

HONG KONG / JUDGMENT

MTLJ v. LSKR

COURT

Family Court

DECIDED

27 October 2011

CASE / FILE NUMBER

FCMC1214/2010

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bjbj FCMC 1214/2010 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES SUIT NO. 1214 OF 2010

BETWEEN MTLJ Petitioner and LSKR Respondent and LSLWM Intervener

Before : HH Judge Bruno Chan in Chambers Date of Hearing : 27th September 2011. Date of
Judgment : 27th October 2011.

J U D G M E N T (Maintenance Pending Suit)

AUTONUMOUT This is the Petitioner Wife s application for maintenance pending suit against the Respondent Husband for herself and the 2 children, both daughters now aged 8 and 10 respectively. She is now said to be a housewife occupying the former matrimonial home with her 2 daughters, and by her application dated 13th August 2010 she seeks a total sum of HK\$77,000 per month being HK62,000 for their interim maintenance and HK15,000 towards her legal costs in these proceedings, while he is a director of a family business and counter-offered HK\$25,000 at the hearing as the best that he can afford by relying on financial assistance from his father, and that such amount is more than sufficient to meet their reasonable needs with no contribution towards her costs necessary. The huge gulf between the parties respective proposal is due mainly to their disputes over what exactly is the Husband s current income and financial resources of which he claims to have seriously deteriorated due to his many obligations and liabilities in particularly to various banks and credit card companies to the extent that he even has to get his father, the Intervener named in the parties ancillary relief proceedings, to help fund his counter-proposal for the Wife. He also takes issue with the amount of her claim as excessive and unreasonable, and that she has undisclosed income and other resources such as savings and stock investments to meet part of her expenses as well as to fund her own legal costs. As is

common in this sort of applications, the parties just relied on their Financial Statements (Form E) and other relevant affidavits without oral testimony or cross-examination, whereupon the court can only take a broad brush approach with an aim to provide some interim measures to meet the urgent needs of the applicant and children pending the final resolution of the ancillary relief matter when proper adjustments or rectifications can be made accordingly. On this it should be noted that the parties have been scheduled to attend their FDR hearing on 9th December 2011. But before turning to the evidence, it would be necessary to first go into some of the relevant background of the case, in particularly as to the financial role of the Intervener in connection with the Husband's financial means.

Background

The Wife is now aged 43 while the Husband is 44. They married on 19th January 2000 in Hong Kong when the Wife was then a director of MW Hong Kong Limited (MW Hong Kong) and MW (China) Limited (MW China), the Hong Kong representatives of a Japanese company trading on petrochemical products, while the Husband was a director of a successful family business trading in similar products in particularly plastic materials, which was first set up by his father in the 1960s and later incorporated into a limited company known as VG (H.K.) Limited (VG) in the 1970s, in which the Husband joined in 1994 after his university studies in Canada, and was later appointed a director. In July 2005 a 1,250 sq ft flat at Villa Lotto, Broadwood Road, Happy Valley, Hong Kong was purchased in their joint names for HK\$10,910,000 with the assistance of a mortgage of HK\$6 million from Standard Chartered Bank, and which had since become their matrimonial home. In addition the Husband had also at various times purchased other properties in his sole name which were then let out for rental income. At the time of the application he was holding 3 other properties with rental income. In October 2008 the Wife ceased working purportedly to spend more time at home to help and prepare the children in their transition from kindergarten to primary school, and while she remained as a director and worked mainly at home, she claimed to have received no income which she agreed last stood at HK\$40,000 per month. At about the same time the Husband began to spend more time in China on his business. Sadly their marriage started to unravel when the Wife suspected that he was having an affair with a woman there, to which he denied but she eventually moved out of their bedroom into the children's room in early 2009. On 2nd February 2010 the Wife issued a petition for divorce in these proceedings based on the Husband's unreasonable behaviour and also sought custody of both daughters and general ancillary relief for herself and the children. Initially the Husband filed an answer to oppose the petition, but subsequently the parties were able to resolve that matter by the Wife amending her petition to one based on the parties separation for 1 year with the Husband's consent, and the decree nisi was subsequently granted on 28th January 2011. Sadly that was the last of the parties consensus, as while the Wife had filed her Financial Statement (Form E) back in May 2010 for the purpose of FDR, followed shortly thereafter on 13th August 2010 with the issue of the application now before me, the Husband had not filed his until after he was ordered to do so on 4th October 2010, and that since the exchange of their Form E they have become embroiled in their financial disputes in particularly over the Husband's

interests in those properties held either in his sole name or joint names with the Wife including their former matrimonial home at Villa Lotto, all of which were however stated in his Form E to belong beneficially to his father, and for whom he was merely holding as his trustee. The parties relationship deteriorated further when the Wife sought an injunction on 17th January 2011 against the Husband to restrain him from assaulting molesting or disturbing her and from entering or remaining in the former material home after 2 earlier incidents in which both parties accused each other of assault and the police had to be called to keep the peace. Those incidents arose as a result of the Husband having earlier brought certain workers to the former matrimonial home for what he claimed to be renovating the place on his father's instruction with a view of putting it in the market for sell, but which the Wife believed to be his attempts to harass her and to cause damage to her home in order to force her and the children out of the property. Eventually the Husband agreed to undertake not to return to the former matrimonial home to avoid further confrontation. He is said to have since been staying at his parents home at Tin Hau Temple Road. That was of course not the end of the matter, as the Husband's father shortly thereafter on 2nd February 2011 launched an action in the High Court under HCA 220 of 2011 against the parties as 1st and 2nd defendants for inter alia a declaration that he is the sole beneficial owner of those properties then held in either the sole name of the Husband or joint names with the Wife including their former matrimonial home, that they were holding them on trust for him, and for an order that these properties be assigned to him. The father then followed up with an application before this court on 23rd March 2011 for leave to be joined as Intervener in these proceedings, and for an order that the parties ancillary relief application be stayed pending the outcome of his High Court action. I granted him leave to be joined as Intervener but adjourned his stay application for argument. It seems that he has since agreed not to proceed with that application and that his dispute over the interests of these properties be determined in these proceedings together with the parties ancillary relief matter instead of in the High Court. Eventually the Wife restored for hearing her application now before me after both parties had filed further affidavits and made further financial discovery, for which she was represented by Mr Surman while he was by Mr Wu, and as noted above only submissions were made on their behalf based on the affidavits before the court without oral testimony or cross-examination. The Wife's Case The Wife's case is set out in her 5th Affidavit of 20th August 2011 (PB 3 : 998), in which she explained that her initial monthly expenses stated at HK\$34,400 in her earlier Form E had not included those items which the Husband was paying directly at that time, but which he has since failed or refused to pay, such as her household utilities, domestic helper, extracurricular activities for the children, and insurance payments totalling HK\$27,700 thus bringing her monthly expenses to HK\$62,100, and when she has run out of her own savings to meet her expenses, and with insufficient payments from the Husband, she was therefore obliged to come to court for urgent interim relief pending the final resolution of her ancillary relief application. She also said that prior to their separation, the Husband used to pay her, on a monthly basis, HK\$10,000 for the household expenses and HK\$8,000 for her expenses, as well as being responsible for the family's holiday trips averaging HK\$6,000 per month, their outside meals and entertainment of about HK\$15,000 per month, as well as their household utilities of HK\$3,500, the children's insurance of HK\$4,500 and their school books and other school expenses of about

HK\$1,000, making a total monthly amount of HK\$47,900 which he would pay to her or pay directly himself. Due to his failure or refusal to provide sufficient financial support to her, and after exhausting her own savings, she said she had had to liquidate her insurance policies with AXA and to borrow 2 personal loans in the amount of HK\$540,000 to meet the expenses of her and the 2 children, and has been trying to cut down on some of the regular expenses such as the physiotherapy treatments for her neck and back pains and the twisted neck condition of the elder daughter, as well as some of the children's extracurricular activities. She disputes the Husband's claim of his inability to meet her needs, and expresses grave suspicions over his recent pay arrangement with his company or his various alleged payments and debts of over HK\$2.5 million as his attempts to mislead the court and to defeat her financial claims, as evidenced by the reduction of his shareholdings in his 2 companies, the aforementioned VG and PS (HK) Limited (PS) from 12% and 9.5% respectively to only 4% since the breakdown of their marriage. She also believes that the Husband had during the marriage invested in the equity market through various investment accounts but which he has failed to disclose in these proceedings, and that his complaints about his financial difficulties are in fact not supported by the fact that he is still enjoying an extravagant lifestyle with lavish spending both on himself as well as on the 2 children with expensive gifts and meals. As for her claim for contribution towards funding her litigation, she has already incurred more than HK\$330,000 in legal costs due mainly to the Husband's uncooperative and unreasonable conduct in these proceedings, and since she has now run out of all her resources, she asks for an additional sum of HK\$15,000 per month from the Husband for this purpose. The Husband's Case The Husband's case is set out in his 3rd, 4th and 5th Affidavits respectively of 13th April 2011, 20th June 2011 and 20th September 2011 (PB2 : 758, PB3 : 893 & 1111) which can be summarised as follows : He was asked by his father to work for VG in 1994 and was subsequently appointed a director in 2007 responsible for the sales and marketing side of the business, and received his income by way of salary, bonus and commission; He had since the 1990s been investing his father's money on his behalf in the property market buying and selling properties including those referred to in his Form E and his said affirmations, either in his sole name or in joint names with other members of his family, as well as with the Wife as in the case of their former matrimonial home, all in trust for his father, with the purchase price all sourced from him, and any bank mortgage payments met by rental income from letting out the properties, and any deficits paid for also by his father, and upon their sale the proceeds would be ploughed back into the market on his father's instructions; In 2006 his father and 2 other major partners of VG decided to sell their respective residential property to the company so that it could use them to secure various banking facilities for its business, while the company would then let the properties back to the partners as their residence; Accordingly and after the sale of the Tin Hau Temple Road residence to VG, his father instructed him to use the sale proceeds to finance the purchase of the said Villa Lotto Property and allowed him and his family to reside there and to facilitate his daughters school enrolment in that neighbourhood, and in return he was to pay for his father's rent for the Tin Hau Temple property directly to the company of HK\$31,450 per month, as well as the monthly mortgage payments of the Villa Lotto Property of then about HK\$34,600, bringing his total financial commitment under this arrangement to more than HK\$60,000 per month at that time; When his father wanted to liquidate that investment in 2010,

he instructed him to carry out renovation to the Villa Lotto Property, but when the Wife sought an injunction in respect of the property, his father had no choice but to write to her to state his position, and failing resolving the issue with her he therefore took out the said High Court action to protect his interests in the property; His bonus and commission earned from VG had dropped last year due to unsatisfactory business performance of the company thereby caused him great difficulty in his repayments of various bank overdraft and credit card debts in excess of HK\$2 million in total; He therefore entered into a new arrangement with VG on 1st February 2011 by fixing his salary, bonus and commission at HK\$100,000 per month, so that he would be able to meet his loans repayments of about HK\$50,000 per month, and at the same time to continue to pay for his father's rent of HK\$31,450 as well as the mortgage payment of the Villa Lotto Property now stands at HK\$23,000 per month, but with no money left to meet his own expenses, let alone to pay any maintenance for the Wife or the children; He believes that their monthly expenses as stated in the Wife's Form E and 5th Affidavit are exaggerated or excessive, that her personal and household expenses should be more reasonably at less than HK\$9,000, while those of the children should be at no more than HK\$6,000, bringing their total reasonable needs at no more than HK\$15,000 per month, but whatever amount this court may deem fit to order him to pay, he would have to go to his father for financial assistance, but there is no telling whether his father is willing or able to do so after having spent more than HK\$400,000 renovating the Villa Lotto Property just recently. The Applicable Principles Before considering the relevant evidence of the parties case, it would be helpful to set out the applicable principles for this sort of applications. Firstly, the power to order maintenance pending suit is set out in s 3 of Matrimonial Proceedings and Property Ordinance (MPPO), Cap. 192, whereby the court may order a party to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the presentation of the petition and ending on the date of the determination of the suit, as the court thinks reasonable. Hence, the only test which the statute lays down is as the court thinks reasonable, which means that the court has a discretion in the matter, and subject to the result being reasonable, the discretion is not fettered in any way. It has also been said in Rayden and Jackson on Divorce and Family Matters, 18th edition, that the approach to these applications should be empirical, and that in the ordinary sort of case the judge will have to take a broad view of means on the one hand and income on the other, and come to a rough and ready conclusion, or take a broad brush approach, with the overriding consideration of the actual needs of the parties pending suit, and while the provisions of s 7 of MPPO are expressed to arise only when the court is deciding whether to exercise its power in post-decree substantive ancillary relief applications, the court may nonetheless have regard to those criteria on an application for maintenance suit. Perhaps the two most outstanding matters in every case are the standard of living of the parties, and the ability of the husband to pay. It is because in practice oral evidence is normally not heard, as in this case, hence it will be unusual for the court to be in a position to make findings of fact on issues in dispute sufficiently to deal with allegations such as conduct or non disclosure. However if it is demonstrated that the paying party has not made full and frank disclosure of his financial resources, the court can take a broad and robust view of his means, and it does not have to accept and proceed on the basis of the assertions of the paying party as to his means or inability to pay : G v G (maintenance pending

suit : legal costs) [2002] EWHC 306 (Fam), [2002] 3 FCR 339, [2003] 2 FLR 71. Furthermore, the court can look at the reality of the situation and take into account voluntary funding from third party, as in the English case of *M v M* (maintenance pending suit) [2002] 2 FLR 123, where the family had been generously supported by the husband's father during the marriage, and in the wife's application for maintenance pending suit the husband said that his father would no longer support the family financially, it was held by Charles J that a party who suggested that there was a significant change in the circumstances from those that had prevailed during the marriage had to produce evidence to convince the court that this was so, and while the father's unfettered discretion as to whether he should fund the husband had to be acknowledged and taken into account by the court, but he had not appeared to give evidence to the court and there was insufficient evidence to persuade the court that it should proceed on the basis that financial support would not be forthcoming. In other words, the principles and guidance set out in *Thomas v Thomas* [1996] 2 FCR 544, [1995] 2 FLR 668, CA apply to this situation : the court must look to the realities of the case and may assume that proper financial provision would be funded by a third party, such as the father in *M v M*, but should not put improper pressure on that third party. In *Thomas*, the husband was joint managing director of a successful family business with various resources including the family home mortgaged to a bank, and in the wife's application for financial relief the judge held that the husband had failed to satisfy him that it was beyond his power to free the primary equity in the family home by providing the bank with alternative security, and accordingly ordered the sale of the family home and payment to the wife *inter alia* a lump sum from the proceeds. The husband appealed, contending that the lump sum order was improper because it assumed without sufficient evidence that the husband could find substitute security for his liabilities. Dismissing the appeal, the Court of Appeal held that the general principles to be deduced from the authorities as to the exercise by the courts of their wide discretion were that the court was not obliged to limit its orders exclusively to resources of capital or income which were shown actually to exist, but might infer from the evidence the availability of unidentified resources, and that where a spouse enjoyed access to wealth but no absolute entitlement to it, the court would not act in direct invasion of the rights of a third party, nor put a third party under pressure to act in a way which would enhance the means of the maintaining spouse, but nevertheless need not act in total disregard of the potential availability of wealth from sources owned or administered by others. It is therefore with these principles as my guidance that I shall now turn to consider the Wife's application and the evidence before me, in particularly those on the financial relationship between the Husband and the Intervener when it comes to determining his resources and ability to meet the needs of the Wife and the children, on the premises that any under or over provision in my order for maintenance pending suit can always be corrected when the account comes to be taken at the substantive hearing when there is every opportunity to do fairness by set-off, and that the court also has the power to vary, discharge, suspend and revive such an order under s 11 of MPPO. I propose to start with the needs of the Wife and the children which are somewhat more straightforward and less controversial. The Needs of the Wife and Children In her Form E the Wife put her monthly general expenses at HK\$9,000 being HK\$7,000 for food and HK\$2,000 for the household of the family, HK\$14,000 for her personal expenses, and HK\$11,400 for the 2 daughters, totalling

HK\$34,400 (PB1 : 29 30). At that time the Husband was still residing in the same household and was separately responsible for the other expenses not listed by the Wife such as the utilities, domestic helper, and the children's extracurricular activities and insurance, all of which if no longer being met by him, would of course add on to her expenses of a further sum of HK\$27,700 according to her calculation, bringing her total needs to HK\$62,100 per month. As mentioned above the Husband takes issue with this amount as exaggerated and excessive, claiming that she actually needs only HK\$15,000 per month, being HK\$9,000 for herself and HK\$6,000 for the children however without any further explanation or elaboration. It is however not disputed that he has since moving out of the matrimonial home been paying HK\$10,000 per month for the interim maintenance of the Wife and the daughters. Considering the standard of living this family was able to enjoy prior to the breakdown of their marriage, with a joint income in excess of HK\$150,000 per month before the Wife ceased working in 2008, and looking at the breakdown of her personal expenses such as HK\$1,200 for meals out of home, HK\$800 for transport, HK\$2,000 for clothing, HK\$1,000 for entertainment, I am unable to agree with the Husband that they were excessive or unreasonable, in particularly when one compares them with his as stated in his Form E, such as HK\$10,000 for meals out of home, HK\$3,000 for clothing, or HK\$10,000 for entertainment. Granted that he has a business to run and hence these expenses of his must necessarily be much higher, but that does not follow that her expenses are therefore exaggerated or excessive. The same argument can also be made for the Wife about the children's expenses when the Husband's own figures for them in his Form E were higher at HK\$13,350, how then can he justify his proposal of HK\$6,000 as reasonable or sufficient to meet their needs? Again looking at the breakdown of these expenses listed by the Wife, and bearing in mind that they were of 2 fast-growing children on full-time education, I do not find them in any way unreasonable or excessive. As to those expenses which the Husband is said to have paid in the past but is no longer paying, it is not clear whether the Wife still has the use of the domestic helper who must in any event be under the Husband's contract, while he may dispute the utilities amount of HK\$3,500 as too high but which does not appear to me unreasonably excessive for this family, the remaining items of the children's insurance of HK\$2,200 and in particularly their extracurricular activities of HK\$12,000 are more controversial, which the Husband argues as unnecessary for the former, and grossly exaggerated and unsubstantiated in respect of the latter. While neither items appear essential expenditure, they are relatively common these days especially for middle class families, and I cannot imagine that the children in this case would not have any paid extracurricular activities, but I also agree with Mr. Wu for the Husband that the Wife has provided very little detail of such activities other than a global amount, nor is there any documentary evidence such as invoices or receipts, which could have been easily produced as proof, unless she actually meant the physiotherapy treatments for the elder daughter and the speech therapy for the younger child, which are certainly not extracurricular activities but some of their invoices have indeed been attached to her Form E (PB1 : 46 51). Still they do not add up to the amount claimed, and otherwise the disclosure about the expenses of the children's activities is simply inadequate and unsatisfactory. Be that as it may, and on the available evidence before me, I agree that the Wife and the children do require some HK\$50,000 per month for their reasonable needs on interim basis between now and the final resolution of the financial dispute

between the parties, but whether this monthly sum should all be borne by the Husband or shared by the Wife of course depends on their respective financial resources, as it is the Husband's case that the Wife has her own means to shoulder up part of the burden, of which I shall next consider. The Wife's Financial Resources In her 5th Affidavit the Wife claimed to have no income or any other resources save about HK\$140,000 left in her savings to maintain herself and the children for the next 2 to 3 months. That was in August 2011. She also claimed to have earlier liquidated all her AXA funds and borrowed 2 loans in the total sum of HK\$540,000 to meet her expenses since the filing of her Form E in May 2010. As mentioned above the Husband does not accept that she is in financial difficulties, and believes that she has not disclosed all her savings or investments, and that she is working and earning at home. When she filed her Form E, the Wife put the net total value of her assets at just below HK\$1.6 million which consisted mainly of bank savings of about HK\$790,000, stocks and shares of HK\$575,000, and MPF of HK\$ 226,000, a liquidity in excess of HK\$1.36 million available to meet her expenses in May 2010 (PB1 : 26). By the time of her 5th Affidavit in August 2011, she claimed to have only HK\$140,000 left, hence she would have spent about HK\$1.2 million over that period of 16 months, of which HK\$330,000 were on her legal costs, which means that HK\$895,000 would have gone into her expenses and those of the children at an average sum of almost HK\$56,000 per month which appears to tally with her claimed amount of HK\$62,000 if one also takes into account of the Husband's monthly payment of HK\$10,000 to her over that period. That would of course be correct if she indeed has no income or other assets, both of which however the Husband takes great issue with, as he believes that she is still receiving income from the commissions earned by matching up the suppliers and buyers of chemical products for the parent company in Japan, and that she still has substantive stocks investment which she has not disclosed. The Wife does not dispute that she is still the director of MW Hong Kong but insists that she has received no income since November 2008 when it ceased trading, while MW China never had any business transaction since its incorporation and has since been deregistered. In support of her case she has produced copies of the Inland Revenue Department's tax assessments of herself as well as both companies for the relevant periods (PB3 : 1008

¹⁰¹⁷⁾ showing indeed no tax was chargeable against either of them. No tax payable of course does not necessarily follow that there was no income receivable, especially when in the Husband's tax return for 2009/2010 exhibited to his Form E the Wife was also stated to have received an income of HK\$80,000 during that period (PB1 : 393 396), which amounts to only HK\$6,600 per month on average and much lower than her previous income, it tends to support the Husband's case that she does have some earning capacity even staying at home. The issue of whether the Wife still has other assets is however less straightforward, as it seems that as recent as her July 2011 HSBC Advance Account statement show that she still had savings and securities of almost HK\$550,000 at that time, and that she was actively trading in the stock market involving quite substantial sums (PB3 : 1002 1004), but one month later in August 2011 she claimed to have HK\$140,000 left, only of what she had a month ago. Certainly the balance of HK\$400,000 could not have all gone into her usual expenses, unless she had just paid for her legal costs of HK\$330,000 in one go, but given

that the proceedings have been going on for more than 18 months, that explanation seems unlikely. Whatever the true situation with that sum, it is certainly not so substantial as to negate the Wife's application, nor can it be right or fair for her to have to exhaust all her resources before coming to court for urgent relief, as there can be no question that the Husband has a duty to support her and the children, and whose financial circumstances, which I shall now turn to consider, are much less straightforward and much more controversial. The Husband's Financial Circumstances In his Form E filed on 5th November 2010 (PB1 : 161), the Husband put his net total income at HK\$118,550 per month, being salary of HK\$55,000, average bonus of HK\$30,000, average commission of HK\$55,000 and director fees of HK\$10,000 but less HK\$31,450 for his father's rent under the said arrangement with VG. While he also claimed to receive HK\$35,400 per month in rental income from 3 properties held in trust of his father, he had to apply them to meet the mortgage payments and other expenses of those properties and hence they were not for his own use. As evidence he had attached copies of his Employer's MPF Contribution Advice from November 2009 to October 2010 giving details of his income during that 12 months period (PB1 : 213 223), which reveal a monthly payment of commission varying between HK\$20,000 odd and HK\$50,000, a fixed director fee of HK\$55,000, and one payment of HK\$250,000 as bonus, giving him a total amount of just over HK\$1.2 million for the year and at an average of about HK\$100,000 per month. In addition, in his tax return for 2009/2010 he put his total income for that year at HK\$1,307,154 (PB1 : 393

- 396) which gave a monthly average of HK\$108,929.50, all of which just about tally with the average figure stated in his Form E. With this average income the Husband claimed to have to meet a monthly expenditure of HK\$158,850 with mortgage payments of HK\$80,000, the biggest item of his expenses and the first of the many controversial aspects of his financial situation, as it is not clear what property or properties for which these mortgage payments were for, since he claimed to have no beneficial interests in any of the properties registered in his name and disclosed in his Form E, and any of their mortgage payments were met either by their rental income with any deficits paid out of his father's pocket, hence he should not have to meet any such payments himself, let alone such substantial amount. If, as suggested by Mr. Wu on his behalf, he actually meant to say the rental payment for his father, the amount clearly does not match as his father's rent payment was much lower at HK\$31,450, and that according to him it would have already been deducted from his monthly salary. Hence that question remains unanswered or has been answered unsatisfactorily. The rest of his items of expenses do not appear to attract much dispute or criticism from the Wife, but it would be of interest to note that he spent HK\$20,000 on entertainment on himself and HK\$10,000 on the children, which tend to support her case of their high standard of living in the past, while his alleged contribution of HK\$10,000 to her parents seems to contradict his case about their wealth, or that it would be a valid argument to the Wife that such contribution may well be unnecessary, and is certainly so when he needs his income to maintain his former wife and children. There is also one item of his expenditure which may go into the parties credibility : the utilities expenses which the

Husband stated at HK\$3,500. As he was then still residing in the former matrimonial home at Villa Lotto, it must be the same item of the Wife for which she subsequently asked for in her 5th Affidavit, but which the Husband disputed in his later 5th Affidavit when he said I can agree that I paid utilities charges but not as much as HK\$3,500 per month as alleged by her (PB3 : 1118), thus contradicting his own earlier evidence. Whatever his actual expenses were at that time, one of the main reasons for the Husband's alleged financial difficulties was his liability due to his bank overdrafts and credit card debts, of which he did give a breakdown in his Form E amounting to more than HK\$2.5 million, which if true must mean a very substantial regular repayments, and which he later stated at least HK\$50,000 per month in his subsequent 4th and 5th Affidavit, but he had somehow managed to omit from his monthly expenditure in his Form E, which just further fuels the Wife's suspicion over the truthfulness of his financial disclosure. Another item of his expenses which he had also omitted from his Form E but which according to his 5th Affidavit amounts to more than HK\$23,000 per month and thus also accounts for his alleged financial difficulties : his premium payments for 6 insurance policies. These payments were simply not mentioned or included in the monthly expenditure of his Form E. Again no explanation for their omission has been given. In fact, in the appropriate column of the Form E (Item 2.8) for particulars of insurance and endowment policies, he just left it blank. One of the Wife's main suspicions is of course over the Husband's alleged reduced income arrangement made with his employer in February 2011, of which his explanation was given in his 4th Affidavit as follows (PB3 : 895

896) :

6. My commission and bonus earned from my employer dropped since last year due to the unsatisfactory business performance of the company. My monthly earnings reduced substantially which made me even more precarious as I have to repay the overdraft loans credit card indebtedness and other debts as much as HK\$2,116,714.77 and CNY24,175. I also need to maintain myself. I have been in a financially precarious situation.
7. Starting from 1st February 2011, I entered into a new arrangement with my employer that in order to enable me to maintain my living, my salary, commission and bonus be agreed at a fixed amount of HK\$100,000 per month until further negotiation. There are now produced and shown to me marked LSKR-21 copy of my Employer Overall Payment Summary Report for the months of March to May 2011.
8. Yet, the monthly rent (HK\$31,450) for my father's premises at Tin Hau Temple Road payable by me has to be deducted from my monthly earnings. Thus the net amount of earnings payable to me is about HK\$68,550 per month.
9. Further, I have to make repayment of the mortgage loan for the Villa Lotto Property in the sum of about HK\$23,000 per month

10. Thus, out of my monthly earnings of HK\$100,000, after deducting about (a) HK\$50,000 odd as the repayment of the overdraft loan, (b) HK\$31,450 as the rental and (c) HK\$23,000 odd as the repayment of the mortgage loan of the matrimonial home per month, I have no money remained to make further periodical payment to the Petitioner. He made it clear again in his 5th Affidavit that this new arrangement with his employer would leave him with no money to provide any periodical payments for the Wife and the children (PB3 : 1115) : out of my monthly earnings of HK\$100,000, after deducting about HK\$50,000 odd as the repayment of the overdraft loan, HK\$31,450 as the rental I had to pay for my parents house at Tin Hau Temple Road and HK\$23,000 odd as repayment of the mortgage loan of the matrimonial home per month, and also about HK\$23,537.06 the monthly premium of the above life policies as mentioned in paragraph 8 above, I have no money remained to make further periodical payment to the Petitioner... The Wife has serious doubts over the Husband's explanation for this new income arrangement which she believes was intentionally designed to defeat her financial claims, and I can see why. Firstly, if an employee's income is based on his salary, bonus and commission, as in the case of the Husband, and when the company's business performance is unsatisfactory which causes the employee's bonus and commission to drop, it just makes no commercial sense for the employer to agree to fix his income in such a way to enable the employee to meet his personal liabilities. Unless of course, as pointed out by the Wife, there is some special relationship between the employer and the employee, and in this case it is the Husband's own family, and that it appears that they were willing to help him by paying him enough to meet his alleged expenses notwithstanding the drop in his bonus or commission or the company's unsatisfactory business performance. While it is true that apart from the Husband's father, there are 2 other majority shareholders in VG, and Mr. Wu has emphasized that the Husband, being a minority shareholder with only 4% shareholding, could not have entered into any false or sham arrangement with the company, as suspected by the Wife, so as to mislead the court or to defeat her claims, and hence his new income arrangement, as evidenced by his employee payment summary record attached to his 4th Affidavit, must be beyond any challenge or disputable. On the evidence before the court, however, I am unable to agree that must necessarily be the case. Firstly, it is his own evidence, and the evidence of his father, that the company was founded by his father years ago and who is still one of the majority shareholders, and in his first affidavit of 28th February 2011 (PB2 : 416), his father repeatedly referred to VG as his company or his business as follows : the truth is that I or through my corporate vehicle, a limited company known as VG 13 all along, I have been buying and selling landed properties in Hong Kong for profit through my family members and corporate vehicle(s), including VG, in which I have interest and of which I have control 17 as my son was quite helpful and showed his ability, I started to rely on and trust him in running the business and in investing in landed properties for me 19 I directed my son to assist me in handling my business and my investment It seems therefore that his father regards VG as his own company notwithstanding the other 2 majority shareholders, whose relationship with him is otherwise not clear, and that the Husband also appears to be running the company for him. Against this background and relationship, it is not difficult to see why the Wife has such

doubts over the Husband's new income arrangement with the company made in the midst of her financial claims. If indeed that arrangement was genuine and was made out of necessity for the reasons alleged by him, the fact that the company was willing to help the Husband by providing sufficient income to enable him to meet his liabilities speaks volume about their relationship, and when the Wife raised doubts about such arrangement, it would have been apparent to him or his legal advisors that it would be necessary to produce the company record of his bonus and commission for the earlier years to show by comparison that they have indeed dropped significantly, or other relevant financial documents of the company to show its unsatisfactory business performance, which the Husband as a director certainly has the authority to do so, but with just his income record for 2010, there is simply insufficient and unsatisfactory disclosure to enable the court to draw that conclusion in his favour. Nevertheless one could still venture to look to other areas for signs or indications of his alleged dropped as to his bonus or commission, or reduction as to his income, such as his bank accounts statements, of which he has disclosed 8 accounts in his Form E with numerous copies statements going back at least the preceding year, but from the many transactions revealed by these statements, it is simply impossible at this stage to differentiate just by looking which were his actual income and which were something else. Be that as it may, it is clear from the Husband's case that prior to the new arrangement made in February 2011, his average monthly income before deducting for his father's rental payment was HK\$150,000, hence a net amount of HK\$118,550 after deduction as stated in his Form E, while the fixed monthly income under the new arrangement is HK\$100,000 before deducting for the rental payment, which would give him a net income of HK\$68,550, a drop by HK\$50,000 per month, incidentally the same amount which I have found above to be the reasonable needs of the Wife and children. At his previous income, if one were to disregard the 2 items of his expenses which I have earlier questioned their legitimacy : HK\$80,000 for mortgage instalments and HK\$10,000 for his parents, his monthly expenses would have come down to HK\$68,850, and by further economizing on other reducible items such as meals out of home of HK\$10,000, or entertainment of HK\$20,000, the Husband would have been able to meet the Wife's claim without too much difficulty. But that has not taken into account of his loans repayments of HK\$50,000 per month, and notwithstanding the queries raised about their omission from his monthly expenditure in the Form E, it is clear from the documents produced by the Husband that these debts do exist. Whatever the causes for these debts, whether they are the consequences of his or her past extravagances, they do not in my view matter at this stage to the application now before me, they just have to be repaid. Which then brings me to his remaining item of the Husband's major expenses, i.e. payment for his father's monthly rent of HK\$31,450. Is it genuine, and if so, should it take priority over paying for the reasonable needs of his former wife and children if he cannot afford to pay for both? The evidence from both the Husband and his father is that this payment arrangement has been in place since the purchase of the Villa Lotto Property as residence for the Husband and his family, at which time there was no sign of any marital problems, and hence no cause for any suspicion over this arrangement, but whatever the reasons behind it, which will no doubt become clearer at the final hearing when oral testimony will

be available, it appears to be a matter entirely between father and son, which begs the question of whether it should continue given the Husband's alleged financial difficulties, in particular when there is a clear need for him to use his income to meet the Wife's application now before me. While the evidence of the extent of the father's wealth is not clear other than his interests in VG, and his own assertion of full beneficial ownership in not just the 4 properties currently held by the Husband and listed in his Form E, but also those which he claimed to have owned and disposed of over the years as many as 16 properties as listed in his 4th affidavit (PB2 : 538 540), he has certainly impressed to be well capable of paying for his own monthly rental of HK\$31,450, and given his claim to have allowed the parties to reside in the Villa Lotto Property to facilitate their daughters enrolment to the school of their choice in the neighbourhood, and his concern for the welfare of their daughters expressed in his earlier letter to the Wife, I would be very surprised that he would still insist that the Husband should continue with his rental payment in the circumstances, in particular when according to the Husband he was prepared to help him with his interim payment for the Wife. Mr. Wu perhaps in anticipation has argued in his submission that the court should not make such order that will in effect require the father to make the payment of which he has no legal obligation, but as stated in *M v M* and in *Thomas* referred to above, the financial relationship between the Husband and his father and whose resources which can be made available to him are certainly relevant factors which the court can and should take into account in determining his ability to meet the Wife's claims. In fact, what is being proposed here is not for the father to pay maintenance to the Wife, but rather for the Husband to pay what he was supposed to pay to his father to her instead as a matter of priority and urgency. Apart from the actual quantum of the Husband's income from VG, and it is relevant to note that the Husband had actually disclosed directorship in 2 other companies in addition to VG and PS but no information as to any income from those positions, the Wife also takes issue with his other financial resources which she argues has not been fully or frankly, when she raised issue about his insurance policies and especially his investment accounts, neither of which were disclosed in his Form E until almost a year later in his 5th Affidavit when he revealed 6 insurance policies which require a monthly payment in excess of HK\$23,000, and securities account at EBS International and at Shenyin Wanguo, in which he claimed to have nil or debit balance but in the absence any statements or records of such accounts, or any explanation as to their non-disclosure in his Form E, the Wife is fully justified with her criticisms against him as well as her argument that adverse inferences should be drawn against him accordingly. Furthermore, not only was this substantial insurance payment not mentioned at all in his Form E as noted above, but even in his 4th Affidavit when he tried to explain how he needed his reduced monthly income of HK\$100,000 to meet his various necessary expenses, he still failed to mention this insurance payment, and it was not until it was raised by the Wife about his insurance policies when he finally disclosed this payment in his 5th Affidavit, in which he claimed in paragraph 9 that it has brought his alleged total must-pay expenses to more than HK\$127,000 per month even before taking into account of his personal expenses, which just go to support the Wife's argument that either he has exaggerated or fabricated some of his expenses, or that he has

other undisclosed resources to meet them. There are other important aspects of the Husband's case which I find inconsistent, contradictory or suspicious. As noted above, he initially intended to defend the Wife's petition by filing an answer on 14th April 2010, where he described in paragraph 3 as follows his maintenance for his family and in particular the purchase of the former matrimonial home :

- (i) The Respondent provides full maintenance to the household since marriage save and except that some small household expenses, and children education expenses, were provided by the Petitioner, the items paid by the Respondent includes, but not limited to, monthly mortgage payment of the matrimonial home which amounts to \$25,000 per month now and the initial payment for the purchase of the matrimonial home which includes the down payment, the stamp duty and the decoration expenses, which amounts to \$7.5 million respectively, in addition to utilities payment and the maid's salary paid by the Respondent regularly. The Respondent had borrowed the said \$7.5 million from his father in satisfaction of the said down payment. While this answer may have subsequently been withdrawn by the Husband after reaching agreement with the Wife on the divorce, he had clearly presented that statement as accurate by signing the accompanied statement of truth, but which he had later contradicted in his Form E and subsequent affidavits as far as the down payment for the former matrimonial home and his interests therein are concerned, when he claimed that his father was the beneficial owner who paid for everything including the down payment. Further conflicting evidence can be found in his 4th and 5th Affidavit when he claimed that he has all along paid for the mortgage payment of between HK\$23,000 - \$25,000 per month of the Villa Lotto Property, which is however contradicted by his father's evidence when the Intervener said this in his 1st Affidavit of 28th February 2011 (PB2 : 419) : the truth is that I or through my corporate vehicle paid for the down-payments, acquisition and decoration costs and expenses, and mortgage payments in respect of Villa Lotto Property. Neither Madam M nor my Son paid for Villa Lotto Property His father then produced documents showing various payments relating to the purchase of the property not just by him but also by VG (PB2 : 492 593), which not only contradict the Husband's evidence on the mortgage payments, but also show that the company was being used in the purchase which just go to fuel the Wife's suspicion that the Husband and his father are in fact in control of the company notwithstanding the other majority shareholders. In the premises and given all these inconsistent and conflicting evidence, I agree with Mr. Surman's submission that there are serious doubts about the Husband's alleged expenditure and liabilities, as well as the true extent of his financial resources and abilities, and that adverse inferences should be drawn against him accordingly. Legal Costs Contribution The Wife's claim for this item at HK\$15,000 per month, on the other hand, appears woefully inadequate in that she has failed to provide the necessary evidence or information other than her words that she has paid more than HK\$330,000 for legal costs and that she would need at least HK\$15,000 per month for her future proceedings, despite the clear requirement that they be supported by documentary evidence such as invoices and receipts for such payments as well as projection of future costs by her solicitors. Furthermore, as pointed out by Mr. Wu for the

Husband, and as noted above, the Wife's bank statements show that she still had as much as HK\$550,000 in savings and securities as recent as July 2011 and was still actively trading in the stock market, I am not satisfied that she has demonstrated to have no assets, or none that can reasonably be deployed, or other conditions set out by the English Court of Appeal in the case of *Currey v Currey* [2006] EWCA Civ 1338, [2007] FLR, and which have been endorsed by our courts. This of course will not bar her from bringing this claim back to court for determination if and when these conditions are complied with.

Conclusion

There is no question that many of the doubts and suspicions raised and discussed above, mostly over the Husband's financial means, will be explained and clarified by the parties at the final hearing of their ancillary relief application with the benefit of oral testimony, cross-examination and attendance of witnesses, but until then, bearing in mind that there is a FDR hearing forthcoming and that the Wife's claim is only for a relatively short period of time to meet her urgent needs and those of the children, the court can and will take a broad brush approach based on the available evidence, and if the Husband has so far failed to make full or clear disclosure, of which I have refrained from including the word frank at this stage, then he has only himself to blame when the court has no choice but to draw adverse inferences against him that he has the means and resources including from his father to pay, and for all the reasons given above, HK\$45,000 per month as maintenance pending suit for the Wife and the children which is to date back to 1st October 2011 with credit to be given for payment already made, and to be payable thereafter on the 1st day of each month until further order. I have arrived at this quantum on the premises that the Husband will continue with any direct payment of those expenses of the Wife and/ the children which he has been making prior to this application. Lastly, on the question of costs, since I have not heard any argument from the parties, I propose to deal with it by way of order nisi on the basis that they should follow the event in favour of the Wife to be taxed if not agreed, and to be made absolute at the expiration of 14 days. (Bruno Chan) District Judge Mr. Surman instructed by M/S Ho and Yip for the Petitioner. Mr. Wu of M/S W.K. To & Co. for the Respondent. PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk hf1E gdAO h3x~ h3x~ hu"* h#D+ h#D+ h#D+ hAO hAO hu"* h#D+ hKbp hKbp hKbp hAO hAO hAO hAO hKbp h8K' h8K' hDnL hDnL hDnL gd{| h8K' hX{U hDnL hDnL hAO h~mR h~mR h#D+ h#D+ hX@T h3x~ hX@T hCf1 ha:> hCf1 hf1E gdf1E h|5l h|5l h|5l hE+D h|5l h|5l h|\$C wr|r|n|n|iw hf1E h|\$C h#?\$ h#? \$ h*2 h|\$C hCf1 gdf1E h|\$C h<@ h<@ h*2 h|\$C h*2 hN,] hN,] hN,] hN,] h<@ h<@ h<@ h|\$C h<@ hP? = hP?= hP?= hP?= zupkf h#?\$ h*2 hP?= hP?= }xsnid_Z h~mR ha:> &`#\$ H I J K L M N O P Q R S T U V [Content\_Types].xml Iw}, \$yi} \_rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/ theme/theme1.xml w toc'v)I`n 3Vq%`#q x}r :TZaG I u3 L+M2 e\O\* \$\*c? )6-r IqbJ#x ,AGm T[XF64 E)` # R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/ theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/ drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1"

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