

HONG KONG / JUDGMENT

WHK v. LCH

[2024] HKFC 147**COURT**

Family Court

DECIDED

9 August 2024

CASE / FILE NUMBER

FCMC10933/2022

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bjbj FCMC 10933 / 2022

**[2024] HKFC 147 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO. 10933 OF 2022**

BETWEEN WHK Petitioner and LCH Respondent

Coram: Deputy District Judge Peter Barnes in Chambers (Not open to public) Dates of Hearing:
27, 30, 31 October and 2 November 2023 Written Closing Submissions: 21 December 2023 Written
Replies: 25 January 2024 Date of Judgment: 9 August 2024

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

A. Introduction and Background This judgment follows a Trial in October/November 2023 of the parties respective claims for ancillary/financial relief. Both parties were born in Hong Kong, and have lived most of their lives here. The Petitioner/Wife was born in 1978 and is 45 years of age. She works as a production manager for her family s company (), a jewellery design and manufacturing company, earning HK\$25,000 per month. (Unless otherwise stated, all references to dollar amounts in this Judgment are to Hong Kong dollars). The Respondent/Husband was born in 1976 and is 48. He studied computing, networking and telecommunications engineering in Melbourne, graduating in 2002. He then returned to Hong Kong and pursued a Master s degree at HKU, graduating in 2004. He then worked for a financial technology company as a systems engineer. He has worked in this field for various financial institutions and is currently a systems analyst for a major bank, with a salary of about \$93,700 per month. The parties met in 2010 and became romantically involved the following year. They were married in October 2012 in Hong

Kong. They have one child, a son born in December 2016 who is now aged 7 (the Child). The Child attends a local primary school and at the time of this judgment has just completed P1. H has another child (a son, aged 2) from a post-separation relationship, who lives with him (the mother of the child lives elsewhere, in Hong Kong). By Order dated 9 July 2021, the parties have joint custody of the Child, with care and control to W and reasonable access to H. A further order was made on 16 June 2022 defining access including providing for staying access from Friday 5pm to Saturday evening. Pending determination of the ancillary relief claims, an interim Order has been in place since 12 January 2023 which requires H to pay \$8,000 per month to W for child maintenance. The marriage was not a happy one and there were frequent quarrels from the outset. In the years before their son was born there were several occasions when the Wife left the matrimonial home and stayed with relatives. Eventually, in July 2018, after an argument which became physical, W moved out with the Child to a rented apartment. H exhibited photographs to one of his affirmations which he says show bruising he sustained during the dispute. In October 2018, W filed a Petition (FCMC 13043/2018) (the First Petition) seeking dissolution of the marriage alleging unreasonable behaviour by H. The parties then received marriage counselling, and they agreed to try again. In October 2019 the First Petition was withdrawn. In April 2020, W moved back with the Child to the matrimonial home. The reunion did not last long and the parties separated again in June 2020, this time permanently. In August 2020 the Wife filed a fresh Petition (FCMC 7201/2020) (the Second Petition), again alleging particulars of unreasonable behaviour by H as her grounds for seeking dissolution of the marriage. There is disagreement as to how much time the parties spent apart during the 5 years between the marriage and when W moved out in July 2018. H says that this was substantial, including periods of absence soon after the marriage when he says W disappeared without informing him of her reasons or where she was going. In particular, in February 2013, after an argument which H viewed as very trivial but which he says was taken out of proportion, W moved all her personal belongings out of their flat, and severed all communications with H, disappearing, according to H, for about 7 8 months. He says W eventually returned in September 2013 and they began receiving marriage counselling. Nonetheless, there were other times, says H, when he was living alone, due to W's decision to move out whenever they quarrelled or when she was unhappy. H's estimate is that, although the marriage (i.e. from wedding to final separation) lasted for a total of 7 years, he lived alone for at least half of that time. Allowing for the 21 months they spent apart between July 2018 and April 2020, when W moved back in for a few months before their permanent separation in June 2020, H is in effect saying that for the 5 years between the marriage and the first separation in July 2018, W's absences were between 18 months and 2 years in total. H argues that this is relevant to the financial division as it amounts to gross and obvious misconduct by W, and/or reflects on her lack of contribution to the marriage. W disputes H's account. She says that quarrelling between a married couple is never one-sided, and that for H to point to unhappy times resulting in temporary separation invites the Court to conduct an impermissible post mortem of the marriage. Her estimate is that, in the pre-July 2018 period, she and H spent no more than about 6 months apart in total. Although she accepted that in February 2013 she moved out her belongings from the flat, she says this was because H had asked her to essentially that he had kicked her out. W says that, irrespective of the total length of the absences, they have had a child together and

that it would be unfair and wrong in principle to penalise her in money terms for periods of marital disharmony. No witnesses were called by either party to verify these matters including as to the periods of, and the possible reasons for, temporary separation. The Second Petition was defended with H filing an Answer and Cross-Petition. The parties eventually agreed to compromise the suit and a new Petition was filed in November 2022 with the present action number, seeking dissolution of the marriage on the basis of one year's separation plus consent. The Decree Nisi was pronounced on 21 September 2023.

B. The Assets The main asset is an apartment in Kowloon of approximately 900 square feet, purchased in April 2016 (2nd FMH), together with a carpark in the same building, both registered in H's sole name. The apartment block has a clubhouse. The values of the 2nd FMH and carpark have been agreed for the purposes of the Trial at \$15,000,000 and \$1,500,000 respectively. The parties contributed equally to the downpayment on the property. There is a mortgage on the apartment which at the time of the Trial had a balance owing of \$4,287,687.94. The carpark is mortgage-free. The parties agree that the 2nd FMH and carpark will have to be sold to achieve the agreed clean break. Given the nature of the asset, I will treat it and refer to it in the concluding paragraphs of this judgment as a joint asset, notwithstanding that it is in H's sole name. I make clear that this is not pre-judging the issue of whether the asset should be equally divided (as W says) or there should be a departure from equal sharing (as H asserts). The parties had previously lived in another flat in Kowloon (1st FMH) which H had purchased in 2009 under the Home Ownership Scheme. During this time, H paid the mortgage instalments and utilities and (according to W) it was agreed she would pay for all other expenses of the household, such as food and groceries and meals out. After they moved to the 2nd FMH, the agreement changed and W says that, given the significantly higher mortgage instalments, in addition to food and groceries, she agreed to pay for the utilities, with H remaining responsible for the mortgage instalments. H disputes this, and says that it was always agreed that W would contribute to half of the mortgage instalments, but she failed to keep to her promise. The standard of living of the parties during the marriage was commensurate with them having two incomes and can be described as comfortable but not extravagant. They had the support of domestic helpers including to take care of their son. They travelled internationally approximately once a year. A Schedule of Agreed and Disputed Assets was provided for the Trial. The parties were not able to agree on a number of items, set out below. W's disputed assets/liabilities:

- (1) Shareholder's loan. W holds shares in two companies, her family company SCL, and EBL, a company she set up with a friend, also to manufacture and market jewellery. W invested a significant sum into EBL, and she says that EBL has been a complete loss and she will not be able to recover any of her investment. H disputes this and says that the amount of her investment, which on the books is recorded as a shareholder loan of \$1,194,840, should be included as one of W's assets.

- (2) Insurance policies. W has six insurance policies. The values of five of these are agreed; the sixth is not. W says that it should be valued at its surrender value. H says this is wrong in principle and that it should be valued on the basis of the policy's account value. This is a difference of \$333,892.25.
- (3) Valuable personal items. With his narrative affirmation, H produced photographs of several expensive designer handbags belonging to W, and which he says she wrongly failed to disclose as part of her assets. Having researched online, he estimates them to be worth in total \$1,228,000. He also says W is in possession of a diamond ring valued at \$111,800. W denies she has any genuine designer handbags she says they are all cheap fakes. She says she has sold the ring, and that the proceeds have either been included in her savings or have been spent.
- (4) Loans. H disputed three loans disclosed by W as non-genuine i.e. soft loans. These total \$830,000. The disputed items are significant in money terms. If W succeeds on all, this puts her net assets (excluding her interest in the landed properties) at \$683,675.29. If H succeeds on all, the figure is \$4,382,207.54. H disputed assets/liabilities:
- (1) Alleged unexplained cash withdrawals. According to W, these amount to \$620,000. She says that there is no proper explanation for these withdrawals and that therefore the amount should be re-attributed to H's assets. H's position is that the withdrawals were to meet genuine and reasonable expenses and there is no missing or hidden money.
- (2) Lost rental income. The 2nd FMH was leased out by H in September 2020. The tenant terminated the lease in September 2021, and W says that H should have found another tenant, at least for the remainder of the lease term. Instead, it remained empty until H moved back into the 2nd FMH in September 2022. She says that another \$441,600 representing one year's rental under the lease should be added back or there should be an adjustment to H's award to reflect this loss. In response, H says that he acted reasonably and tried his best to re-lease the flat, instructing several agents to assist, but without success. Depending on the outcome of these disputed items, H will have net assets, excluding his interest in the landed properties, of between \$5,602,625.67 and \$6,664,225.67. On W's case, the total net assets are \$19,560,213.02. On H's case, they are \$22,197,145.27. W's Opening Proposal is for a 50/50 split of all the matrimonial assets, involving a sale of the landed properties. According to her, this is a needs case. In addition to a lump sum, she seeks payment of ongoing maintenance for the Child at the rate of \$40,000 per month. H's Opening Proposal seeks a departure from equal sharing: he says that the matrimonial pot should be divided 60/40 in his favour to reflect W's conduct during the marriage, as well as what he says is the uneven financial contribution to the purchase of the 2nd FMH, specifically W's failure to honour her promise to contribute to half of the mortgage. Further, he says that out of the net proceeds of sale of the properties, \$600,000 of this should be set aside in a dedicated account on fixed deposit for the future education of the Child, not to be touched until his 12th birthday. He agrees he should pay ongoing maintenance for the Child but says this should be limited to \$10,000 per month. C. The Law The Matrimonial

Proceedings and Property Ordinance, Cap 192 (MPPO) empowers the Court on applications for financial relief to make various orders including the direction that one party do pay such lump sum or sums or periodical payments to the other for that parties benefit or the benefit of a child of a marriage (ss 4 and 5) and orders for the transfer or sale of real or personal property (ss 6 and 6A). On such applications the Court is required by s. 7(1) of the MPPO to have regard to the conduct of the parties and all the circumstances of the case including

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
- (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring. Section 7(2) further provides that in considering whether and how to exercise the powers under ss. 5, 6 and 6A in relation to a child of the marriage, the Court must have regard to all the circumstances, including
 - (a) the financial needs of the child;
 - (b) the income, earning capacity (if any), property and other financial resources of the child;
 - (c) any physical or mental disability of the child;
 - (d) the standard of living enjoyed by the family before the breakdown of the marriage;
 - (e) the manner in which he was being and in which the parties to the marriage expected him to be educated; and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (a) and (b) of subsection (1), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him. In LKD v DD [HYPERLINK "https://www.austlii.edu.au/cgi-bin/LawCite?cit=\(2010\)%20%2013%20HKCFAR%20537"](https://www.austlii.edu.au/cgi-bin/LawCite?cit=(2010)%20%2013%20HKCFAR%20537)

(2010) 13 HKCFAR 537, the Court of Final Appeal laid down the procedural steps the Court must follow in exercising its powers to grant ancillary relief, and the underlying principles to be applied when doing so. The steps to be taken by the Court are: Step 1: The identification of the assets, income and other financial resources of the parties Step 2: The assessment of the parties and the children's financial needs and how these may be met by the assets, income and other financial resources as assessed Step 3: In the event that there are assets surplus to those needs, the application of the sharing principle Step 4: The consideration of whether there are good reasons to depart from an equal division of the assets Step 5: Deciding upon the outcome. In following these steps through to conclusion, the Court must strive towards the goal of achieving an outcome which is just, having regard to these principles: First, the objective of fairness Secondly, the rejection of discrimination, including the rejection of gender or role discrimination Thirdly, the yardstick of equality Fourthly, the rejection of minute retrospective investigations which will serve only to deplete the parties (and the courts') resources and to increase antagonism and discourage settlement. (LKW v DD (2010) 13 HKCFAR 537 at 62 (Ribeiro PJ)) Both parties referred the Court to a number of other authorities on the relevance of conduct. Counsel for the Wife, Mr. Ken Chan and Ms. Tiffany Tse, cited the decision of A v B [2016] 1 HKFLR 322, where Bruno Chan J (as he then was) summarised the law on wanton, extravagant and reckless spending by a party to a marriage, and the circumstances in which a Court might adjust the award to reflect such extravagance. The judgment in that case refers to several of the leading authorities in this area including the Court of Appeal's decisions in ARAV v VP [2011] 3 HKLRD 759 and MKKWH v RKSH (Ancillary Relief: Addbacks and Claw Backs) [2013] HKFLR 540, CACV 197/2012. The Court of Appeal has recently re-examined the law on allegations of conduct amounting to wanton and irresponsible expenditure: LCC v LTLA, [2024] 2 HKLRD 1177, [2024] HKCA 406. LCC v LTLA involved an alleged loss through gambling of very significant sums of money by the husband. The wife claimed that the husband was in the habit of gambling in Macau three to five times per week, involving total losses of about \$96M. She alleged that he had irresponsibly gone into debt and had broken his promise not to use loans from family companies to fund his gambling habit. At First Instance, the wife succeeded in arguing that the entire sum should be added back into the matrimonial pot. The husband appealed. On appeal, the Court of Appeal found that there was insufficient evidence on which the judge could have concluded the loss was as alleged, and absent this, it was not possible to find that the gambling losses, if they existed at all, constituted wanton or reckless conduct justifying any add-back or re-attribution of large sums to the assets in the Husband's name. In the course of its judgment the Court conducted a thorough review of the relevant law on addbacks. At 27 of its judgment the Court began its analysis of the area by referring to its earlier decisions in ARAV and MKKWH, confirming (at

- 34) that for a court to have regard to conduct, it must be obvious and gross and of such a nature that it would be inequitable to disregard it. Further, even where a court is satisfied that the conduct is of this nature, it does not automatically follow that there will be a re-attribution by add-back or claw-back:
34. Pausing here, it is clear from the above authorities whether a spouse's conduct in relation to financial matters after the separation is a conduct issue under section 7 of our MPPO, and for the courts to have regard to such conduct, the conduct has to be obvious and gross and that it would be inequitable to disregard. It is not the case that a finding of misconduct must inevitably lead to a re-attribution of assets to the guilty spouse, and not every item of non-marital expense can be added back even though it could be said that such expense was a depletion of the matrimonial pot and as such it reduces the share of the spouse who has not benefitted from such expenditure, and any re-attribution must be conducted very cautiously by clear evidence of dissipation in which there is a wanton element. The ultimate goal is to achieve fairness. The CA then examined a number of other UK decisions on the topic, including *BJ v MJ (Financial Order: Overseas Trust)* [2011] EWHC 2708 (Fam), [2012] 1 FLR 667, where Mostyn J remarked that Although intellectually pure, the problem with this technique is that it does not re-create any actual money. In my judgment it is in truth a process of penalisation, and it should be applied very cautiously indeed and only where the dissipation is demonstrably wanton. At 45, the CA referred to another decision of Mostyn J, *OG v AG (Financial Remedies: Conduct)* [2012] 1 FLR 1105, which identified four situations where conduct might be relevant: (i) where there is gross and obvious personal misconduct by one party against the other, which can extend to economic misconduct (ii) the addback jurisprudence, where one party has wantonly and recklessly dissipated assets (iii) identifiable litigation misconduct and (iv) permissible inferences drawn from a party's failure to give full and frank disclosure, resulting in a conclusion that there are undisclosed assets. At 47, the Court of Appeal referred to *Tsvetkov and Khayrova* [2023] EWFC 130, where Peel J noted the 4 situations identified by Mostyn J in *OG v AG* and proposed a two-stage approach in cases of alleged misconduct impacting on claims for ancillary relief. The Court of Appeal accepted this as appropriate where misconduct falling into one of the four situations is claimed:
48. We find the Two Stage Approach helpful in cases where conduct is an issue in ancillary relief claims and we set out the Two Stage Approach (slightly modified) as follows - Stage (1) A party asserting conduct must prove:
- (i) the facts relied upon; and if established, (ii) those facts meet the conduct threshold, which has consistently been set at a high or exceptional level; and (iii) that there is an identifiable (even if not always easily measurable) negative financial impact upon the parties which has been generated by the alleged wrongdoing. A causative link between act/omission and financial loss is required. Sometimes the loss can be precisely quantified, sometimes it may require a broader evaluation, but it is doubtful that the quantification of loss can or should range beyond the financial consequences caused by the pleaded grounds. Stage (2) If Stage

(1) is established, the court will go on to consider how the misconduct, and its financial consequences, should impact upon the outcome of the financial remedies proceedings, undertaking the MPPO section 7 exercise which requires balancing all the relevant factors. At 61, drawing the threads together, the Court summarised the law:

61. To summarise, following *GS v L*, the line of add-back cases in England has consistently set the threshold for the conduct for the court to have regard to for the section 7 exercise at a high or exceptional level, namely so gross and obvious that it is inequitable for the court to disregard it. In cases where one spouse alleges the other spouse of misconduct of over-spending, there must be clear evidence of dissipation in which there is a wanton element. In considering whether there has been wanton dissipation, the court has taken into account matters including (i) the extent, timing and nature of the alleged wanton dissipation; (ii) the general assessment of the overspending party; (iii) the motivation for the overspending such as whether the overspending was with the intention to reduce the other spouse's financial claims, and/or whether it was bona fide; and (iv) the negative financial impact upon the parties. Upon the misconduct being established, the court will then consider how the misconduct and its financial consequences should impact upon the outcome of the financial award having regard to all the relevant section 7 factors. Add-back is ordered in very limited circumstances even though it is recognized as an option, and the courts in England appear to be moving away from this option, with at least one judge pointing out that this technique does not re-create any actual money and is a process of penalisation. What is clear is that, there has been a constant reminder that the add-back has to be conducted very cautiously. No matter which route one pursues, the ultimate goal is to achieve fairness. Mr. Eric Leung, counsel for the Husband, referred to decisions in support of his client's contention that there should be a departure from equal division due to the Wife's misconduct during the marriage. First, *TCWF v LKKS (No 1)* [2014] 1 HKLRD 896 (CA) confirming that conduct in s. 7(1) MPPO is not confined to financial misconduct, but such non-financial misconduct must be relevant to the issues to be decided on ancillary relief applications to be taken into account:
260. Whilst [counsel] is correct in his submissions that conduct need not have any impact on the property available for distribution before it could be taken into account, the conduct in question must be examined against the notion of fairness before it can be decided whether there should be any adjustment on its account. Thus, it is necessary to search for the relevance of the conduct on the principles of needs, compensation and sharing as explained in the case law. In respect of conduct which has no financial impact whatsoever, the relevance would be less apparent. Mr. Leung then referred the Court to two other cases on gross misconduct. *West v West* [1978] Fam 1, where, after her marriage, the wife refused to live with the husband. The English Court of Appeal held that the trial judge had been correct to take this into account and adjust her award of periodical payments accordingly. Next, in *Cuzner v Underdown* [1974] 1 WLR 641, where the English Court of Appeal dismissed the wife's appeal against a finding that she had committed obvious and gross misconduct in bargaining for and acquiring a half share of the matrimonial property (to which she had

made no financial contribution), then six weeks later leaving with the children and moving in with a neighbour, with whom she had been having an affair. D. The Evidence The parties were the only witnesses called at the Trial. In addition to their several Forms E, the main written evidence comprises the narrative affirmations prepared for the Trial and exhibits thereto. Both parties accuse the other of giving untruthful evidence. H accuses W of under-declaring her income to the Inland Revenue Department. W says that H made up an alleged loan to his sister in an attempt to explain significant cash withdrawals from his bank accounts during the months following their final separation. These are serious allegations. The Court is reminded by Mr. Leung of the test to be applied in assessing the credibility of witnesses, as was summarised in *Hui Cheung Fa v Daiwa Development Limited* (unreported, HCA 1734 of 2009, 8 April 2014). The Court, in assessing the credibility of a witness, may be assisted particularly by having regard to objective facts and documents, including undisputed and indisputable evidence, the motives of the witness, and the overall probabilities. The Wife The Husband submitted in Closing that the Wife's evidence was full of unexplained or inexplicable inconsistencies and illogicality, and most particularly that she gave inadequate evidence as to her income, which is contradicted by contemporaneous documents. W is one of two directors of SCL, the family jewellery company, her brother being the other. The Financial Statements of SCL for the year ended 31 March 2020 show total directors remuneration for that year of \$800,363. W said that she received a higher proportion of this sum, but she was not able to give a precise percentage. Mr. Leung contrasted this with the Notice of Assessment of Salaries Tax for that financial year showing declared income of \$193,818 plus value of residence provided of \$19,381, total \$213,199. Mr. Leung then put to W that she had significantly under-reported her true income to the IRD. (At this point W was informed by the Court of her right not to answer a question if she felt that her answer might incriminate her.) She denied the allegation of under-reporting, saying that the preparation of her tax return was handled by SCL's accountants, and they took care of everything; further, that they had advised her she was entitled to various deductions, including for her rental. Mr. Leung then suggested that such a deduction was unlikely to have been the reason, given that the Notice of Assessment specifically referred to the rental allowance as part of her total reported net income. W was unable to assist further as to what specific deductions might have been disclosed in her 2019/2020 tax return, but offered to produce it to the Court. This was, of course, far too late. It is not possible to know the reason for the difference in her apparent income according to SCL's financial statements and her confirmation that she was entitled to at least half of it i.e. \$400,000, and the amount ultimately reported to the IRD. The absence of this information is concerning, and I will revisit it when I come to deal the question of W's earning capacity. However, there is insufficient basis to support a conclusion that W has deliberately under-reported her true income to the IRD, or has otherwise been untruthful in her oral evidence on this issue. The Husband W's primary criticism of H's evidence, both written and oral is that his explanation for the large movements of cash from his bank accounts in the months following separation in June 2020 was untruthful. W's case is that H put forward a fiction of having loaned the money to his sister so as to present a false picture to the Court of the extent of his assets. In

his first Form E, filed in May 2021, H said he had HK\$372,189 in his bank accounts. With this Form E he produced 12 months of bank statements. In her first Questionnaire, W asked for an explanation of substantial cash withdrawals which had started in August 2020. In answer to several of these, H responded Loan to sister, [her name], for her mortgage payment. In all, there were 22 cash withdrawals matching this description between August and October 2020 for a total of \$4,490,430. H's evidence was that \$4,480,430 was transferred to his sister from late August to early November 2020 in 64 cash deposits into her Hong Kong HSBC account. As to any amounts owed to him, in paragraph 2.9 of this first Form E, dated 24 May 2021 H inserted . In his Answers to a Further Questionnaire, he explained that he had not mentioned the loan to his sister in his Form E as he did not then expect his sister to repay it. When cross-examined on this at the Trial, H gave a different explanation, namely that the reason he did not refer to the loan in his Form E was that his sister had not yet moved the money to Australia, and he did not know if it should be listed as a debt due to him. In his narrative affirmation, filed 5 September 2023, H set out further details as to how the loan had been arranged and his attempts to retrieve the money (70):

- (1) In the period after his separation, in late 2020, he was in frequent contact with his sister, who lives with her husband in Melbourne.
- (2) H's sister told him about money problems they were having brought on by the possibility that she and her husband might lose their jobs because of Covid, and compounded by the fact that they still owed money on their house. H said his sister had mentioned that her husband had used some of the housing loan account for gambling. The sister asked H if he would lend her money so that she could pay off the loan, or at least reduce the interest payments on their mortgage. H agreed to lend her around HK\$4.5M.
- (3) H was working from home (due to Covid-19), and decided to withdraw money from ATMs to avoid physical contact and deposit it into his sister's HK bank account, using ATMs.
- (4) In late October 2021, H received a call from his sister, who was in a state of distress, and who told him that her husband had gambled and lost some of the money loaned. He said that, however, by the end of the conversation she had reassured him that it would nonetheless be repaid.
- (5) As time passed, H began to worry about whether he was going to be able to get repaid, and contacted his sister to demand an explanation. This time, her husband spoke to him and said that they had converted the money into Australian dollars and transferred this to their mortgage account, to obtain a high interest rate to set off the interest charged on the mortgage. H says that, after this time, his sister began to avoid his calls.
- (6) Eventually, having discussed the matter with other relatives, H decided that he should take action, and he consulted a firm, Sun Lawyers LLP, who wrote a demand letter to the sister, dated 1 March 2023. This letter, exhibited to his narrative affirmation, includes a reference to various e-mails and whatsapp correspondence and phone conversations between you or your husband and our client in which you and/or your husband on your behalf have

admitted that you owe our client the Borrowed Sum and promised to settle the loan. The letter demanded immediate repayment of HK\$4,490,430.

- (7) H's narrative affirmation concluded on this issue by saying
70. According to information from my Sun Lawyers LLP, I learned that on 25th May 2023, my sister and her husband unexpectedly visited Sun Lawyers LLP office, accompanied by an elderly individual whom I believe was my mother. They handed over a cheque in the amount of HK\$4,490,430 to my lawyer as a repayment.
- (8) H exhibited to his affirmation a copy of a cheque from his lawyers client account dated 8 June 2023, to him, for HK\$4,490,430. At Trial, H said he first approached Sun Lawyers in late 2021, but that they had not sent the demand letter until 1 March 2023 as he had been advised that under the circumstances it would be difficult for him to press for repayment. As to the manner in which H advanced the loan to his sister, by ATM cash withdrawals and ATM cash deposits, Mr. K Chan, counsel for the Wife, asked H why he did not simply write a cheque to his sister for the full amount of the loan i.e. \$4,490,000. H's response was such idea did not occur to me. By early June 2023, H had received and banked the Sun Lawyers cheque, but he did not at the time inform W that the money had been returned to him. On 12 July 2023, W applied by Section 17 Summons to set aside the transfers, and for an order that the sister be joined as an intervener in the proceedings. In response to this Summons, H's solicitors King & Co. () wrote to W's solicitors Benjamin Au & Billy Chan (BABC) on 27 July 2023. This letter did not say that the money had already been returned, but offered reassurances that (a) there were sufficient family assets to set off the amount loaned, and that (b) H agreed that the sum should form part of the matrimonial pot. About a month before her s. 17 Summons was filed the Wife had been contacted, through Facebook and WhatsApp messages, by a person who said she was H's sister and who said that \$4,490,000 had been deposited into her account without her knowledge, and that the money had since been returned to H, via Sun Lawyers. These messages were then forwarded by BABC to KC and to Sun Lawyers, with a request for confirmation that the full amount of the alleged loan had been returned, failing which action would be taken to recover it. No response was received until the letter from KC dated 27 July 2023, a week before the callover of the s. 17 Summons. At that hearing, on 4 August 2023, H confirmed that the money had been returned in full and was back in his account. In considering the truthfulness of H's account, I have not relied upon or drawn any conclusions from these Facebook/WhatsApp messages to W referring to the depositing of the money in an account and statements in those messages that this was without the knowledge of the author of them. I make no finding as to whether those messages were in fact from H's sister and I place no reliance on them, other than that I accept they were received by W, and forwarded by her solicitors to H's two firms of solicitors seeking confirmation that the \$4.49M had in fact been returned. For the following reasons, I do not accept the Husband's explanation for the withdrawals from his account and deposits into his sister's account of the \$4.49M. First, H has produced no evidence in the form of contemporaneous written communications between him and his sister/brother-in-law

concerning the alleged loan. The demand letter from Sun Lawyers said that such communications existed, but they were not attached to the letter at least not as H exhibited it and nor were they elsewhere exhibited or produced. Secondly, there is no evidence the money deposited into the sister's Hong Kong bank account was ever withdrawn from it (before it was finally returned to H), e.g. by a transfer from the account to an Australian bank account held by the sister or her husband. If not, this would suggest that the conversations H claims he had with his sister and brother-in-law did not occur. This casts doubts as to whether the sister and her husband were in financial difficulties, this being the only explanation put forward by H as to why the sister wanted to borrow money from him. If they were indeed in financial difficulties, why leave the money in the Hong Kong account, bearing little interest, when it could have been deposited into an Australian mortgage offset account or in an interest-bearing banking facility such as a time-deposit? That the money was left in the sister's Hong Kong account for the entire time further supports W's case that the loan was an invention. Thirdly, I consider the timing of the withdrawals is significant. They happened in the latter half of 2020 following the final separation. H gave evidence of the efforts he had gone to in order to persuade W to move back, including renovations to the flat undertaken at W's request, and in the acquisition of new furniture. The failure of this reunion after only 2 months of trying, when coupled with W's frequent and (on H's case) lengthy absences from the matrimonial home between the wedding and their previous separation in July 2018, have produced a palpable resentment towards W. This was readily apparent from H's narrative affirmation and his oral testimony. Fourthly, the way in which H went about transferring the money to his sister is inconsistent with it being a genuine loan. Even allowing for Covid-related concerns, to withdraw large sums of cash by ATM; then to keep the cash at home before re-depositing it by further visits to ATM machines, is not only unwise but suggests subterfuge. It would have been a far safer and more obvious means to transfer the money in one transaction or a series of transactions from H's account to his sister's account in Hong Kong or her account in Australia. This could have been achieved by a cheque (as W contended), by online banking, or an in-person visit to the bank if necessary, with appropriate safeguards including the wearing of a mask at all times. Fifthly, H's oral evidence on the subject was unconvincing. I have referred to the difference between the statement he gave in his second set of Answers as to why he had not mentioned the alleged loan in his first Form E, and his response at Trial to the same question. When confronted with this inconsistency he said I did not check this part i.e. of his Answers. When asked by W's counsel which of the two explanations he wanted to adopt, he said I don't know how to answer. I accept W's contention that the series of withdrawals by H from his bank account and the numerous deposits into his sister's account were vain attempts by H to put substantial cash savings beyond the reach of a claim by W and a Judgment of this Court. At the same time, I accept H's submission that there is no net loss, as the full amount withdrawn has been returned. However, it is H's conduct in advancing a narrative which I have found to be untrue, which is of real concern. When faced with W's first Questionnaire the reason for the substantial cash movements, H then had the option of admitting having moved funds away from his bank accounts without good reason, perhaps providing a

reassurance to W that it would be returned to his account, and to take prompt steps to do so. It is troubling to me that H has maintained the story of the alleged loan throughout, and that he took steps to provide evidence to support it including instructing lawyers (not those acting for him in these proceedings) to issue a demand letter to his sister for the return of moneys he had deposited into her account, not, as I have found, as a loan to her, but as a way of draining his bank accounts of most of his cash and placing it in a bank account he knew he would not be required to disclose to the Court and to W, in an attempt to show he was in a far poorer financial position than was really the case. It is of real concern that he persisted with this fiction in his narrative affirmation and at the Trial. It reflects poorly on him as a reliable witness of truth. E. LKW v DD Steps E.1 Step 1 The identification of the assets and other financial resources E.1.1 Assets in dispute The Wife s disputed assets In 2015 W set up EBL, with her brother and a friend. She owns 45% of the shares. She hoped to run a business similar to her family s jewellery business but independent of it, and to specialise in silver jewellery. She says that EBL has been a complete failure. She injected a total of \$1,197,840 into it, and the audited financial statement of the company for the year ended 31 March 2021 shows significant sums due to shareholders. Her first Form E was dated 31 March 2021. Paragraph 2.9 of this first Form E is crossed through, indicating that at that time there were no moneys owing to her. H s first Questionnaire prompted Answers from W dated 16th June 2022, which included this question and answer:

25. Please state if there is any monies owed by EBL and/or SCL to the Petitioner. Answer: No money is owed by SCL to the Petitioner. Nothing in EBL s financial statements for 2020/2021 suggests that by the end of the financial year the amounts due to shareholders had been written off in whole or in part. Further, these accounts show that the during that financial year the company was still trading, albeit at a loss. W asserted in her narrative affirmation that by 2018 or 2019 EBL had ceased operations: it was put on hold due to my divorce proceedings s narrative affirmation,
61. It was put to her that this statement was untrue. She denied this. The 2020/2021 Financial Statements show a significant increase in spending on advertising: \$20,340 in 2020/2021, up from \$1,417 the year before, and on websites and applications : \$70,000 in 2020/2021, with \$Nil being spent on this for the previous financial year. This additional expenditure appears to have been funded in part by additional injections from the shareholders, as the amounts due to shareholders increased from \$2,612,340 for the financial year ended 31 March 2020 to \$2,694,590 for the year ended 31 March 2021. W said that EBL received a Government subsidy and this could have been applied to such expenditure. According to W, EBL no longer had a website, as she had concluded that the expense of the domain would likely exceed the income it would generate. EBL now retains only a Facebook page and Instagram page, although these are no longer kept up to date. When she was questioned about the discrepancies at the Trial, W admitted that EBL was still trading, in online retail in 2021, and that the statement that it had no business activity referred to the closure of the physical shop in Tsim Sha Tsui. The financial statements show continued sales and a closing inventory of \$439,936 compared with an opening inventory of \$481,810. The most recent financial

statements accounts for EBL show poor results, and that EBL is indeed no longer trading: no accounts have been prepared for the subsequent financial years. W said that in order to liquidate the inventory, the items would have to be melted down, requiring spending further money. She also said the inventory could not be sold through SCL. I have concerns as to the way in which W has provided information about EBL. The true picture of the company only emerged at the Trial, and it is clear to me that W's assertion that the company had ceased operations in 2018 or 2019 was intended by her to be understood as EBL then permanently ceasing all business activities, not simply closing the physical shop and transitioning to an online business. Further, during the Trial, W for the first time asserted that the initial injection of \$1,197,840 was a loan from her father. H submitted in closing that I should not only reject W's claim in this respect but also that I should find that the entire sum is potentially recoverable from liquidation of the assets of EBL. For W, it was submitted that, irrespective of whether or not the money was hers or a loan from her father, the amount is not recoverable, as

- (1) while the inventory is valued at \$439,836, it is mostly silver and will need to be melted down to be liquidated, and this will involve additional expense
 - (2) the alternative sale of the stock through SCL is not possible as they are separate entities
 - (3) there is little prospect of significant recovery from liquidation of the company
 - (4) it is not feasible for the company to continue to trade, given the lack of success of its reinvention as an online store. I reject W's recently asserted position that the investment/injection of \$1,197,840 was a loan from her father. I note that, in her Reply submissions, W disavowed any suggestion that she was seeking to include this amount as an additional indebtedness she owed to her father, who has now passed away, or his estate. I am not satisfied that there is no prospect of the remaining stock being sold, potentially with the assistance of SCL. I note, for example, that W sold one of her personal items of jewellery a ring through SCL. I find that there is a realistic prospect of W being able to recoup some of the amount she invested into EBL. W's shareholding in EBL is 45%. 45% of the presently valued inventory is \$197,926.20. I accept that there may be further costs in liquidating the stock and that the proceeds may not reach the current assigned inventory value. I assess the value of her shareholding in EBL at \$150,000.
- (2) W's Insurance policies In her first Form E, dated 31 March 2021, W disclosed insurance policies which she said were worth in total \$1,858,214. By her second Form E, dated 19 January 2023, the value of these policies had diminished to \$889,109. By the time of her last Form E, 28 August 2023, it had risen to \$1,150,833. As noted, the dispute concerns only one of these policies, an FWD policy. W says that the policy should be valued at its surrender value of \$531,852. H says the total account value of the policy should be used, i.e. \$865,744. The date of the statement giving these two different amounts is 17 August 2023. The policy conditions relevantly specify a diminishing penalty for early surrender of the policy are:
- Year 9 18 August 2023 Year 10 18 August 2024 Year 11 18 August 2025 Year 12 18 August 2026

Year 13 18 August 2027 W accepted that she will be able to surrender the policy without penalty from year 13 onwards, i.e. approximately 3 years from now. In support of her contention that the policy should be valued at its current surrender value, W referred the Court to a decision of Deputy District Court Judge Jacqueline Lee (as Master Lee then was) in *WSW v CSLPC* [2022] HKFC 155 where the Judge, as part of her computation of the matrimonial assets available for distribution on the parties respective claims for ancillary relief, decided to value the wife's life insurance policy, which the wife had purchased for the benefit of the couple's children in the event she would pass away, at surrender value on the basis that it was not possible to predict what might happen in the future (at 93). H draws a distinction between the policy in this case with the one in *WSW v CSLPC* for the reason that W's FWD policy has a known account value, whereas the wife's life insurance policy in *WSW v CSLPC* did not. W says that there is no guarantee, and therefore no basis for the Court to infer, that the policy will be worth its current account value when she has the option of cashing out without penalty in August 2027. She pointed to the risk reminder clauses in the policy document referring to the possibility that the value of the policy from time to time was contingent on the performance of the underlying funds, and the accompanying disclaimer that there was no guarantee of return of the full amount of premium paid. Neither party suggests that the Court should apply a liquidity discount to take account of the fact that the undiscounted value of the policy is not accessible until August 2027. In arguing for the current account value to be used for the policy, H referred to a recent decision of DDJ Theresa Chow in *MKW v LLY* [2023] HKFC 14, where the Judge drew a distinction between MPF funds which might not be accessible for many years, even decades, and insurance policies which she considered were on a different footing. W's Reply did not dispute this as correct in principle, but argued that the Court must look at the value of the asset at the date of Trial. She also submitted that given W's indebtedness and her low bank balance, she might well be forced to surrender the policy. I consider that to be unlikely. Taking into account that both parties agree to an asset split which will provide them with significant amounts after the sale of the 2nd FMH and carpark, it is far more likely that W will choose to retain this policy and only look cashing it in when it can be surrendered without penalty, from August 2027 onwards. As such, it would in my view be inappropriate to assign a value to the policy based on the current surrender value. I find that its value is the current account value, i.e. \$865,744.

- (3) W's valuable personal items In his narrative affirmation, H said this:
49. I verily believe that the Petitioner also owns valuable personal items including but not limited to designer handbags, jewelry such as diamond rings, Chinese bridal gold bangles which have not been disclosed in her Form Es.
- (a) The handbags The relevant paragraph of H's narrative affirmation on this issue is as follows:
50. When the Petitioner and [Child] moved back to Property in June 2020, she brought back many luxury handbags, including about seven to eight Hermes handbags, and she retained the receipts for purchasing these handbags which I saw. There is now produced and shown

to me marked as exhibit LCH-4 copies of photographs of the Petitioner's designer/Hermes handbags that I took on my phone from home. I note that the Petitioner has not set out any of these luxury bags in her Form E. Based on the photographs above, I also did some research online to find out their prices from VIP Station. H exhibited to his affirmation photographs of six bags. He also exhibited a chart of these based on his research using VIP Station, listing the following bags and their corresponding estimated value: Bag model Estimated value
rmes Handbags Kelly 32 P9 Shoulder Bag / Crossbody Bag/Handbag Anemone HK\$168,000
rmes Handbags Kelly 23 37 Shoulder Bag / Crossbody Bag/Handbag Gold HK\$218,000
rmes Handbags Birkin 25 8F Handbag Etain HK\$208,000
rmes Handbags Kelly II Mini 63 Shoulder Bag / Crossbody Bag/Handbag Vert Amande HK\$238,000
rmes Handbags Kelly 25 89 Shoulder Bag / Crossbody Bag/Handbag Noir HK\$218,000
rmes Bags Kelly 25 73 Shoulder Bag / Crossbody Bag / Handbag Bleu Saphir HK\$178,000
Total: HK\$1,228,000. In his first Questionnaire dated 6 August 2021, H asked W about other valuable personal items including specifically designer handbags. In her Answers to this Questionnaire, W said that the designer handbags alleged by the Respondent were purchased from Taobao website. These Answers were filed 10 December 2021. A slightly modified question on this topic was included in H's 2nd Questionnaire dated 14 February 2023:

23. Please state the source, the price, the whereabouts and the resell price (if it is resold) of any undisclosed valuable personal items including but not limited to designer handbags, jewellery such as diamond rings with supporting evidence. W's Answer (given 23 February 2023): Answer: The Petitioner does not keep any valuable items. W was allowed to give Evidence-in-Chief on Day 1 of the Trial on this issue and to provide receipts which she said demonstrated that the bags she had in her possession were fake, and acquired through Taobao. Her evidence and post-Trial submissions were:
- (1) Except for Bag No 2, the other 5 bags exhibited to H's affirmation were purchased by her on Taobao.
 - (2) Bag No 2 was a gift from her sister-in-law, was also non-genuine and in any event was thrown away by W after it broke. This was the first H-rmes-like bag she owned and it was how she learned about fake H-rmes bags available from Taobao.
 - (3) W produced the purchase history on Taobao and her chat records with the vendor of the 5 bags. To the extent that the purchase history description did not correspond to the bags purchased, this was explained by the fact that W could further customise her preferences through chat with the vendor, who would then supply a link for payment. H disputed W's explanation of the discrepancies between the purchase records and the bags. First, he says that there was nothing in the purchase records or the item descriptions which showed that the orders were customisable, or that such customisation was ever requested: nothing in the chats suggested that W was engaged in a discussion about size/colour preferences. Second, he says there was no way of telling how each of the chats corresponded to the purchases (other than W's oral evidence). Third, that W's evidence of the number of bags she had

purchased was vague: she was not able to give a clear answer on this, whether she purchased 5, 6 or 7 bags in all. I have considered the documents produced by W by which she sought to demonstrate that the bags are not genuine designer handbags at all but are all inexpensive replicas of the considerably more expensive genuine products. I note that in one of the chats the vendor says dear, the bag is made , which would be inconsistent with the product being offered as being a genuine designer handbag. The receipts provided by H by which he sought to link W with the purchase of genuine designer handbags were unconvincing they were two receipts from H rmes, neither of which pointed to any of the handbags, and were from Spain, a country which W said she had never been. W gave evidence that she had travelled to Italy, where she bought a pair of shoes, a scarf for H, and a designer bag not H rmes on behalf of a friend. I note further that in Closing, W confirmed the offer she made at Trial for H to take, and keep, all 5 H rmes-like bags she produced at Court, without any attribution of value being assigned to them for the purposes of the Court s assessment of the total matrimonial pot. It was not until he filed his narrative affirmation that H produced the photographs of the handbags. More importantly, no request was made by him to inspect the handbags in W s possession prior to the Trial nor did he make any application for the handbags to be properly appraised by an expert to confirm that they were genuine and if so, their value. In the circumstances, I am not satisfied that W is in possession of expensive and genuine designer handbags. I disregard them for the purposes of the asset calculation.

- (b) The ring In his narrative affirmation, H also referred to the possibility that W or her family members were hiding jewellery of significant value:
51. I also have suspicions about the Petitioner s mother and family members holding assets including jewelry on the Petitioner s behalf to avoid distribution in the present divorce proceedings. In particular I remember that during the marriage, it was usual for the Petitioner and her family members to buy valuable jewellery which they come across in the business and store them in the Companies safe deposit boxes as their personal collection but the Petitioner has not disclosed any valuable items kept there in her Form E. W s narrative affirmation set out her position on H s claim:
62. The Husband always insists that I had a lot of valuable jewellery which is untrue. I wore some expensive jewellery for my wedding, which I borrowed from storage of my family s company, but these had been returned right after the wedding. Since my family s company trades with these jewellery, they did not belong to [SCL] permanently as well.
63. Previously, the Husband complained that I had an 1.5 Carat ring from my mother. While I used to have an expensive ring, this was sold to my friend in 2017. I hereby attach the receipt of this sale, as WHK4-12 The exhibit WHK4-12 is an invoice of SCL for the sale of a Tiffany six prong ring for \$111,800. It was put to W that she received this full amount from SCL, or that she still retained the ring in her possession, and had never disclosed it. She denied this, and said that she did not receive \$111,800 but a lesser amount, although she did not specify how much she had received. It was also put to her that there was no logical reason why she

would sell the ring, which had been a gift from her mother, through SCL rather than directly. In Closing, H argued that the Court should conclude that the alleged sale did not take place at all, and W still retains it, or that it was a guise for W to hide an asset under the name of SCL, and that in either case the full amount should be added back to the pot. In my view there is nothing illogical in W seeking to sell the ring through LCS rather than directly. I find that the ring was sold, and the proceeds form part of W's current savings or have since been spent.

- (4) W's Loans W did not disclose any personal loans in her 1st Form E dated 31 March 2021. In her 2nd Form E dated 19 January 2023 she disclosed: Loan Lender Amount A P's mother HK\$180,000 B P's friend HK\$50,000 In her Answers to H's 2nd Questionnaire on this 2nd Form E, W said that the reason for these two loans was that she had run out of savings. She produced with her Answers loan agreements for the two loans and copies of cheques for the full amounts. The loan agreements provide for repayment by 1 January 2024 (to the mother) and by 1 June 2023 (her friend) and for interest to accrue on amounts outstanding if payment was not made by the due dates. In W's 3rd and final Form E dated 20 August 2023 the position of her personal loans was stated to be: Loan Lender Amount A P's mother HK\$480,000 B P's 1st friend HK\$250,000 C P's 2nd friend HK\$100,000 In her narrative affirmation, W specified the dates of the borrowings and said that she had agreed with her mother and her 1st friend that she would repay the loans by the end of 2024. No loan agreement was produced for loan C, which she said was to cover legal costs. Nor was there any updated or amended loan agreement for the additional sum of \$300,000 from her mother. She produced a further agreement for Loan B, dated 18 May 2023, which provides for repayment of the full amount by 31 December 2024 failing which interest would be payable. W was cross-examined on the absence of any further documents evidencing the additional amounts borrowed. She explained that there was an urgent need for the funds, to pay her lawyers. It was suggested to her that there was ample time, after the further amounts were provided to her, for a formal documents to be prepared. W said that although she was not in a position to repay the amounts, she would be able to make the payment after the conclusion of this case. This is consistent with her narrative affirmation i.e. that she had told lender A and lender B that she would be able to repay them by the end of 2024. W's evidence on loan C was that her friend was aware of the present litigation and he asked her to pay him back when he was in a position to do so. The Court of Final Appeal judgment in *WLK v TMC* (2010) 13 HKCFAR 816 considered the status of four significant loans put forward by the husband as liabilities which would substantially reduce his net asset position. The first instance judge had accepted the genuineness of two out of the four loans. The Court of Appeal had left undisturbed the judge's conclusion on the disregarded liabilities but reversed his decision on the other two loans, holding that they should be considered assets and brought back into the pool. The CFA reversed the CA's decision (judgment paragraphs 42

- 58) save and except that it found the CA was correct to have altered the first instance finding in respect of interest on the second loan (paragraph 61). *WLK v TMC* confirms the need for the Court to examine the circumstances of borrowings, including those from family members, to determine whether or not the alleged indebtedness is genuine and should be reflected in the calculation of the net assets of a party for the purpose of ancillary relief proceedings. This is further reinforced by a case cited by Mr. Leung (a UK Family Court decision of *P v Q*), suggesting that factors pointing towards the existence of a soft loan include that the obligation is owed to a family member who remains on good terms and is unlikely to want the debtor to suffer hardship; that the obligation arose informally and the terms of the obligation do not have the feel of a normal commercial arrangement. In Closing (43), H advanced the following points which he suggested showed that the payments received by W from her mother pointed to them being in the nature of gifts, not a loan. First, that the terms of the loan agreement itself did not reflect the actual or at least the full arrangement between W and her mother. The loan agreement refers to the \$180,000 being paid in cash, whereas the mother wrote a cheque for that sum. Second, the repayment date of 1 January 2024 and interest to be levied in the event of non-payment of the \$180,000 is argued to be in contrast to the fact that the later payment of \$300,000 was not repayable by a fixed date but essentially when W was in a position to do so, and without any penalty interest being payable. Third, that the loan agreement provides for a very high interest rate an effective rate of 60% per annum and H suggested this was most unlikely to be enforced by the mother, and there is no evidence to suggest that it had been. H then argued that the family had provided significant financial support to W in the past. In 2016 W had paid \$4.3M for the acquisition of the 2nd FMH. She accepted that \$500,000 of this was from her father. H submitted that, given W's working history and modest monthly income after she returned to Hong Kong in 2003, she could not possibly have met the balance of her investment i.e. \$3.8M without substantial further financial support from her family. When this was put to her by Mr. Leung, she disagreed. I am not satisfied that there is a proper basis to conclude that it was impossible for W to save \$3.8M from the beginning of her employment and the 2016 investment into the 2nd FMH. W's Reply Submissions referred to W's evidence supporting the conclusion that this is not a soft loan but one which the mother will expect to have repaid to her, namely that her mother:
- (1) had on both occasions had difficulty making immediate transfers to W due to insufficient funds
 - (2) had always been strict with money and ran the family finances like a business
 - (3) was not happy with W's late father having given her the \$500,000. I do not accept that this is a soft loan. I find that this is a genuine loan of \$480,000 which will have to be repaid by W after conclusion of these proceedings. However, I do not accept that the mother will insist upon payment of any interest on the amount loaned to W. In respect of the loans from friends, H submitted that

- (1) In respect of Loan B, the loan is unenforceable pursuant to s. 24(2) of the Money Lenders Ordinance (Cap 163) as the interest was impermissibly high.
- (2) In respect of Loan C, no agreement was provided and no other document supports the conclusion that money allegedly received from the friend was in fact loaned by the friend to W. I accept W's evidence on the loans, and the reasons why she borrowed these sums at the time she did. I find that they are not soft loans, and she will repay them when she is in a position to do so, after the conclusion of these proceedings. The debt amounts are limited to the principal of the loans, and any interest payable thereon, whether enforceable under the agreements or not, is to be disregarded. The Husband
- (1) Alleged unexplained cash withdrawals W asserts that a total of \$620,000 should be added back to H's assets representing alleged expenditure which she says is wanton, and extravagant expenditure, is inconsistent with H's claimed monthly expenditure, and is in any event insufficiently supported by contemporaneous documents. She provided a breakdown in her Opening Submissions, by reference to the relevant parts of H's Answers to her Questionnaire(s), which I set out below (the reverse chronological order is in the original chart).
- | No | Date | Withdrawals Description/Amount (HK\$) | s Explanation |
|----|--------|---------------------------------------|---|
| 9 | Nov-20 | Cash 20,000 | From Citibank account Daily living expenses purchase of electronic components of STEM learning, old computer repair (since P broke it) (e.g. purchase of SSD, HD, data recovery cost, battery replacement, etc.) |
| 4 | Nov-20 | Cheque 200,000 | Citibank Deposited to H's HSBC account, which was closed in December 2020. Given H had not been using this HSBC account, the account was frozen. The HSBC account had to be activated again in order to close it. Therefore, H deposited a sum and said the account was closed in or about December 2020. The cash was subsequently used as preservation fund for Mother's surgeries. It was identified in or about 2018 that Mother would have to undergo total knee replacement surgeries, a percutaneous coronary intervention surgery and an AMD surgery with her eyes. |
| 31 | Oct-20 | Cash 6,000 | Citibank Daily living expenses |
| 27 | Oct-20 | Cash 6,000 | Citibank Daily living expenses |
| 8 | Oct-20 | Cash 20,000 | Citibank Purchase of a new computer for Work-From-Home purpose |
| 7 | Oct-20 | Cash 20,000 | Citibank Expenditure for household electrical appliance |
| 6 | Oct-20 | Cash 20,000 | Citibank Buying furniture for [H's rented apartment] (including labour fee for assembly service) |
| 1 | Oct-20 | Cash 6,000 | Citibank Daily living expenses |
| 1 | Oct-20 | Cash 20,000 | SCB Contribution to Mother and family expenses |
| 29 | Sep-20 | Cash 20,000 | Citibank Vehicle repair |
| 17 | Sep-20 | Cash 20,000 | SCB Miscellaneous expenses after moving to Amoy Gardens (including kitchen water filter, tableware and beddings etc.) |
| 17 | Sep-20 | Cash 20,000 | SCB Furniture expenses for 2nd FMH (including removing furniture and repaint of damage walls) |
| 7 | Sep-20 | Cash 20,000 | Citibank's rented apartment's] rental and/or deposit and/or agent fee |
| 7 | Sep-20 | Cash 6,000 | Citibank's rented apartment's] rental and/or deposit and/or agent fee |
| 7 | Sep-20 | Cash 6,000 | Citibank's rented apartment's] rental and/or deposit and/or agent fee |
| 7 | Sep-20 | Cash 5,000 | Citibank's rented apartment's] rental and/or deposit and/or agent fee |
| 4 | Sep-20 | Cash 20,000 | SCB Household, daily and entertainment expenses |
| 1 | Sep-20 | Cash 20,000 | SCB Contribution to Mother and payments for family gathering dinners |
| 31 | Aug-20 | Cash 20,000 | SCB Household, daily and |

entertainment expenses 26-Aug-20 Cash 20,000 SCB Expenses on friends gatherings and shopping with friends and family 26-Aug-20 Cash 20,000 Citibank Hong Kong Government s Cash Payout Scheme payable to H and sister, payable to the Mother 17-Aug-20 Cash 20,000 Citibank Contribution to Mother and monthly food expenses for H s home 14-Aug-20 Cash 20,000 Citibank Contribution to Mother and miscellaneous expenses (including purchase of car dash camera, car pipe replacement etc.) 10-Aug-20 Cash 20,000 Citibank Daily living expenses 29-Jul-20 Cash 5,000 Citibank Daily living expenses 28-Jul-20 Cash 20,000 Citibank Release payment to domestic helper 21-Jul-20 Cash 20,000 Citibank Occasional purchase of Ganoderma supplement for Mother TOTAL HK\$620,000 These withdrawals from the Citibank accounts and the SCB account were made at approximately the same time H was making the withdrawals which were when deposited into his sister s account for the alleged loan. H accepted that at any one time he probably kept \$200,000 in cash at home. Two charts were produced by W during cross-examination based on the disclosed dates of his cash withdrawals and cash deposits into his sister s bank account, and it was put to H that in fact he must have had far more than \$200,000 and as much as, at one point, \$1M cash at home. W submits that I should not accept H s explanation of the expenditure, and should find that H retains physical cash of \$620,000 in his possession and that this should be added back to the pot. Below is a further version of the Chart adding H s oral evidence given in cross-examination, item by item, and remarks from W s Closing Submissions thereon: No Date Withdrawals Description/Amount (HK\$) Further evidence at Trial and W s submissions 9-Nov-20 Cash 20,000 From Citibank account H said that this was for the purchase of an Apple Computer. W submits that this cannot be correct, as the only evidence provided by H was a receipt for an Apple Computer dated 6 February 2021 for HK\$11,499. The same criticism i.e. lack of evidence, is made in respect of item 5. 4-Nov-20 Cheque 200,000 Citibank transfer to HSBC account H said that his mother had two knee operations in mid-2018 and March 2021. He accepted he had no proof but that he had provided the money to his mother and did not ask her how she used it, whether for these operations or on her needed eye surgery. W criticised the lack of any proof of closure of the HSBC account, lack of estimated costs of or receipts for the surgery and in any event the expenditure is unreasonable 31-Oct-20 Cash 6,000 Citibank H said that one of these \$6,000 cash withdrawals was given to his then girlfriend. W: no documentary proof. Bogus expenses. 27-Oct-20 Cash 6,000 Citibank 8-Oct-20 Cash 20,000 Citibank See comment on Item 1. 7-Oct-20 Cash 20,000 Citibank H provided receipts for some of the purchases which were from Taobao. Some cash was put into his Alipay account for this purpose. H exhibited photos of furniture purchased (not from Taobao). A new fridge was purchased from Fortress using his credit card. W: The Taobao receipts account for RMB8,000. No receipts are provided for the furniture. The fridge from Fortress is irrelevant as it was purchased using H s CC. 6-Oct-20 Cash 20,000 Citibank 1-Oct-20 Cash 6,000 Citibank s evidence was that he needed the cash for his daily expenses and, in respect of money given to his mother, it was unreasonable for him to expect her to provide receipts. W: No documents at all. Bogus expenses. 1-Oct-20 Cash 20,000 SCB 29-Sep-20 Cash 20,000 Citibank H: The garage repaired the car for around HK\$17,000 to HK\$18,000 but did not issue a receipt for payment. A friend conducted the repair. I had no

intention of selling the car so didn't ask for a receipt. W: It is not credible that a garage would not issue a receipt. H sold the vehicle in October 2020, a month after it was repaired. His evidence that he had no intention of selling it is not credible. 17-Sep-20 Cash 20,000 SCB W: No documentary proof provided. Bogus expenditure. 17-Sep-20 Cash 20,000 SCB 7-Sep-20 Cash 20,000 Citibank 7-Sep-20 Cash 6,000 Citibank 7-Sep-20 Cash 6,000 Citibank 7-Sep-20 Cash 5,000 Citibank 4-Sep-20 Cash 20,000 SCB W: No documentary proof 1-Sep-20 Cash 20,000 SCB W: No documents to support any of the claimed expenses on daily living or contribution to H's mother. Only 1 WhatsApp conversation between H and his sister on giving the sister's HK\$10,000 Cash payout which occurred long after these transactions (in October 2020). The alleged payment on 26 August 2020 from H and H's sister to H's mother is false. In any event, the total sum withdrawn of \$145,000 far exceeds H's claimed expenses including contribution to his mother as reported in his Form E and exceeds the living standard during the marriage. 31-Aug-20 Cash 20,000 SCB 26-Aug-20 Cash 20,000 SCB 26-Aug-20 Cash 20,000 Citibank 17-Aug-20 Cash 20,000 Citibank 14-Aug-20 Cash 20,000 Citibank 10-Aug-20 Cash 20,000 Citibank 29-Jul-20 Cash 5,000 Citibank 28-Jul-20 Cash 20,000 Citibank H: H said he laid off the helper hired in 2019 after W moved out. HK\$5,000 of this amount was 1 month's salary and this, together with bonus payment and flight ticket made up the HK\$20,000. W: The only document is the standard contract, which did not support the sum claimed. One month's salary is HK\$4,520. 21-Jul-20 Cash 20,000 Citibank H: H said he purchased 3 packets of Ganoderma for HK\$6,000 each from a friend of his girlfriend, so there is no proof. W: No documentary support. TOTAL HK\$620,000 H submitted that the first time the withdrawals were challenged was by way of W's 1st Questionnaire dated 2 November 2021, almost a year after the last withdrawal was made. It was submitted that the explanations and proof of expenditure were inevitably imperfect, but did not support a finding that the withdrawals were improper or that H is concealing assets. H's Reply Submissions referred to the judgment of Mostyn J in *NG v SG (Non-disclosure)* [2012] 1 FLR 1211 on the circumstances where the Court is entitled to draw adverse inferences from alleged non-disclosure, including that there must be a sound evidential basis for such a conclusion. See also *H v W & Ors* [2013] HKCFI 2296: HCMC 6/2008 (10 September 2013), at 47-48. W's challenge to the total withdrawals of HK\$620,000 is essentially on two grounds: either (1) the money has not been spent at all or (2) if it has been spent this is wanton and reckless spending which justifies a re-attribution or add-back to the matrimonial pot. My findings are as follows, again replicating the Chart for clarity: No Date Withdrawals Description/Amount (HK\$) Finding 9-Nov-20 Cash 20,000 From Citibank account I agree with W's submission that there is insufficient evidence of this expenditure. 4-Nov-20 Cheque 200,000 Citibank transfer to HSBC account I find that H has supported his mother financially relating to her health problems, and this is neither an unreasonable or unnecessary expense. However, what is concerning is the lack of any evidence either as to (1) the payment by H to his mother of this cash or (2) the costs of treatment. It is not unreasonable for the Court to expect such evidence. I accept H has made some payment to his mother for her medical expenses, and doing the best I can I find that this is \$100,000. I find that he retains the balance. 31-Oct-20 Cash 6,000 Citibank I accept that H has spent both these

amounts, including that he paid one of the \$6,000 withdrawals to his girlfriend. 27-Oct-20 Cash 6,000 Citibank 8-Oct-20 Cash 20,000 Citibank See comment on Item 1. I find that H still retains this \$20,000. 7-Oct-20 Cash 20,000 Citibank There is not sufficient evidence to support H's assertions. I find that he retains \$20,000. 6-Oct-20 Cash 20,000 Citibank 1-Oct-20 Cash 6,000 Citibank I accept that this has been spent. 1-Oct-20 Cash 20,000 SCB 29-Sep-20 Cash 20,000 Citibank Despite the lack of receipts, I accept that H expended this sum. I consider it likely that he was intending to sell the car and that this was one of the reasons to get it repaired. 17-Sep-20 Cash 20,000 SCB These sums amount to a total withdrawal of \$77,000 in 10 days. I accept that half of this was spent on food and other household expenses, and personal expenses. I find that H retains half of this sum i.e. \$38,500. 17-Sep-20 Cash 20,000 SCB 7-Sep-20 Cash 20,000 Citibank 7-Sep-20 Cash 6,000 Citibank 7-Sep-20 Cash 6,000 Citibank 7-Sep-20 Cash 5,000 Citibank 4-Sep-20 Cash 20,000 SCB I find that H retains half of this sum i.e. \$10,000. 1-Sep-20 Cash 20,000 SCB I accept that \$10,000 of this, being the Government payment, was paid by H to his mother. The balance of the withdrawals (HK\$135,000) considerably exceeds H's reported monthly expenditure and there is a lack of documentation to support such expenditure. I find that H retains \$80,000 of these withdrawals. 31-Aug-20 Cash 20,000 SCB 26-Aug-20 Cash 20,000 SCB 26-Aug-20 Cash 20,000 Citibank 17-Aug-20 Cash 20,000 Citibank 14-Aug-20 Cash 20,000 Citibank 10-Aug-20 Cash 20,000 Citibank 29-Jul-20 Cash 5,000 Citibank 28-Jul-20 Cash 20,000 Citibank I accept that H spent half of this sum having terminated the domestic helper's contract. \$10,000 remains. 21-Jul-20 Cash 20,000 Citibank I accept that \$18,000 of this was spent. \$2,000 remains. TOTAL HK\$620,000 Total amount not spent: HK\$280,500 which I will round down to HK\$280,000. I conclude that H still retains a significant amount of these cash withdrawals, most probably in the form of cash he is keeping in his apartment. I remind myself that such a conclusion is only to be arrived at where there is a sound evidential basis there are undisclosed assets and as to the quantum of them. I am satisfied that there is. I bear in mind particularly the following matters:

- (1) My concerns expressed above as to H's credibility as a witness, in particular his explanation as to the reasons for the withdrawal of \$4.49M, which I have found to be untrue.
- (2) H's habit of withdrawing significant sums of cash and keeping such sums at home. I find his explanation that at most he has had at any one time is \$200,000 is inaccurate and a significant under-estimation.
- (3) The lack of documents to support much of the claimed expenditure. For some items, such as daily expenses including groceries, travel etc, it is unlikely H would have obtained and retained receipts either at all or for more than a short while. However, in respect of significant expenditure on matters where proof is likely to exist, it is not unreasonable to expect the claimed item to be supported by such proof, particularly so when H must have known for a significant period of time that he would likely be questioned about his claimed expenditure and would be asked to supply documentary proof of it. No other explanations have been put forward by H which might account for where the cash has gone. I find that H

retains a significant amount of cash, and that this amounts to \$280,000. This sum will be re-attributed to his cash savings. To be perfectly clear, this conclusion is not based on a finding of wanton dissipation of cash assets, but rather a finding that, contrary to H's testimony, he still retains a significant amount of cash from his multiple withdrawals which he has not spent.

- (2) **Lost rental income** After the final separation, H rented the 2nd FMH out for a monthly rental of \$36,800 per month. The tenant terminated the tenancy early with effect from September 2021. W complains that H unreasonably failed to either (a) terminate his own tenancy and move back to the 2nd FMH, or (b) to take steps to re-rent the 2nd FMH after the first tenant had terminated the lease. She says that this needlessly ate into his savings. She asks that the loss of a year's rental i.e. $\$36,800 \times 12 = \$441,600$ should be added back to the pot. The rental agreement was for 2 years, from 14 September 2020 to 13 September 2022. H signed a lease on a smaller flat in September 2021, and exercised the break clause on this lease as soon as he was entitled to do so, i.e. after 12 months and then moved back to the 2nd FMH. H's evidence was that he had made attempts with the assistance of a real estate agent, to find a new tenant, and that he did his best to do so, and that he even offered a discount in rental. In my view, although it is unfortunate that there was a time when the 2nd FMH remained empty and H was paying rental for another flat, this does not amount to reckless or wanton expenditure or gross and obvious misconduct of the kind which would justify an order for the lost rental to be re-attributed to his assets. For some of the time the rental of the 2nd FMH was providing additional income. I accept that there was nothing inappropriate in H renting out the flat and moving to smaller accommodation. To a significant extent the loss of rental for the period after the tenant terminated the lease and before H moved back into the 2nd FMH cannot be blamed on anything H did or failed to do. He could not have predicted that the tenant would terminate the lease early, and he could not have anticipated that he would be unable to find a replacement tenant. Even if I was to accept that he failed to make sufficient efforts, with the assistance of estate agents, to re-lease the 2nd FMH, for example by accepting a lower rent, this does not, in my view, amount to misconduct of the kind contemplated by the authorities as supporting the exercise of a discretion to add back a sum or sums to the matrimonial pot. To reiterate, the requirement is that the conduct is so gross and obvious that it is inequitable for the court to disregard it, and that there is clear evidence of dissipation in which there is a wanton element (*LCC v LTLA* at 61). The failure to re-rent the 2nd FMH for the year between September 2021 and September 2022 does not match that description. **Conclusions on disputed assets** My conclusions on the disputed assets are therefore:
- (1) EBL the value of W's shareholding in this company is \$150,000.
 - (2) W has no genuine H-rm designer handbags or any other handbags of significant value.
 - (3) W no longer retains the Tiffany six-prong ring, which has long since been sold. W is not hiding the proceeds of sale.

- (4) None of W's claimed loans are soft. The principal of each loan is to be taken into account as a genuine liability. Any interest on the loans pursuant to the Loan Agreements or otherwise is to be disregarded.
- (5) H is retaining cash of \$280,000 in addition to his current disclosed cash assets.
- (6) No add-back will be made for an alleged loss due to H's failure to rent out the 2nd FMH for the period of a year when H was living in separate rental accommodation. Conclusion on overall asset position The asset position is therefore as follows
- (1) Joint assets 2nd FMH and carpark: \$15,000,000 + \$1,500,000 = \$16,500,000, less \$4,287,687.94 = \$12,212,312.06
- (2) W's assets: Item Sub-total Cash in bank 139,047.36 139,047.36 Shareholdings SLC EBL 123,698.00 150,000.00 273,698.00 Insurance policies Manulife (life insurance) Manulife (Fund) Manulife (Fund) Manulife (Son's Life Insurance) FWD Prudential (Life Insurance) 1,249.00 299,667.00 35,202.00 29,340.00 865,744.00 253,523.00 1,484,725 Pensions Manulife x 3 404,959.93 Less Liabilities Loans Credit cards Legal fees (830,000.00) (4,862.93) (300,000.00) (1,134,862.93) Total: HK\$1,167,567.36
- (3) H's assets Item Sub-total Cash savings In bank In cash 4,857,998.51 280,000.00 5,137,998.51 Stock Holdings Friends Providence International 27,772.09 27,772.09 Pensions AIA MPF 2x plans 668,090.03 668,090.03 Less Liabilities Credit Cards (6,086.20) Total: HK\$5,827,774.43 The total net assets are HK\$19,207,653.85. E1.1.2 Earnings/earning capacity The Wife W studied international business and IT at the University of Technology in Sydney. After graduation she remained in Australia for 1 years, working in a number of part-time jobs. She returned to Hong Kong in 2003, initially working for a textile company, then at Fossil, a watch company, then at a separate jewellery company, before joining SCL in 2006. 90% of the shares in SCL are held by her mother, with W and her brother holding 5% each. In her narrative affirmation she described the operation of the company thus:
59. This is a small jewellery trading family business which is controlled entirely by my mother. Despite owning 5% of the Company's shares and working as a director, my mother makes most of the decisions of the Company and I also never received any dividends or shared profits etc as a shareholder throughout my years working at [SCL]. My salary is my director remuneration and that is all I get from this Company. In her 1st Form E dated 31 March 2021, W disclosed a base salary of \$35,000 and that she was entitled to double pay i.e. 13 months, averaging \$2,916 per month, plus travel allowance of \$3,000 per month, making a total income of \$40,916 per month, or \$39,416 after MPF contribution. In her narrative affirmation, she explained that her present salary of \$25,000 per month without double pay or transport allowance was due to the negative impact on SCL's business of the Covid pandemic. She said that during the early part of 2020 she, along with other staff in SCL, was asked to take leave without pay and that her salary for the months of April, May and June 2020 was \$33,318, \$28,260 and \$25,524 respectively. For about half a year from late 2022 to mid-2023, her salary was reduced to \$20,000 per month, or \$19,000 per month after MPF

contribution. With her Answers to H's 2nd Questionnaire she produced a company resolution dated 20 October 2022 purporting to this effect. Eventually, in or about mid-2023 her salary was increased to its present amount of \$25,000 per month. W expressed a hope that her income would gradually increase to pre-covid levels (her narrative affirmation):

55. I am hopeful that my basic salary would eventually go up to its original level of \$35,000 per month basic salary and that the benefits of transportation subsidy and double pay could return.
56. But this would take time. I could not accurately predict how long it would take. My living expenses now far exceeds my income. I also believe that my salary would not have a lot of room to grow beyond the level stated in my 1st Form E (around \$40,000). My income had not risen at all since around 2014. I believe my pre-covid income was the maximum my family's company could afford to pay me given their scale of business.
57. I have worked in the same family business for over a decade since 2006. While I had other jobs prior to working in the family business, I do not think I am as competitive in the private market anymore and I also do not want to leave my family's company. The SCL's financial statements provided for the Trial confirm that turnover decreased during the Covid pandemic, during the various measures put in place locally and overseas in response to it. Turnover for the financial years ending 31 March 2018 and 31 March 2019 was \$22,727,569 and \$28,054,279 with gross profits for the respective two years of \$4,548,465 and \$5,007,697. For 2020/2021 it significantly reduced to approximately \$17M, and in 2021/2022 again there was a reduction to approximately \$15.46M, with the company making a loss for that year. The directors remuneration disclosed by SCL's financial statements for these years was Year ended 31/3/2018 806,000 31/3/2019 806,000 31/3/2021 708,203 31/3/2022 744,000 H's case is that W's income has been greater than the \$25,000 salary she claims to have been earning in the last few years. In the witness box, she said she was paid more than her brother but was not able to say how much more. W's statement in her Form E that she was being paid \$35,000 per month by SCL on a 13-month basis, which is \$455,000 per year, is consistent with her statement at Trial that she earned more than her brother, the other director. I am unconvinced by the company resolution and prefer to rely upon the audited financial statements of the company as indicating the true picture of W's earning capacity. I accept H's submission that W's earning capacity is no less than as stated in her 1st Form E, i.e. \$40,916 per month before MPF contribution, and I further find that, with the potential that SCL could return to a healthier turnover akin to its pre-Covid position, her earnings have the potential to increase in the future. The Husband In his narrative affirmation, H expressed uncertainties about his current job as systems analyst with a Hong Kong bank. He said that the bank had closed one of its Mainland branches and had decided to relocate its headquarters to Singapore, and that as a result he might be laid off. He further expressed doubts about his competitiveness in the job market in the event he was terminated. He pointed to his health problems, specifically a lower back condition with symptoms of sciatica causing difficulty in sitting for lengthy periods (he produced a medical report of an

MRI scan). In the witness box H provided an update that various signs indicated the possibility he might be one of the employees let go by the bank in the months after the Trial. According to his bank statements, in the year or so prior to the Trial, H's salary varied from month to month between \$91,000 to \$96,000 per month, with an average for the period August 2022 to July 2023 of \$92,829 per month. This range is a significant increase since his first Form E dated 24 January 2021 which disclosed a salary of \$67,916 per month. H has Master's level qualifications, and more than a decade of relevant experience. I do not accept his submission that he will have difficulty finding alternative work if he is let go by his current employer. On behalf of W, it was submitted the Court should find that H's earning capacity is no less than \$93,686 per month. I find that H has an earning capacity of at least \$92,800 per month i.e. the average referred to in the previous paragraph, and that it is reasonable to expect that this could increase in the coming years. E2. Step 2 Ascertaining Needs The Wife W claims that her monthly expenses are as follows: General Amount (HK\$) Rent 17,600 Utilities 1,500 Food 6,000 Household expenses Helper \$6,000 (hiring) \$833 (agency fees) 6,833 Total \$32,433 Personal Amount (HK\$) Meals out of home 1,500 Transport 2,000 Clothing/Shoes 1,000 Personal grooming (including haircut and cosmetics) 1,000 Entertainment/present Holiday Medical/Dental Insurance premia 5,900 1,250 Total \$14,150 W explained that the Child had been diagnosed with ADHD in 2021 and had been receiving therapy and consulting with government doctors since then. She attached reports. She hired two private tutors for a time, but due to her salary decrease did not continue with this. Nonetheless she expressed a keenness to provide whatever support was needed given the signs of ADHD the son has been exhibiting. H challenged the following items of W's claimed expenses, for the reasons stated:

- (1) Transport. W's evidence is that she takes the MTR from her residence in Sai Ying Pun to her workplace in Tsim Sha Tsui. She mainly takes public transport and would make occasional return trips to Shenzhen. H's case is that \$1,000, representing over \$30 a day, would be reasonably sufficient.
- (2) Insurance premia. The policies for which there are documents showing that the wife is still paying premium includes [policies and contributions stated]. These come to a monthly average of HK\$3,857.50. W's evidence is that she is also contributing to Manulife, but she could not point to any documentary proof showing the payment of premium. H's case is that the expenses for insurance premia should be at \$3,857.50 per month. I consider that W's estimate of transport at \$2,000 per month is reasonable and not excessive. I will allow \$5,000 per month for insurance premia. The following general and personal expenses for W are accepted: General Amount (HK\$) Rent 17,600 Utilities 1,500 Food 6,000 Household expenses Helper \$6,000 (hiring) \$833 (agency fees) 6,833 Total \$32,433 Personal Amount (HK\$) Meals out of home 1,500 Transport 2,000 Clothing/Shoes 1,000 Personal grooming (including haircut and cosmetics) 1,000 Entertainment/present Holiday Medical/Dental Insurance premia 5,000 MPF* Total \$12,000 *I do not regard MPF as an expense Child-related expenses. I accept that half of the General expenses as assessed i.e. \$16,216 should be attributed as child-related expenses. In the course of her evidence, W accepted that some of the claimed

child-related items were inaccurate, namely

- (a) She accepted that \$1,000 for transport to and from school was sufficient.
- (b) Her estimate of \$2,000 for extra-curricular activities was too conservative, and at Trial she modified this to \$3,560, which includes to include weekly swimming classes at \$290 to \$440 per class, poetry and speech class \$350 per week and phonics class \$250 per week. I assess the reasonable expenses of the Child as follows: School fees 9,500 Extra Tuition fees 4,489 School books and stationery Transportation to school (including maid bring him to school) 1,000 Medical/Dental Extra Curricular Activities 3,000 Entertainment/presents 1,000 Holidays 1,000 Clothing/Shoes 1,000 Insurance premia Nil (subsumed within W s policies) Lunches and Pocket money 1,000 Uniform Special need for therapy attention problem with over activity 2,000 Total \$25,639 Total child-related expenses incurred by W: \$16,216 + \$25,639 = \$41,855. W s own expenses are \$16,216 + \$12,000 = \$26,216. W s total expenses: \$68,071. The Husband H provided the following breakdown of his expenses (taken from Exhibit LCH-15 to his narrative affirmation, but modified to group into the traditional Form E division of General/Personal/Child-related): General Amount (HK\$) Mortgage payment 22,000 Management fee 4,128 Rates/Government rent/tax 1,833 Utility bills (including internet/phone) 3,000 Food (including meals out of home) 12,000 Household expenses 8,000 Maintenance/repair of household appliances/pipes/windows 2,000 Helper 6,000 Helper fees Agency fee 11,500 Insurance 1,250 Air ticket 3,000 1,312.50 Car (breakdown provided) 4,779 Total 65,052.50 Personal Amount (HK\$) Meals out of home Transport 1,200 Clothing/Shoes 2,000 Personal grooming (including haircut and cosmetics) Entertainment/present 2,000 Holiday 2,000 Medical/Dental 3,500 Insurance premia 1,077 13,166.66 Personal phone plan Cloud Storage Service Interim maintenance for Child 8,000 Expenses for younger child 23,633.33 Total \$58,043 In addition, H said that he spent approximately \$4,000 per month on specific expenses relating to the Child, \$1,000 for meals and \$3,000 for entertainment/presents. W, in Closing, had the following criticisms of H s expenses list:
- (1) Given that the 2nd FMH will be sold (as part of the Court s Order on the parties claims) the mortgage, management and other expenses will no longer be applicable.
 - (2) Other items, for utilities, food, household expenses and for personal expenses should broadly equate with those claimed by W.
 - (3) Given that the 2nd FMH will be sold, it is unreasonable for H to retain a car.
 - (4) Where there is no documentary proof of the claimed expenses, they should not be allowed.
 - (5) Given that H s younger son is living with him, some of the general expenses will be attributable to this younger son, and the mother of the younger son should be contributing to his upkeep. Taking these matters into account, W suggested H s expenses should be around \$51,676. I assess that H s reasonable expenses going forward, including after the sale of the 2nd FMH, to be as follows: General Amount (HK\$) Accommodation needs 20,000 Utility bills (including internet/phone/Cloud) 3,000 Food (including meals out of home) 8,000

Household expenses 2,000 Helper 6,833 Car 4,000 Total 43,833 Personal Amount (HK\$) Meals out of home Transport Clothing/Shoes 1,000 Personal grooming (including haircut and cosmetics) Entertainment/present 1,000 Holiday 1,000 Medical/Dental 3,500 Insurance premia 1,077 13,166 Expenses for younger child 5,800 Total \$30,843 s reasonable monthly expenses going forward I assess as \$43,833 + \$30,843 = \$74,676. H estimates that he spends an additional \$4,000 per month on the Child. I consider this to be reasonable. H s breakdown of expenses relating to the younger son included legal costs which he apparently incurred in relation to proceedings for custody/care and control. There was no proof of this and in any event I do not regard it as a relevant expense for the purposes of assessment of his reasonable future needs. My assessment of the reasonable expenses relating to this younger son is: Younger son Amount claimed Amount assessed Nursery class 3,000 3,000 Milk powder and diapers 3,000 Nil (included in general food and household expenses) Clothing/shoes 2,000 Entertainment/presents 2,000 Uniform Swimming class Medical bills 3,000 Insurance premia 1,000 Total 5,800 E3. Step 3 Deciding to apply the sharing principle A notional 50/50 split of the assets would provide each of the parties with net assets of approximately \$9,500,000. I accept that this is a needs case, but for completeness, given the submissions of both parties on the remaining LKW v DD steps, I will address each of these below. E4. Step 4 Are there good reasons to depart from equal division of assets? As noted, H submits that fairness demands an unequal division of the net assets 60/40 in his favour (a) to reflect the lengthy periods during which W by her own choice decided to live apart from him and (b) to reflect the unequal contribution to the 2nd FMH, specifically a breach by W of her promise to pay some of the mortgage instalments. During his oral opening at the beginning of the Trial, Mr. Leung proposed an alternative to the 60/40 split which was that W should repay 50% of the mortgage instalments on the 2nd FMH, which then amounted to \$1.76M. I have noted the difference between the parties estimates of how much time they lived apart between the 2012 marriage and the separation in 2018. I accept that there were several months in 2013 after the February 2013 argument during which they were not cohabiting possibly as much as H s estimate of 7 8 months. I also accept that there were other periods before the lengthy separation between July 2018 and April 2020 during which H and W spent time apart. Mr. Leung for H emphasised the importance of considering the circumstances de facto rather than de jure, citing Mostyn J s decision in GW v RW (Financial Provision: Departure from Equality) [2003] 2 FLR 108. In that case, in computing the length of the marriage, the Court disregarded an 18-month period of estrangement after which there was a reconciliation, including because during that time divorce proceedings had been commenced: at 34. GW v RW has been cited with approval by the Court of Appeal: EJB v CJB [2011] 5 HKLRD 508,

85. There, Hartmann JA regarded as significant the filing of divorce proceedings pleading an irretrievable breakdown of the marriage (at

87) and that in matters of ancillary relief the basis on which our courts recognise the existence of a de facto married state is the fact of continuous cohabitation comparable to married life. See 88, citing the CFA decision in *WLK v TMC* (2010) 13 HKCFAR 618. Mr. Leung also relies on Hartmann JA's judgment in *EJB v CJB* in support of his submission that attempts at reconciliation cannot be considered to detract from the fact of separation. I note, however, that the paragraph he cites, 92 of Hartmann JA's judgment, states (emphasis added): 92. But realistically, if the parties are no longer living together as man and wife, if the reason for their separation is the contemplation of the end of their marriage, attempts at reconciliation can only in the very rarest cases be equated to a continuation of the married state. In this case, although brief and unsuccessful, the reconciliation between April 2020 and June 2020 did involve W and H living together as a couple in the 2nd FMH. Mr. Leung's submissions on this issue focus on two elements. First, he is advancing a case on conduct, specifically W's alleged misconduct in leaving the matrimonial home for lengthy periods of time between the October 2012 marriage and the first separation. Second, he says that the Court should consider the overall length of the marriage, including these periods, and the (undisputed) period of separation between July 2018 and when W moved back to the 2nd FMH in April 2020. I am not convinced that there is any conduct by W which rises to the level of gross and obvious misconduct which it would be unfair to disregard. In many if not the majority of divorces, allegations are made by parties blaming the other for the breakdown in the relationship, and in the post-fault-based-divorce era the Courts have emphasised the fruitlessness, in ancillary relief trials, of becoming bogged down in debates on such matters: *LKW v DD* (2010) 13 HKCFAR 537 at 100 (Ribeiro PJ). I do not accept H's case that these periods of separation were entirely due to W's unreasonable choice to move out and that he is essentially the blameless victim of her misconduct. In my judgment it is more likely that there were faults on both sides. Whatever unhappy difficulties they had in the year or so after the marriage, they reconciled, and ultimately in 2016 decided to have a Child and to purchase a property. The question then is whether some or all of the period between when W moved out in July 2018 and when she moved back in April 2020 should not be considered for the purposes of computing the overall length of the marriage. W gave evidence that during this time:

- (a) She and H attended over 40 counselling sessions together. Exhibited documents show they attended counselling from December 2018 onwards.
- (b) They regularly had meals together, including after the counselling sessions.
- (c) They spent some weekends together, on family outings with the Child.
- (d) As far as their friends were concerned, they were still a married couple in a normal and loving relationship. It is also not disputed that H spent considerable time and money on renovations to the 2nd FMH and on looking for a kindergarten for the Child close by. Notwithstanding these matters, I consider that some of the period of separation at this time is not to count towards the duration of the marriage. Applying *EJB v CJB*, I consider that the period between July 2018 and October 2019, at which time the First Petition was withdrawn,

should not count as part of the duration of the marriage. This is a period of 16 months. This is therefore a marriage of approximately 5 years. Section 7(1)(d) of the MPPPO provides that duration of the marriage is a factor the Court must consider in the exercise of its statutory powers. In the case of shorter marriages, fairness may dictate that one party should exit the relationship with less than half of the total assets : LKW v DD at 108. This is particularly significant where those assets include property acquired before the marriage or during the marriage from an external source such as an inheritance: LKW v DD at

109. In this case, neither party suggests that the matrimonial pool includes assets of this nature. What H is suggesting is that the shortness of the marriage and the periods during which he and W were separated, coupled with his own unmatched payments for the mortgage on the 2nd FMH, justifies a departure from equal sharing. I disagree. In my view this is inconsistent with the principle that the Court is to reject any gender or role discrimination, and amounts to a submission that W's contribution to the family, including her care for the Child, should be discounted. As noted by Ribeiro PJ in LKW v DD:
111. The parties contributions are generally factored in as an intrinsic part of the sharing principle. The yardstick which favours equal division unless some good reason exists to the contrary implicitly gives equal recognition to the parties respective contributions, though different in kind. Although I have found that, for the purposes of calculating the length of the marriage, some of the period during which the parties were separated from mid-2018 to their reunion in April 2020 is not to be included, the efforts made during this time by both parties in attending multiple counselling sessions, in spending time together with the Child, are to be considered as contributions to the marriage, even though ultimately they did not result in a permanent reconciliation. I note, finally, that even where there is some basis to depart from equal sharing, the Court is not bound to make such an order: LKW v DD. The overall aim is fairness. I find that there is no justification for a departure from equal sharing of the matrimonial assets in this case. E5. Step 5 Deciding the outcome The 2nd FMH and carpark will be sold with the net proceeds after payment of the mortgage and sales costs to be divided equally. I have found that W has net assets of \$1,167,567 and H net assets of \$5,827,774. That is a total of \$6,995,341, half of which is \$3,297,670.50. In order to achieve equal division of the net assets there will be an order that H do pay W a lump sum of \$2,330,103 within 3 months from the date of this Judgment. I have considered the parties submissions on H's proposal to set aside a sum for the Child's future education. I do not regard this as a case where that is appropriate. The monthly expenses of the Child are between \$40,000 and \$42,000. H has a greater capacity to pay these expenses, given his higher current salary. I accept that his current monthly expenses eat up a significant amount of that salary. There will be an order that starting from 1st September 2024 H do pay to W periodical payments of maintenance for the benefit of the Child the sum of \$25,000 per month, by direct credit to W's nominated bank account. I conclude that H has the capacity to make regular payments of maintenance at this level, and I have taken into account the fact that H did not pay any maintenance for the Child for several years after separation, and then only at the rate of \$8,000 per month since January 2023. I have considered W's

submission that these payments should be further secured by an attachment of income order due to H's past misconduct in respect of the withdrawals from his bank account, but do not find that this is necessary. H has made all payments under the interim maintenance order. Therefore, the Order upon this Judgment, to be drawn up by W, will be as follows:

- (1) The 2nd FMH and carpark will be sold, with the assistance of a real estate agent or agents.
- (2) The net proceeds of sale of the 2nd FMH and carpark are to be divided equally between the Petitioner and the Respondent.
- (3) The Respondent do pay to the Petitioner a lump sum of HK\$2,330,103 within 3 months from the date of this Order.
- (4) Each party do retain all other assets in their own name.
- (5) Upon compliance with paragraphs (1), (2) and (3) of this Order, both parties' claims for ancillary relief be dismissed.
- (6) The Respondent do pay to the Petitioner periodical payments of maintenance for the Child of the family in the sum of HK\$25,000 per month until the Child's 18th birthday or the completion of his full-time education whichever is later, by direct credit to the Petitioner's nominated bank account. Such payments to commence on 1st September 2024.
- (7) A Section 18 declaration do issue. I remind the parties that pursuant to section 25(1) of the MPPO these Orders, including the order for sale of the 2nd FMH and carpark, will not have effect until the Decree Nisi is made absolute. F. Costs I have made criticisms of both parties' conduct in these proceedings. Arguments may be made that this conduct should be reflected in the award of costs. However, neither party has succeeded fully either in obtaining awards in line with their Opening Proposals or on the contentious issues including in respect of the disputed assets. As such, with one exception, there will be an order nisi to be made absolute within 28 days from this Judgment that there be no order as to costs including all costs reserved. If either party seeks a different costs order they must write to the Court within this period of 28 days, and proposing directions for the filing of (brief) written submissions and submissions in reply, and the matter will be dealt with on paper. The exception is in respect of the Section 17 application. This Summons was dismissed by Order dated 4 August 2023 (paragraph 5 thereof) with costs to be in the cause of the ancillary relief proceedings. It is clear to me that this Summons was brought about by (a) H's conduct in removing money from his bank accounts and depositing it into his sister's account in circumstances without good reason and (b) his failure to inform W in a timely fashion that the full amount had been returned to him. I see no reason why I should not direct that W's costs of this Summons should be paid by H and I so order. W says that H's conduct justifies an order that costs of the Summons be taxed on an indemnity basis. The governing principle is that an award of indemnity costs must be appropriate: *Choy Yee Chun v Bond Star Development Ltd* [1997] HKLRD 1327 (CA). Additionally, there must be some special or unusual feature, and the reasonableness of the conduct of the parties in the litigation may be considered: *Town*

Planning Board v Society for Protection of the Harbour Limited (2004) 7 HKCFAR 114, at 23.
My findings as to the removal of the moneys from his accounts and deposits into his sister's account have been set out above. The section 17 Summons was entirely reasonable. H could have prevented it by responding to W's query in a timely fashion and reassuring her that the money had been returned. In my view his conduct justifies an award to W of her costs of the Summons to be taxed on an indemnity basis. I record my gratitude to both teams of solicitors and counsel for their able and comprehensive presentation of their respective clients' cases.

(Peter Barnes) Deputy District Judge Mr. Ken Chan and Ms. Tiffany Tse instructed by Benjamin Au & Billy Chan, for the Petitioner Mr. Eric Leung instructed by King & Company for the Respondent -

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