

HONG KONG / JUDGMENT

YU v. HO

COURT

Family Court

DECIDED

10 November 2009

CASE / FILE NUMBER

FCMC12363/2002

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bjbj FCMC 12363/2002 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NO. 12363 OF 2002

BETWEEN YU Petitioner and HO Respondent

Coram: HH Judge C.K. Chan in Chambers (not open to the public) Dates of Hearing: 3-6
November 2008, 3 & 13 February, 2 April, 2 September 2009 Last Date of Written Submission: 15
October 2009 Date of Handing Down Judgment: 10 November 2009

J U D G M E N T

This is a trial on the petitioner wife (hereinafter called the wife s application for ancillary relief against the respondent husband (hereinafter called the husband). I think it would be helpful if I should set out the parties respective request for ancillary relief right at the beginning of this judgment. The Wife s Request for Ancillary Relief

3. The wife accepts the starting point for the division of the family assets is equal division. However, she asks the court to deviate from this starting point after taking into account of the following: The husband s reckless dissipation of the family assets by gambling and having entertainment on leisure cruises; While he spent hundreds of thousands of dollars within a few months, he failed to pay maintenance pending suit () to the wife under a MPS Order over the past 6 years; and
- (3) He failed to disclose all his income and assets.
4. The wife now asks for:
 - (1) An award of 65% of the total family assets in her favour;

- (2) A lump sum of \$625,000 (calculated up to September 2009) representing the arrears of MPS for the past 6 years; and A periodical payment of \$15,000 per month. The Husband s Request
5. On the other hand, the husband s open offer is simpler. He asked for all family assets to be liquidated and after the deduction of outstanding salary and severance payments to Ms. Ng (a staff of the family company) and other costs of sale, the net proceeds should be divided up between the parties in equal share.

Background

6. The parties married in 1974.
7. Within wedlock, 2 children were born and they are: A son (born in 1974) who has unfortunately passed away in 2008; and A daughter who is now aged 33 and residing with the wife.
8. On 24 October 2002, the wife issued a petition for divorce against the husband based on the ground of adultery and unreasonable behaviour to which the husband has filed an Answer. The parties later came to an agreement to proceed with the divorce on the ground of 1-year separation with consent. A decree nisi was granted on 16 September 2004.
9. In order to preserve the family assets, the wife successfully obtained a court order in freezing the assets of a family company called U-Fai XXX Ltd. (hereinafter called U-Fai).
10. In addition, the wife has also applied for and successfully obtained a maintenance pending suit order on 3 March 2003 (the MPS Order) at the rate of \$10,000 per month. However, the husband has only paid a total of \$30,000 for MPS so far. As the husband has defaulted in the MPS payment for the past 6 years, the wife has to come to court from time to time to ask for payment out from the frozen assets of U-Fai.
11. As the parties cannot agree on the wife s ancillary relief application, the case finally came before me for trial in November 2008. But due to the gross under estimation of the length of trial, the case had to go part heard and the evidence and submissions were only completed on 15 October 2009.

Issues

12. After hearing the case for 9 days, I am of the view that these are the issues of the case: What is the amount of the total family assets for distribution; Should the conduct of the parties be taken into account in the consideration of a final ancillary relief order; and What kind of ancillary relief order should be made after the due consideration of Section 7 of the Matrimonial Proceedings and Property Ordinance, Cap. 192 (MPPO) and the relevant case law. Total Family Assets Total Distributable Family Assets (Undisputed)
13. The parties agree that the following family assets are readily available for distribution:
Property Value

- (1) Fook Yip Property \$2,210,000 Charming Car park \$300,000 Kwun Shan Hui Property \$92,135 Ming Yuet Property \$668,181 (RMB 588,000)
- (5) Mercedes Benz \$15,000 Balance of proceeds of sale of a golf \$163,285 club membership (RMB 143,900)
- (7) Accessories in the Fook Yip Property \$180,000 Total: \$3,628,601 Disputed Assets
14. However, during the course of the trial, it was the wife's case that the husband had either not made full and frank disclosure of all his assets or he had dissipated some of the family assets that certain sums of money should be added back to the above figure for the purpose of distribution. It is the wife's case that a sum of \$854,307 ($\$800,959 + 16,748 + \$36,600 = \$854,307$) should be added back making the total assets for distribution at \$4,482,908 ($\$3,628,601 + \$854,307 = \$4,482,908$). Reckless Gambling and Entertainment on Cruises
15. At trial, counsel for the wife has cross-examined the husband on some of his spending in Macau casinos and on board some holiday cruisers. It has become apparent that the husband has spent a total of \$800,959 between June 2004 and August 2007 in those places. Counsel for the wife has very helpfully set out the details of those spending in the attachment to his closing submissions which will not be repeated here. I note that the husband did not dispute those figures although he did try to give an explanation for those spending. The Husband's explanation
16. When being questioned on those spending, the husband explained that he did not gamble at all. He said he only lent money to his friends from the mainland through buying chips with his credit cards. Through this, he received Reminbi (RMB) in return and he earned from the difference in the exchange rate of the 2 currencies. Discussion
17. In considering this issue, I note that it is the first time the husband has ever raised this explanation. He has never mentioned this in any of his previous affirmations, even after I have rejected his earlier application for payment out from the frozen assets of U-Fai when I specifically denounced his gambling behaviour upon noticing his spending in casinos and on leisure cruises in my earlier judgment dated 5 January 2007.
18. Furthermore, apart from his own words which were only offered at trial, the husband has not called any of his friends to give evidence to support his case. To be fair to him, he did try to adduce some supporting evidence by producing his Star Cruise VIP membership card and some ferry tickets to Macau, but I am afraid those documents are far from being able to prove his lending to his mainland friends.
19. All in all, I am satisfied that between the period of June 2004 and August 2008, the husband has gambled away a total amount of \$800,959. The behaviour was particularly deplorable in view of the fact that he has failed to comply with the MPS Order and has even dared to come to court to apply for a further payment out from the frozen family assets. I have no doubt in my mind that this sum of \$800,959 should be added back to the family pool in order to be fair to the wife. Overdue of RMB 14,760 (HK\$ 16,748) being deducted from the sale proceeds

of the Golf Membership

20. It is common ground that the husband's golf membership has been sold and, among other things, a sum of RMB 14,760 (HK\$ 16,748) has been deducted from the sale proceeds as overdue in the membership account. It is now the wife's case that this overdue was for services solely enjoyed by the husband who should therefore be accountable for this deduction. Discussion
21. At trial, not much evidence has been led by either party on this point. There is no evidence to suggest that this overdue was not out of the husband's normal use of his membership and therefore, I am not satisfied that this sum of RMB 14,760 (HK\$ 16,748) should be added back to the family pool. Adding Back of \$36,600 onto the Husband's cash in Bank
22. In the husband's Form E filed on 30 October 2007 (p.1996-7 of the Trial Bundle), the husband stated he had \$183,001 in all his 11 bank accounts in both the mainland and Hong Kong. He also stated (at p.2005 of the Trial Bundle) that he had no income at all.
23. At trial, counsel for the wife has cross-examined the husband extensively on his income. It is the wife's case that the husband has been inconsistent and being evasive in saying how much income he has received. It is also the wife's case that only during cross-examination that his Hong Kong Jockey Club (HKJC) account has come to light. In view of the husband's unsatisfactory evidence about his income and the non-disclosure of the HKJC account, the wife invited the court to draw an adverse inference against the husband and she suggested adding 20% to the husband's cash in bank in order to reflect his more accurate financial position. Translating this into monetary terms, the wife asked for a sum of \$36,600 ($\$183,001 \times 20\% = \$36,600$) to be added back as part of the husband's assets. Discussion
24. I entirely agree with the wife's contention that the husband has not been truthful about his income. When he was asked why and how he could have kept his salaried staff, Ms. Ng for 2 years without pay, the husband did say that there was in fact some business since September 2007 and that was why he was able to pay Ms. Ng on various occasions. But that explanation does not sit well with his Form E which stated that he had no income at all.
25. It is also true that the husband has failed to disclose his HKJC account before trial. I trust this may be a betting account and so there may not be too much money in it. However, this does not change the fact that the husband was not prepared to give full and frank disclosure of all his accounts and assets.
26. The issue here is whether I am satisfied that a sum of \$36,600 should be added back in view of the husband's rather unsatisfactory evidence and disclosures. Before I do that, there has to be some evidence or undisputed facts upon which I can draw the adverse inference and more importantly to justify the quantum of 20%. Whilst I have no problem in drawing the adverse inference, Counsel for the wife has failed to address me on how he came up with this quantum of 20%. Therefore, I am afraid I cannot be satisfied that this sum of \$36,600 is the right amount to be added back. However, in view of the husband's attempt to hide his

income and his failure to make full and frank disclosure at trial, this will be treated as a conduct on the part of the husband that I should take into account when I consider the kind of ancillary relief order to be made at the end of the trial. Total Notional Family Assets

27. Based on the above discussion, it is my ruling that the total notional family assets is \$4,429,560, which is made up of: Undisputed Properties Value
 - (1) Fook Yip Property \$2,210,000
 - (2) Charming Car park \$300,000
 - (3) Kwun Shan Hui Property \$92,135
 - (4) Ming Yuet Property \$668,181 (RMB 588,000) Mercedes Benz \$15,000 Balance of proceeds of sale of a golf \$163,285 club membership (RMB 143,900)
 - (7) Accessories in the Fook Yip Property \$180,000 \$3,628,601 ADD
 - (8) Husband s reckless gambling \$800,959 Total: \$4,429,560 Conduct
28. The next issue is whether the court should take into account the conduct of the husband in deciding on the final ancillary relief order. In the preceding paragraphs, I have already ruled that the husband has gambled away a sum of \$800,959 which forms a substantial part of the family fortune, and he has also attempted to hide his income and the existence of the HKJC account. The wife now asks the court to take all these conduct into account when it decides on the proper financial order to be made at the end of the trial. Discussion
29. The court should take into account conduct of the parties which it would be inequitable to disregard (DD v. LKW [2008] 2 HKLDR at para. 69(6)(3)).
30. It is clear from the evidence that this is not a particularly wealthy family, especially during recent years. The total family assets amount to about \$4.4 million and almost 1/5 of them (i.e. about \$800,000) has been gambled away by the husband. With this reckless gambling, the husband even dared to come to court to ask for further money from the frozen account. His actions were also deplorable against the background of his non-payment of MPS for 6 years. It is therefore my view that the husband s reckless gambling, the attempt to hide his income and the non-disclosure of his HKJC account are all conduct that have to be taken into account when the court considers the final award for ancillary relief. The Proper Ancillary Relief Order The Law on Ancillary Relief
31. The jurisdiction of the Court in granting financial relief for a party is governed by section 4 of the Matrimonial Proceedings and Property Ordinance, Cap 192 (MPPO) which provides:
 4. Financial provision for party to a marriage in cases of divorce, etc.

- (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 section 25(1), make any one or more of the following orders, that is to say-
 - (a) an order that either party to the marriage shall make to the other such periodical payments and for such term as may be specified in the order;
 - (b) an order that either party to the marriage shall secure to the other to the satisfaction of the court, such periodical payments and for such term as may be so specified;
 - (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified.
- (2) Without prejudice to the generality of subsection (1)(c), an order under this section that a party to a marriage shall pay a lump sum to the other party-
 - (a) may be made for the purpose of enabling that other party to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or herself or any child of the family before making an application for an order under this section;
 - (b) may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court.
32. Apart from the granting of financial relief, the court has also power to grant a property transfer order or a sale of property order under ss.6 and 6A of MPPO:
6. Orders for transfer and settlement of property and for variation of settlement in cases of divorce, etc. 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 the use of the proceeds of such sale 6A. Orders for sale of property Where the court makes an order under section 4, 5 or 6 then, on making that order or at any time after the making of that order, the court may make a further 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. [HYPERLINK "http://www.legislation.gov.hk/blis_ind.nsf/e1bf50c09a33d3dc482564840019d2f4/4d588636363cc08c88256489000ba67d?Navigate&To=Prev"](http://www.legislation.gov.hk/blis_ind.nsf/e1bf50c09a33d3dc482564840019d2f4/4d588636363cc08c88256489000ba67d?Navigate&To=Prev) [HYPERLINK "http://www.legislation.gov.hk/blis_ind.nsf/e1bf50c09a33d3dc482564840019d2f4/4d588636363cc08c88256489000ba67d?Navigate&To=Next"](http://www.legislation.gov.hk/blis_ind.nsf/e1bf50c09a33d3dc482564840019d2f4/4d588636363cc08c88256489000ba67d?Navigate&To=Next) [HYPERLINK "http://www.legislation.gov.hk/blis_ind.nsf/WebSwitchLang?OpenAgent"](http://www.legislation.gov.hk/blis_ind.nsf/WebSwitchLang?OpenAgent) [HYPERLINK "http://203.85.188.32/blisdata/blis.nsf/WebBacktoView?OpenAgent"](http://203.85.188.32/blisdata/blis.nsf/WebBacktoView?OpenAgent) [HYPERLINK "http://203.85.188.32/CltIndex.htm"](http://203.85.188.32/CltIndex.htm) \t "_parent" [HYPERLINK "http://www.legislation.gov.hk/blis_ind.nsf/e1bf50c09a33d3dc482564840019d2f4/4d588636363cc08c88256489000ba67d?Navigate&To=Prev"](http://www.legislation.gov.hk/blis_ind.nsf/e1bf50c09a33d3dc482564840019d2f4/4d588636363cc08c88256489000ba67d?Navigate&To=Prev) Section 7 Considerations

33. In deciding on how to exercise its power in this regard, the Court is bound to consider Section 7 of MPPO which provides:
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- 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; the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; the standard of living enjoyed by the family before the breakdown of the marriage; the age of each party to the marriage and the duration of the marriage; any physical or mental disability of either of the parties to the marriage; 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; 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. Income, Earning Capacity, Property and other Financial Resources The Wife s Situation
34. According to the wife, she has not been in gainful employment at least for the past few years. She only does voluntary works nowadays. I accept she has been unemployed as least from about 2001. However, what seems to be more controversial is about her future earning capacity.
35. It is common ground that the wife is a director of U-Fai but even according to the husband, U-Fai is no longer active in its business.
36. It is also not in dispute that the wife had operated some movie studios from 1989 to about 2001. From 1989 to 1991, she was actively involved in a company called XX Investment Company Limited which was in the business of running a movie studio. As from 1996 to 2001, she also operated a company called XX Studio Limited which was also in the business

of operating a movie studio. But according to the wife, the movie industry in Hong Kong has experienced a rapid decline in the past decade or so and therefore, it is now impossible for her, as a woman in her late 50s, to continue this business of operating a movie studio.

37. I think it is common knowledge that the Hong Kong movie industry has been in the decline in the past decade or so. I therefore accept the wife's evidence that with her age and rather low educational background, it is not possible for her to continue her business of operating a movie studio. I accept she is now unemployed and is only relying on her savings or some very limited financial support from her daughter.
38. During the course of the trial, it has come to the husband's knowledge that the wife was once in possession of 2 insurance policies, the value of which might not have been fully disclosed in the past. This fact came to light during cross examination when the wife was asked how she sustained her living and she said she took out the bonus and interest in the sum of \$160,000 odd from the Sun Life Policy, which was only stated as \$72,164.40 in her Form E. Upon further investigation, it turned out that her testimony was corroborated by the relevant insurance documents (i.e. Exhibits P1A P1C), namely Policy Value Transaction Advice of the Sun Life Policy dated 4 January 2008, the Life Insurance Policy Contract dated 25 November 1997 and the Policy Anniversary Statement dated 25 November 2006. The wife gave an explanation that she did not fully understand the contents of the insurance documents and she had no intention of misrepresenting their true value.
39. I note that the wife is not a highly educated person and after seeing her demeanour in giving evidence, I accept her explanation. I do not consider the non-disclosure of the former value of her insurance policies was a deliberate attempt to hide her assets. In any event, in view of the fact the husband has failed to pay MPS for the past 6 years, I accept that the wife has already used up the cash value of her insurance policies for her living expenses. The Husband's Situation
40. According to the husband, he is a businessman but having no income (Part 3 of the husband's Form E, p.2005 of the Trial Bundle). I have already discussed the husband's income in paragraph 24 above and it was my ruling that the husband has not been frank about all his income. Therefore, an adverse inference can be drawn that the husband does have some income although the exact amount is not known to us. Needs, Obligations and Responsibilities The Wife's Situation
41. The wife has set out her monthly expenses in her Form E but that has to be revised because of the sudden death of her son. In court, she has revised her expenses as follows: General Expenses Rent \$13,500 Utilities \$1,500 Food (2 persons) \$4,500 Household Expenses \$1,000 Insurance premia \$4,000 Domestic helper (part-time) \$500 \$25,000 Personal Expenses Meals out of home \$1,500 Transport \$500 Clothing \$1,000 Personal Grooming \$1,000 Entertainment/presents \$1,000 Medical/Dental \$3,000-\$4,000 \$8,000-\$9,000 The wife's total monthly expenses amount to \$33,000 to \$34,000.

42. I take that the above figures are her expected future expenses, instead of her actual current spending because I do not think she is able to afford that at all. By taking into account that the daughter should share at least half of the general expenses, I think it is reasonable to set the wife's monthly expenses at \$20,000. The Husband's Situation
43. As to the husband, he set out his monthly expenses at \$46,537 which are made up of the following items: General Expenses Utilities \$2,000 Management fees \$2,759 Car expenses \$2,700 Insurance premia \$93 Staff salary \$16,800 \$24,259 Personal Expenses Meals out of home \$6,000 Transport \$1,000 Clothing \$200 Personal Grooming \$2,000 Holidays \$1,400 Tax \$385 Insurance premia \$10,000 Others \$1,000 \$22,185 The total amount of the husband's monthly expenses is \$46,537.
44. During trial, it has become apparent that some of the above figures can not be right. For example, the husband listed the payment of Ms. Ng's salary at \$16,800 but on the other hand, he said he had not paid her for the past 2 years. Another example is the payment of insurance premia at \$10,000. At trial, the husband said this should be the amount of tax that he has to pay. Again, if he has to pay \$10,000 per month for tax (i.e. \$120,000 per year), this certainly does not sit well with his contention that he has no or very little income for the past few years.
45. All in all, I do not accept the husband's current monthly expenses amount to \$46,537. To be fair to both parties, I would allow the husband to have a monthly spending of \$20,000 which is a figure similar to the wife. Husband's Liabilities of \$1,106,206
46. In the husband's Form E (p.2003 of the Trial Bundle), the husband has set out all his existing liabilities at \$1,168,932 which are made up of the following: Nature Amount Loan from mother \$204,721 Loan from brother \$644,555 Loan from friend: Lau \$83,032 Loan from friend: Guo \$8,798 Outstanding salary to staff \$165,100 Expenditure for frozen assets \$1,024 Expenditure for legal expenses \$8,060 Cash in advance from Master Card \$42,942 Surveyor's fee for valuation report \$10,700 Total: \$1,168,932
47. Out of this sum of \$1,168,932, the wife is challenging the 4 loans from relatives and friends and also the outstanding salary to staff in the total sum of \$1,106,206, saying that they are sham or at best debts for the repayments of which no demand have been made. It is the wife's case this sum of \$1,106,206 should not be taken into account when calculating the total notional family assets. Loans from relatives and friends
48. Out of the husband's liabilities, there were 4 loans from his mother, brother and friends in the total sum of \$941,106 ($\$204,721 + \$644,555 + \$83,032 + \$8,798 = \$941,106$). In the closing submission of the husband's counsel, it was submitted that a highly significant proportion of these loans were used to maintain the value of the matrimonial assets and therefore, the husband's liabilities of \$941,106 should be reflected in the percentage of the matrimonial assets to be given to each spouse resulting in a higher than 50/50 split in the husband's favour.

49. On the other hand, it was submitted on the wife's behalf that the husband's account for all these loans were not believable and so all these so-called loans were just a sham. Alternatively, even if the court accepts the existence of those loans, there is still no evidence that the creditors have demanded their repayments and therefore, they should not be taken into account for the calculation of the total notional family assets. Discussion
50. I have considered the evidence in respect of these loans very carefully. I note that all, or at least most of those loans were well documented in the sense that there were loan agreements signed and evidence of proper transfer of funds into the husband's bank accounts. On balance, I accept that the husband has taken out those loans from the various parties.
51. The next issue is the purpose of those loans. Were they made entirely for the benefit of the family? In view of the reckless gambling behaviour of the husband, I am afraid I cannot be satisfied that those loans were obtained entirely or even substantially for the purpose of maintaining the family assets as contended by the husband's counsel. Of course, neither can I rule out the possibility that some of the funds may have been used by the family business or for the maintenance of the family assets, therefore, I think the fairest way to deal with the matter is for only half of those amounts to be taken into account as the husband's liabilities in the consideration of the final ancillary relief order. In other words, out of these 4 loans of \$941,106, I am prepared to take into account of \$470,553 as the husband's genuine debts. This sum, together with the unchallenged sum of \$62,726, means that a total amount of \$533,279 ($\$470,553 + \$62,726 = \$533,279$) will be taken into account as the husband's genuine debts and be deducted from the total notional family assets.
52. The next item is the outstanding salary to staff in the sum of \$165,100. According to the husband, he has kept a staff called Ms. Ng who has helped him in the management of the company and so far, he has owed her a sum of \$165,100.
53. In the preceding paragraphs when I discussed the income of the husband, I have already mentioned this staff Ms. Ng. It is the husband's evidence that he has kept Ms. Ng for 2 years without pay. Even if I take the husband's case to the highest and accept for a moment that Ms. Ng may be a very loyal staff (on which there is actually no evidence at all), I do not believe a staff would work for a company for free for 2 years. The husband's evidence in this respect is just inherently improbable. In short, I do not believe the husband owes Ms. Ng \$165,100 in salary. Expenses in the winding of the family businesses
54. It is the husband's case that after the conclusion of these matrimonial proceedings, a natural step to take is to close down the family company U-Fai. According to his estimation, if the company is to be de-registered, the costs would be about \$35,000. But if a full company winding up process has to be adopted, the costs would be in the region of about \$125,000. Therefore, it is his case that certain amount of money should be set aside for the closing down of U-Fai. Discussion

55. I think it is reasonable that there should be some financial provision from the family assets for the wrapping up of U-Fai. I understand that the company has been dormant for quite sometime and therefore, a simple de-registration procedure should be adopted. However, the estimated costs of \$35,000 seem to be on the high side and I would think a sum of \$20,000 should be enough. Therefore, I would allow the husband to retain a sum of \$20,000 so that he can close down the company after the conclusion of the ancillary relief trial. In other words, this sum of \$20,000 will also be deducted from the total notional family assets. Standard of Living Enjoyed by the Parties before the Breakdown of the Marriage
56. The husband has been quite a successful businessman in the past, firstly in Hong Kong and later expanded his business into the mainland. The family has also enjoyed a good standard of living and from 1994 to 2004, they lived in a self-owned flat at Beacons Height of about 1,500 sq. ft. Age and Duration of the Marriage
57. The wife is now aged 57 and the husband aged 60.
58. They married in 1974 and separated in 2002. It is a very long marriage of 28 years. Physical or Mental Disability
59. It is the wife's case that she needs regular medical attention, especially in the form of Chinese medicine.
60. The husband also said he was suffering from bilateral Cataract and Meibomian Cyst Right Upper Eyelid.
61. After hearing the parties' evidence in this regard, I do not see any concrete medical evidence from the wife concerning her health condition. As to the husband's condition, I have seen him in court for a number of days and I do not think his eye problem has caused any profound effect on his eyesight. All in all, I do not think the parties are suffering from very serious illnesses. Contribution
62. It is quite clear that this family started with a rather humble background and after some hard work by both parties, the family was able to create and accumulate certain level of wealth which enabled them to lead a more comfortable life. In terms of wealth creation, I am satisfied that there may have been more contribution from the husband as it is quite clear he has been the main driving force in the development of the family business in Hong Kong which later branched out in the mainland as well. But that does not mean the wife did not make any contribution. I am satisfied that she has also assisted in the family business and furthermore, she has also contributed by way of looking after the family and the 2 children. Overall speaking, I am satisfied that both parties have made more or less equal contribution to the family as a whole. Recent Case Law
63. The leading Hong Kong authority in ancillary relief application is the case of *DD v LKW* [2008] HKEC 379. After a careful and comprehensive consideration of some similar UK cases, Cheung JA said this in paragraph 64 of the judgement: On divorce the principle and spirit underlining the union should be reflected in the division of the family assets. The

division should proceed on the basis of fairness and this necessarily means there is no room for discrimination between husband and wife. The starting point is equality in division unless there is a good reason to depart from it.

64. Apart from giving a detailed discussion on the interaction between the 3 principles of needs, compensation and sharing, His Lordship has also given the following guidance (at paragraph 69 of the Judgment) to Family Court Judges in the determination of future ancillary relief cases: In cases where there are only limited financial resources, fairness requires such division of the assets so as to provide for the housing and financial needs of the parties. In appropriate cases, it may be necessary to augment the available assets by making periodical payment orders. If the assets are more than enough to satisfy the parties immediate housing and financial needs, there should be equal division unless there is a good reason to the contrary. This approach is not limited to big money cases. There should first be a computation of the total family assets.
- (4) The assets should then be divided by reference to the 3 principles of needs, compensation and sharing.
- (5) If there should be any irreconcilable conflicts between these 3 principles, the criterion of fairness is to be applied.
- (6) Such principle of fairness is applicable to both matrimonial and non-matrimonial properties. The equal sharing principle should apply to both long and short marriages but in case of short marriage, the non-matrimonial property may be a good reason to depart from equality of division. The concept of special contribution may be regarded as a factor pointing away from equality of division when, but only when, it would be inequitable to proceed otherwise. Ancillary Relief in this Case Clean Break In considering the kind of ancillary relief orders to be made, it is my view that a clean break order is desirable. In this regard, I note that both parties are not of young age. The wife is now aged 57 and the husband 60. Despite the fact that the husband has not disclosed all his present income, it is my view that his working life will not be too long as he is already approaching his retirement age. Under such circumstances, it will not be appropriate to order a periodical payment order, which may only last for a short period of time even if ordered. Net Notional Family Assets
66. The total notional family assets in this case are \$4,429,560. I think it is only fair for the wife to get back her arrears in MPS in the sum of \$645,000 (as calculated up to November 2009) first. I also accept that the husband has a genuine debt of \$533,279 (para. 51 above) which was incurred partly for the maintenance of the family assets and so should be deducted from the total notional family assets before their distribution. I have also ruled that a sum of \$20,000 should be set aside for the wrapping up of the family company U-Fai. Therefore, after the deduction of these 3 sums, the net notional family assets that is available for distribution amounts to \$3,231,281 (\$4,429,560 - \$645,000 - \$533,279 - \$20,000 = \$3,231,281).

67. According to the principles as laid down in the case of DD v. LKW, the starting point for distribution should be equal sharing. But after taking into account of the husband's conduct as discussed in paragraphs 28 to 30 above (i.e. the gambling away of family fortunes and the hiding of income and account), together with the fact that the husband is presently having a better earning capacity as compared with the wife, it is my view that a departure from equal sharing is justified. It is my view that a sharing ratio of 60:40 in the wife's favour is reasonable.
68. By this ratio, the wife will get \$1,938,769 ($\$3,231,281 \times 60\% = \$1,938,769$) and the husband will get \$1,292,512 ($\$3,231,281 \times 40\% = \$1,292,512$).
69. As the wife is entitled to be paid back the arrears of MPS in the sum of \$645,000, therefore, the total amount the wife will get is \$2,583,769 ($\$1,938,769 + \$645,000 = \$2,583,769$).
70. For the husband, since he has to pay back \$800,959 into the family pool, being money he has gambled away, that would reduce his share to \$491,553 ($\$1,292,512 - \$800,959 = \$491,553$). Finally, the respective sums of \$533,279 (genuine debts incurred for the family) and \$20,000 (fee for wrapping up U-Fai) have to be added back to the husband's entitlement, taking it to a total sum of \$1,044,832 ($\$491,553 + \$533,279 + \$20,000 = \$1,044,832$).
71. For the sake of clarity, I will set out the husband's entitlement again in the following table:
- | | |
|-----------------------------------|---|
| Item | Amount |
| 40% of net notional family assets | \$1,292,512 ($\$3,231,281 \times 40\% = \$1,292,512$) |
| Less | |
| (2) Pay back what he gambled away | \$800,959 |
| | \$491,553 |
| Add | |
| (3) Debt incurred for the family | \$533,279 |
| (4) Wrapping up of U-Fai | \$20,000 |
| Net Entitlement: | \$1,044,832 |
- Summary of the Parties Respective Entitlement
72. As a summary, out of the total distributable family assets of \$3,628,601 as set out in paragraph 13 above, the wife will get \$2,583,769; the husband will get \$1,044,832. In terms of percentage, the wife will get 71% ($\$2,583,769 / \$3,628,601 \times 100\% = 71\%$) and the husband will get 29% ($\$1,044,832 / \$3,628,601 \times 100\% = 29\%$).

Orders

73. Based on the above reasons, I now make the following orders: All the properties as listed out in paragraph 13 above, except the balance of proceeds of sale of the golf club membership be sold at the best available market price within 3 months from the date of this order; After the deduction of all reasonable costs of sale including (but not limited to) any government taxes (if any), agent fees, legal fees and other reasonable outgoings, the net proceeds be divided between the parties at the ratio of 71% to the wife and 29% to the husband (the payment to the husband should be subject to the first charge of the Director of Legal Aid); A sum of \$115,932 (representing 71%) be paid from the net proceeds of sale of the golf club membership to the wife within 14 days from the date of this order; Subject to the first charge of the Director of Legal Aid, a sum of \$47,353 (representing 29%) be paid from the net

proceeds of sale of the golf club membership to the husband within 14 days from the date of this order; and There be liberty to apply on how to carry out the above orders. Costs

74. It is quite difficult to say who is the winning party in this case and therefore, I think the proper order should be no order as to costs, including all costs previously reserved. The husband s own costs to be taxed in accordance with the Legal Aid Regulations. This will be in the form of an order nisi to be made absolute after the expiry of 14 days from the handing down of this judgment. C. K. Chan District Judge Representation: Mr. Gary Lam, Barrister-at-law, instructed by Messrs. Edwin Yun & Co. for the Petitioner Mr. Clement of Messrs. Massie & Clement for the Respondent PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V odZdK }tlflt yeyey] &`#\$ t7q j Z\$: vC&c l,t 6)&&cDO 25 AEw9 <*>? 25 l,t <*>? t7q AEw9 &'L- @\\Hc-oa-ws-656\\HP LaserJet 1200 Series PCL 6 Ne04: winspool HP LaserJet 1200 Series PCL 6 \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 G,"> NR Gh 3<f k Y6Z5 VY7v (yvN \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 G,"> NR Gh 3<f k Y6Z5 VY7v (yvN Normal.dot Administrator Microsoft Word 9.0 Title _PID_HLINKS Microsoft Word Document MSWordDoc Word.Document.8

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