

HONG KONG / JUDGMENT

W v. C

COURT

Family Court

DECIDED

8 August 2007

CASE / FILE NUMBER

FCMC2162/2006

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bjbj FCMC 2162 of 2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 2162 OF 2006

BETWEEN W Petitioner and C Respondent

Coram : Her Honour Judge Chu in Chambers (Not Open to Public) Date of Hearing : 27, 28 June
2007, 5 & 9 July 2007 (submissions) Date of the Respondent s Supplemental Closing Submissions :
20 July 2007 Date of Handing Down of Judgment : 8 August 2007

J U D G M E N T

INTRODUCTION

1. The parties marital relationship lasted about 17 years, and the Petitioner () is now applying for ancillary relief against the Respondent ().

BACKGROUND

2. The parties were married in Shanghai on 18th February 1985. There is a son born out of the marriage, who is now 21 and self supporting. (the). After their marriage, W and the Son continued to live in Shanghai, while H was living in Hong Kong.
3. In anticipation of W and the Son joining him in Hong Kong, on 5th October 1987, H bought a property in Chaiwan (the Chaiwan Property) as a matrimonial home. Later that year, on 4th December, W and the Son obtained single entry permits to come to reside in Hong Kong. The family re-united and lived in the Chaiwan Property.

4. Due to unhappy differences mainly over financial disputes, W apparently tried to apply for a divorce some time in 2002. According to her, as the Son was still young, and she and the Son had nowhere to live, she later changed her mind. Nevertheless, the parties started to live apart on about 1st April 2002, with H sleeping separately in the sitting room although they continued residing under the same roof in the Chaiwan Property.
5. In about May 2004 the parties reached an agreement whereby H was to transfer 1 / 3 of the legal title and beneficial interest of the Chaiwan Property to W, and 1 / 3 to the Son, leaving himself holding the remaining 1 / 3. This was carried out on 27th May 2004.
6. Eventually, W petitioned for divorce on 25th February 2006, and around February / March, H moved out of the Chaiwan Property at W s insistence.
7. The trial for ancillary relief commenced on 27th June 2007, but on the first day of the trial, this Court discovered that due to an oversight on part of W s solicitors, she had not yet obtained a Decree Nisi of divorce. With the agreement of both parties, and upon H agreeing to withdraw his Answer previously filed, this Court then granted a Decree Nisi, and immediately thereafter proceeded to hear W s application for ancillary relief.
8. Although it was clear from W s petition and her Form Es that she was applying for ancillary relief for herself, there was no Form A Notice filed on her behalf. Upon enquiry from this Court, eventually her solicitors filed one after the trial, seeking a periodical payments order and a transfer of property order in respect of the Chaiwan Property. H filed his Form A Notice shortly before the trial to seek various forms of ancillary relief for himself, including a lump sum / periodical payments order, and a transfer of property order in respect of the Chaiwan property, but due to a typing error, an amended Form A Notice had to be filed after the trial. Neither took issue with such procedural defects, since it was clear during the trial as to what the parties were seeking, and the trial proceeded on that basis.
9. According to the Statement of Open Proposals filed by W s solicitors on 20th June 2007 pursuant to Practice Direction 15.11, W is no longer seeking any lump sum. She only seeks a transfer of property order in respect of H s 1 / 3 interest in the Chaiwan Property with all transfer costs to be borne by H, and periodical payments of HK\$5,000 per month.
10. In H s 1st affirmation of 20th September 2006, he stated that he was willing to transfer his 1 / 3 interest in the Chaiwan Property to W at the consideration of HK\$100,000, with all legal costs and disbursements of transfer being equally shared between W and him. He was at that time also willing to pay W a nominal maintenance of HK\$1.00 per annum to protect her future right .
11. Notwithstanding what he said in his 1st affirmation and the various claims set out in his Form A Notice, according to H Statement of Open Proposals filed on 22nd June 2007, he is now willing to the transfer all his interest in the Chaiwan Property at nil consideration subject to all costs and disbursements of transfer being borne by W, but proposes that such transfer is to be in full and final settlement of all the parties claims against each other.

Further during H's solicitor Mr. Choi's Closing Submissions, he has clarified that what H is seeking is a dismissal of all the parties' claims against each other upon the transfer, but in the event that this Court comes to the conclusion that W's claims should not be dismissed and that she should be entitled to either a nominal or a substantial periodical payments order, then H also seeks a nominal periodical payments order against W to preserve his future right.

12. The Chaiwan Property was purchased on 5th October 1987 in the sole name of H in the sum of HK\$242,000. H paid the down payment of HK\$62,000 and obtained a mortgage loan of HK\$180,000 from the Kwangtung Provincial Bank. There was a further charge on 27th May 1997 for HK\$200,000. All the loans were repaid in about August 2002 and the property was released on 18th November 2002. On 27th May 2004, the property was assigned by H to H, W and the Son as tenants-in-common, each holding 1 / 3 interest, and the stated consideration was HK\$550,000. It is agreed that this consideration was never paid by W or the Son. The market value of the Chaiwan Property is now agreed to be HK\$790,000 as at 13th June 2007, pursuant to a valuation report. According to the valuation report, the approximate saleable area is about 290 sq ft.
13. The pleadings in this matter were all filed in English. Although the trial was conducted in Chinese and the Final Submissions were in Chinese, this Judgment is in English for ease of reference to the pleadings and the authorities. The Law
14. The law is set out in s. 7 (1) of the Matrimonial Property and Proceedings Ordinance, namely as follows :
 - (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;

- (9) 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 . Main Issues
15. The main issues appear to be :
- (i) whether W knew of H s re-mortgage of the Chaiwan Property; (ii) whether H paid W sums totalling HK\$197,000 upon re-mortgage of the Chaiwan Property; (iii) W s earning capacity and health condition THE RE-MORTGAGE
16. I will deal with (i) and (ii) of the above issues at the same time as they both arise out of H s re-mortgage of the Chaiwan Property.
17. According to H, in about February 1997, W told him that she had gambled in Macau and owed debts to loan sharks, and that these debts were borrowed on 4 occasions, amounting to a total sum of HK\$197,000. She told H that she had managed to borrow money from her friends to repay some of the debts to the loan sharks. H said she burst into tears and asked H to help her to repay her debts by re-mortgaging the Chaiwan Property and promised that she would not gamble again in future.
18. H said he trusted W and believed what she told him. He went to the bank to arrange for the Chaiwan Property to be re-mortgaged to obtain a further loan of HK\$200,000, and he gave details in relation to the disposal of HK\$197,00 thereof. He said he issued 2 cashier orders of HK \$40,000 and HK\$50,000 respectively to 2 separate friends of W s at her direction. He then went with W to Tai Wai to hand over one of the cashier orders to an alleged friend of W s, and as for the other cashier order, he just handed it to W. He then gave cash of HK\$30,000 to another of W s friend WK, with whom he is still in contact, and then the remaining sum of HK\$77,000 was credited in cash into an account of Bank of China Shau Kei Wan branch at the direction of W, who told him that this account was an account of a loan shark.
19. H told this Court that WK now lives in Shau Kei Wan, and that he still has telephone contact with her about once a month. H said he had requested WK to come to testify in Court, but she was scared of W and did not wish to come. According to H, WK was W s former colleague. Although this Court indicated that he could serve a subpoena on WK, H in the end decided not to do so.
20. H admitted he never actually saw W gamble, and that if she had gone to Macau, she would have gone during day time when he was at work. According to H, WK s husband used to work for the hydrofoil company and apparently he had seen her going to Macau.
21. H further said he never received any threats or telephone calls from loan sharks, and when he later told his friends / relatives about what W told him, they told him that she had deceived him and that W had managed to obtain the money from him through help of her friends.

22. W flatly denied all H's allegations. She claimed she had no knowledge of H's re-mortgage of the Chaiwan Property until receipt of his Form E. The property was in H's sole name, and she had nothing to do with the re-mortgage. She denied going to the solicitor's office with H to arrange for the re-mortgage. She admitted having been to Macau on about two occasions only, the first being soon after she came to Hong Kong when H took her there, and the second being about 5 or 6 years ago, again with H. She denied she had any gambling habit, and denied she knew any one by the name of WK. Her case was that H obtained the loan without her knowledge and spent all the money.
23. W said there were two particular incidents which took place in 1997. On one occasion, W discovered that H took condoms at home to Shenzhen, and the other, H was assaulted on the head by a rifle when he was working in Shenzhen, and W believed that this assault was over a woman. Due to such incidents, W said she felt insecure and that she insisted on her name being added as a co-owner of the Chaiwan Property, and even offered to contribute to half of the mortgage repayments, but H disagreed.
24. H denied W's allegations about the condoms and the assault. He said he was assaulted once during a robbery about 15 years ago, and it had nothing to do with any woman. Anyway, there is no evidence that H's remortgage or obtaining the further loan had any connection with these alleged incidents.
25. One thing that was clear was that H's mortgage repayments were only about HK\$1,799 per month before the re-mortgage and after the re-mortgage, it was increased by HK\$4,200 per month making a total of HK\$5,999, i.e. almost HK\$6,000 per month for 5 years from May 1997 to May 2002. H's case was since W's arrival in Hong Kong, from his monthly salary, after paying the mortgage payments, and utilities, and the Son's expenses, he would keep 1 / 3 of his remaining salary for his own use and would pay 2 / 3 of his remaining salary to W for household maintenance. This pattern of payment continued until their separation in 2002. H's evidence was that before the re-mortgage, he was paying on average about HK\$7,000 per month to W for household expenses, and that after the re-mortgage, he could only afford about HK\$3,000 per month. Thus, his payments were reduced by almost 57%. This must have been significant and yet W's evidence about his payments after the re-mortgage was rather vague and ambiguous.
26. W's evidence was that for the first 5 years after her arrival, apart from paying the mortgage payments and utilities, H did not pay her any sums at all for household expenses, as, according to W, he was not earning only much at that time, and after paying for the mortgage repayment, he only had about HK\$1,000 left for his own expenses. W said she had to be responsible for household expenses out of her own salary. But after about 5 years, H's income had increased, and he did start to pay irregular sums to her for household expenses, sometimes more, sometimes less until their separation in 2002.

27. In H's 3rd affirmation, H had said after the re-mortgage he still managed to pay W 2 / 3 of his remaining monthly salary until the parties separation. When W's solicitor Mr. Fung asked her about this, her answer was that at the time of the re-mortgage, H did pay, and he paid until 2002 when she first applied for divorce, and the parties started to live apart, and their finances became separate and independent. When giving this answer, W did not mention that there was any significant change in the pattern of H's payments in 1997. Anyway, during cross-examination, W denied that she had mentioned the re-mortgage in her above answer. The Court had to arrange for the tape recording of her answers to be played back, and it was clear that she did mention the re-mortgage in her answer and that she did say that H did continue to pay her at the time of the re-mortgage.
28. During examination-in-chief, W at first said the sums paid by H were about HK\$2,000 to \$3,000 per month, and sometimes about HK\$4,000 per month. Later, when her solicitor Mr. Fung asked her whether H paid her 2 / 3 of his remaining salary before they started to live apart, W answered yes and that he paid about HK\$5,000 to HK\$6,000 per month. She then clarified that for the first 5 years, H did not pay as their financial situation was tight, and later he started to pay about HK\$5,000/6,000 per month until April 2002, and since then he has not paid her any money. Again, she did not mention during this answer that there was any significant change in 1997.
29. During cross-examination, she was asked specifically whether the sums H paid her were reduced in 1997 and her answer was they were as H told her his expenses had increased. W said H did not tell her why. When asked whether she asked, she said she did, but then they would argue. Later, when Mr. Choi put to her that after re-mortgage H only paid her HK\$3,000 per month, her answer was H did pay her HK\$3,000 although the rest of what was put to her was not correct. Previously, W mentioned payments of HK\$5,000 / HK\$6,000 per months, thus if she agreed that in 1997, the payments were reduced to HK\$3,000, such reduction would still be quite significant. W's answers in respect of H's payments over the years were confusing. Further, her manner did not give this Court the impression that there was any significant reduction in H's payments 1997, which should have caused W considerable concern at that time.
30. It is H's case that W went with him to the solicitors office to attend to the formalities of the re-mortgage.
31. After the parties finished their evidence, Mr. Choi produced a letter from Bank of China (R
- 4) which he had just managed to obtain on H's behalf. The letter indicated that there was a copy of W's Hong Kong identity card and her income confirmation letter with the bank. The parties then had to be recalled and cross-examined over this letter. H's explanation was that when applying for a further loan through the re-mortgage the bank was concerned that he would not be able to afford the significant increase of the monthly repayments with his then income. W then had to produce her identity card and income proof before the bank agreed to the further loan. Again, W denied all knowledge as to how the bank would have a copy of

her identity card or income proof. She said she had the habit of keeping several copies of her identity card at home, and also when she changed jobs, there would be reference letters certifying her income, which she also kept in her drawer, and H could have obtained these through searching her drawer without her consent / knowledge.

32. H's solicitor sought leave to write to the bank to obtain copies of W's identity card and her income letter, and made further supplementary submissions thereafter. This was not objected to by W's solicitor. The letter in relation to W's income was dated 10th April 1997 issued by her then employers V, and clearly stated that W's then salary was HK\$7,000 per month. I will call this letter . It is quite apparent from the letter that W was at that time still employed by V and it was not a reference letter issued after she had left the company. There was no reason why her employers should issue her a certificate of income while she was being employed unless W specifically requested for one. The letter was issued about 6 weeks before the re-mortgage deed was executed. H's evidence was that his income alone at that time might not have satisfied the mortgagee bank to approve a further loan of HK\$200,000. W was not required to sign any guarantee. However, as the further loan repayments could have caused a financial strain on the family, I believe H and W could have provided the letter from V to allay any concerns the bank might have.
33. Anyway, having considered all the above, I am of the view that W was fully aware of the further loan and re-mortgage in 1997, and that she provided a certificate of her income to support H in obtaining such further loan. Did she then receive the sums totalling HK\$197,000 out of the re-mortgage ?
34. Looking at W's Kwangtung Provincial Bank account (KPB account), between May 1997 until October 1997, she said she had remitted a total of about HK\$63,000 to Mainland China, which W said was for her mother's surgical fees, and W said that HK\$30,000 of the said HK\$63,000 was a loan from a good friend who was her superior at work for her previous employer. However, W was not able to provide the full name of this friend. W at first said her mother passed away in 1997, but there were 3 transfers out of her said account of HK \$ 10,150 each between April 1998 to October 1998, and then regular transfers of HK\$2,150 each between November 1999 to May 2000. W later changed her evidence about when her mother died, and said after her mother left hospital after the surgery, she was paralysed, and W had to employ an amah to look after her, and that was why she was remitting sums of HK\$2150 to her mother.
35. According to W, the amounts transferred out from 31st May 1997 were all remittances to Mainland China, and thus, the total remittances starting with a sum of HK\$30,000 (plus HK\$80 for bank charges) on 31st May 1997 until 29th May 2000 were about HK\$105,000 (after taking into account bank charges). W said these were all to her mother. There was no documentary evidence produced by W to show when her mother died, or that those transfers were indeed for her mother. Apart from the loan of HK\$30,000, W said some of the monies remitted came from her savings. Mr. Choi pointed out to her that the remittances started at about the time of the re-mortgage, and put to her that these were part of funds she

obtained from H giving the story about borrowing money from loan sharks. W denied this.

36. W's evidence regarding her savings was also contradictory. During cross-examination, when asked whether her income together with the sums from H were just sufficient for the family expenses, she answered yes, and when asked whether she had any savings, she answered no. It is not clear as to which account W's salary was credited into, and if she indeed had savings, which account were such savings kept in. Anyway, for most of those remittances / transfers in her KPB account, before each remittance / transfer, W would make a cash deposit to meet the remittance/transfer. The cash deposits were a total of about HK\$100,400 between 30th May 1997 until May 2000.
37. I must say that I find W's evidence about the source of the funds for her various remittances from her KPB account not satisfactory at all. There was no supporting evidence regarding the alleged loan of HK\$30,000, which was presumably repaid by W at some stage. There was no explanation how W managed to come up with HK\$100,400, including any repayment of the loan of \$30,000, assuming there was indeed such a loan, particularly when according to her evidence, for about a year between 1997 to 1998, she was only working part time, and also she had to be responsible for household expenses.
38. During the trial, W struck me as a clever and quite enterprising lady, although her evidence was somewhat confusing at times. She was educated to secondary school level. Although she started off as a factory work, she managed to obtain an insurance agent's licence and also a health carer certificate, and had worked as a cashier in a supermarket and even became a supervisor in a factory earning HK\$10,000 per month. By comparison, H's job involved manual labour, and he was educated to a level lower than W, and he never obtained any other qualifications.
39. If H had wanted to make up a story about the re-mortgage and the payments to W, I would have thought he would make up a less complicated story. I have had the opportunity to observe the parties' demeanour during the trial and balancing their respective evidence, I am more inclined to accept his version.
40. H's version was that W needed the money to repay gambling debts, although he now doubts this story. I agree that W does not strike me as being an irresponsible woman who would gamble in Macau. Mr. Choi has submitted that W had not made frank and full disclosure as to her financial means, which I accept. However, it is not H's case that the sum of HK\$197,000 or any part thereof should be brought back to the pool of family assets for adjustment orders to be made. Notwithstanding Mr. Choi's submissions, H is in fact prepared to transfer his entire interest in the Chaiwan Property. W S AGE, EARNING CAPACITY, & HEALTH
41. One of the issues in this application is W's earning capacity and health condition.

42. W filed two Form Es and provided Answers to H s questionnaire. She attended trial to give evidence and to be cross-examined. The Son also filed one affirmation to support W s application for ancillary relief, and was in fact the first witness to give evidence and to be cross-examined. He gave evidence about his mother suffering from heart disease since about 2003 and that she ceased working in April 2006.
43. W was born on 2nd September 1960, and she will be 47 in September this year. She was educated to secondary school in Mainland China, and had worked there before coming to Hong Kong.
44. About a month after W and the Son arriving in Hong Kong, when the Son started attending nursery school at about 2 years old, W started working in an electronics factory.
45. W s evidence was that she was taken to job interviews by H who wanted her to find work as soon as possible. H explained that as W s Cantonese was not good at the time, he did accompany her to attend various job interviews. I am in no doubt that at the time it was the intention of the parties that W should also work to help with the family expenses.
46. It was not difficult to find work in Hong Kong in those days, and W soon found a job with an electronics factory. She worked there between 1987 to about 1989, earning about HK\$1,000 odd a month. In about 1990, she started working as a Quantity Controller for a German electronics factory. She worked there for about 4 years until about 1994, earning about HK\$3,000 odd a month. Thereafter, she worked for another factory V 34 for about 2 years as a Quantity Control Inspector until sometime in 1997. By April 1997, she was earning HK\$7,000 per month. Then there was a period when she was working only part-time as a cashier/sales person in various supermarkets before working as a Quantity Controller between 1997
1998. Thereafter, W joined a watch factory as a manager, earning about HK\$10,000 per month, and according to W, this was the highest salary she ever earned.
47. Unfortunately, the watch factory closed down in about April/Mary 2000 after W had worked there for about 8 or 9 months.
48. Thereafter, W studied and obtained an insurance agent licence, and she worked as an insurance agent for a while. Then, she started working as an administration assistant at a Home for the Aged in about 2002 until about March 2004, earning about HK\$7,000 per month. While working as an administration assistant, she attended and completed a 3 month evening course to obtain a Health Carer s Certificate issued by the Social Welfare Department. After she ceased working as an administration assistant, she worked part-time to care for an old lady.
49. W s alleged health problem was first brought to light in the Son s affirmation of 15th March 2007. He said W had been suffering from heart disease since about 2003, and that in April 2006 her health started to deteriorate in April 2006 and that she had to cease work completely then. According to the Son s affirmation, he said that W was very weak then and

stayed at home most of the time apart from attending regular medical consultations at Pamela Nethersole Eastern Hospital. When the Son was asked when he knew of his mother's heart disease, he said it was in 2003, and that his mother told him that some time she could not breathe. He said she did not need to see a doctor then, but that in April 2006, her condition deteriorated. He said she had difficulty in breathing and had to take medication to control her condition, and that she was often tired after taking the medication. When asked what kind of heart disease W was suffering from the Son said he did not know.

50. After the Son's affirmation was filed, W herself first mentioned her heart problem in her 2nd Form E filed at the end of May this year. In the said Form E, she produced a copy of an appointment slip for attending Pamela Youde Nethersole Eastern Hospital (the Hospital), and copy of an appointment letter for a TL 201 Thallium Scan with the same hospital. The appointment slip indicated that W consulted the hospital on 7th February 2007, and then the next appointment was 17th July 2007. The Scan appointment letter was dated 27th October 2006, and the appointment date given is 24th October 2007, a year later.
51. During the trial, W has said that she had to carry Angised tablets with her. She produced a bottle with the description Glyceryl Trinitrate (Stabilised) and 0.5 mg per tablet and later produced a copy of an internet search on what these tablets were for (P 1). W said that whenever she felt nervous and had shortness of breath or difficulty in breathing, she would keep one tablet under her tongue. She was told by the doctor that if her condition did not improve, then she had to take another one, and then she would have to go to hospital. W further told this Court that she was also suffering from neck pain, and had to take pain killers 4 times a day, but she was not able to produce these pills during trial. W claimed that on 17th June, just before the trial she had to be admitted into the casualty ward for observation due to pain in her neck.
52. On the last day of trial, W produced 2 further documents (P 2). One is a medical report dated 3rd July 2007 from the Hospital to say that W presented herself to the Hospital with a history of atypical chest pain since December 2004, and that she is currently being followed-up by the general clinic. Previous investigation including echocardiogram, CT coronary angiogram and thallium scan showed that there was no evidence of significant coronary heart disease. The report also says W has a history of palpitations and dizziness, and a history of neck pain. Xray showed cervical spondylosis for which W was referred for physiotherapy. The other document was a discharge slip which showed that W was admitted into Hospital on 17th June 2007 and discharged on 18th June 2007.
53. In W's 1st Form E, W had said she was employed on a casual basis, and this was filed in April 2006, and according to her 2nd Form E, W said she ceased working since April 2006. During the trial, W initially said that after resigning as the administration assistant at end of March 2004, she started to care for an old lady from July until October 2004.

54. W was cross-examined at length in relation to this in the morning of the 2nd day of trial, and in relation to the various credits in her HSBC bank account. H s solicitor Mr. Choi had prepared a summary of these credits (R 2). At first, W said all the Cash credits and Autocredits (AutoCr) were from the Son, and that the Cheque payments were from the old lady. W said that the cheque payments from 8th July 2004 until 7th February 2005 were from the old lady, as she was paid every 2 weeks, and that the last cheque on 5th July 2005 in the sum of HK\$4,957 was the Son s salary cheque, which he gave to her.
55. W s evidence was clearly very confusing in relation to all these credits in R
2. She was told to think carefully over her evidence during the lunch break. After lunch, she then said that all AutoCr items were in fact from her part-time work, some at the Home of the Aged when other staff was on leave, some to substitute for colleagues / friends who were private nurses in hospitals. Her wages were all paid by the Home of the Aged and / or hospital by autocredit. She said her hourly rate was HK\$30 per hour. The AutoCr payments ceased after 1st April 2006.
56. As pointed out by Mr. Choi, question 1.12 of the Form E was for the deponent to set out details of any physical or mental disability. In W s two Form Es, her answer was N / A , i.e. not applicable. W was given the opportunity to provide further medical evidence to support her allegation that she was not able to work due to her health condition. None of the medical related documentary evidence produced by her showed that she was not able to work due to her health condition.
57. W clearly continued to work from about 24th June 2004 until end of March 2006 notwithstanding her alleged heart condition, and her income during this period was about HK\$42,000 by cheques (excluding the cheque she said was from the Son), and about HK\$85,659 by AutoCr , totalling HK\$127,659 over a period of about 20 months. This would mean an average of about HK\$6,380 per month.
58. When the Son was asked whether his mother was often at home, he answer was that she would go out in the mornings, to do voluntary work in old people s home as she has a health carer s certificate .
59. W gave lengthy evidence, starting from about noon on the 1st day and continued for the whole of the second day. I observed her during the trial, and not once did she inform this Court that she needed a rest or she needed to take one of her tablets.
60. Having heard and read her evidence, I find there is no sufficient evidence that W s heart and neck problems would affect her earning capacity. She has worked shortly after she arrived in Hong Kong, and appears to be a very hard working person, striving to improve herself along the years by first obtaining an insurance agent licence and then a health carer s certificate. She may not be able to earn as much as before, but I am of the view that even on part time basis, she should be able to earn on average at least HK\$5,000 to HK\$6,000 per month. In fact, during Mr. Fung s Final Submissions, he informed this Court that W would go and look

for a job after the trial, and that her income would be around HK\$5,000 to HK\$6,000. W S ASSETS, LIABILITIES & OTHER FINANCIAL RESOURCES

61. After completing Form 5 in 2003, the Son started to work in a Japanese restaurant as a trainee for a robata-ya chef, initially earning HK\$5,000 per month. The restaurant ceased business at end of April 2007, by which time the Son was earning HK\$7,000 per month having been promoted to a middle chef from a trainee position. The Son was unemployed for about 2 months. As from 1st July 2007, he found another job, also in a Japanese restaurant, and started working there again as a trainee for a sushi chef. His starting salary is HK\$5,500 per month. According to him, it takes about 2 to 3 years to be promoted to a middle chef earning about HK\$7,000 per month. A fully qualified chef will earn about HK\$13,000 to HK\$14,000 per month, but this will take about 7 years.
62. According to the Son, he is presently paying his mother about one half of his salary, i.e. HK\$2,500 per month for household expenses, and will continue to do so in future.
63. According to W's evidence, the cheque she received on 4th July 2005 for HK \$4,957 was from the Son. When she was first asked by the AutoCr payments and the cash payments, W was saying that those payments were from the Son, although she later corrected this part of her evidence. According to W, the Son would receive a bonus in December each year and it seems that he gave that to her as well, and it appears that W would buy things for the Son from time to time, such as a computer or computer games, or other items requested by him, using her credit card, and that the Son would then re-imburse her. During the trial, W said that when the Son was earning HK\$7,000 per month, he would pay her HK\$4,000 per month regularly. She had also said that the Son was very frugal, even if he only earned HK\$5,500 per month he would pay her HK\$4,000 per month.
64. W said during the trial that the Son would like to study further, but the Son did not mention this when he was giving evidence. The Son is of course under no legal obligation to pay any sums to his mother, but as the Son is clearly close and attached to W, and he appears to be a dutiful and responsible young man, I believe that he will continue to pay various sums to his mother, and thus this continues to be a finance resource for W, apart from the earning capacity she has.
65. As to W's present assets, apart from the 1 / 3 interest in the Chaiwan Property which H transferred to her, she said the cash in her bank accounts was about HK\$632.38 at the time when her 2nd Form E was filed in May this year. She had one HSBC credit card. She said she had no liabilities. W S FINANCIAL NEEDS
66. According to her latest Form E, her expenses were about HK\$5,800 per month, with no anticipated changes in the foreseeable future, although she said she could no longer afford physiotherapy classes for her neck problems.

67. W said she wanted H's entire interest in the Chaiwan Property as she and the Son would require a roof over their head. W had partitioned a small room out of the sitting room, and she and the Son now each occupies one. H'S AGE, EARNING CAPACITY & HEALTH
68. H was born on 24th June 1955. He is now 52 years old. He was educated to about Form 2 level.
69. At the time of the marriage, H was already working as a printing worker. According to him, his then income was already HK\$7,000 odd per month, which included his basic salary plus overtime pay. This was disputed by W. Later, his income increased to about HK\$13,000 per month when printing business was at its height, but later most of the printing factories in Hong Kong started to move to Mainland China. He worked for a printing company until April 2005 when the company ceased business. He said he only received a sum of HK\$43,000 for his MPF and long service payments.
70. Thereafter, H said he started working part time until about January 2006. H then found a job with a printing and binding company for about 3 months until 15th April 2006, earning about HK\$7,500 per month. As from 16th April 2006, he started to work for his present employers, also a printing company.
71. According to H's recent Form E, his basic salary was HK\$9,000 per month and there were overtime payments. H had produced a copy of his Employer's tax return for the year 1st April 2006 until 31st March 2007 to indicate his total salary as from 16th April 2006 was HK\$132,421, i.e. an average of about HK\$11,515 per month. This included a small bonus of HK\$745.
72. During the trial, H said the overtime payment was not a regular payment. He received his salary every two weeks, and such salary was credited into his Shanghai Commercial Bank account, after deducting MPF payments. Looking at his bank statements, for January 2007, H received about HK\$9,700 odd, for February 2007, he received about HK\$9,380, for March, he said there was no overtime, and he received only about HK\$8,000 odd, and then for April, he received HK\$2,000 extra as bonus, and therefore he received about HK\$12,900 in total. Any way, on average, his monthly income should be about HK\$11,000 per month from January to April this year.
73. Like W, H also complained of several health problems such as high blood pressure, tennis elbow, kidney problems, skin problems. As his work involved physical labour, he suffered pain in his arm. For his high blood pressure, he said he needed to attend follow-up treatment every 3 months, and needed to take pills every day. He also had pain in his kidneys, and needed to take kidney tablets. Anyway, like W, H has not been able to produce any medical certificate to show that the ailments he complained of has affected his earning capacity. I accept as time goes on, his ability to carry out a job which requires some manual labour may diminish, and he may not be able to work overtime as frequently as before, but for the foreseeable future, he should be able to continue to earn at least HK\$9,000 to HK\$11,000 per month. H'S ASSETS, LIABILITIES & FINANCIAL RESOURCES

74. Apart from his 1 / 3 interest in the Chaiwan Property, he had the following assets :
- (i) cash at bank HK\$12,752 (as at May 2007) (ii) MPF HK \$50,000 (as at May 2006)
75. He has one credit card but as of end May 2007, there was no outstanding amount.
76. H received MPF / long service payments in April 2005, but he said it was only about HK\$43,000, as the legislation on MPF only came in not long before that. Anyway, although at one stage, W appeared to be alleging H received much more, during the trial H was not challenged about what he said. On 20th August 2005, H withdrew a total of HK\$28,000 from his Shanghai Commercial bank account. H said this was part of the MPF he received. H said the amounts were spent on supplementing on the household and personal expenses from August 2005 to December 2005. Another HK\$10,000 which he withdrew on 4th March 2006 was transferred into his BOC account, and then remitted to his sister in Shanghai for his mother s heart surgery. Subsequently, H s mother decided not to go through with the surgery, and the sum was spent on her medical and maintenance fees. As to the HK\$6,000 withdrawn on 9th March 2006, H said HK\$2,000 was paid to the Legal Aid Department as his contribution under the Legal Aid Scheme, and the rest was spent on his personal expenses. I accept H s explanations.
77. It was W s allegation that H had a property in Shanghai. H denied this. During cross-examination, W was asked whether she had visited H s mother in Shanghai, and she said she had. When questioned as to why W did not ask H s mother about this property, her answer was that H s mother would not tell her. The impression I got from her answer was that she never asked H s mother. The Son mentioned during the trial that he had heard about H having a property in Pudong during conversations between his parents. He was unable to give any details. Having considered what W and the Son had said, I am of the view that there is no sufficient evidence to say that H has another property in Shanghai. H S FINANCIAL NEEDS
78. After H was asked to leave the Chaiwan Property, through the arrangement of the social welfare department, he stayed in a Jockey Club hostel for single men. He had to stay in a large dormitory with 8 other occupants, and they all shared only one bathroom. He stayed there until 15th January 2007 when he moved into a rented room in Chai Wan of about 60 sq ft. The tenancy is for one year, and the rent is HK\$ 2,000 per month exclusive of utilities. He is not allowed to use the kitchen or the washing machine, or the refrigerator except to put a bottle of water therein.
79. According to H s latest Form E, his monthly expenses were about HK\$10,953. He indicated in the Form E that he anticipated he would like to move out and rent a suite which would cost about HK\$3,000 per month, as at the moment he is living in a very small room and he is not allowed to use the kitchen and electrical appliances.

80. Mr. Choi submitted on behalf of H information from the internet about property rentals. Although he was unable to find a room for rent in ChaiWan, there was one in Shaukeiwan of about 200 sq ft which was asking for HK\$4,000 per month. There were three in North Point of about 120 sq ft asking for HK\$3,300 per month. I accept H s estimate of HK\$ 3,000 per month to be his reasonable rent.
81. H said when he moved to a larger room, he would have some initial capital outlay. He anticipated his utilities expenses would increase, but some items such as his laundry and food expenses would reduce, as he would buy a washing machine, and could cook at home.
82. Mr. Fung in his Final Submission has submitted that on the whole H could save about HK \$ 3,200 per month from various items of expenditure and that even allowing an increase of HK\$1,000 per month towards rent, H could still save about HK\$2,000 to HK\$3,000 per month. According to Mr. Fung s submission, it would mean that apart from rent of about HK\$3,000 per month, the rest of H s living and personal expenses should be about HK\$4,952 per month. I think HK\$4,952 is a reasonable amount and I accept what Mr. Fung has submitted. LENGTH OF MARRIAGE AND STANDARD OF LIVING
83. The parties started to live apart in April 2002, and up till then their marital relationship lasted about 17 years, although it was not until the first day of this trial that a Decree Nisi was granted. Anyway, it was a long marriage.
84. The parties were living in self-owned home, i.e. the Chaiwan Property which although according to H was 380 sq ft, but the saleable area is only about 290 sq ft.
85. The parties led a rather frugal and average lifestyle throughout their marriage. The only large financial items which stood out were the further loan of about HK\$200,000 obtained from the re-mortgage, and the large remittances which W made to Mainland China. PARTIES CONTRIBUTION
86. Both parties are clearly both very hard working, and after marriage, they have worked to build up the family assets. W started to work shortly after she arrived in Hong Kong, and in addition to working to contribute towards household expenses, she had to look after the Son, and did household work and cooking. On the other hand, before W and the Son arrived, H had managed to save enough money to pay for the downpayment for the Chai Wan Property. The Son gave evidence that on a few occasions, H had to work overnight. The Son said he saw H only about 3 days a week and he often had to work overtime, and this was probably why the Son s relationship with his mother was much closer than with his father.
87. Whatever W might say H s income was at the time when the Chai Wan Property was purchased or when she arrived, I believe he was earning more than HK\$3,000 per month, as he had been working and living in Hong Kong longer than W. Although W said she started off earning only about HK\$1,000 odd per month, by 1990, that is 2 years after she arrived, she was earning over HK\$3,000 per month. However, as H had to pay the mortgage and utilities, I accept that the sums he paid W in the early years, if any, would be of small

amounts.

88. Having considered their evidence, I am of the view that both had made substantial contribution towards the family welfare, and that their contribution was more or less equal.
- CONDUCT
89. W alleged that there were a couple of incidents involving violence, in particular an incident in about January 2006 when she was attacked by H by a knife. H said it was W who threatened him with the back of the knife and by accident she cut herself, and H said it was he who reported the matter to the police. H was not charged over this incident. Having heard the parties evidence, I am of the view the incidents of violence were isolated incidents when the parties were obviously having arguments. In my view, there was no obvious and gross marital behaviour on either s part (paras 16.77 to 16.79 Rayden 18th Ed)

CONCLUSION

90. The only substantial family asset is the Chai Wan Property. H has agreed to transfer all his interest therein to W. W s solicitor, Mr. Fung, in his Final Submission, submits that H is able to pay W HK\$ 2,000 to HK\$3,000 per month, in addition to the transfer of the Chaiwan Property.
91. Mr. Fung initially provided this Court with 5 authorities, 4 of which are English decisions made 20 years ago, one of which is *Moss v Moss & ano* (CACV 145 / 1992 unreported judgment of 5th January 1993), where the trial judge awarded the wife nearly half of the joint capital and one third of the income of the parties, effectively that of the husband, in a 23 year marital relationship. The husband appealed and the Court of Appeal dismissed his appeal. I do not understand how this case would assist W in the present case.
92. In another case produced by Mr. Fung, *Barrett v Barrett* 1988 2 FLR 516, the parties marital relationship was about 15 years. After separation, W started working part-time employment. By the time of the divorce, some 8 years after the separation, W was awarded about 77% of the sale proceeds of the matrimonial home, which was the bulk of the family assets and a periodical payments order. At the time of the divorce, the wife was 44, and the youngest child of the family was 16 and receiving education. The issue before the Court of Appeal in England was whether the periodical payments order should be terminated after 4 years. It was held that the order should continue during joint lives or until further order or remarriage as W had been unable to find full time employment as her years of caring for the children had severely limited her career opportunities. In that case, W devoted herself for about 20 years to looking after the children, and had no commercial experience other than part-time work. W in the present case had worked almost entirely throughout the marriage, and she will be receiving the entire interest in the former matrimonial home.

93. I do not find the other English cases in Mr. Fung's List of Authorities of much assistance as their facts were quite different as pointed out by Mr. Choi. Anyway, apart from the Moss case, Mr. Fung himself did not refer to the other English cases in his submissions.
94. During Final Submissions, Mr. Fung provided two more Family Court unreported judgments, which again I do not find of assistance to this Court. In one of the cases, the only issue was periodical payments, and no capital provision was involved, and in the other, it was in relation to variation of periodical payments. Anyway, Mr. Fung himself did not refer to these cases in his Final Submission, and I am not sure why they were provided.
95. Mr Choi provided this Court with one English case *Scipio v Scipio* (1983) 4 FLR 654. In this case, the parties marriage was about 17 years, and there were 3 children, who were 17, 12 & 11 at the time of the divorce. The wife remained in the matrimonial home with the children, and the home was ordered to be held on trust for sale in equal shares and not to be sold until (inter alia) the death or remarriage of the wife, and there was a nominal order for the wife. The order also provided the wife to pay all outgoings of the home and that she should pay the husband an occupation rent from the time the children completed full time education. The wife appealed. On appeal, the Court of Appeal ordered the husband to transfer all his interest in the home to the wife on payment by her of a small sum, to achieve a clean break, and which would provide the husband with an immediate capital sum which he could use as a deposit towards the purchase of a home. In *Scipio*, the wife had to pay the husband a small sum for the entire interest of the matrimonial home, but the present case is different, as H has now agreed to transfer the entire matrimonial home to W, and also the Son is financially independent.
96. Mr. Choi also referred this Court to an unreported Chinese judgment of the then Deputy Judge Woo in FCMC 5840 / 2005. In that case, the parties marriage was about 14 years, and there was a child who was 12 at the time of the divorce. The parties joint matrimonial home was agreed by the husband to be transferred to the wife's name at the trial, and one of the main issues during the trial was whether the wife should be awarded a nominal periodical payments order to preserve her future right to maintenance. The Deputy Judge was of the view that the wife's claim for a nominal maintenance order in addition to the interest of the matrimonial home was unreasonable and was refused. The order was that the transfer of the matrimonial home to her was on a clean break basis and that her claim for nominal order was dismissed.
97. *White v White* 2001 1 AC 596 was held in *F v F* 2003 1 HKLRD 83 to be not binding on Hong Kong courts. In *C v F* FCMC 1701 of 2000, Judge Bruno Chan went through the recent cases on ancillary relief, and eventually his conclusion was that the overall objective in the exercise of discretion when considering the matters in s. 7 of MPPO in making ancillary relief orders is to achieve fairness between the parties. These cases were not referred to by either Mr. Fung or Mr. Choi, and there is no need for me to go into them in detail but merely to indicate that I agree that in exercising my discretion in making any orders for ancillary relief, I should try to achieve fairness.

98. I accept that H may be able to save about HK\$2,000 to HK\$3,000 per month, having transferred the home to W, but I am of the view that he should be allowed to save for himself, as the only major family asset is to be the W
- s. As I have mentioned above, W received a slightly higher education than H, and she is enterprising, having obtained an insurance agent's licence and a health carer's certificate. According to her own solicitor Mr. Fung, she should be able to earn about HK\$5,000 to HK\$6,000 per month. I am therefore of the view that she will be able to continue to support herself. In addition, the Son will be contributing to a share of the household food and miscellaneous expenses as he is living in the Chaiwan Property and has 1 / 3 share therein.
99. Having considered all the circumstances and the s. 7 factors, I am of the view that, to achieve fairness, H's transfer of his interest in the Chai Wan Property to W should be on a clean break basis in full and final settlement of all her claims. As to the costs of the transfer, I am of the view that each party shall pay his / her own legal costs and disbursements of the transfer. The stamp duty shall be paid by the W. I am of the view that she should be able to pay this. ORDER
100. My order is thus :
- (i) The Respondent shall transfer all his interest in the Chaiwan Property to the Petitioner subject to present encumbrances within one month of the Decree Nisi being made absolute.
- (ii) Each party shall be responsible for his / her own legal costs and disbursements. The stamp duty shall be paid by the Petitioner.
- (iii) Upon the transfer being completed, the parties' respective claims for all ancillary relief against each other, including such claims for periodical payments, secured periodical payments, lump sum / s, transfer of property orders shall stand dismissed.
- (iv) As both parties are under legal aid, I made no order as to costs, including all costs reserved, save that the parties own costs to be taxed under legal aid regulations. This is an order nisi, which shall be made final after 21 days. (Bebe P Y Chu)
- District Judge Mr Fung of Messrs Fung, Law & Ng for Petitioner Mr Choi of Messrs Leung, Tam & Wong for Respondent
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