000 only, which means that there was no need to borrow the said 26 loans and thus suggests that there must be something having been hidden by the husband. With respect to Mr Chow, this line of argument has to be rejected. Importantly, all the money received under the 26 loans were first paid into the HSBC Joint Account. Whether the wife had the chance to review the bank statements of this Joint Account there and then, or only during this litigation, the plain fact remains that she (and her legal team) has not been able to pinpoint any specific item(s) of withdrawal by the husband from this Joint Account that she says is/are dubious and/or parted away by the husband. Summary of their assets & liabilities According to the simplified joint list of agreed and/or disputed assets and liabilities dated 9 February 2021, the parties joint account has a balance of \$556 only, which is very trivial and shall be disregarded by the court in this trial. Due to the matters set out above, I come to the conclusion that the parties assets and liabilities (down to dollars only) come up to about \$17,569,427 as follows: Wife Husband Matrimonial home \$6,000,000 \$6,000,000 Car park \$1,800,000 Cash at banks \$29,971 \$47,903 Stock/securities \$65,537 \$41,968 Insurance policies \$1,792,419 \$1,015,847 Debts receivable from Girl-Friend \$339,000 Personal valuables \$1,000 MPF (70%) \$1,128,292 \$140,783 Sub-total: \$9,017,219 \$9,385,501 Less: Liabilities \$81,872 \$42,221 Personal loan from elder brother \$709,200 Grand total: \$8,935,347 \$8,634,080 The wife's financial means & reasonable needs The wife was born in 1966 and is now 55 years old. She has a master degree in training and human resources management. She has been working as an executive assistant in the X Group since 2006. Her income, comprising of basic salary and a discretionary bonus, was averaged to \$73,888 per month as at March

2019 (her 1st Form E) or \$68,804 as at December 2020 (her 2nd Form E). It is her case that although she has been the main breadwinner of the family for the last 10 years or so, her job is not very secured due to a sharp drop of business of her employer caused by the Covid-19 pandemic. Since April 2020, she was forced to take a salary-cut by 15%. Her employer has taken drastic measures to lay off a large number of employees. There cannot be any dispute that the world economy, including that of Hong Kong, is hard struck by the Covid-19 pandemic. However, the pandemic would come to an end some day. When international travel revives and becomes frequent, it is not moonshine that tourists would return and our economy would bounce back. Further, despite that the pandemic commenced in January 2020 and the wife faced a pay cut in April 2020, she is still able to keep her job as at the trial. This leads me to conclude that the chance of her losing her job is comparatively remote. She should be regarded as having the ability to work and continue to earn at least her current income until her notional retirement at the age of 65. Since the husband moved out of the matrimonial home in January 2018, the wife has continued to live in the matrimonial home with the son. She has filed 2 Form Es (dated 7 March 2019 and 2 December 2020 respectively). Her total expenses have dropped from \$64,614 to \$57,076 per month, the breakdown of which is as follows: 1st Form E (7/3/2019) 2nd Form E (2/12/2020) GENERAL Mortgage 9,500 Utilities 1,548 1,656 Management fees 1,781 1,817 Food 2,500 Household expenses Insurance premia Household maintenance & repairs 4,167 1,500 Wi-fi Sub-total: 17,744 8,529 PERSONAL Meals out 5,040 4,000 Transport 1,600 1,400 Clothing/shoes 1,500 1,500 Personal grooming 4,500 4,500 Entertainment/presents 2,400 1,800 Holiday 2,500 Medical/dental Tax 6,104 10,296 Insurance premium 20,288 22,123 Contribution to parents 2,500 2,500 Mobile phone bill Sub-total: 46,870 48,547 Grand-total: 64,614 57,076 It can be seen from the above table that the wife's expenses are substantial, which would in turn throw light as to why the family faced the problem of cash flow during the marriage, despite the fact that she had a regular income. However, the husband does not take any issue on the aforesaid monthly expenses. Thus, I shall conclude that her income would be able to meet her expenses. The husband's financial means & reasonable needs The husband, born in 1959, is now 62 years old. He is a higher diploma holder, specialising in electronic parts. He used to run GK Co which was set up in 1993 under the sole proprietorship of the wife and which major business was trading computer/electronic components. As said, there cannot be any dispute that the business of GK Co started to shrink since about 2000 and finally it was closed down in 2011. There is also no dispute that the husband worked as an insurance agent in 2005 for a short period of time, but with trivial income. The husband says in his section 7 affirmation that he has retired since 2011. However, his oral evidence suggests that it is not his true intention to totally step down from any work. Since 2011, he contacted his counterparts to see if there was any job opportunity in trading electronic parts; he had considered working in the field of property management; he once planned and did set aside about \$100,000 from the loans that the family obtained for future business opportunity (but it turned out that there was none). He adds that he has continued to look for a job even after separation in 2018. In my judgment, one of the major reasons that the husband has not been able to successfully find a job is because he has set the benchmark too high. He aims at

getting a job of intermediary level and of average salary of about \$18,000. With his age and the fact that he has been out of the labour market for a decade, I think he needs to come to his senses that he may only take up some manual work in the future, such as security guard or cleaning worker. With the minimum wages protection, he is deemed to be able to earn at least \$10,000 per month. The husband has filed 2 Form Es (dated 13 March 2019 and 18 November 2020 respectively). At the time of his 1st Form E, he claims that he lived with his parents at their flat in Shaukeiwan, and thus did not incur any rental or household expenses. His personal expenses ran up to about \$7,977 per month only, with the major item being his insurance premia in the sum of \$4,007 per month. In his 2nd Form E, however, he says that he has moved out from his parent s home to live in a hotel room in Causeway Bay, costing him \$10,800 per month. As a result, his total expenses has soared up to \$17,926 per month. For easy reference, I set out his claimed expenses in his Form Es in the table below:

1st Form E (13/3/2019)	2nd Form E (18/11/2020)
Rental	\$10,800
Meals out	\$600 \$900
Transportation	\$264 \$220
Clothing/shoes	\$100
Personal grooming	
Entertainment/presents	\$100
Holidays	\$250 \$250
Medical/dental	\$200 \$230
Insurance premia	\$4,007 \$1,470
Contribution to parents	\$500 \$500
Mobile phone bill	\$126
Food	\$1,100 \$1,200
Health supplement	\$200 \$1,200
Management fee of car park	\$250 \$250
Gym & sports	\$100 \$500
Miscellaneous	\$150
Total:	\$7,977 \$17,926

A few points can be said on the husband s expenses. First of all, one can see from the above table that putting aside the rental expenses, the husband actually lives rather frugally. This is actually in line with his own affirmation evidence (translated from Chinese): 33. My major hobby is sports. And I have maintained a frugal life style. My expenses are limited. On the other hand, it is noted that the husband gave contradictory evidence as to where he was living during the period covered by his 1st Form E. He said that he lived with his parents, but in fact, he lived with the Girl-Friend (a government servant) at her quarters in Stanley from the end of 2018 to 2 March 2020, and returned to his parent s flat only once a month. The Girl-friend was later deployed to the checkpoint in Sheung Shui and thus her quarters in Stanley was returned to the government and another smaller quarters in Sheung Shui was assigned to her. The husband could then have returned to live with his parents, but he chose to stay in a hotel room, which I think, is for the convenience of the Girl-Friend coming over to stay with him, at least during her free time if not every day. I reject his excuse that his parents flat, of net area of about 400 sq feet and housing only his parents and a maid, is too crowded for him to stay. In any event, since the Girl-Friend is staying over in his hotel room from time to time, I cannot see why she should not be sharing out the rental expenses with the husband. The overall conclusion I arrive at is that the husband s deemed income of at least \$10,000 will be sufficient to cover his frugal life style way forward. Deciding to apply the sharing principle It is clear from the above analysis that the parties would be able to meet their own expenses, and accordingly there are surplus assets available for distribution. The law is clear that unless there are good reasons for departure, the court should adopt the equal sharing principle as a yardstick to achieve a fair financial outcome for the parties. Departing from equal division due to conduct? The husband says that the family pot should be shared equally, but the wife advocates that due to the financial conduct of the husband, there

should be a departure from the equality principle to approximately about 75% of the assets be awarded to her. His reckless financial conduct includes mainly the following: he chose to retire in 2011 at the age of 52 knowing that there would not be sufficient liquidity of the family assets to cater for the financial needs of the family; he failed to make a prudent and accurate assessment of the family budget, despite that the wife had entrusted her with the financial matters of the family; he took out 26 loans without necessity and/or the consent of the wife; he signed and took out an insurance with AIA in the name of the wife but with him as the beneficiary by forging her signature in early 2010; he used false excuse to lure the wife to change the name of an AXA policy to his own name in March 2017; he transferred the benefit under 2 AIA insurance policies to the Girl-Friend in around January 2018, with the intention to park his assets to the exclusion of the wife. This was found out by the wife, upon which he transferred the policies back to his name again; and he encashed from 4 insurance policies in October 2019 and January 2020 and obtained a total sum of about \$469,089, out of which he loaned 3 sums totalling \$398,000 to the Girl-Friend. I shall begin by referring to section 7 of the Ordinance and the wise words of Riberio PJ in LKW (supra) on the law on conduct. Under section 7 of the Ordinance, the court is required to have regard to the conduct of the parties in determining whether to exercise its powers, and if so, in what manner, in the ancillary relief matters. In LKW(supra), Riberio PJ explained conduct as a material factor in departing from the equality principle in this way: E.5.b Conduct as a material factor

99. Section 7(1) makes it the court's duty to have regard to the conduct of the parties in exercising its discretionary jurisdiction. It is therefore in principle a factor which may, alone or in combination with others, result in a departure from an equal division.
100. However, the courts have recoiled from permitting the parties to indulge in a post mortem of their marriage in order to find fault with each other or to air their mutual recriminations and go into their petty squabbles for days on end. As Sir George Baker P stated in *Campbell v Campbell*, ... everything should be done by the court to avoid costly, indecent and time-wasting investigations regarding conduct in relation to ancillary relief proceedings. Otherwise the court will be faced with ... a lengthy, costly and, most likely, profitless investigation stretching over days, when allegations and counter-allegations are made by the ex-spouses or spouses, one against the other. These sentiments are just as pertinent today and are reflected in the fourth underpinning principle referred to above.
101. In *Wachtel v Wachtel*, Ormrod J devised a means to counteract such objectionable practices which was endorsed by Lord Denning MR in the Court of Appeal. It was made clear that conduct was only relevant to financial provision if it was: ... 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. His Lordship added: 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.

102. As Sir Mark Potter P stated in *Charman v Charman* (No 4): ...the case of *Wachtel* was seen at the time, and is still seen to be, fundamentally important. It established, amongst other things, that the acrimonious disputes as to the causes of the breakdown of marriage, which had characterised the law of divorce prior to the 1969 Act, were not to be born again in the arena of financial disputes.
103. In England and Wales, section 25 was amended in 1984 so that section 25(2)(g) now states that conduct is to be taken into account only if that conduct is such that it would in the opinion of the court be inequitable to disregard it. It therefore differs from section 7 which does not contain that express qualification. However, in my view, that amendment makes no material difference. Section 25(2)(g) puts into statutory language what is essentially the obvious and gross test used before 1984. This is indicated in the passage from the learned President's judgment cited in the preceding paragraph and made clear by Baroness Hale: ... once the assets are seen as a pool, and the couple as equal partners, then it is only equitable to take their conduct into account if one has been very much more to blame than the other: in the famous words of Ormrod J in *Wachtel v Wachtel* [1973] Fam 72, 80, the conduct had been both obvious and gross. This approach is not only just, it is also the only practicable one. It is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases.
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 in the opinion of the court be inequitable to disregard it.
105. The conduct heading is sometimes used in the case-law to refer to positive conduct which I prefer to discuss under the heading of contribution. It has also been suggested that prenuptial and post-nuptial agreements might be classified as instances of conduct. I would be more inclined to regard them as relevant matters brought in under the general rubric of all the circumstances. They do not in any event call for any detailed discussion in the present case. (the underlined is my emphasis) It is thus clear that the wife has to prove that the aforesaid behaviour or acts of the husband was/were obvious and gross such that it would be inequitable to disregard it/them. In my view, none of the aforesaid conduct of the husband alleged by the wife beat the threshold. First, I have already ruled that the husband retired or stopped work since 2011 with full knowledge of the wife. Since then, although he has not pro-actively looked for a job, it is not the case that he idled around at home and made no contribution to the family. Even according to the wife, she entrusted him to take care of the family finances since 2000. For example, he arranged payment for utilities; he went groceries shopping at supermarkets as he preferred to check the prices before he made purchases; he planned family activities such as overseas family tours; he planned and

handled the son's study in the UK; he monitored insurance policies with investment nature. Above all, the wife made regular purchases of branded-name items for her relatives and friends, and he had to compare and locate matching records of credit and debit entries of the bank statements of the HSBC Joint Account and the wife's various credit cards statements (evidenced as so gross and obvious that would make it inequitable to disregard. It is also trite to say that the court should not allow the parties to embark on minute retrospective examination of past finances. Third, the allegation of forged signature in the AIA policy and the change of name of the AXA policy to the name of the husband are irrelevant in my consideration, because such act, even if true (just assuming), has not reduced or affected the size of the family pot. Fourth, the loans to the Girl-Friend is not a conduct that would warrant a departure, as the husband has included the loans due to him into his assets to be shared with the wife. Although he had transferred his policies to the Girl-Friend at one stage, he later realised that it was a naive act and thus he reverted the policies back into his name well before this trial. Again, the size of the family pot is not affected or reduced as a result. It is thus my conclusion that none of the acts suggested by the wife of the husband amounts to a factor on conduct would warrant the court to depart from the equality principles. Deciding on the result Both parties were married for about 29 years, which is a very long marriage in all respects. During the marriage, both parties contributed to the family financially, though starting from 2011, the husband stayed at home and took care of the family finances and other chores, whereas the wife continued to work and thus became the main breadwinner of the family. This is a case that the equality principle of sharing the parties net assets should generally apply. The wife's argument that there should be departure from the equality principle due to the conduct of the husband is rejected. The court has ruled that the total net assets in the pot is about 17,569,427, which means that each shall be entitled to roughly \$8,784,713 (subject to the necessary costs in respect of the sale of the matrimonial home). I intend to let the husband keep the car park, subject to any equalisation money that he should pay to the wife, so that he can have a steady income upon his notional retirement at 65. Neither party has the financial resources to buy out the other's share in the matrimonial home which has to be sold. Upon its sale, the net proceeds should be used to pay off the debts/liabilities of the respective parties in the total sum of \$833,293. The remaining net balance (roughly at \$11,167,707) should be apportioned to the wife and the husband in the broad-brush ratio of 51.5% and 48.5% respectively. I do take note that the above broad-brush sharing ratio of the sale proceeds of the matrimonial home would lead to the result that the husband will receive about \$16,000 - \$17,000 more than 50% of the net value of the family pot. I nevertheless still regard this as a fair order, in view of the costs order to be made by me in the next section of this judgment. The parties should be allowed to retain his/her other assets under their respective names. There should then be a clean break between the parties upon the sale and sharing of sale proceeds of the matrimonial home. Costs On the issue of costs, I opine that it is fair for me to take into account the following matters: One of the major dispute of the parties relate to the size of the family pot. It is quite clear from the above determination that neither party is the overall winner of all the issues relating to the size of the family pot; The court accepts the husband's stance that

[illegible]

hw.W hvyo hw.W hvyo hw.W hw.W hw.W hw.W hs%} hw.W hw.W hw.W hw.W 8 + \$280,814 = \$1,792,419. Husband s 1st affirmation [B21/ 33]. [C809] & [C810].

[1976] Fam 347 at 353.

[illegible]

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