

HONG KONG / JUDGMENT

QCSL v. GCJ

COURT

Family Court

DECIDED

28 November 2014

CASE / FILE NUMBER

FCMC2157/2013

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj FCMC 2157 / 2013 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 2157 OF 2013

BETWEEN QCSL Petitioner and GCJ Respondent

Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to public) Dates of Hearing:
20 and 21 March, 11 and 12 September 2014 Date of final written submission: 26 September 2014
Replies to written submissions: 3 October 2014 Date of Judgment: 28 November 2014

J U D G M E N T (Ancillary Relief)

Introduction

AUTONUMOUT This judgment followed a four day trial which was conducted in two tranches - to determine the issue of final ancillary relief. AUTONUMOUT Both parties agree that this is more of a needs based case as opposed to a sharing case. The main point in dispute is how much the wife should receive from the net proceeds of sale of the former matrimonial home. The wife seeks 80%, whereas the husband originally offered 65% subject to a number of caveats. The husband said that he needed at least 35% of the net proceeds of sale in order to pay off his outstanding debts, which he says arose as a direct result of the breakdown of the marriage. There is also an ongoing dispute with respect to a loan from the wife s father. The wife says that this money should be deducted from the net proceeds of sale prior to distribution, whereas the husband says that this is at best a soft loan and as such it should not be so deducted. Both parties are in debt otherwise, the husband significantly so and there is a related issue with respect to each party s relative earning capacity. The husband asks for sufficient funds to enable him to pay off his most pressing debts. The wife for her part asks for funds to put down a deposit on a home for herself

and the two children of the family; in the alternative she seeks assistance with her rent.

Background

AUTONUMOUT The parties, who are both Australian passport holders, met in Hong Kong in 2006 and began living together in 2007. The husband was born in the United Kingdom, but he immigrated to Western Australia with his family when he was 11 years old. The wife for her part is Chinese Malay and likewise her family also immigrated to Western Australia when she was quite young. In June 2004 the wife moved to Hong Kong from Perth and in February 2006 the husband was seconded by his employer to Hong Kong from Sydney. They met through work in Hong Kong. The wife holds a degree in architecture, but has never practiced as an architect. From a professional perspective she has mainly been involved in project management, whereas the husband originally worked in retail and then moved into procurement. In April 2008 the parties first son, C was born and the wife stopped working in order to concentrate on raising him. She did not work outside the home from the beginning of 2008 until April 2011, although she did take her real estate exams during this period. C is now 6 years old. The parties subsequently married in December 2008. A year or so later the husband was made redundant. He recommenced paid employment on the 1 April 2010. Meanwhile in February 2010 the parties second son D was born. He will be 5 in three months or so. On the 9 March 2011 the husband set up his own company X, with two other partners. He holds a 35% stake in that company and in its sister Y Company. In July 2011 the husband began working full time for X and he stopped receiving a regular salary. In May 2011, in order to assist with the family finances the wife returned to work as senior project manager with a well known international law firm. This was a full time position but was on a fixed term contract originally for a 9 month period. Infact the position lasted for 14 months and in order to assist with child care the wife s father came to Hong Kong to help out and a second helper was also employed for some of that time. In June 2012 the wife stopped working for the international law firm and instead started working part time as a property agent. In December 2012 the parties separated and the husband moved out of the former matrimonial home. Costs increased as a result. On the 21 February 2013 the wife filed for divorce based on the husband s unreasonable behaviour. On the 25 June 2013 the parties agreed joint custody with care and control of the boys to the wife and reasonable access to the husband. In September 2013 the wife began working part time as a project manager earning HK\$35,000 per month. The husband s income has gradually increased and he is now also earning HK\$35,000 per month. He expects his salary to rise to approximately HK\$50,000 within a relatively short period of time. On the 29 January 2014 the former matrimonial home was sold and the net proceeds of sale were paid into the husband s solicitors escrow account. Other points to note from the litigation AUTONUMOUT One of the main points of contention between the parties has related to the children s schooling and how that should be funded going forward. The parties eventually came to terms and agreed inter alia as set out in the court order dated the 13 August 2013 as follows: UPON the Petitioner and the Respondent agreeing and acknowledging to each other and to the Court that it is the long term intention of both parties that the children of the family namely CQG, a boy, born in April 2008, now aged 5; () and DQG, a boy, born in January 2010, now

aged 3 (Children) be educated in an international school and then subsequently at an international university in either Australia, United Kingdom or the USA; AND UPON the Petitioner and the Respondent agreeing, acknowledging and undertaking to each other and to the Court that each of the Children will study at ABC Kindergarten (Local School) until no later than completion of Primary 4 or until the age of 9, whichever is the earlier, whereupon in the best interests of their continuing education, they will transfer to an English Schools Foundation school () or to an International School to be mutually agreed by the parties in order to continue their education in the international system until they finish Secondary school (Agreement); AND UPON the Petitioner and the Respondent agreeing and acknowledging to each other and to the Court that both parties will review and monitor the Children s progress in the Local School every 6 months and if they agree that the Children are not making good progress at the Local School, they will transfer both Children or either of them to a mutually agreed suitable school; AND UPON the Respondent and the Petitioner agreeing, acknowledging and undertaking to each other and to the Court that in the event that their financial situation improves and they have the earnings or resources to pay for the Children s on-going education at International school or ESF school, they will inform the other accordingly within 1 month of their knowledge of the same and both parties will discuss and mutually agree a date in each of the Children s best interests to transfer the Children to an International/ESF school; AUTONUMOUT Thus there will, as a direct consequence of this order, need to be a variation of the maintenance for the children and the way in which the children s schooling is funded longer term. This variation will need to take place prior to C turning 9 or him completing P4, whichever is the earlier. This judgment is therefore written on the premise that this variation will take place either by agreement or in the absence of agreement by further court order.

Issues

AUTONUMOUT It seems to me that the following issues now fall to be determined by this court: What is the computation of assets available for distribution? How should the loan from the wife s father be treated? How should the issue of the parties debts be regarded? What are the reasonable needs of the parties? In the event that this is a needs based case how should the assets be divided? How should the court regard each party s earning capacity? How much maintenance should the husband pay to the wife for the two children of the family going forward? Should the husband pay the wife nominal maintenance or some other sum? What order should be made for costs? The law on Ancillary Relief AUTONUMOUT The Court of Final Appeal s decision in LKW v DD (FACV no 16 of 2008) 13 HKCFA 537 sets out the approach that the lower courts should now take when determining issues relating to final ancillary relief. AUTONUMOUT Mr Justice Ribeiro PJ reiterates that there are four underlying principles that should guide ancillary relief proceedings namely fairness, the absence of discrimination, the upholding of the concept of the yardstick of equality and the rejection of a need for a minute retrospective investigation of the parties finances. AUTONUMOUT In addition he identifies a four step approach to be adopted in an ancillary relief trial which if I may I will summarize as follows: The identification of the assets An assessment of the parties financial needs (see below) Whether or not the sharing principle

should be adopted? Whether or not there is a good reason to depart from an equal division of the assets? AUTONUMOUT The s 7 factors are largely dealt with within this general framework. They are:

- (1) It shall be the duty of the court in deciding whether to exercise its powers under section 4, 6 or 6A in relation to a party to the marriage and, if so, in what manner, to have regard to the conduct of the parties and all the circumstances of the case including the following matters, that is to say-
 - (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (c) the standard of living enjoyed by the family before the breakdown of the marriage;
 - (d) the age of each party to the marriage and the duration of the marriage;
 - (e) any physical or mental disability of either of the parties to the marriage;
 - (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
 - (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring. AUTONUMOUT The court is also asked, when looking at the financial provision for the children of the family, to look at the financial position that the children would have been in had the marriage not broken down. I should add that it is normally accepted that save for in the more affluent cases, it is generally accepted that each parties standard of living will of necessity reduce on a divorce. This also means that the children s standard of living will come down as a matter of practical reality. This is especially so in a case like this where money is in short supply. Open Proposals AUTONUMOUT Both parties have each filed open proposals which for the avoidance of doubt I will repeat below. The wife s open proposals AUTONUMOUT The wife says as follows:
 - (a) Following the return of the loan advanced by the Wife s father to the parties, a loan that enabled them to purchase the matrimonial home in early 2011 of some \$835,821 then;
 - (b) the balance of the proceeds of sale (after return of the loan at 1(a) above) currently held in escrow be divided in the proportion of 80% to the Wife and 20% to the husband such division will not enable the Wife to house the children as she wishes but will provide some ability for her to (she hopes) use the money as a deposit to purchase. Maintenance for the Wife in the sum of \$1 pa Maintenance for the Children; \$11,000 per month per child such sum to be index linked to the Hong Kong Consumer Price Index and adjusted by the change (either up or down) in the index on the anniversary of the Order. Contribution of \$17,000 per

month from Husband to the Wife for assistance with rent or mortgage repayments the choice to buy or rent being entirely that of the Wife, she having the best interests of the children at heart for a period of 17 years, until the youngest child finishes his tertiary education. Explanation: anticipated rent of \$30,000 per month. Wife's gross salary \$35,000 per month. Thus in order to adequately house children a contribution towards housing is required. This could be added into the children's maintenance but is here as a separate item for clarity. The husband's open proposals AUTONOMOUS The husband for his part put his updated proposals thus in his Counsel's note prior to the start of the second tranche of the trial:

21. In order to resolve the disputes between the Parties and to save further legal costs, H proposes that:
 - a. The sum in the Parties joint account with HSBC No XXX-XXXXXX-XXX be held by the parties to meet the expenses of the children's education and agreed extra-curricular activities. Both parties to undertake to the Court not to use the funds for any other purpose;
 - b. The sum held in H's Zurich Policy No XXXXXXXX, when it becomes payable in 2015, be transferred to the Parties joint account and held for the same purpose as above;
 - c. H transfers the Toyota car registered in his name to W, or W be entitled to replace the Toyota car for a car of the same value (HK\$80,000);
 - d. The Parties otherwise each retain the chattels in their possession;
 - e. Each Party retains their MPF and the Australian Superannuation Fund held in their respective names;
 - f. H retains the Generali Policy No XXXXXXXXXX;
 - g. The net proceeds of the FMH, before the deduction of HK\$114,000 for rent on FMH for February to April 2014, be divided as to 35% to H and 65% to W;
 - h. H pays periodical payment of HK\$5,000 per month for each of the children of the family until they attain the age of 18 years old or further Order of the Court; and
 - i. H pays nominal periodical payments to W until further Order of the Court.
33. Despite the increase in his debts since the filing of his Open Offer on 7th March 2014 [P3/1065 to 1074], H maintains that offer. So far as the net proceeds of sale of the FMH are concerned, that means that he is offering a split of 65/35 in favour of W of the original proceeds of sale, before the deduction of the advance of rent on the FMH from February to September 2014 which now totals HK\$304,000.
34. Each party would then have to meet their respective debts, including their outstanding legal fees from their share.

35. While a 65/35 split would not enable H to discharge his current debts fully, it would enable him to reduce them to a manageable amount.
36. W's proposal on her Open Offer [P3/1057 to 1060] that the sums paid to her by her father are first repaid and that the sum currently then in the escrow account is divided 80/20 in favour of W would leave H in serious debt.
37. When W made that Open Offer, the sum in escrow had already been reduced by the payment of three months rent on the FMH. Five more months have now been paid, but it appears that W does not accept that those payments and the payments in respect of February to April 2014 should be regarded as an advance of her share. AUTONUMOUT I must now turn to consider the issues, the law and the parties evidence as set out in their respective Form E's, together with their narrative affidavits and their answers to the questionnaires raised by each side. Further I will rely on each party's oral testimony. Discussion What is the computation of assets available for distribution? AUTONUMOUT A schedule was produced at court, which I have set out below at paragraph 20. I have marked in bold the areas in dispute or areas where there is likely to be some adjustment including the computation of the net proceeds of sale and how to treat the sum of HK\$835,821.96 received from the wife's father. Computation of the net proceeds of sale AUTONUMOUT By virtue of court order dated the 21 March 2014 it was agreed that the wife's rent would continue to be met from the net proceeds of sale held in escrow by the husband's solicitors in the sum of HK\$38,000 per month until further order. The sum calculated below includes the rental payments up until September. Since then there have been two further rental payments for the months of October and November totalling HK\$76,000. Thus I am proceeding on the basis that there is approximately HK\$4,646,173.16 held in escrow (i.e. HK\$4,722,173 less HK\$76,000 = HK\$4,646,173). This will be subject to final confirmation. AUTONUMOUT The parties are in dispute regarding the treatment of the rental payments. The husband asks that this amount be accounted for and included in the wife's percentage share of the net proceeds of sale whereas the wife asks that this amount be deducted from the net proceeds of sale and that the remaining funds are then divided between them. AUTONUMOUT Given that the wife clearly needed somewhere to live with the two boys and that it is not clear where provision for the rent would have come from otherwise, I accept that it is not appropriate for the rental payments to be included as part of her share of the net proceeds of sale. AUTONUMOUT The original schedule of assets table Assets's value (HK\$) s value (HK\$) Joint value (HK\$) Remarks Property Former Matrimonial Home Net proceeds of sale 5,349,797.89 Less HK\$114,000 Paid out by conveyancing solicitors for rental of the FMH between February and April 2014 pursuant to Order of 20.01.14 (HK\$38,000 per month) Sale proceeds received by BCC 5,235,797.89 Less: repayment of renovation loan 323,624.89 Renovation loan discharged Rent for FMH from May to Sept 2014 (HK\$38,000 per month from escrow account) 190,000.00 Net sales proceeds of FMH 4,722,173.61 Sum remaining in escrow account Bank accounts HSBC xxx-xxxxxx-xxx (as at 28/8/2014) 36,072.38 To be used for the Children or any expenses to be agreed by the parties, not included in the calculation of family assets. SCB xxx-x-xxxxxx-x (as at 07/08/2014) 926.95 HSBC xxx-xxxxxx-xxx (as at

26/07/2014) 47,202.73 SCB xxx-x-xxxxxx-x (as at 13/1/2014) 0.00 Commonwealth Bank of Australia minimal CITIC China minimal SCB xxx-xxxxxxx-x (as at 29/08/2014) 0.00 Account closed according to HWB letter o f29.08.14 SCB xxx-x-xxxxxx-x (as at 07/08/2014) 4,552.20 SCB xxx-x-xxxxxx-x (as at 07/08/2014) 665.63 HSBC xxx-xxxxxx-xxx (as at 26/08/2014) 863.78 HSBC xxxxxxxxxx (as at 26/08/2014) 44,684.93 Commonwealth Bank of Australia xxxxxxxxxxxxxxxx (as at 04/08/2014) 3,215.59 AUD\$459.37 Bank account Subtotal 47,202.73 53,982.13 0.00 Companies Z Limited (as at 27.08.14) (i.e. the Y company) HK\$30,521.16 Holding company of X P Limited (as at 27.08.14) HK\$1,072,270.83 Investment Zurich xxxxxxxx (as at 03/09/2014) 165,470.07 Set aside for children s education expenses Investment Subtotal 0.00 0.00 Insurance AMP (Life insurance) Sum payable on death as at 7/8/2014 was AUD789,782.12. Not accessible Valuable items Car Toyota 80,000.00 P is using the car. R will transfer the car to P. R bought P Jewellery: Pearl Necklace \$80K Engagement ring \$250K Diamond earrings \$25K Jewellery (bought for HK\$355,000) 30,000.00 Watch 20,000.00 Valuable items Subtotal 110,000.00 20,000.00 Pension / assets not currently available MPF (as at 26/07/2014) 63,174.77 Australian Superannuation 6,492.90 AUD\$941 (changes due to exchange rate) MPF (as at 26/08/2014) 119,595.54 Australian Superannuation (as at 7/8/2014) 630,722.75 AUD\$90,103.25 Generali xxxxxxxxxx (as at 6/8/2014) 258,502.03 Not accessible until 2024 Pension Subtotal 69,667.67 1,008,820.32 Total Assets 226,870.40 5,804,976.06 0.00 Liabilities s value (HK\$) s value (HK\$) Joint value (HK\$) Remarks HSBC Master xxxxxxxxxxxxxxxxxxxx (as at 09/08/2014) 215.65 HSBC Visa xxxxxxxxxxxxxxxxxxxx (as at 22/07/2014) 5,842.21 Outstanding legal fees 145,970.00 s father s money 835,821.96 HSBC Visa xxxxxxxxxxxxxxxxxxxx (as at 28/08/2014) 149,231.03 HSBC Master xxxxxxxxxxxxxxxxxxxx (as at 19/08/2014) 167,258.70 SCB credit card number xxxx-xxxx-xxxx-xxxx (as at 07/08/2014) 310,636.06 American Express (as at 20/08/2014) 8,188.64 Outstanding SCB loan of \$200,000 (as at 08/08/2014) (approximate pending confirmation from Bank) 162,613.14 Loan xxxxxx \$5,606.66 per instalment, 19 out of 48 instalments were debited to credit card Outstanding SCB loan of HK\$175,000 (as at 18/08/2014) (approximate pending confirmation from Bank) 138,833.24 Loan xxxxxx \$4,958.33 per instalment, 20 out of 48 instalments were debited to credit card Loan from X 54,000.00 For deposit etc. for new flat Loan from X 50,000.00 To cover bills and loan repayments Loan from X 50,000.00 To cover bills and loan repayments CBA credit card (as at 06/08/13) 313,216.82 Outstanding balance AUD\$44,745.26 s mother s loan 98,000.00 AUD\$14,000 Outstanding legal costs as at 03.09.14 480,970.90 Subtotal 987,849.82 1,982,948.53 How should the loan from the wife s father be treated? AUTONUMOUT It is now accepted by the husband that the wife s father did transfer the sum of HK\$835,821 to the parties in three tranches, the first on the 21 September 2010 in the sum of HK\$245,881.96. This was originally paid into the wife s sole account and three days later the wife transferred this sum into the parties joint account. It appears that HK\$100,000 of this money was then used to purchase a car. On the 5 January 2011 the wife s father transferred a further HK\$190,000 to the wife, which she then transferred into the parties joint account as before. On the 26 January 2012 the wife s father transferred a third sum of HK\$399,940 to the wife s account. This sum was not subsequently transferred into the parties joint account. These payments were all made during the course of the marriage.

There is a dispute over the purpose of these payments and the husband also maintains that he knew nothing about the third tranche until after the divorce proceedings were commenced. The husband's original stance was that he did not believe that these monies were loans. Rather he alleged that the wife had undisclosed assets and maintained that these funds in truth belonged to her. Later when the evidence was produced which showed clearly the way in which these funds had been transferred from the wife's father to the wife, he alleged in the alternative that these were either soft loans or gifts. AUTONUMOUT Some of the difficulty with respect to these monies arose because the wife's version of events changed as the litigation progressed with very little explanation in the first instance of the reasons behind this. Her oral testimony was similarly quite confused. In her affidavit of the 11 February 2014 she said as follows: My father's loan to us Whilst we were looking to buy a family home in Sai Kung, we needed help with the deposit for the place. We were required to put down at least a 50% deposit. This would have wiped out our entire savings and we would have little or no money for day to day expenses. This was difficult to do with 2 children. We had very little savings. Additionally the Respondent has never been particularly good with money. He is a spendthrift and tends to spend whatever funds are made available to him. My parents have always invested their money prudently. We therefore spoke with my parents about this issue of a loan. I remember that this conversation took place in September 2010. I remember this because we were in Singapore for my grandparents 90th birthday celebrations. My parents discussed between themselves and agreed to make available funds equivalent of up to 10% of the purchase price of the matrimonial home. The idea was that we would use this money for our day to day expenses therefore giving us the ability to fund the mortgage and other loan repayment. My parents loaned us HK\$835,941 in 3 tranches. I have rarely been involved in matters in relation to finances in my marriage. I left most of these matters to C. When I was swearing my first Form E in February 2013, I had not given much thought to exactly how much money my parents had loaned me. I also did not discuss these matters with my parents as my mother was really seriously ill and I did not want to discuss matters in relation to my divorce with my mother or my father to add to their distress at the time. They had enough of their own problems to deal with. When C declined to pay my parents back, I discussed this with my father in late 2013 after my mother had passed away. My father reminded me of the agreement and of the fact that he had made 3 payments and the total loan was HK\$835,941. I had also realised this as I was going through my old bank statements going as far back as to 2010 to provide the explanations that C had sought. My understanding of the agreement on the loan was that my parents would loan us 10% of the purchase price and once we sold the home, we would return the original amount plus 10% of the net sale proceeds back to my parents. The matrimonial home, the biggest asset of the family has now been sold for HK\$10 million and the sale was completed on 29 January 2014. I have managed to negotiate a lease back from the purchasers until April 2014 at a rental for HK\$38,000 per month (HK\$114,000 for 3 months). The net proceeds of sale after deduction of mortgage, the renovation loan and the 3 months rental for a home for the children and me are now held in escrow with the Respondent's solicitors. The available liquid assets for division including our home have reduced significantly due primarily to the

Respondent's significantly reduced earnings which, unlike in the past, have been insufficient to pay for the household and children's expenses. Instead of earning a decent income to meet our family expenses, he has drawn down on assets (policies) and has taken loans (Standard Chartered) to make his contribution towards the support of the family (QCSL-2). In essence he has not contributed financially at all, but has simply made his payments by decreasing our asset base with loans and huge credit card debt, (one of which was not even declared in Form E), all of which has been incurred since our marriage broke down at the end of 2012. AUTONUMOUT I should say at the outset that I do not accept what the wife says at the end of paragraph 39 with respect to the husband's contribution given that it is not in dispute that the husband will remain responsible for repayment of the debts out of his share of the net proceeds of sale. I do not accept that he has deliberately overspent or increased his level of debt. Rather it seems to me that he found himself in an untenable position brought about by the need to maintain two households instead of one. This was also at a time when it had been acknowledged that his income would decrease significantly. AUTONUMOUT Having heard both parties and the wife's father give evidence in the witness box I have come to the conclusion that the wife's father did indeed lend the parties this sum of money. I do not accept that this money represented undisclosed assets of the wife. There is no evidence to support such a conclusion. Neither do I accept that this money was a gift. I accept that it was a loan, albeit a soft loan. I also accept that had the parties not divorced that the wife's father may have been quite content not to have insisted on its repayment. The situation has of course now changed and I accept that the wife's father is quite within his rights to insist on the loans repayment at this juncture especially given the change in his own financial circumstances following the death of his wife and the cost of her medical treatment. I do not accept the argument that because these loans may be regarded soft that the burden for repayment should sit on the wife's shoulders only. These monies were forwarded to the parties during the course of their marriage and therefore the burden for repayment rests with both of them. Consequently I accept that this sum of money should be deducted from the net proceeds of sale prior to the division of the remainder between the parties - and returned to the father. AUTONUMOUT It is also the wife's case that given that the wife's father intended the monies to be used as part payment of the deposit on the matrimonial home, that it was also agreed that he should receive 10% of any net profit on the sale in addition to the return of his capital. The wife's father also confirmed in the witness box that if the net profit had been quite small that he probably would not have insisted on the additional 10% in any event. In such circumstances and given the fact that I accept that the funds were not actually used in order to help put down the deposit on the matrimonial home, the wife's father shall receive the sum of HK\$835,821.96 only. There will not be an additional 10% uplift of the net profit paid in addition. How should the issue of the parties' debts be regarded? AUTONUMOUT The wife complains about what she perceives to be the husband's mismanagement of the parties' finances. She is bitter about the current level of debt and puts the blame for this squarely at the door of the husband. With respect, the parties agreed whilst they were married that the husband should set up his own company with two other partners. There were always going to be risks associated with that

course of action. This was recognised to an extent by the wife when she agreed to go back to work initially in order to ensure that there was a steady income stream whilst the husband tried to get the business up and running. I have no doubt that had the parties stayed together that they would have continued to have made joint decisions concerning the viability or otherwise of continuing with the husband's business venture and the possible necessity of the wife returning to the work force in a more full time capacity. AUTONUMOUT The husband explains the situation thus in his affidavit of the 10 February 2014:

11. I started running my own business, X, with partners in about July 2011. As X has been facing litigation from G Limited, it has been harder to break even than we initially anticipated. Although X was not making a profit in the year ended 31 March 2013, it has secured some new projects in late 2013 and for calendar year 2013 has made a small profit. There was a marked improvement of income in November 2013. We estimate this to continue through 2014. There is now produced and shown by me marked GCJ-1 a copy of the cash flow forecast for the calendar year 2014. Previous cash flows have been optimistic and affected by the ongoing litigation. I estimate that I will be able to draw a monthly salary of HK\$35,000 per month in 2014. My partners and I believe that there is opportunity and value in X. We are committed to make X a success.
12. The Petitioner was aware that it would take some time for X to become profitable as we have previously discussed this. She was supportive of me starting this business. Since the Petitioner was working at F, we agreed to share the family expenses. I was responsible for the mortgage and renovation loan repayment totalling about HK\$35,000 per month whereas the Petitioner paid for the household and children's expenses. Following the breakdown of marriage, the Petitioner is now blaming me for lack of regular and substantial income in the past 2 years and ignoring the fact that I had been the sole breadwinner of the family for more than 3 years between the birth of C and the Petitioner working for F.
29. Since the Petitioner asked me to leave the Matrimonial Home, I have had to pay rent of HK\$17,000 for my accommodation. Whilst my income from X was unstable, the accommodation costs for 2 separate households alone were HK\$52,000. I was forced to realize the Generali policy in the sum of HK\$350,000 and draw down loans of HK\$375,000 from Standard Chartered Bank. I have borrowed AUD\$14,000 (equivalent to HK\$98,000) from my mother. She deposited AUD\$4,000 and AUD\$10,000 into my Commonwealth Bank of Australia on 14th October 2013 and 2 December 2013 respectively.
30. I have drawn cash from my credit card account to pay for my living expenses. Since I was not able to pay the credit card expenses promptly, substantial interest has been incurred. My outstanding credit card debts, including future obligation to repay the Standard Chartered bank loans, is over HK\$1.2 million. If I am not able to repay the loans, my ability to pay maintenance for the children is undermined. AUTONUMOUT Despite the wife's scepticism I accept the husband's explanation in this respect. I also agree that the husband will need to pay off as many of these debts as possible from his share of the net proceeds of sale. Further I do not accept the argument as indicated above, that the husband has been double dipping

i.e. that the husband pays for items for or on behalf of the children and then claims that back as debt. The husband is not seeking a bigger share of the assets because of the debts. Neither is he arguing that the debts be deducted from the asset base prior to an equitable division. He is simply telling the court what he will of necessity be required to do with his share of the net proceeds of sale. In such circumstances it seems to me that the wife's assertions in this respect must fail. What are the reasonable needs of the parties?

AUTONUMOUT In broad terms it seems to me that both parties need a home in which to live and sufficient money to live on. The issue is whether or not in the circumstances it is reasonable or even possible for the wife to purchase a property in which to live with the boys. If not, how are her reasonable accommodation expenses to be met? In addition the husband also needs to pay off as many of his debts as possible. In the event that this is a needs based case how should the assets be divided? The net proceeds of the matrimonial home AUTONUMOUT I accept that the net proceeds of sale amounts to approximately HK\$4,646,173 (i.e. HK\$4,722,173 as set out in the schedule of assets less a further sum of HK\$76,000 being the rental for October and November 2014 leaving a balance of HK\$4,646,173). Out of these monies the sum of HK\$835,822 (rounded up) shall be deducted and repaid to the wife's father within the next 28 days. This leaves a balance of HK\$3,810,351 say HK\$3,810,350. AUTONUMOUT Although admirable I do not think that it is realistic to expect the wife to be able to buy a property at present. This would be the case even if I were to award her 80% of the net proceeds of sale as requested (which I am not). Even with a deposit of just over HK\$3 million, it is not clear to me how she could then hope to repay a mortgage when both she and the husband have a current salary of HK\$35,000 per month each. I am also concerned that this would leave the husband with dangerously little money with which to pay off the outstanding debts. I am also not convinced that it is sensible to make an order based on the husband's anticipated earning capacity when at best it will take some time for him to find alternative employment in the event that he leaves X.

AUTONUMOUT Having given this matter considerable thought I have therefore decided to accept the husband's basic proposition which is that the net proceeds of sale shall be divided on a 65/35 basis. I have not accepted the other caveats namely that the wife's father's loan should not be repaid or that the wife should pay for her rental out of her share of the net proceeds of sale. 65% of the net proceeds of sale will give the wife a lump sum of approximately HK\$2,476,727.50. This should be regarded primarily as a housing fund and I will certainly expect the wife to use these monies to rent (or possibly buy) a property in the immediate to short term. The remaining 35% i.e. HK\$1,333,622.50 will be paid to the husband. This should enable him to pay off the most pressing of his debts. In addition the wife also has some other debts to repay, which she will also need to do from her share of the assets. How should the rest of the assets be split? AUTONUMOUT I also accept the husband's other proposals as set out in paragraph 12 above, namely that:

- a. The sum in the Parties joint account with HSBC No XXX-XXXXXX-XXX be held by the parties to meet the expenses of the children's education and agreed extra-curricular activities. Both parties to undertake to the Court not to use the funds for any other purpose;

- b. The sum held in H s Zurich Policy No XXXXXXXX, when it becomes payable in 2015, be transferred to the Parties joint account and held for the same purpose as above;
- c. H transfers the Toyota car registered in his name to W,
- d. The Parties otherwise each retain the chattels in their possession;
- e. Each Party retains their MPF and the Australian Superannuation Fund held in their respective names;
- f. H retains the Generali Policy No XXXXXXXXXX; AUTONUMOUT In broad terms then the assets will be split as follows: Wife: 65% of the net proceeds of sale - 2,476,727.50 Bank accounts 47,202 Toyota car 80,000 Jewellery 30,000 Mandatory Provident Fund 63,175 Australian superannuation fund 6,493

Sub total HK\$2,703,597.50 Husband: 30% of the net proceeds of sale HK\$1,333,622.50 Bank accounts 53,982 Watch 20,000 Mandatory Provident Fund 119,595 Australian superannuation fund 630,773 Generali (as at 6 August 2014) 258,502

Sub total HK\$2,416,474.50 AUTONUMOUT In addition some money has been put to one side to cover the costs related to the children s education in the immediate to short term. Thus, if one were to look as this as a whole, after the repayment of the wife s father s loan and rental, the wife will receive just over 53% of the total matrimonial pot and the husband the remaining 47% odd. Of those assets the wife will receive the vast majority of the liquid assets. I have also noted the husband s submission that most of the Australian superannuation fund was accumulated by him prior to marriage. I accept what he says in this respect and have taken this into account when coming to a final decision. How should the court regard each party s earning capacity? AUTONUMOUT Both parties are currently earning HK\$35,000 per month, although the husband has said that he is hopeful that his income will shortly rise to HK\$50,000 per month. The wife seeks a maintenance award of HK\$39,000 per month which is more than the husband is currently earning, based not on his actual earnings but on his current earning capacity. (This request is made up of HK\$11,000 per child per month and HK\$17,000 per month as a contribution towards the mortgage or rent). AUTONUMOUT I should say at the outset that it seems to me that both parties have a greater earning capacity than HK\$35,000 per month and that both parties will need to do everything within their power to realize that within the next two years. As I have said this order is therefore made on the premise that there will of necessity need to be a revision to the children s maintenance prior to C turning 9 years of age or completing P4. AUTONUMOUT However I should add that it seems to me that the onus for providing for the children financially lies with both parties. I appreciate that the wife would like to spend more time at home and that in an ideal world she would have preferred to have been a full time mother until the children reached the age of 8 years. Unfortunately the parties jointly made a decision which led to the husband setting up his own business. Although the ramification of that decision might have been

unexpected, it ill becomes the wife to shy away from that now. Thus it seems to me that the wife will need to consider returning to work on a full time basis especially if she wishes to purchase a property in which to live. AUTONUMOUT Likewise the husband will need to take stock of the situation and give his company a realistic time frame within which it must start to make a more acceptable profit margin. If it does not do so within say the next two years then there may be no alternative but for the husband to return to corporate in order to earn a higher income.

AUTONUMOUT The responsibility for supporting the children financially lies with both parents and they are each put on notice now that this is what I will expect of them going forward. How much maintenance should the husband pay for the two children of the family going forward?

AUTONUMOUT The wife sets out her current outgoings as follows: 4.1 General Item Amount Rent 38,000 starting from 30 January 2014 Mortgage instalments [paid by the Respondent in the sum of HK\$35,204 per month for the 2 loans until 29 January 2014] Utilities (electricity, gas, rates, telephone & water) HK\$3,000 Management fees (Land Rates) HK\$1,156 Food HK\$8,000 Household expenses HK\$2,000 Car expenses (petrol, repairs, parking and insurance) [2nd car is used by the Respondent only on every 2nd weekend] HK\$6,000 Insurance premia HK\$1,000 Domestic helper(s) inclusive basic wage, phone, bonuses, yearly travel home, medical & insurance HK\$6,000 Other (specify) general house repairs and garden maintenance HK\$2,000 Total monthly household expenses HK\$67,156 Attach copies of the latest rental receipt. Personal Item Amount Meals out of home HK\$2,500 Transport HK\$3,000 Clothing / shoes HK\$3,000 Personal grooming (including haircut and cosmetics) HK\$2,500 Entertainment / presents HK\$2,000 Holiday 2 to 3 overseas trips a year either during CNY and / or Christmas, Easter and Summer Holidays HK\$2,000 Medical / dental HK\$3,000 Tax (assuming 1 pay 15% x \$420,000 HK\$5,250 Insurance premia [paid by the Respondent's company] Interim maintenance Contribution to parents HK\$2,000 Dependent family members Others (specify) Mobile HK\$500 Total monthly personal expenses HK\$25,750 Children Item Amount School fees (Local School for both boys + D Leapfrog) HK\$5,000 Extra tuition fees [2 Cantonese classes and 1 mandarin class per week for D] HK\$1,800 School books and stationery for 2 children HK\$1,000 Transport to school (including school bus) for 2 children HK\$2,000 Medical / dental for 2 children HK\$1,500 Extra Curricular Activities for 2 children HK\$4,300 Entertainment / presents for 2 children HK\$2,000 Holidays for 2 children HK\$2,500 Clothing / shoes for 2 children HK\$2,000 Insurance premia [paid by the Respondent's company] Lunches and pocket money for 2 children HK\$500 Other transport HK\$500 Child-minding fees [I have a helper who takes care of the children when I am working] Uniform for 2 children HK\$300 Others (specify) Total monthly children's expenses HK\$22,400 Total Monthly Expenses (4.1 + 4.2 + 4.3) HK\$115,306 AUTONUMOUT Likewise the husband says that he has the following outgoings. 4.1 General Item Amount Rent 17,000.00* Mortgage instalments Utilities (electricity, gas, rates, telephone & water) 500.00 Management fees 0.00 Food 6,000.00 Household expenses Car expenses Insurance premia Domestic helper(s) MPF contributions 1,250.00 Others (specify) House Loan SCB Personal Loan (drawdown of HK\$200,000 on 8/2/2013) 5,606.66 SCB Personal Loan (drawdown of HK\$175,000 on 19/1/2013) 4,958.33 Total monthly household expenses HK\$35,315.00 Personal Item Amount Meals out of home 2,000 Transport 1,000 Clothing / shoes Personal grooming (including haircut and cosmetics) Entertainment / presents 1,000 Holiday Medical / dental Tax 1,000 Insurance premia Interim

maintenance Contribution to parents Dependent family members Others (specify) credit card payments 10,000 Total monthly personal expenses HK\$16,472 4.3 Children Item Amount School fees Paid out from education fund Extra tuition fees School books and stationery Transport to school (including school bus) Medical / dental (for when under the limit of health insurance) Extra Curricular Activities Paid out from education fund Entertainment / presents Holidays (Paid by the parent who takes children on holiday. My trip with the children to Australia in last summer costs HK\$36,000. I plan to take them to Australia once in every two years) 1,500 Clothing / shoes Insurance premia Medical insurance currently provided by X Lunches and pocket money Other transport Child-minding fees Uniform To be paid out from education fund Others (specify) Total monthly children s expenses HK\$3,200 Total Monthly Expenses (4.1 + 4.2 + 4.3) HK\$54,987 AUTONUMOUT Once the majority of his debts have been settled the husband should be able to live more easily within his means. He indicated during the trial that he is now paying HK\$12,000 per month for rent. Consequently that brings his outgoings down to approximately HK\$50,000 per month. In the event that he is able to pay off the outstanding personal loans and his credit card debt his outgoings should reduce by a further HK\$20,000 per month. Thus in round figures the husband should be able to reduce his outgoings to HK\$30,000 per month. Other items such as holidays may also be reduced in the short term. Thus depending on his income he should have between HK\$5,000 HK\$20,000 available each month to pay for other items including the boy s maintenance. AUTONUMOUT In so far as the wife s general expenses are concerned, as indicated above, I am approaching this case on the premise that her housing needs have been covered by her share of the net proceeds of sale. I accept the remainder of the general expenses as being reasonable. They amount to approximately HK\$30,000 per month. I also accept that a certain percentage of the general household expenses should be attributed to the wife directly. The remainder, being costs associated with the children should then be split between the husband and wife in an equitable manner. I should add that it seems to me that the wife only has a full time domestic helper because of the children and that this is an expense that is attributable directly to them. Consequently this expense will be included under the children s expenses as opposed to the general expenses. Thus I would accept that the mother s general expenses stand at approximately HK\$23,156 per month (i.e. HK\$67,156 less the rent of HK\$38,000 and the domestic helper of HK\$6,000 = HK\$23,156). Of this half should be apportioned to the wife in the first instance and half to the children i.e. HK\$11,578 each. The wife and husband will then each be responsible for half of children s general expenses i.e. HK\$5,789 each or rounded up to say HK\$6,000 each. It seems to me that this would be an equitable approach to the general household expenses. AUTONUMOUT The wife estimates the children s direct expenses at HK\$22,400 per month but this includes items that are presently covered by the education fund (i.e. school fees, extra tuition fees, extracurricular activities and school uniform). What is left is the domestic helper salary of HK\$6,000 and the children s other direct expenses as follows: Children Item Amount Domestic helper HK\$6,000 Medical / dental for 2 children HK\$1,500 Entertainment / presents for 2 children HK\$2,000 Holidays for 2 children HK\$2,500 Clothing / shoes for 2 children HK\$2,000 Insurance premia [paid by the Respondent s company] Lunches and pocket money for 2 children HK\$500 Other transport HK\$500 Total monthly children s expenses HK\$15,000 AUTONUMOUT Prima facie if the parties are to split the children

s expenses 50:50 then they should each pay HK\$13,500 per month (i.e. HK\$6,000 as a contribution towards the general expense plus half of the children s direct expenses in the sum of HK\$7,500 per month each). The husband is offering HK\$10,000 per month or HK\$5,000 per month per child. If the husband is earning more than HK\$35,000 per month as indicated then he should be able to contribute a little more to the children s expenses. I also accept that the wife should be able to make some economies especially in the area of entertainment and holidays. Thus I will order that the husband shall pay the wife maintenance for the children of HK\$12,000 per month or HK\$6,000 per child per month. This is on the premise that this sum will of necessity need to be reviewed once C reaches the age of 9 or completes Form 4 whichever is the earlier. Should the husband pay the wife nominal maintenance or some other sum? AUTONUMOUT I accept, and this does not seem to be seriously disputed, that given the fact that the wife is the primary carer for two small children that it is entirely appropriate that there should be a nominal maintenance order made in her favour. The Section 7 factors AUTONUMOUT I have largely dealt with these factors when discussing the various issues as set out above. However for the avoidance of doubt I will summarize the situation under the various heads as follows: It shall be the duty of the court in deciding whether to exercise its powers under section 4, 6 or 6A in relation to a party to the marriage and, if so, in what manner, to have regard to the conduct of the parties and all the circumstances of the case including the following matters, that is to say-

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; AUTONUMOUT As indicated above both parties have a fairly limited income at present. Each party has argued that the other has a greater earning capacity than their present incomes might imply. I largely accept that to be the case. It seems to me that both parties must now exploit their true earning capacity to the full. AUTONUMOUT The suggestion during the trial is that the husband also has an additional financial resource in that he is able to run certain expenses through his company. Having heard the husband give evidence I accept that this was done in a wholly legitimate way. Further I do not accept the suggestion that the husband was hiding assets in the sister Y Company.
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; AUTONUMOUT Both parties clearly have an ongoing obligation to financially support the two children of the family. This is central to the case.
- (c) the standard of living enjoyed by the family before the breakdown of the marriage; AUTONUMOUT I accept that the parties enjoyed a reasonable standard of living commensurate with the husband generally earning in excess of HK\$100,000 per month. They were also able to purchase properties in Hong Kong and to take regular trips overseas either to Australia or Malaysia or otherwise.

- (d) the age of each party to the marriage and the duration of the marriage; AUTONUMOUT The wife is 37 and the husband is 46 years of age. The parties were married for four years. If one includes the period of cohabitation prior to marriage it would be fair to state that this was a fairly short relationship of 5 years but one that produced two young children.
- (e) any physical or mental disability of either of the parties to the marriage; AUTONUMOUT Thankfully this is not in issue.
- (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family; AUTONUMOUT I accept that both parties made a full contribution to the marriage.
- (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring. AUTONUMOUT As indicated above each party will retain their own Australian superannuation funds. I accept that given the relative shortness of the marriage that this is an entirely appropriate way to proceed. What order should be made for costs? AUTONUMOUT Although the husband has on the face of it been more successful than the wife he did not win on two of the main issues i.e. how the loan from the wife s father should be treated and whether the division of assets should take effect after payment of the wife s rental. In such circumstances I have decided to exercise my discretion and to make an order nisi to be made absolute in 14 days time that there be no order as to costs. Each party will therefore be responsible for their own legal costs from their share of the assets. The order AUTONUMOUT
1. Upon the parties acknowledging and agreeing that
 - a. The sum in the Parties joint account with HSBC No XXX-XXXXXXX-XXX shall be held by the parties to meet the children s agreed expenses including their school fees, extra tuition fees, extracurricular activities, school books and stationery, transport to and from school and school uniform fees. Both parties undertake to the Court and to each other not to use the funds for any other purpose;
 - b. The sum held in the husband s Zurich Policy No XXXXXXXX, when it becomes payable in 2015, shall be transferred to the parties joint account and held for the same purpose as set out in a) above;
 - c. The husband do transfer the Toyota car registered in his name to W within the next 28 days;
 - d. The Parties shall otherwise each retain the chattels in their possession;
 - e. Each Party shall retain their MPF and the Australian Superannuation Fund held in their respective names;
 - f. The husband shall retain the Generali Policy No XXXXXXXXXX; IT IS ORDERED THAT The net proceeds of sale of the former matrimonial home shall be divided between the parties as set out in paragraph 30 and 32 above. In particular the sum of HK\$835,822 shall be paid to the

wife s father from the net proceeds of sale held in escrow by the Respondent s lawyers within the next 28 days. Nominal periodical payments to the Petitioner to be paid by the Respondent at the rate of HK\$1 per annum for her maintenance during the joint lives of the parties or until the Petitioner s remarriage whichever is the shorter first payment to be made upon the pronouncement of the decree absolute. The Respondent do pay periodical payments for the children of the family in the sum of HK\$6,000 per month per child first payment to be made on the 1st day of December 2014 and subsequent payments to be made on the 1st day of each succeeding month until each child s 18th birthday or cessation of full time education, whichever is the later or until further order. It is further directed that the maintenance for the children shall be reviewed prior to C reaching the age of 9 years or completing Form 4 at primary school whichever is the earlier. The division of capital as set out in the preamble and order 1 above shall be in full and final settlement of the Respondent s claims for all forms of ancillary relief and in full and final settlement of the Petitioner s claims for capital ancillary relief. There shall be an order nisi to be made absolute in 28 days time that there be no order as to costs. A section 18 declaration to issue. (Sharon D. MELLOY) District Judge Mr Giles Surman instructed by Howse Williams & Bowers for the Petitioner Mr Ian Wingfield instructed by Boase Cohen & Collins 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 A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V gdLQ wswnj h Az hMuO hOAJ gdw~ gdw~ gdw~ hu/- hu/- hu/- h3[- hOAJ hOAJ h Az hOAJ h)4% h)4% hOAJ hOAJ hOAJ hOAJ hOAJ h)4% hOAJ hOAJ hOAJ hOAJ hOAJ hOAJ gdLQ {toho h}lr h} lr hIAi gdO= gdO= gdLQ gdIAi sgs^M hIAi hIAi hIAi hIAi hIAi gdO= gdLQ gdO= gdO= gdO= ymymy hXU" hXU" hXU" gdO= gdO= gdO= gdLQ gdO= h>)" hS(hS(hS(hS(hS(hS(hS(hS(h>)" hS(h>)" h>)" h>)" h>)" h>)" h>)" h>)" gdLQ gdLQ gdLQ ytS(hS(gdLQ gdLQ gdLQ gdLQ ytS(gdLQ gdLQ gdLQ ytS(gdLQ gdLQ gdLQ ytS(gdLQ gdLQ gdLQ ytS(gdLQ gdLQ gdLQ ytS(gdLQ gdLQ gdLQ ytS(gdLQ gdLQ gdLQ ytS(gdLQ gdLQ gdLQ ytS(gdLQ gdLQ gdLQ ytS(gdLQ gdLQ gdLQ ytS(gdLQ gdLQ gdLQ ytS(gdLQ gdLQ gdLQ kdH ytS(gdLQ gdLQ kd?! ytO= gdLQ gdLQ gdLQ gdO= ytO= gdO= gdO= gdO= gdO= ytO= gdO= gdO= gdO= gdLQ ytS(gdLQ gdLQ gdLQ gdLQ ytS(gdLQ gdLQ gdLQ gdLQ ytS(gdLQ gdLQ gdLQ gdLQ ytS(gdLQ gdLQ gdLQ gdLQ ytS(gdLQ gdLQ gdLQ kdV+ ytS(gdLQ gdLQ gdLQ gdLQ kdm, ytS(gdLQ gdLQ gdLQ gdLQ kdd- ytS(gdLQ gdLQ gdLQ gdXU" kd[. ytS(gdLQ gdLQ kd' / gdLQ gdLQ gdLQ kdQ0 hS(gdLQ gdLQ gdLQ kdV1 gdLQ gdLQ gdLQ kdM2 gdLQ gdLQ kdD3 gdLQ gdLQ kd;4 gdLQ gdLQ kd25 gdLQ gdLQ gdLQ kd)6 ytO= gdLQ gdLQ gdO= kd 7 ytO= gdO= gdO= gdLQ kd%8 ytO= gdLQ gdLQ kd*9 ytV\ gdLQ gdLQ kd!: ytV\ gdLQ gdLQ ytV\ gdLQ gdLQ gdLQ ytV\ gdLQ gdLQ gdLQ ytV\ gdLQ gdLQ gdLQ h>)" hS(gdLQ ytV\ gdLQ gdLQ gdLQ ytV\ gdLQ gdLQ gd[j gdO= ytV\ h)!0 h)!0 h)!0 h>)" h!.r h!.r gd[j gdj6 gdIG gdj6 gd)!0 hK _ hrch_h hK _ gdO= gdj6 umh`Y gdLQ gdj6 gdj6 gdhdD# hhD# hhD# hhD# h|Z| hhD# hhD# hhD# hgRg hhD#

18 / 18