

HONG KONG / JUDGMENT

TWF v. HWKR

COURT

Family Court

DECIDED

7 August 2017

CASE / FILE NUMBER

FCMC16534/2015

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FCMC 16534/2015

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES NO. 16534 OF 2015

BETWEEN

TWF

Petitioner

And

HWKR

Respondent

Coram:

Deputy District Judge D. Cheung in Chambers

(Not open to public)

Date of Hearing:

18th May 2017

Date of Handing Down Judgment: 7th August 2017

J U D G M E N T

(Maintenance Pending Suit & Litigation Funding)

This is a hearing of the petitioner wife's (hereinafter called "the wife") application for reinstatement, backdating and upward adjustment and variation of her maintenance pending suit and extension of litigation funding against the respondent husband (hereinafter called "the husband") granted under the order dated 3rd March 2016 (hereinafter called "the last MPS Order").

For the aforesaid application, the wife had taken out a summons dated 8th March 2017 (hereinafter called "the current MPS application").

Brief History

The brief history of the parties had already been set out in my judgment dated 3rd March 2016 (hereinafter called "the last MPS judgment"). I therefore shall not repeat it again.

The Wife's case

Since the last MPS Order, the husband had been paying her an amount of HK\$61,000 as her monthly maintenance (hereinafter called "the last MPS payment"), and an amount of HK\$50,000 as her ongoing legal costs provision.

She stated that she solely relied on the last MPS payment which was her only source of income. However, her credit card debts required her to meet a regular monthly payment of HK\$35,000, and she was still owing a total amount of around HK\$900,000 credit card debts to date.

After making the monthly credit card payments of HK\$35,000 per month, she only got HK\$26,000 for her monthly expenses. She stated that the said sum is insufficient for herself and the household.

She also stated that she owed his friends and relatives debts of round HK\$830,000 in total which were mostly lent to her in 2014 and 2015, and some of her friends and relatives had been urging her for repayment.

The wife complained that though the husband undertook to cover expenses for food at home, household expenses, car expenses, and driver, the wife still incurred expenses on these items.

The wife further complained that the husband had cancelled her membership at a private club in January 2016 and that for her medical expenses, it was unrealistic to expect the husband to reimburse her future medical expenses.

Regarding the current MPS application, the wife needed an increase of HK\$69,000 from the current HK\$61,000 to HK\$130,000 in total per month. She explained that she would apportion HK\$19,000 to support personal and household expenses, and the remaining HK\$50,000 to repay debts to her friends and relatives so that she will be able to repay all the debts within 1.5 years.

The wife also wanted the husband to continue to pay for her legal costs at an increased amount of HK\$80,000 per month instead of HK\$50,000.

She was of the view that the husband had the ability and means to pay her requested increase of maintenance and legal costs contribution, as the husband had hidden assets so the husband had sufficient cash to meet her request.

The Husband's case

The husband said that there had been no change of circumstances on the wife since the last MPS Order, and the wife was basically requesting the court to re-assess her needs again.

The husband stressed that he had honoured his undertakings since the last MPS Order, and that he denied the allegations made by the wife against him. It is also submitted that the wife's alleged Personal expenses were grossly exaggerated.

He further explained that the legal costs incurred or to be incurred by the wife should have already been taken into account in the court's original assessment of the wife's legal costs provision.

As to his ability to pay, the husband stated that he had been in monthly deficit and had run out of liquid assets.

The husband proposed that he would continue to pay the wife the last MPS payment per month as her MPS payment on the 10th day of each month until further order of the Court, and upon the sale of the Sentosa House and within 7 days of receipt of his share of net proceeds, he will commence to pay the wife HK\$50,000 per month as her ongoing legal costs provision until the date of FDR hearing or further order of the Court whichever is earlier, and in any event for a period of not more than 12 months.

The Law on Interim Maintenance

The power to order maintenance pending suit is set out in s 3 of Matrimonial Proceedings and Property Ordinance, Cap 192 ("MPPO") whereby the court may order a party to make to the other such periodical payments for his or her maintenance and for such 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.

Other applicable principles had already been set out by me in the last MPS judgment which I shall not repeat them again. Further, for the current MPS application, it is submitted by Mr. Jeremy Chan, counsel for the husband that the wife is applying for "variation". Therefore, the starting point and basis is the last MPS judgment.

The powers to vary a periodical payment order are expressly provided for by section 11(1) and 11(2) of MPPO :

“(1) Where the court has made an order to which this section applies, subject to the provisions of this section, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.”

How those powers are to be exercised is stated in section 11(7):

“(7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates and, where the party against whom that order was made has died, the changed circumstances resulting from his or her death.”

The proper approach to such an application has been succinctly summarized in Raydan and Jackson on Divorce and Family Matters, 18th Edition, Chap.18.21:

“... The court considers the application to vary on the basis of the means of the parties as they stand at the time when the case is before it, and approaches the matter as if it were assessing the payments de novo. It follows that the principles governing the assessment of periodical payments will in broad measure apply to applications to vary: the overriding objective is fairness. Discrimination between the sexes must be avoided. The court should consider not only the descending income of one party but also any ascending income of the other, and take into account of any increase or decrease in responsibilities or liabilities on the part of each party, including obligations to a new family. Whilst the court deprecated the notion that a husband and father could evade his financial responsibilities it would have regard to reality; there was life after divorce and a payer was entitled to order his affairs in such a way as to balance his responsibilities to his existing family with his proper aspirations for a new future, in particular, that he should have accommodation suitable for proper staying contact. In considering the application the court might have regard to the availability of social security benefits to the wife and children if there was no practical alternative. Financial mismanagement by the payer or the payee may be one of the relevant circumstances to which the court is required to have regard under s 31(7), and conduct on the part of a wife post the substantive ancillary relief order can be weighed in the balance in an application for a variation of periodical payments.

This approach was examined and endorsed by the Court of Appeal in AFM v VFM (Variation of Maintenance) [2008] HKFLR 106 at 111:

“3. The traditional approach to variation was not to re-fix afresh the amount of maintenance but to consider the amount of change in the actual means of the parties so that the new order should merely be increased or decreased roughly in proportion to the change in the means: Foster v Foster [1964] 3 All ER 541, Jackson’s Matrimonial Finance and Taxation 7th Ed. Ch.3.131.

4. The modern approach, as required by section 11(7), is for the Court to consider all the circumstances of the cases. The Court is not required to proceed from the starting point of the original order but look at the matter afresh: Flavell v Flavell [1997] 1 FLR 353 at 357B following Lewis v Lewis [1977] 1 WLR 409 and Garner v Garner [1992] 1 FLR 573.
5. Any change in any of the matters to which the Court was required to consider when making the original order was one of the circumstances to be considered.

6. Almost invariably, an application to vary an earlier periodical payment order will be brought on the basis that there has been some changes in the circumstances since the original order was made, for example, continuing inflation; the increased costs in supporting a growing child and that one party may be more adversely affected than another by the increase in the costs of living: *Garner v Garner*.
7. An increase in the wealth of the husband was a relevant factor to be taken into account: *Premavera v Premavera* [1991] 1 FLR 16 and *Cornick v Cornick* (No.2) [1995] 2 FLR 490.
8. At the same time the basis and intended effect of the original order are relevant factors to which the Court on variation should pay regard and there should not be a radical departure from the approach taken by the parties themselves when they had entered into an agreement embodied in a consent order: *Boylan v Boylan* [1988] FLR 282.”

Recent case law

In a recent Court of Appeal decision on variation – *WNWG v PBF* – [2012] HKCU 675, these basic principles were reiterated. The Hon Lam J said that:

[12]

As regards the approach that the court should adopt in considering an application for variation and the weight to be attached to the original order, Tang V-P said in *HCTT v TYYC* [2008] 5 HKC 86 at paras 15 to 16:

“15.

But as *Garner v Garner* [1992] 1 FLR 573 shows that does not mean that the earlier order, whether made by consent or not, carries no weight. How much weight should be given to the earlier order must depend on the circumstances. Cazalet J said in the English Court of Appeal:

“Almost invariably, an application to vary an earlier periodical payments order will be brought on the basis that there has been some change in the circumstances since the original order was made, otherwise, except in exceptional circumstances, the application will, in effect, be an appeal. If it was correct when made, then there will usually be no justification for varying it unless there has been a material change in the circumstances. However, because of the impact of continuing inflation, because children grow older and cost more to support and because, for example, the cost of living in its increase may hit one party harder than another, it will usually follow that, if time has passed, there will inevitably have been some changes in the circumstances, and in particular in the financial circumstances, of the parties concerned.

Following *Lewis v Lewis*, by which decision this court is bound, a court on the hearing of an application to vary is fully entitled to look at all the relevant matters set out in s 25 of the Matrimonial Causes Act 1973 [i.e. s.7 MPPO] . On occasions, the court may be slow to accede to an application to vary a consent order, not least because the parties’ solicitors might otherwise be deterred from either seeking to negotiate such a provision or to achieve finality. Another factor which may influence a court will be the time that has passed since the original order was made.

If an application consequent on an order is brought very soon after that order has been made, the court, in normal circumstances, is likely to attach more weight to the earlier order than if it had been made some years previously. Like-wise, the court would expect to pay full regard to any special terms agreed between the parties at the time the original order was made – as, for example, when endorsements on briefs or contemporaneous correspondence show that an agreed order has, for some particular reason, been set at an artificially low figure. Shortly stated, the court must decide what weight it should attach to the original order and all the surrounding circumstances. However, once an application to vary is before it, the court is fully entitled to make an order considering all the circumstances afresh, paying such regard to the old order as may be thought appropriate.”

16.

Thus, although the jurisdiction to vary is untrammelled, normally the earlier order would not be varied unless there has been a material change in circumstances.”

[13]

And further at para 37, His Lordship said,

“Justice requires that proper weight should be given to the consent order.”

[14]

Though the emphasis may be slightly different, Cheung JA was of the same view in *AEM v VFM* [2008] 3 HKLRD 36, at para 14, in particular at sub-paras 6 and 8,

“6.

Almost invariably, an application to vary an earlier periodical payment order will be brought on the basis that there has been some changes in the circumstances since the original order was made, for example, continuing inflation, the increased costs in supporting a growing child and that one party may be more adversely affected than another by the increase in the costs of living: *Garner v Garner*.

8.

At the same time the basis and intended effect of the original order are relevant factors to which the court on variation should pay regard and there should not be a radical departure from the approach taken by the parties themselves when they had entered into an agreement embodied in a consent order: *Boylan v Boylan* [1988] 1 FLR 282.”

It is therefore with these principles in mind that I now come to consider the matters relevant to the current MPS application.

Issues of the case

The following issues arise for my consideration:

How much maintenance should the husband pay to the wife as reasonable maintenance pending suit for herself? (issue 1)

Can the husband afford to pay these sum? (issue 2)

Should the husband also increase his contribution towards the wife's litigation costs as maintenance pending suit? (issue 3)

Issue 1

How much maintenance should the husband pay to the wife as reasonable maintenance pending suit for herself?

The wife's Financial Position and needs

It is worth noting that one of the major complaints made by the wife in this case is that the last MPS payment was not sufficient to cover her personal expenses.

To deal with the issues raised by the wife, it would be useful to first set out here a list of the wife's alleged expenses, based on her last Form E dated 12th February 2016 (hereinafter called "her last Form E") that I had referred to in the last MPS judgment and her subsequent explanation in her affirmations, for comparison purpose. The figures quoted in her last Form E was about \$71,000.00 and the figures suggested by her in the current MPS application was \$80,000, and they were made up of the following items:

General & Personal

last MPS

current MPS

Food

\$3,000

\$10,000

Meals out of home

\$7,000

\$ 9,000

Transport

\$1,000

\$ 2,000

Personal grooming

\$7,000

\$ 7,000

Holiday (China-weekend hotel)

\$5,000

Entertainment/presents

\$ 3,000

Medical/Dental

\$1,000

\$ 4,000

Contribution to parents

\$3,000

Contact lens

\$1,000

\$ 1,000

Massage

\$3,000

\$ 3,000

Facial

\$5,000

\$ 5,000

Health club

\$ 1,000

Minimum payment of credit card

and bank loans

\$35,000

\$35,000

Grand Total:

\$71,000

\$80,000

On last occasion, the wife sought maintenance pending suit order to cover the servicing of her credit card debts and her regular reasonable needs in the sum of HK\$71,000.

On last occasion, Mr. Jeremy Chan confirmed to me that they had checked the bank statements and they took no issue to the accuracy of those documents and that they confirmed to me that the documents supported the figure of HK\$35,000.00 as the minimum payment of credit card and bank loans.

In the last MPS judgment, I pointed out that the wife's case was that the minimum payment of credit card and bank loans was a monthly regular liability of the wife, and I see no reason why the sum of HK\$35,000.00 should not be provided for the wife.

My view on last occasion was that the general expenses of food paid by the wife in the sum of HK\$3,000.00 should be deducted after taking into account of the husband's undertaking to pay for the expenses for food at home.

In the wife's previous affirmation, she stated that when she came back to Hong Kong in 2013, the husband paid her approximately HK\$70,000.00 each month. She was given to understand that such monthly sums were maintenance for her from the husband.

I had mentioned in the last MPS judgment that the amount of the previous sum given to the wife was one of the indicators, though not conclusive one, for me to consider what amount should be reasonable and fair in the circumstances.

On last occasion, the wife asked for HK\$71,000, out of which HK\$35,000 would be used for her monthly credit card payments and HK\$3,000 would be treated as contribution to her parents so in effect she only got HK\$33,000 for her monthly expenses which she considered sufficient for herself.

As the husband undertook to cover the household expenses, I therefore granted HK\$61,000 to the wife as her last MPS payment so in effect, she got HK\$26,000 for her monthly expenses and the difference between what she asked for and what I granted was HK\$7,000.

On last occasion, what had been taken out or reduced was food at home from HK\$3,000 to nil, holidays expenses from HK\$5,000 to HK\$1,000, and contribution to parents from HK\$3,000 to nil. As a result, HK\$10,000 was deducted from her proposed monthly MPS budget, that was why I granted HK\$61,000.

I shall not repeat my reasons as to why I made adjustments to her proposed monthly MPS budget on last occasion.

Her present complaints has been set out in her 5th Affirmation at paragraphs 23 to 26 and her 6th Affirmation at paragraphs 3 to 12.

She stated at paragraph 28 of her 5th Affirmation that she needed an increase of HK\$69,000, from the current HK\$61,000 to HK\$130,000 in total per month. She said that she would apportion HK\$19,000 to support personal and household expenses, and the remaining HK\$50,000 to repay debts to her friends and relatives, so that she will be able to repay all the debts within 1.5 years.

She further stated at paragraph 12 of her 6th Affirmation that with reference to HK\$40,000 monthly that she had from the husband in around the years 2004 to 2006, to about HK\$150,000 monthly that the husband had been paying her from the year 2007, and subsequently about HK\$70,000 since the year 2013, the amount of HK\$26,000 was apparently far from the previous standard.

One of her main complaints was that while the husband covered expenses for food at home, household expenses, car expenses, driver etc, she still needed to incur expenses for herself under these items, and I shall now deal with them one by one.

She complained that when the husband is not in Hong Kong, he did not provide any kitchen money to the maid but just left her a supermarket card for household expenses and for her food. The wife stressed that she did not eat food from supermarket so she had to buy food for herself and her mother from wet market, and sometimes she had to buy food for her daughter.

She further explained that their normal lifestyle over the years had been to buy fresh food from the wet market and not rely on supermarket shopping.

The husband in reply said that the domestic helper was always provided with sufficient money to purchase food from the supermarket and the wet market for the household. Food, including fish, meat and vegetables were sufficiently provided at home for the wife, her mother and the children.

The husband further said that given that they were already separated, he would not prepare meals for the wife himself, and the wife could always rely on the domestic helper or cook for herself and the wife should have no need to purchase her own food at home.

I can appreciate that the wife did not want to stay in the matrimonial home with the husband when he was there, as they were already separated.

I shall proceed to deal with the expenses for food for her based on what she said i.e. she mainly stays in mainland China during weekends and occasionally, she stays in mainland China for 1 to 2 weeks in a particular month.

In her last Form E, she stated that the expenses for food under the general expenses was HK\$10,000 paid by the husband and HK\$3,000 paid by her respectively, and that meals out of home was HK\$7,000.

Comparing to the current MPS application, she had increased the expenses for food under the general expenses from HK\$3,000 to HK\$10,000, and she had also increased the expenses for her lunch in two areas i.e. from 20 days per month to 30 days per month and each lunch from HK\$50 to HK\$100.

In fact, the wife stated in her last Form E that the whole family required HK\$13,000 for food at home under the general expenses. I find it excessive that she asked for HK\$10,000 for her alone under this item, especially the husband had already undertaken for food at home.

At paragraph 4 of her 6th Affirmation, the wife said that 5 people (i.e. the wife, her mother, her daughter, the maid and sometimes the driver) take meals at home, so based on what she said in her last Form E, HK\$13,000 shall be divided by 5.

My view is that with the benefit of the undertakings already made by the husband and honoured, the wife can continuously enjoy the food at home free and an extra HK\$3,000 per month under the general expenses will be more than sufficient for her to buy additional food she considers appropriate for herself because this figure was what she suggested on last MPS application.

I see no reason why the figure of HK\$3,000 if accepted on last occasion should be increased to HK\$10,000 merely because of her complaints. In fact, I am surprised to note that the wife did not buy fresh fish at the wet market inside the supermarket but insisted to buy fresh fish at the wet market elsewhere.

The wife said that the husband stayed in Hong Kong for two weeks each month now and occasionally she stayed in mainland China for 1 to 2 weeks in a particular month, and that she chose not to stay at the matrimonial home when the husband was there.

Taking into account of the recent living pattern of the parties, as to the expenses for meals out of home, I am prepared to allow the figure suggested by the wife i.e. HK\$9,000, since the wife now spent more time out of the matrimonial home when the husband was there. This does not mean that I had found that the husband had breached any of his undertakings.

I shall adjust the general expenses for food and personal expenses for meals out of home to HK\$3,000 and HK\$9,000 respectively. My view is that the adjustment could accommodate the wife's needs to have lunch out of home every day, and if she chooses not to dine at home, that extra HK\$3,000 will be sufficient for 5 dinner outside which makes her total dining out per month to 15 days.

The wife also wanted to adjust the expenses for transport from HK\$1,000 to HK\$2,000. Her reasons was that when the husband was in Hong Kong, he has the priority to use the car and the driver, so she had to pay extra for transportation expenses for herself.

In addition, she also said that she spent time in Zhuhai every month and she needed more transportation expenses for travelling. I am of the view that the upward adjustment is reasonable taking into account of the recent living pattern of the parties.

In her last Form E, the wife did not claim any expenses for entertainment/presents. The wife complained that the husband had cancelled her membership at the private Club in January 2016 so she had to spend extra money joining a fitness club for exercise.

The husband said that the reason why he cancelled the wife's membership was that he found out that the wife had been making bulk purchase of expensive wine.

Since the wife could purchase wine whether for her own consumption or as presents and she can exercise at the private club previously, and now she no longer can do so since the husband had cancelled her membership, I will allow her request for expenses of health club for HK\$1,000, and her needs to purchase wine whether for herself or others as presents will also be covered under the item of entertainment/presents for HK\$3,000 per month.

The wife also said that she needed extra expenses for annual medical check-up. Her reason was that though the husband had a medical insurance policy for her, it required her to pay first then apply for reimbursement through the husband.

She said that her last medical check-up was in 2014 which costed her HK\$45,000. In order to avoid the trouble of asking the husband to reimburse her the medical expenses in future, as it may not be realistic to expect the husband to reimburse her, I am of the view that the wife's request for the expenses of medical/dental for the sum of HK\$4,000 per month should be allowed.

However, the wife is required to provide the receipts of her medical expenses to the husband within reasonable time for the husband to process the reimbursement.

I had granted HK\$1,000 per month for Holiday (China-weekend hotel) in the last MPS Order. Although the wife did not put this item under the current MPS application, the wife in her various affirmations did mention that there is ongoing accommodation expenses under this item. Therefore, I trust that the reason why she did not put that item was only due to inadvertance. I see no reason why this item previously allowed should be deducted this time.

In the premises and for the reasons articulated above, I have found and would allow as reasonable and/or necessary the following monthly expenses of the wife:

General & Personal

current MPS

Food

\$3,000

Meals out of home

\$9,000

Transport

\$2,000

Personal grooming

\$7,000

Holiday (China-weekend hotel)

\$1,000

Entertainment/presents

\$3,000

Medical/Dental

\$4,000

Contact lens

\$1,000

Massage

\$3,000

Facial

\$5,000

Health club

\$1,000

Minimum payment of credit card

and bank loans

\$35,000

Grand Total:

\$74,000

The wife said that her friends and relatives had been urging her for repayment of the loans by way of telephone conversations. I shall decide whether any provision shall be made for this item after I had dealt with the husband's ability pay.

Issue 2

Can the husband afford to pay these sums? (issue 2)

The husband's Financial Position

At paragraph 24 of the 6th Affirmation of the wife, she said that the daughter will finish her final examination in May 2017 and will start working in September 2017, and the son is no longer studying and does not plan to further his study.

At paragraph 38 of the 2nd Affirmation of the husband, he said that the children's expenses which he undertook to pay was about HK\$70,000 per month. Out of which, the tertiary education fees was at about HK\$38,000 per month for both children.

The difference of the last MPS payment and the MPS figure mentioned at paragraph 68 above i.e. HK\$74,000 was HK\$13,000. After the relief of the burden of paying the education fee, there should not be any difficulties for the husband to meet the said difference of HK\$13,000.

The husband complained that according to the wife's answer, all the alleged loans were interest free, repayable on demand, and without any loan agreements. The husband believed that the repayment is not imminent because no repayment had ever been made by the wife for years at all.

As to whether the husband should pay any sum on top of HK\$74,000 per month so that the wife can repay debts owed to her friends, my view is that it depends on whether repayment of debts falls within the definition of maintenance pending suit, and if it did, then whether the husband had the ability to pay that extra sum.

By definition, maintenance pending suit is restricted to payments which constitute 'maintenance', which are reasonable in the circumstances and which will endure for no longer than it takes to determine the divorce litigation, and it must be restricted to those payments necessary to meet the recurring costs of living at whatever standard of living appropriate.

In the last MPF judgment, I stated that my focus should be looking to the "immediate and reasonable needs" of the wife, and again in the current MPS application, my focus is just the same like the last one.

The wife said that because the husband did not provide her maintenance for a period of time, she therefore incurred debts from friends and relatives to support her living. The loan from her friends and relatives may be repayable on demand, so the repayment will immediately become monthly liability.

The wife stressed that the husband had hidden assets. The wife argued that the husband had sold Leonie Gardens (hereinafter called "Leonie Garden") on 30th July 2015 at an amount equivalent to around HK\$17,600,000, and also Regency Park (hereinafter called "Regency Park") on 20th November 2015 at an amount equivalent to around HK\$26,950,000.

The wife also said that she believed that the husband had received not only 10% out of the forfeited deposit of the sale of the Sentosa House but all of the forfeited deposit of an amount equivalent to around HK\$5,500,000.

The wife further said that a property situated in Zhuhai (hereinafter called “Zhuhai property”) which was held by a Macau company in which the husband allegedly said that he had 27.78% of legal and beneficial interest was recently sold at the amount of RMB2.1 million, and that the husband allegedly received an amount of HK\$211,635.57. The wife suspected that all the sale proceeds of the Zhuhai property should have gone to the husband’s own pocket.

In reply to the wife aforesaid allegations, the husband said that he sold the Regency Park to his sister because he needed to provide funds to the wife for her spa business in 2008. Therefore, the sale of the Regency Park in 2015 had nothing to do with the husband.

The husband also said that during the period from May to December 2008, he had transferred a total RMB5 million to the wife for the spa business, and throughout 2008 to 2012, he continued to provide funds to the wife. He estimated that on top of the RMB5 million to start up the spa business, he additionally provided over 16 million RMB throughout the years from 2008 to 2012.

He also said that for the sale of Leonie Garden, after deducting the original mortgage loan and other expenses, the net proceeds on completion was HK\$6,820,000 and the said proceeds were deposited into the husband DBS and UOB accounts from May 2015 to July 2015, and the said proceeds had been subsequently used to pay off the mortgage repayments of the matrimonial home, WDL and EPL expenses. The mortgage installment of the matrimonial home is HK\$196,700 per month.

The husband said at paragraph 35 of his 2nd Affirmation that he had transferred part of the said proceeds to his sibling’s OCBC Account as his contribution towards the mortgage loan of Sentosa House.

There will have to be a determination of the issue of the husband’s ownership of Sentosa House. However, whether the husband owns 10% or 100% of Sentosa House, my view is that he still needed to pay his contribution towards the mortgage loan of Sentosa House.

Based on what the husband said in his Form E, he stated that his total monthly expenses is HK\$349,165.70. In the last MPF judgment, I stated that if the husband only had a salary of HK\$183,000 per month, there will be a short fall of HK\$166,165.70 each month, and since the last MPS judgment, he had paid HK\$854,000 of the last MPS payment and HK\$600,000 as the wife legal costs provision.

At paragraph 84 of the last MPS judgment, I stated that the husband admitted that he had sold the Leonie Garden and the sale was completed in July 2015 and he obtained sufficient funds to sustain the family and make mortgage repayment for the time being.

The husband also stated that he had received an amount of HK\$529,929.60 being his share of deposit forfeited from the intended purchaser of Sentosa House.

If using the net proceeds of HK\$6,820,000 to subsidize his living expenses of the shortfall of HK\$166,165.70 per month. The said proceeds will be used up in 41 months. My estimation is that from July 2015 up to December 2016 (i.e. 18 months), his shortfall of monthly expenses will be HK\$2,990,982.60.

The husband said that in his Form E, he stated that his income was HK\$183,000 per month, that income consisted of director's remuneration from his business SPIP Limited (hereinafter called SPIP Limited") at SGD3,000 per month plus the consultation fee at US\$20,000 per month from a system maintenance contract from 1st December 2015 for 18 months.

The husband said that he was not able to continue to receive his monthly consultation fee of US\$20,000 since January 2017. From January 2017 onwards, his income was limited to SGD8,000 i.e. about HK\$44,000.

Based on what he said, his total shortfall of monthly expenses from January 2017 to July 2017 (i.e. 7 months) will be HK\$2,136,159.90.

He had also paid HK\$854,000 of the last MPS payment, so if he only had the said net proceeds, the remaining net proceeds should be around HK\$768,000 after using his share of deposit forfeited to set off the payment of the wife legal costs provision of HK\$600,000.

The husband said that he had run out of liquid assets, and since the last MPS judgment, he had been relying on borrowing from friends and relatives, and that from February 2016 to December 2016, he borrowed over 2.5 million from his friends.

The wife challenged the aforesaid debts and alleged that the husband had a practice of arranging for his friends or business partners or staff members to hold some of his assets on his behalf so as to disguise the true ownership and diversify the risk of being involved in litigation.

My focus is not to decide whether the aforesaid alleged loan is genuine or not at this moment. To me, from what the husband said, it means that the husband had another 2.5 million to use shortly after he sold Leonie Garden.

The husband further said that he intended to sell Sentosa House and the matrimonial home in the near future so as to ease the family's immediate financial needs.

The wife in her 4th Affirmation exhibited a copy of a handwritten draft letter, she quoted part of the contents of the handwritten draft letter where it stated that the husband received the down payment of Sentosa House, and he used SGD100,000 for his Regency park and Sentosa House monthly mortgage loan because he owed 3 months unpaid. If he did not give OCBC & OUB one month payment they will put him into court cases.

The contents of the aforesaid handwritten draft letter relied on by the wife indicated that the husband though owed 3 months mortgage repayment, he could only pay one month. For the rest of the contents of the aforesaid handwritten draft letter, the husband explained to his friend why he had to delay the repayment of loan to his friend.

Although the aforesaid handwritten draft letter was exhibited by the wife, the truthfulness and the weight of the contents remained to be a issue. Nevertheless, after reading the handwritten draft letter, I will draw an inference that the husband was having a difficult time from 2014 to 2015, otherwise there is no need for him to draft such a letter and that was consistent with what he said in his previous affirmation, where he stated that he was having a very difficult time from 2014 to 2015 and he had to further liquidate his assets and cut down his spending.

While the wife had summarized how much cash she believed the husband had realized over the past years from 2003 to 2016, I find that those information may not be helpful as they could not reflect the true financial position of the husband. For example, the wife's figure on how much cash the husband could actually get after the completion of Leonie Garden had disregarded the mortgage repayment.

Despite the aforesaid, the husband in his 2nd Affirmation at paragraph 38 presented his case in such a way that the children expenses was about HK\$70,000 per month, including tertiary education fees at about HK\$38,000 per month for both children.

The 2nd Affirmation of the husband was made on 21st April 2017, since the wife said that the husband no longer required to bear the expenses for tertiary education for the sum of HK\$38,000 per month, and the husband had not complained that the sum of HK\$38,000 was not affordable. I trust that financially the husband could still afford to pay a sum of HK\$38,000 for the children, if needed.

At paragraph 68 above, I had found and would allow HK\$74,000 for the monthly expenses of the wife. The last MPS payment was HK\$61,000, so the husband needed to pay an extra of HK\$13,000. As the husband is no longer required to pay the aforesaid HK\$38,000, so I am of the view that he could pay an extra of HK\$38,000 on top of HK\$61,000.

I am of the view that repayment of loan by the wife to his friends and relatives is also one of the reasonable and immediate needs of the wife at the moment, because the debts had been incurred since 2014 as a result of the husband's non payment of maintenance to the wife and some of the friends and relatives had been urging the wife for repayment.

Since the wife was planning to repay them by installments, and I found that the husband can pay HK\$38,000 on top of HK\$61,000. I would allow the wife to use HK\$25,000 per month to repay her debts owed to her friends and relatives.

As all the aforesaid monthly payments will be paid on account of any sum eventually received by the wife and/or the husband when the ancillary relief is determined, there is nothing to stop the husband to challenge the wife's debts in due course.

After considering all the circumstances of the case and the evidence received so far, I am prepared to vary the last MPS payment to HK\$99,000 per month.

Issue 3

Should the husband also increase his contribution towards the wife's litigation costs as maintenance pending suit?

In the last MPS judgment, I estimated that the sum of HK\$50,000 would be required for a period of 12 months at least for the preparation of FDR hearing. The breakdown of anticipated costs were provided by the wife in her previous affirmation. The rough estimation of costs to be incurred for the interlocutory application and FDR hearing is HK\$1,300,000.

In the last MPS judgment, I said that if the estimated costs is HK\$1,300,000, and the husband has to contribute HK\$50,000 each month, it will take at least 26 months for the husband to match the sum.

I was told on last occasion that the wife will challenge the husband's version that Sentosa House was jointly held by the husband and his siblings.

In the 5th Affirmation of the wife, she had provided a rough estimation of her legal costs to be incurred. She estimated that costs up to the preliminary issue will be HK\$1,000,000 which included the costs of HK\$300,000 for the discovery in ancillary relief proceedings and HK\$700,000 for the preliminary issue.

Since the wife had taken out TL v ML Summons dated 20th February 2017 to determine the preliminary issues related to the beneficial ownership of Sentosa House and Regency property, the FDR hearing will not take place until the ownership of the aforesaid 2 properties had been determined.

According to the order dated 30th December 2015, neither the wife nor the husband shall further charge, mortgage, or otherwise encumber on the matrimonial home, as a result the parties had made themselves not available to this resource.

While I am of the view that the husband is able to pay HK\$99,000 per month to the wife as her maintenance pending suit, that does not mean that the husband is equally capable to pay the wife ongoing legal costs after the husband had already paid her HK\$600,000 for that purpose.

The wife had asked me to draw adverse inference to the husband's ability to pay because the husband had hidden assets.

My view is that the determination of the preliminary issue is in fact crucial and helpful to get a better picture of the financial position and ability of the husband. By that time, some of the allegations against the husband related to the issue of hidden assets will be resolved.

According to paragraph 82 of HJFG v KCY [2012] HKLRD 95, it was stated that applicants should not therefore expect that an order that the allowance be paid until the final determination of all proceedings will be the inevitable order. It was observed that if the application for an allowance for legal costs was made before the FDR hearing, it may well be wise to order that the costs allowance should fund the applicant only up to that hearing.

The reason for me to mention the determination of the preliminary issue was that by the time the ownership of the two major assets be determined, it may be appropriate to re-visit the financial position and ability of the husband.

As a result, my view is that for the current MPS application, it will be more practical to estimate the costs allowance by reference to the costs up to the determination of the preliminary issue instead of up to the FDR hearing.

In the last MPS judgment, I have considered the rough estimation of costs that covered the costs to be incurred for the interlocutory application and FDR hearing including the estimated costs incurred for the wife to challenge the beneficial ownership of Sentosa House.

Since the estimated costs provided by the wife under paragraph 39 of her 5th Affirmation was HK\$1,000,000 up to the preliminary issue, and the husband had already paid her a total sum of HK\$600,000, the remaining estimated costs up to the preliminary issue should be HK\$400,000.

Although the wife said that she still owed his solicitors legal fees of more than HK\$300,000 after the husband had paid her HK\$600,000, the husband's position is no better than the wife's. The husband also owed his solicitors legal fees of substantial amount. I see no reason why the wife should be better off than the husband after the husband had paid HK\$600,000 for her legal costs provision.

I am not persuaded that the husband will be able to pay the wife's ongoing legal costs in the meantime based on the financial position of the husband currently.

The husband proposed upon the sale of Sentosa House and within 7 days of receipt of his share of net proceeds, the husband will commence to pay the wife HK\$50,000 per month as her ongoing legal costs provision until the date of FDR hearing or further order of the Court whichever is earlier, and in any event for a period of not more than 12 months.

The wife did not accept the husband's proposal. She submitted that the husband proposed a solution that perpetuated her problems by linking this to a contingency, namely the sale of Sentosa House over which she had no control and recent history suggested that the husband had no interest in pursuing with any enthusiasm. She also argued that the husband claimed a minority interests in Sentosa House so, on his case, he is limited in his control over any sale.

Whether the husband had minority interests in Sentosa House or not is irrelevant to the proposal made by the husband, because the husband stated within 7 days of receipt of his share of net proceeds, he will start to pay the wife HK\$50,000 per month as proposed. There is no linkage to the percentage of his share of net proceeds.

The sale of Sentosa House took place in late 2015, however the completion eventually did not take place and the purchaser's deposit was forfeited. The husband said that the lawyer in Singapore advised that the husband and his siblings could claim the difference in the selling price against the original potential purchaser and they could only sell Sentosa House at market value but not at great discount as they have a duty to mitigate their loss.

My view is that there is no reason why the husband and the siblings chose not to sell Sentosa House if they need to claim against the purchaser and to mitigate their own loss. The husband and the siblings should have common interests.

Since the proposal linked to a contingency, I find that it is more appropriate to make the husband's proposal as an undertaking instead of an order as it is an open offer made by the husband to the wife.

While the wife had said that she planned to use HK\$50,000 per month to repay debts to her friends and relatives so that she will be able to repay all the debts within 1.5 years, my view is that there may be immediate needs to repay debts to some of her friends and relatives but the amount to repay is flexible.

According to paragraph 80 of the case of HJFG v KCY, it stated that thus, to the extent that she has assets, the applicant has to demonstrate that they cannot reasonably be deployed, whether directly or as the means of raising a loan, in funding legal services.

My view is that while I allow the wife to have HK\$25,000 per month to repay debts to her friends and relatives, she is free to apportion that amount with her friends and relatives, and there is nothing to stop her from using a portion of the said amount to pay her legal costs.

I am satisfied that there is a change of circumstances material enough from the parties to justify the variation of the last MPF payment. However, based on the current financial positions of the parties, I am only satisfied that the husband is able to provide HK\$99,000 per month to the wife.

Couple with the undertaking made by the husband to commence payment of HK\$50,000 per month for the wife's ongoing legal costs upon his receipt of his share of net proceeds of the sale of Sentosa House, I am of the view that sufficient provision had been made for the wife up to the time of the determination of the preliminary issue.

Based on the estimated legal costs given by the wife on her previous affirmation and the current affirmation, I am not satisfied that there should be an upward adjustment of legal costs provision per month from HK\$50,000 to HK\$80,000.

The husband had proposed to continue to pay the wife HK\$61,000 per month as her MPS on the 10th day of each month until further order of the court, I am not prepared to backdate the varied MPS payment for the sum HK\$99,000 to the date of the current MPS application i.e. 8th March 2017.

Since the wife said that the daughter will finish her final examination in May 2017 and will start to work in September 2017, and the son is no longer studying and does not plan to further his study, this is one of the main reasons why I believe that the husband can spare an extra HK\$38,000 per month, therefore I shall backdate the sum of HK\$99,000 to 10th July 2017.

Order

The husband undertakes to the Court and to the wife that upon the sale of Sentosa House and within 7 days of receipt of his share of net proceeds, the husband will commence to pay the wife HK\$50,000 per month as her ongoing legal costs provision until the date of FDR hearing or further order of the Court whichever is earlier, and in any event for a period of not more than 12 months.

Upon the husband undertakes to allow the wife to live rent-free at the matrimonial home and the husband will cover utilities, management fees, food at home, household expenses, car expenses, domestic helper and driver and the husband shall deal with the children directly and directly discharge or pay to the children such monies as may be reasonable required by them, it is ordered that the last MPS payment be varied to HK\$99,000 per month, the husband shall pay the wife the sum of HK\$99,000 per month as MPS for the wife with effect from 10th July 2017, and thereafter on or before the 10th day of each succeeding month until further order of the court.

All the aforesaid monthly payments will be paid on account of any sum eventually received by the wife and/or the husband when the AR is determined.

Costs

Since the issue of hidden assets and the determination of the beneficial ownership is relevant to the consideration of the husband's ability to pay, and all the MPS payment will be paid on account of any sum eventually received by the wife and/or the husband when the AR is determined, couple with the result that neither party succeeds completely in this hearing, my view is that the costs of the current MPS application (including all the reserved costs) shall be costs in the cause of the ancillary relief.

I will make a decree nisi of the aforesaid costs order, such order to be made absolute upon the expiration of 14 days if no application made by either party. There shall be a certificate for counsel. Lastly, I thank both counsels for their assistance.

David C. W. Cheung

Deputy District Judge

Representation:

Mr. Neal Clough instructed by Messrs. Ho & Ip, solicitors for the Petitioner

Mr. Jeremy Chan instructed by Messrs. Stevenson, Wong & Co., solicitors for the Respondent

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