

HONG KONG / JUDGMENT

YCKS v. MPKC**[2020] HKFC 172****COURT**

Family Court

DECIDED

10 November 2020

CASE / FILE NUMBER

FCMC5771/2018

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FCMC 5771 / 2018

**[2020] HKFC 172 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NUMBER 5771 OF 2018**

BETWEEN YCKS Petitioner and MPKC Respondent

Coram : Deputy District Judge J Chow in Chambers (Not Open to Public) Date of Hearing : 12
November 2019 – 15 November 2019 Date of Judgment : 10 November 2020

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

Introduction

This is an ancillary relief application between the petitioner (“the wife”) and the respondent (“the husband”).

Background

The wife and the husband were married on 12 July 2001. On 6 July 2015, the wife petitioned for divorce on ground of unreasonable behaviour (FCMC 8480 of 2015). On 14 May 2018, the wife filed a fresh petition on ground of 2-year separation with decree nisi granted on 29 April 2020. The wife and the husband have 4 children aged 18, 17, 14 and 12 (“the children or child C, child R, child L or child T respectively”), they are studying in international schools in Hong Kong. The family lived in a rented village house in the Lamma Island (“the matrimonial home”), all 4 children have been staying with the mother after the husband left the matrimonial home in or

about February – March 2015. On 28 February 2018, sole custody, care and control of the children were granted to the wife with the husband receiving reasonable access of child C and child R, defined access of child L and child T be granted to the husband in FCMC 8480 of 2015. The same custody order was granted in the present case subsequently. The wife has been a full-time housewife since 2000 earning no income, possessing no assets and being completely financially dependent on the husband. The wife otherwise has a degree in psychology and worked 19 years ago as a television commercials producer. She has no immediate family members in Hong Kong so she is the only person who can take care of the children. Sadly, the relationship turned sour when the wife discovered the husband's extra martial affair in or about 2012 which the wife found out through an e-mail. It came to the wife's knowledge that the husband spent HK\$5,000 for a five-star hotel room for a stay for a night with another woman. The wife said the husband would go out drinking in Lan Kwai Fong and meet other women as well. He was expected to be drunk when he returned home and was quick to anger. As a result of his shouting and domestic violence, the husband would sleep on the sofa instead of sharing a bedroom with the wife. He started to threaten her and the children that he would stop paying rent and school fees. He finally did. In or about October 2014, when the husband went to the United Kingdom to visit his sick father, the husband left the wife with around HK\$200 as spending money only. Having said that, the husband has been paying rent of the matrimonial home at HK\$12,000 to the landlord of the matrimonial home directly. The wife suffered domestic violence during marriage. The wife applied for an injunction in FCMC 8480 of 2015 against the husband resulted the husband was subject to his undertaking made on 6 July 2015 not to harass, molest or coming near to the wife. The husband is well educated and can speak fluent English, conversational Mandarin and Cantonese. He was raised and educated in the United Kingdom. He used to be a specialist in the Taiwanese and Asian capital markets after he had worked in Taiwan for about two years from 1992 to 1995. He retook and repassed the Securities and Futures Association exam with good results in May 2018. The husband worked in securities and investments for over 20 years with a lucrative salary but stopped working after being made redundant from his last job with his employer in 2012. After the redundancy, the husband applied to big firms but no offer of employment was forthcoming. With unknown reasons, he found his earning capacity was restrained to a large extent and opportunities were limited. The husband described one instance of an alleged Whatsapp conversation with a female employee of a Taiwanese firm but no employment was offered. He finally worked in the summer of 2019 when he allegedly drove passengers from San Tin to a shuttle service station into China earning HK\$40 per hour. The husband quitted after 6 weeks because he could not physically handle the work. The husband insisted the overriding concern was the children. It has been the husband's wish to relocate all children to the United Kingdom and he could set up a business there. The husband said family expenses in Hong Kong after redundancy were unsustainable. With high qualification and expertise, he maintained unemployed. The only tangible landed asset that the wife has managed to bring before the court is the matrimonial property on Lamma Island ("the Lamma Property") which has been valued by Dudley Surveyors Pty Ltd at HK\$10,100,000 in the report dated 11 October 2019. The house is currently made up of two stories but can be knocked down and rebuilt into a 3-storey house or split into 2 separate flats. It was made subject to a charge since 22

October 2018. The Lamma Property was in the vicinity of the matrimonial home and was rented at HK\$32,000 per month. The husband has been receiving rent from his tenant. Events leading to the ancillary relief trial On 20 May 2016, H.H. Judge Bruno Chan (as he then was) ordered in FCMC 8480 of 2015 that the husband do pay a sum of HK\$40,000 to the wife (HK\$4,800 for the wife and HK\$35,200 for the children) each month as maintenance pending suit ("the 1st MPS"). Up to the end of June 2017, the husband paid the 1st MPS together with the rent of the matrimonial home that the wife and the children were living in and the school fees of the children. Starting from 1 July 2017, the husband stopped paying school fees. The wife then started to borrow from every possible source to make ends meet. She has incurred debts over HK\$606,900.00. The husband's act drove the wife applied for an upwards variation of the 1st MPS. This issue was heard before me and briefly, premised on the husband's non-disclosure of his true financial status, on 27 April 2018, I ordered in my judgment the husband to pay to the wife an additional sum of \$52,000 (HK\$12,000 for rent and HK\$40,000 for school fees) each month on top of the HK\$40,000 the husband was ordered to pay each month on 20 May 2016 (i.e. a total of HK\$92,000 for MPS). I also ordered the husband to pay to the wife the sum of HK\$400,000 being school fees of the children backdated to 1 July 2017 ("the 2nd MPS order"). Since handing down of the variation of 1st MPS judgment, the husband completely stopped paying maintenance pending suit to the wife save and except paying a monthly sum of HK\$12,000 being rent of the matrimonial home directly to the landlord. The husband's default to pay school fees rendered 2 out of the 4 children have been suspended from school occasionally. On 20 August 2018, the wife took out a committal summons against the husband for his failure to pay the outstanding maintenance pending suit. The husband was committed to prison on 20 November 2018 for 4 weeks. On 21 February 2019, the husband filed a summons asking for a further variation of the 2nd MPS order and seeking: The total MPS award be reduced to HK\$20,000 per month and backdated to 27 April 2018; he backdated amount of HK\$400,000 payable to the wife be cancelled; and the previously paid expenses of HK\$100,000 paid to the ESF schools, to the landlord, and to the wife each month the past 7 years, be apportioned for reimbursement to him in any future financial settlement. On 23 April 2019, the wife filed a summons asking for an upwards variation the 2nd MPS order from HK\$92,000 to HK\$145,620 per month. The wife asks for the following in her application for ancillary relief: An upward variation of periodic payment to an aggregate sum of HK\$145,620 per month; transfer of the Lamma Property to the wife's sole name or in the alternative, an order for sale of the Lamma Property; a lump sum payment; and the making of a payment out of the proceeds of sale of the Lamma Property in settlement of the husband's unpaid interim maintenance and a further payment to the Court as secured periodical payments to take account of future maintenance payment for the children and the wife. In light of the litigation conduct of the parties and in consideration of the 2nd MPS order, I do not see the parties should go through another trial on variation on MPS again. In lieu of the circumstance, on 29th April 2019, I ordered both the wife's and the husband's said summonses be heard as the ancillary relief applications of both parties. The wife's open offer The wife said the husband has failed to disclose his assets; failed to pay MPS on a timely basis and has deliberately failed to find work for 5 years, despite being highly qualified. The wife lacks confidence that the husband would satisfy paying periodic payment to her and the children in the future, she therefore seeks a transfer or sale of

the Lamma Property which she can satisfy the needs of herself and the children. With an intention to have closure to the proceedings, the wife maintained the same stance in both open offer and her case. The husband's open offer & the husband's case The husband said he has cash flow problem since separation, he did not dissipate family assets but he has applied the resources to pay living expenses. He blamed the wife not accepting his proposal to relocate all children to the United Kingdom because they could have enjoyed free education. The husband suggested to share the Lamma Property with the wife on a 50% - 50% basis with 50% for the wife and 50% on trust for the children, he later offered at trial the Lamma Property shall be held on trust for the children. General principles for ancillary relief To start off with the landmark case of LKW v. DD (2010) 13 HKCFAR 582, the five principles of manner that section 7 of Matrimonial Proceedings and Property Ordinance, Cap 192 ("the MPPO") should be approached with 5 steps, namely, (i) identification of assets; (ii) assessing parties' financial needs; (iii) deciding to apply sharing principles; (iv) considering whether there are good reasons to depart from sharing principles; and lastly (v) deciding the outcome. The 5-stage tests are summarized below: Step 1: The Court will ascertain the financial resources of each of the parties calculated as at the date of the hearing. The court must have regard to the income, earning capacity, property or other financial resources which each of the parties has or is likely to have in the foreseeable future. The Court is to take a broad brush approach and not required to be precise. The parties are required to make full and frank disclosure and a party who fails to do so runs the risk of the court drawing adverse inferences and robustly attributing assets to him or her. Step 2: The Court will assess the parties' financial needs. The process of evaluating "needs" involves assessing the financial needs, obligations and responsibilities which each of the parties has or is likely to have in the foreseeable future in light of present and foreseeable resources. Step 3: The Court will decide that the sharing principle applies and take the view that the total assets should be divided equally between the parties unless there is good reason, capable of articulation, for departing from an equal division. Step 4: The Court to consider whether there are good reasons to depart from equal division. Factors that may result in the Court departing from equal division are set out in §§87-130 of the judgment. Step 5: The Court will decide the outcome. In light of the parties' needs, the Court shall rely on section 7 of the MPPO. "7. Matters to which court is to have regard in deciding what orders to make under sections 4, 5 and 6

- (1) It shall be the duty of the court in deciding whether to exercise its powers under section 4, 6 or 6A in relation to a party to the marriage and, if so, in what manner, to have regard to the conduct of the parties and all the circumstances of the case including the following matters, that is to say—
 - (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (c) the standard of living enjoyed by the family before the breakdown of the marriage;

- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
- (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.” An order for property transfer order or a sale of property is governed by sections 6 and 6A of the MPPO: “6. (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation, or at any time thereafter (whether in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may, subject to the provisions of sections 10 and 25(1), make any one or more of the following orders, that is to say- an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion; an order for the sale of such property as may be specified in the order, being property in which or in the proceeds of sale of which either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion, and for use of proceeds of such sale... Step 1: identification of assets Principles on material non-disclosure In the landmark English Court of Appeal case, *Baker v. Baker* [1995] 2 FLR 829, her Ladyship Butler-Sloss stated the duty of full and frank disclosure is applicable to both parties. The problem of non-disclosure arose in cases where one party has deliberately failed or refused to provide the material facts and concealed from the other party and the court his true financial position. Her ladyship summarized the *J v. J* [1995] P215 line of cases that the Court can and should draw adverse inference against the party whom is guilty of deliberate failure to give the court an accurate and complete picture of his true financial resources. The Court of Appeal in Hong Kong gave a stern warning of the consequence of non-disclosure in *L v. C* [2007] HKFLR 334, Stock JA at paragraphs 67: “68. This is a poor state of affairs. That this kind of conduct in matrimonial ancillary proceedings is not unique is well understood but what seems not well to be understood is the actual consequence of such conduct, namely, the drawing of adverse inferences, and a further potential consequence of such conduct: there can be little doubt but that in cases of this kind questions of perjury may arise and although each case will no doubt be approached with suitable sensitivity, the option of referring papers to the appropriate authority is an option that judges will bear in mind and which legal advisers would do well to draw to the attention of their clients.

69. The effect of the authorities has been summarised thus: “The importance of the duty of both husband and wife to make disclosure of their assets which is full, frank and clear cannot be over emphasised. Unless a court is provided with correct, complete and up-to-date information on the matters to which ... it is required to have regard, it cannot lawfully or

properly exercise its discretion in the manner ordained by [the statute]. The duty of each party is absolute, and it must be discharged regardless of whether the application for ancillary relief is adjudicated upon by the court after full evidence has been heard, or settled after an exchange of financial information between the parties leading to a consent order. The duty is also a continuing one; a party must not mislead the other party and the court into assuming that his financial situation is unchanged if it [in] fact has changed. ... A party who seeks to negotiate and secure a settlement without informing the other party about a material change in his or her financial circumstances runs the risk that, if a settlement is reached and a consent order is made, the consent order will be set aside by the failure to provide full, frank and timely disclosure. Shortcomings in disclosure will be visited by orders for costs against the offending party, often on the indemnity basis. Furthermore, deviation from the standard of disclosure required may be visited by the court drawing adverse inferences against the party in default.” Rayden and Jackson on Divorce and Family Matters, 18th ed., para 17.28” In a more recent case NG v. SG [2011] EWHC 3270 (Fam), [2011] All ER (d) 180 (Dec), Mostyn J gave a useful summary on the consequence of non-disclosure by either party. When relying on available evidence to draw appropriate inference and to embark on guesswork, her Ladyship concluded the following steps to avoid unjust results: “[16] Pulling the threads together it seems to me that where the court is satisfied that the disclosure given by one party has been materially deficient then: The court is duty bound to consider by the process of drawing adverse inference whether funds have been hidden. But such inferences must properly drawn and reasonable. It would be wrong to draw inferences that a party has assets which, on an assessment of the evidence, the court is satisfied he has not got. If the court concludes that funds have been hidden then it should attempt a realistic and reasonable quantification of those funds, even in broadest terms. In making its judgment as to quantification, the court will first look to direct evidence such as documentation and observations made by the other party. The court will then look to the scale of business activities and lifestyle. Vague evidence of reputation or the opinions or beliefs of third parties is inadmissible in the exercise. The Al-Khatib v Masry technique of concluding that the non-discloser must have assets of a least twice what the claimant is seeking should not be used as a sole metric of quantification. The court must be astute to ensure that a non-discloser should not be able to procure a result from his non-disclosure better than that which would be ordered if the truth were told. If the result is an order that is unfair to the non-discloser it is better that than the court should be drawn into making an order that is unfair to the claimant.” HH Judge I Wong updated the law on non-disclosure in his recent case TCP v. KLS [2020] HKFC 67 in paragraph 51: “51. There has been some development recently, in particular in respect of the principles set out in para [16] (iii) and (vii) of NG v SG (Non-Disclosure), in the English Court of Appeal case of Moher v Moher [2019] EWCA Civ 1482; [2020] 2 WLR 89; [2020] 1 FLR. 225; [2019] 3 FCR. 244. The court held that in the event of non-disclosure of a party's financial resources in a financial remedies case, the court was not obliged to give a precise figure or bracket for the undisclosed resources before making an order. Instead, it should: (i) seek to determine the extent of the undisclosed resources; (ii) draw such adverse inferences as were justified; and (iii) where

appropriate, infer that resources were sufficient that the proposed award represented a fair outcome. Moylan LJ said,

86. My broad conclusions as to the approach the court should take when dealing with non-disclosure are as follows. They are broad because, as I have sought to emphasise, non-disclosure can take a variety of forms and arise in a variety of circumstances from the very general to the very specific. My remarks are focused on the former, namely a broad failure to comply with the disclosure obligations in respect of a party's financial resources, rather than the latter.
87. (i) It is clearly appropriate that generally, as required by section 25, the court should seek to determine the extent of the financial resources of the non-disclosing party.
88. (ii) When undertaking this task the court will, obviously, be entitled to draw such adverse inferences as are justified having regard to the nature and extent of the party's failure to engage properly with the proceedings. However, this does not require the court to engage in a disproportionate enquiry. Nor, as Lord Sumption JSC said, should the court "engage in pure speculation". As Otton LJ said in *Baker v Baker* [1995] 2 FLR 829, inferences must be "properly drawn and reasonable". This was reiterated by Baroness Hale of Richmond JSC in *Prest v Prest* [2013] 2 AC 415, para 85: "the court is entitled to draw such inferences as can properly be drawn from all the available material, including what has been disclosed, judicial experience of what is likely to be being concealed and the inherent probabilities, in deciding what the facts are."
89. (iii) This does not mean, contrary to Mr Molyneux's submission, that the court is required to make a specific determination either as to a figure or a bracket. There will be cases where this exercise will not be possible because the manner in which a party has failed to comply with their disclosure obligations means that the court is "unable to quantify the extent of his undisclosed resources", to repeat what Wilson LJ said in *Behzadi v Behzadi* [2009] 2 FLR 649.
90. (iv) How does this fit within the application of the principles of need and sharing? The answer, in my view, is that, when faced with uncertainty consequent on one party's non-disclosure and when considering what Baroness Hale and Lord Sumption JSC called "the inherent probabilities" the court is entitled, in appropriate cases, to infer that the resources are sufficient or are such that the proposed award does represent a fair outcome. This is, effectively, what Munby J did in both *Al-Khatib v Masry* [2002] 1 FLR 1053 and *Ben Hashem v Al Shayif* [2009] 1 FLR 115 and, in my view, it is a legitimate approach. In that respect I would not endorse what Mostyn J said in *NG v SG* [2012] 1 FLR 1211, para 16(vii).
91. This approach is both necessary and justified to limit the scope for, what Butler-Sloss LJ accepted could otherwise be, a "cheat's charter". As Thorpe J said in *F v F* [1994] 1 FLR 359, although not the court's intention, better an order which may be unfair to the non-disclosing party than an order which is unfair to the other party. This does not mean, as Mostyn J said in *NG v SG*, at para 7, that the court should jump to conclusions as to the extent of the undisclosed wealth simply because of some non-disclosure. It reflects, as he said at para

16(viii), that the court must be astute to ensure that the non-discloser does not obtain a better outcome than that which would have been ordered if they had complied with their disclosure obligations.” The husband’s hidden asset The wife claimed the husband is guilty of non - disclosure of his true financial position, she invited me to draw adverse inference against the husband on his true financial position. The only visible matrimonial asset is the Lamma Property. The wife submitted, in the husband’s Form E filed on 12 January 2016 prepared by his legal representative disclosed the net value of the matrimonial assets was HK\$10,982,638.65. That explained why HH Judge Bruno Chan (as he then was) has ordered the husband to pay HK\$40,000 to both the wife and the children. Subsequently on 24 April 2019, the husband filed an updated Form E prepared by himself. In this Form E, he claimed to only have a net value of HK\$3,266,355.00, the sum has significantly reduced from HK\$10,982,638.65 worth of net assets disclosed in his Form E filed previously. In other words, the husband has dissipated or hidden family assets as much as HK\$7,716,283.65 (HK\$10,982,638.65 - HK\$3,266,355). The husband disagreed. He produced a consolidated statement of Standard Chartered Bank dated 16 July 2014 to show that he had not dissipated the HK\$4 million. He also attempted to explain a missing sum of HK\$1.2 million. He showed a cash balance of HK\$3,061,089.38 in just one bank account and compares unfavourably with the husband’s 1st Form E filed herein on 12 January 2016 which only showed a total bank balance of HK\$1,684,118.11. I am not satisfied that the husband has sufficiently explained the whereabouts of the matrimonial assets after filing his 1st Form E. This topic was canvassed during his cross examination which he had been evasive in answering. He gave no firm answers on how much savings he has had. He said in evidence, he had sustained himself from savings since 2012 and at that time, he had HK\$12 million savings, shortly after in 2012, his savings dropped to HK\$10 million. He answered what he had in 2015, at first he said “almost nothing” and then claiming he had HK\$9 million plus contingent liabilities. Subsequently, he then revised the 2012 savings to around Hk\$11 million, and stated that he had HK\$9 million in savings in 2015 and HK\$10 million in 2014. Secondly, the husband’s 1st Form E was found previously to be materially deficient in the variation of MPS judgment. Despite claiming that the husband has no landed property apart from the Lamma Property, he gave evidence that he is building a house in San Tin for him or his step-mother to live in. The husband has still failed to disclose his United Kingdom assets and claimed that those assets were pre-marital. Despite claiming that the family had cash-flow and affordability problems as far back as 2012, the Consolidated Statement of Standard Chartered Bank dated 16 July 2014 produced by the husband showed a cash balance of HK\$3,061,089.38. The husband was given opportunity to further disclose his financial position for this trial. The only documents the husband produced during this trial were two hand drawn graphs illustrating the family’s cash flow and expenses. He continued to have failed to explain how he has dissipated the family assets and where those assets have gone. In the variation of MPS judgment handed down on 27 April 2018 which the following paragraphs 52 – 58 are relevant here: “52. The father updated the information in his Form E whilst giving evidence. He said, his current expenses had largely reduced to HK\$25,000 per month when he was currently living in his brother’s home. He has to live on personal loans.

His savings in banks plunged; stocks and securities sold. Only HK\$70,000 was left with the “Interactive Brokers Group”. He has no other income apart from HK\$32,000 rental income from the Lamma property.

53. Nevertheless, the documentary evidence revealed the father is the principal or sole beneficiary of premium insurance plans and mandatory provident fund with Fidelity and AIA. He has been paying premiums and was able to maintain them. The father explained the redemption value of the policy or fund would be minimal and disproportionate to benefits. He preferred to maintain them.
54. I am in line with the mother. Letting alone the insurance plans or mandatory provident fund (I agree with the father it might not be wise to redeem them at this stage), the father is capable to pay maintenance pending suit to both the mother and the 4 children. The timeline of premium payments is telling in that they overlap with the father’s default to repeatedly reduce the maintenance of the mother and the children. I see there is also a statement of the father’s pension scheme with Legal & General, the father agreed there is still some £6,000 in there. Without regard whether those schemes are capable or worth to be realised at this moment, the father has assets.
55. The mother further argued, father failed to disclose his financial means. The father’s financial disclosure in his Form E filed on 12 January 2016 was materially deficient. The father had failed to disclose bank statements in relation to numerous financial holdings or interests. The father, in his most recent financial disclosure, appears to have received HK\$260,280 in both HSBC and Standard Chartered Bank between 27 July 2017 and 21 January 2018 from an undisclosed source. The father explained the HK\$32,000 were rental payment from his property, he could not explain the other income source.
56. In the father’s Form E, he stated he would apply for bank statements from Citibank (United Kingdom), NatWest Bank (United Kingdom) and Lloyds Bank (United Kingdom), nevertheless, the father has never disclosed any of such after the filing of Form E. I take into account the father was being ousted from the matrimonial home and might be unable to have access to those statements. Yet, I see no reason he did not attempt to retrieve at least some of those directly from the banks by himself. In fact, the father admitted, his priority in this matrimonial proceedings is to reconnect with his four children, not to fulfil his duty to disclose documents for ancillary relief applications. Ancillary relief is also a vital part in matrimonial proceedings. The conduct of the father, as at this stage, has blatantly failed to disclose relevant materials as required in Form E.
57. The father is also being criticized of dissipating family assets. In the father’s bank statement of China Construction Bank (Asia) dated 31 March 2014, the father has HK\$4 million in there. The deposit was withdrawn and was left with some \$2.8 million in 30 April 2014. The father said he has been transferring monies between banks, so as to accrue higher interest rate for fixed deposit. The father further claimed there were double accounting of sums. I was not required to embark on detailed financial investigation of the financial position of

the father, but at least, there is no evidence to verify the flow of monies.

58. The father even admitted, he had failed to settle the maintenance pending suit (or any outstanding amount due) when he has given two cheques of tax refund around HK\$90,000 by the mother by the end 2017. The father deposited the cheques into his Standard Chartered Bank account and such sums have been reflected in both the statements in October and November 2017. At that time, he has stopped paying 4 children's school fees for some 3 months. The father preferred to settle his bills to paying school fess for his children." To take a closer look of the husband's Form E filed on 24 April 2019, he valued the Lamma Property at HK\$4 million. He maintained he is unemployed, he has been suffering from stress related disorders, high blood pressure, high cholesterol and failing eyesight. He resided temporarily with his nephew in Yuen Long. His private company MXXXXX SXX was no longer in operation with a loss of HK\$50,000. He had no business elsewhere. The value of his stocks and securities with HSBC was HK\$554,000. The value of his insurance policies with HSBC Life and Prudential was nil. The husband stated his tenant of the Lamma Property did not pay rent and the outstanding amount was HK\$320,000. He was expected to receive a loan from "ancestral estate" in sum of HK\$900,000. The MPF value with Fidelity and AIA was (HK\$63,575 + HK\$563,780) HK\$627,355. For reason of his unemployment, the husband has a total liability of HK\$2.91 million. The net value of his asset, including the matrimonial property, was HK\$3,266,355 only. Having said that, with financial difficulties mentioned, he quantified his monthly expenses as high as HK\$133,500 (with HK\$92,000 interim maintenance included but kept outstanding). In other words, the husband's monthly expenses for himself alone, at time when he was unemployed, was (HK\$133,500 – HK\$92,000) HK\$41,500 which is on the high side and was unpersuasive. I reject the husband's evidence on establishing his true financial position. I have no hesitation to draw adverse inference against the husband that he has failed to disclose his true financial position. The lifestyle of the family was not in dispute where the wife being a housewife to take care of 4 school age children with the assistance of a domestic helper. All the children study in international schools in Hong Kong and were supported by the husband (their father) financially. In absence of evidence to assess the real financial position of the husband, I rely on what the husband has stated in his 1st Form E (filed on 12 January 2016), to assess the size of the matrimonial asset. The husband stated the aggregate asset was HK\$10,982,638.65, he valued the Lamma Property at HK\$4 million. In other words, the net value of disposable value less the Lamma Property is (HK\$10,982,638.65 – HK\$4 million) HK\$6,982,638.65. It is fair for me to accept the figure of HK\$6,982,638.65 as the funds that the husband has had at time of 12 January 2016. To attain a realistic and reasonable quantification of the assets and in broadest terms, total matrimonial assets should be those stated by the husband in his 1st Form E. The figure might be even higher if the husband has engaged himself in gainful employment instead of keeping himself idle throughout the years. The only thing I need to revise is the value of the Lamma Property from HK\$4 million to HK\$10,100,000 which makes the aggregate value of matrimonial asset HK\$17,305,768.35 (see below). I am satisfied the value is compatible to the lifestyle and standard of living of the

family. Lamma Property HK\$10,100,000 cash in bank HK\$1,684,118.11 stocks & shares HK\$2,782,904.32 debts owed HK\$2,373,200.00 pensions HK\$365,545.92 TOTAL: HK\$17,305,768.35 Step 2: assessing parties' financial needs: the wife, the husband and the children The needs of the wife and the children The wife filed her 1st Form E on 28 October 2015 (FCMC 8480 of 2015). She stated the husband has been paying her HK\$46,000 as household expenses prior to separation and HK\$20,000 with delays thereafter. The husband paid for the children's school fees and the rent direct. She has no savings. The wife's monthly financial needs are set out in the following table: General Item Amount (HK\$) Rent 12,000 Utilities (electricity, gas, rates, telephone & water) 2,500 Food 10,500 Household expenses 1,500 Domestic helper 5,000 (A) Total monthly household expenses 31,500 Personal Item Amount (HK\$) Meals out of home 1,000 Transport 1,500 Clothing / shoes 1,500 Entertainment / presents 1,000 Holiday 1,000 Medical / Dental 1,000 (B) Total monthly personal expenses 7,000 Children Item Amount (HK\$) School fees 54,900 Extra tuition fees 6,000 School books and stationery 1,000 Transport to school (including school bus) 4,000 Medical / Dental 1,500 Extra-Curricular Activities 9,800 Entertainment / presents 4,800 Holidays 5,000 Clothing / shoes 3,500 Insurance premia 3,720 Lunches and pocket money 4,000 Other transport 4,000 Uniform 1,000 Meals out of home, school trips, school photos, etc. 1,500 Therapy 2,400 (C) Total monthly children expenses 107,120 Total monthly expenses (A) + (B) + (C) 145,620 Due to the failure of the husband to pay MPS, the wife has had to finance her expenses through borrowing and the loans, she incurred HK\$606,900 as at 17 April 2019. On the other hand, the outstanding MPS due and owing by the husband amounted to HK\$2.68 million. The immediate needs for the children being school fees. All 4 children developed behavioural and psychological problems. The wife testified, child T has anger management issues: he gets angry and threatens violence on his siblings often stating that "I'm going to get a knife." The wife was required to be hands on to manage them all. Child L has emotional issues and has been crying a lot. Child R suffers from panic attacks and anxiety which began when he was suspended from school for a few months. He was upset when he could not go to school. The wife noted that he exhibits physical symptoms of depression. The school had expressed concerns over his dark thoughts. Child C suffers from panic attacks which started when he was suspended from school just before his GCSE exams. The wife said child C wants to further his studies in product design in the University of Arts, London or Loughborough University beginning in September 2020. The total cost over 4 years in the UK is roughly HK\$1.2 million. Whereas child R intends to move to studying business in a US university where there are good running teams beginning in September 2021. The total cost over 4 years in the US is roughly HK\$2.1 million. The wife was driven into debts when the husband did not pay maintenance (apart from rent), the wife has had to borrow to make ends meet for her and the children including borrowing from family and friends. Since April 2019, she borrowed HK\$20,000 from her uncle, HK\$20,000 from her brother, HK\$70,000-HK\$80,000 from her friends and obtained a visa loan of \$50,000. The wife shopped in markets and cheaper places for food and clothes for her and the children. She reduced to going to wet markets late in the day for reduced food prices. The wife is not avoiding work. She has to be hands on to look after the children. However,

she hopes that she can return to work in 5 years' time. In the meantime, looking after the children's all-round needs in the current difficult circumstances is a massive responsibility. The wife found in the matrimonial home the husband has kept up with the payments of insurance premiums for his Prudential Insurance Policy No. XXXXXXXX9098. The official receipt issued by the insurance company to the husband dated 23 October 2019 (Exhibit P1) showed that he paid a premium of HK\$82,332.29 recently. Incidentally, the school fees of the 3 older children which were due at the same time added up to HK\$83,000 was unpaid. Having considered the wife's evidence, I accept the needs of the wife and the children is HK\$145,620 per month when all of them are in town. I adopt an approach to quantify the wife's maintenance and also the children's maintenance for reason the husband may default again in paying maintenance. To be precise, the wife's monthly maintenance should be $(HK\$31,500/5 + HK\$7,000)$ HK\$13,300. The wife is expected to have some gainful employment perhaps after 6 years when child T, the youngest son was in the tertiary studies. The aggregate sum should be $(HK\$13,300 \times 12 \text{ months} \times 6 \text{ years})$ HK\$957,600. Monthly maintenance of each child should be $(HK\$31,500/5 + HK\$107,120/4)$ HK\$33,080. I also project child maintenance for a period of 10 years where child C, child R and child L have completed their full time tertiary education. The aggregate sum should be $(HK\$33,080 \times 4 \text{ children} \times 12 \text{ months} \times 10 \text{ years})$ HK\$15,878,400. The wife has liabilities of HK\$606,900 at time of trial. She would have incurred an additional sum by the time of handing down this judgment. I take into account the husband has been paying rent continuously, I opt for a sum of HK\$80,000 per month $(HK\$92,000 - HK\$12,000)$ and that the aggregate liability to be repaid at time of handing down this judgment should be for this $[HK\$606,900 + (HK\$80,000 \text{ per month} \times 12 \text{ months})] = HK\$1,566,900$. The children's needs will be elevated when child C and child R to proceed their tertiary education overseas. I accept HK\$3.3 million $(HK\$1.2 \text{ million} + HK\$2.1 \text{ million})$ an appropriate sum for education. In summary, the wife's needs can be quantified as follows: Wife's maintenance HK\$ 957,600 Children maintenance HK\$15,878,400 Wife's liability HK\$ 1,566,900 Education / school fees for child C and child R HK\$ 3,300,000 HK\$21,702,900 The needs of the husband The husband filed his 1st Form E on 12 January 2016, he was responsible for paying the school fees and rent. He owned the Lamma Property and was rented for HK\$32,000. The husband had HK\$1.6 million cash in bank, HK\$2.7 million stocks and bonds, HK\$2.373 million debts owed to him which has made up a total of HK\$10,982,638.65. Leaving the Lamma Property aside, he should have a disposable asset of HK\$6,982,638.55. The husband has already at this very first instance anticipated he might be unemployed. The husband's last employment ended on 30 June 2012 with an investment company earning HK\$130,625. At time of filing this Form E which was more than 5 years from ceasing the previous employment, he was a director of a private company SXX MXXXXX Limited, he disclosed it was making a loss with a value of HK\$50,000. The husband explained in his Answer to the wife's 1st questionnaire on the nature of SXX MXXXXX Limited, he said it was meant to be a vehicle to receive payments from an online business which the husband has involved during 2013 – 2014 which has been at a loss. He further said SXX MXXXXX Limited was also used as an investment vehicle for an agricultural start-up project cultivating vegetables hydroponically. The husband said he

could not secure new employment in the industry that he had been worked for the past 15 years because the industry continued to undergo dramatic regulatory and technological transformation resulting in aggressive loss of employees. The husband maintained the family has cash flow problem as early as 2012 which family expense were unsustainable. He claimed that his overriding concern was the children, he had wished to provide the best for them but affordability was an issue. As result of financial pressure, he suggested to relocate all children to the United Kingdom because of free education and lower living costs. He further asked the wife to consider whether to put some of the children to a local school which may lessen the financial pressure. The husband said that his earning capacity is considerably lower than before. The husband denied refusing to work for 7 years and earned no income. The husband not having produced any proof to evince an effort to find work, he was only able to describe one instance of an alleged Whatsapp conversation with a female of a Taiwanese firm but turned out without employment offer. At most that the husband claimed he has worked in the summer of 2019 when he allegedly drove passengers from San Tin to a shuttle service station into China earning HK\$40 an hour. The husband allegedly quitted after 6 weeks because he could not physically handle the work. He also allegedly helped a friend with an expansion of business. The husband stated his monthly expense in his updated Form E filed on as follows: General Item Amount (HK\$) Rent 10,000 Utilities (electricity, gas, rates, telephone & water) 2,000 Food 2,000 Household expenses 500 Insurance premia 9,000 (A) Total monthly household expenses 23,500 Personal Item Amount (HK\$) Meals out of home 500 Transport 4,000 Clothing / shoes 500 Personal grooming 100 Entertainment / presents 500 Medical / dental 1,000 Interim maintenance 92,000 Contribution to parents 10,000 (B) Total monthly personal expenses 108,600 Total monthly expenses (A) + (B) 132,100 The husband has given his total monthly expenses at HK\$132,100 in his latest Form E filed on 24 April 2019. The sum of HK\$132,100 includes a sum of HK\$92,000 being maintenance payments that he has not been making and, in any event, is not his financial need but that of the wife and the children. In addition, the sum of HK\$132,100 includes a sum of HK\$10,000 for contribution to parents which is a new item and was not included in the husband's 1st Form E. I therefore deduct the two sums from the gross figure where the monthly expenses of the husband should therefore be only (HK\$132,100 – HK\$92,000 – HK\$10,000) HK\$30,100 per month. The husband claimed that he has been suffering from hypertension, high blood pressure, high cholesterol and poor eyesight. He also claimed to be emotionally distraught because of a lack of proximity to the children. No medical evidence was produced. The husband said that he has been receiving rent from the tenant of the Lamma Property. He said that the tenant still owed him 10 months' rent but he was confident the tenant will be able to pay off all of the outstanding rent soon. The husband gave no account of why he did not enforce forfeit the tenancy and to reposess Lamma Property. Having considered the evidence, I reject the husband has no working capacity or unable to secure a permanent job since his unemployment in 2012. The husband may have some health problems but it does not deprive him to be in the labour market. With his qualifications and working experience, the husband should be able to find a job at least to make ends meet. It is the husband's wishful

thinking that the wife and all children will agree to relocate to the United Kingdom for good. The idea has been rejected by the wife at a very early instance. I am satisfied the husband's monthly expenses should be HK\$30,100 and he should have earning capacity to pay for such expenses. Step 3: deciding to apply the sharing principle The sharing principle comes to place when there are surplus to satisfy the needs of both parties and it is operated by equal division of family asset for long marriage unless there are good reasons to depart from it. I have quantified the value of the matrimonial asset at HK\$17,305,768.35, to be more precise, one immovable property, the Lamma Property and other assets HK\$6,982,638.65. The wife and the children are not well taken care of by the husband. The outstanding MPS has cumulated to HK\$2.68 million as at the time of trial. The needs of the wife and the children are quantified at HK\$145,620 per month and it is expected to increase when child C to study abroad. The aggregate needs of the wife and the children, quantified at HK\$21,702,900 and such needs shall be satisfied from the matrimonial asset. The husband, on the other hand, has working capacity to earn and pay for his monthly living expenses at HK\$31,500. Apparently, no surplus existed. Step 4: whether there are good reasons to depart from equality principle The formula on equal sharing is applicable in the present case when the wife and husband had a long marriage since 2001. I see there is no reason to depart from the general principle of equal sharing if surplus existed. Step 5: deciding on the overall outcome Clearly given the evidence of the husband's past non-payment of MPS, it is expected he will be very likely to default in paying maintenance to the wife and the children. Be it I have quantified the family asset, other than the Lamma Property, at HK\$6,982,638.65, I agree with the wife that it is very probable the husband will not satisfy periodic maintenance on a timely basis and the husband would not be deploying what he has to pay the wife and children. The aggregate sum of maintenance of both the wife and the children are calculated at HK\$21,702,900 being a value exceeded the value of Lamma Property. I am also with the wife that I shall order a transfer of the Lamma Property to her. The advantage of transferring the property into the sole name of the wife is that she is able to provide stability for herself and the children. It is also appropriate for her to make use of the Lamma Property to paid off the needs of herself and the children. I so order such transfer of the Lamma Property by the husband to the wife at nil consideration within one month of the decree absolute and the husband shall pay all costs of transfer, including taxes and legal costs. The outcome is a fair one when the husband has good earning capacity of whom can accumulate wealth until his retirement. Even if the husband was unable to resume work, his has funds to sustain himself. It is well reflected in the difference of the size of matrimonial asset and such sum being HK\$6,982,638.65 can be good enough to pay off HK\$30,100 monthly expenses for over 19 years ($\text{HK\$6,982,638.65} / \text{HK\$30,100} / 12 \text{ months}$). To avoid double counting, the outstanding MPS owed by the husband to the wife in sum of HK\$2.68 million shall be discharged.

Conclusion

I make the following orders: The husband's (the respondent's) summons filed on 21 February 2019 on variation of MPS be dismissed. A costs order nisi that the husband's (the respondent's) do pay cost of the said summons to the wife's (the petitioner's), to be taxed if not agreed. Subject to the first charge of the Director of Legal Aid, the husband (the respondent) do transfer the Lamma Property to the wife (the petitioner) with nil consideration within 30 days from the granting of decree absolute. The husband (the respondent) do pay all expenses of the transfer including legal costs and taxes. A costs order nisi that the husband (the respondent) do pay costs of the ancillary relief including the wife's (the petitioner's) summons for variation of maintenance pending suit filed on 23 April 2019 and all costs reserved to the wife (the petitioner), to be taxed if not agreed. The costs order nisi shall be made absolute in absence of application to vary by way of inter parte summons within 14 days from the date of this judgment. The outstanding maintenance pending suit in sum of HK\$2.68 million due and owing by the husband (the respondent) to the wife (the petitioner) be discharged. The wife's (the petitioner's) own costs be taxed in accordance with the Legal Aid Regulations. Declaration pursuant to section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192). (J. Chow) Deputy District Judge Mr John Pickavant of Messrs John M. Pickavant & Co, appeared for the petitioner The respondent appeared in person

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