

HONG KONG / JUDGMENT

YWS v. SJ

[2025] HKFC 10

COURT

Family Court

DECIDED

9 January 2025

CASE / FILE NUMBER

FCMC10832/2008

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FCMC 10832 / 2008

[2025] HKFC 10

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES

NO. 10832 OF 2008

BETWEEN

YWS Petitioner

and

SJ

Respondent

Coram: Her Honour Judge Elaine Liu in Chambers (Not Open to Public)

Dates of Hearing: 4, 5 and 21 June 2024

Date of Judgment: 9 January 2025

JUDGMENT

(Variation of Maintenance)

Introduction

By a Summons dated 12 April 2023 (“the Summons”), the Respondent (“H”) applied for a discharge of the monthly maintenance payable to the Petitioner (“W”) or a downward adjustment from HK\$23,500 to a sum to be decided by the court to take effect from October 2019. This is H’s second variation application since the parties’ divorce was made absolute in 2009. W opposed.

Before trial, H offered to pay maintenance of HK\$10,000 from July 2021 until he reaches the anticipated retirement age of 63 in February 2028.

W offered a variation of the maintenance to HK\$22,500 from May 2023 (after the Summons) to be paid by H for the same period under the order currently in force, i.e. during the joint lives of the parties or until W remarries, whichever is the shorter.

H and W testified at the trial.

Background facts

B1.

General background

H is 59 years old and W aged 53. The parties got married on 23 January 1994. They have a daughter (“Daughter”) born in 1997. The Daughter is now in late twenties and has gainful employment.

H was a director of a multi-national chain supply company. W was a merchandiser. In 2005, H had a job opportunity in Singapore. W quitted her job and moved to Singapore together with H and the Daughter.

The parties’ relationship deteriorated soon after they moved to Singapore. H formed a relationship with another woman. The parties separated in 2007. W returned to Hong Kong alone. She presented the divorce petition in 2008. Their 15 years marriage was formally ended in 2009 upon the decree absolute was granted. By consent of the parties, the Daughter continued to reside in Singapore under the care and control of H.

W later took up self-employment as an insurance agent in Hong Kong.

H got married with Madam C in Singapore in 2011. They have an 11 years old son (“the Son”). Madam C, aged 45, is a university graduate. She used to work as a customer service executive with a monthly income of SGD4,000. She ceased to work and stayed as a full time housewife since November 2014. H had not disclosed the assets of Madam C apart from their joint ownership of Bishan Property and Jewel Property.

In late September 2019, H lost his job at XXXXXXXXXXXX XXXXXXXXXXXX (“JXXX”). Since then, he had several job changes as follows:

Period

H's employment

Until September 2019

employed by JXX

10.2019 – 7.2021

employed by XXBXXXXX

7.2021 – 3.2022

unemployed

4.2022 – 5.2022

employed by ASX XXX

6.2022 – trial

employed by AXXXXXXXXX

B2.

The maintenance orders

The parties had reached consensus on financial arrangements upon their divorce. A consent order was made on 29 December 2008 ("2008 Consent Order") to the effect that:

their Hong Kong property and 50% net sale proceeds of their Singapore property were passed to W, the other 50% of the net sale proceeds of the Singapore property was held for the benefit of the Daughter until she turned 21; and

H do pay W a monthly maintenance of HK\$27,000 after the granting of decree absolute during the joint lives of the parties or until W's remarriage, whichever is the shorter.

The distribution of the properties and the sale proceeds under the 2008 Consent Order have been complied with.

This trial relates only to the variation of the periodical payment. H started to pay the periodical payment of HK\$27,000 in 2008. After trial of H's first variation application, the amount of periodical payment was reduced to HK\$23,500 ("2011 Order"). The reasons for the downward variation were set out in the Decision ("2011 Decision").

In 2019, H stopped paying any maintenance to W for two months (October and November 2019). He resumed to pay a reduced sum of HK\$15,200 for 19 months between December 2019 and June 2021. Since July 2021, H ceased to make any maintenance payment to W.

It bears repeating that a party is not entitled to unilaterally cease payment of maintenance in violation of court orders. The consequences that may flow from such breach of court orders include not only the payment of arrears, but also, for example, an order for payment of interest on the arrears (see section 28AA of Matrimonial Proceedings and Property Ordinance, Cap. 192 (“MPPO”)), and in serious cases, a contempt of court which may lead to imprisonment.

H was absent from the hearing of the judgment summons commenced in June 2020 by W in Hong Kong. There were disputes on whether H has received notice of the hearing. W then commenced enforcement proceedings in Singapore. In July 2022, the maintenance order made by the Hong Kong court was registered in Singapore. H took out this variation application on 12 April 2023, more than 2 years after the default in payment.

The hearing of W’s judgment summons was adjourned sine die pending the determination of this variation application.

A consent order was made by the Family Justice Courts of Singapore on 3 January 2024, pursuant to which:

H repaid W partial arrears of maintenance in the sum of HK\$150,000 on 17 January 2024; and

H paid a further sum of HK\$300,000 to his solicitors on 9 February 2024 to be stakeheld pending the outcome of this application.

H’s case

H advanced the following in support of his variation application:

There was a material change in his financial position in that (a) his income was reduced by reasons of unemployment from July 2021 to March 2022 and the job changes between September 2019 and 2022; and (b) he was responsible for all the expenses of his current household, including the expense for Madam C and the Son. These expenses have been increased.

He is approaching the retirement age and still has a family of 3 to maintain. He anticipated a further responsibility of around 11-12 years to support the Son through university.

Madam C was financially dependent on him. Madam C might have some savings but he did not know how much. H asked this court not to take into account the 50% interests owned by Madam C in Bishan Property and Jewel Property.

Applicable legal principles on variation of maintenance

The applicable legal principles are well established. The court is empowered by Section 11(1) of MPPO to vary or discharge an order for financial provisions.

Section 11(7) of MPPO requires the court to have regard to all the circumstances of the case when exercising the powers conferred by section 11. These include any change in any of the matters to which the court was required to have regard when making the original order. Thus the matters set out in section 7(1) are often relevant. Each case must be determined with regard to its own facts.

The court has an unfettered discretion in a variation application, including to backdate the effect of the variation after having regard to all the circumstances of the case. In practice, orders are not usually backdated to a date prior to the notice of the variation application unless the justice of the case so requires: *AEM v VFM* §15.

The court is not required to proceed from the starting point of the original order. The court looks at the matter afresh. This does not mean that the court can give no regard to the original order for maintenance, nor that the original order carries no weight. The basis and intended effect of the original order are relevant factors for consideration and proper weight should be given to it.

In *HCTT v TYYC* §§15 and 16, the Court of Appeal acknowledged that normally, the earlier order would not be varied unless there has been a material change in circumstances.

The Court of Appeal in *WNWG v PBF* has held that it is an error not to take into account the original agreement, a fortiori, the original order, as to how the maintenance should be dealt with:

“16. Then the Judge referred to the means of the Petitioner and said that she would be able to provide for the children even if the maintenance payment were to be reduced. At para 47 he jumped straight to the question of how the needs of the children should be reasonably apportioned between the parties. It does not appear that he gave any weight to original agreement as to how the maintenance for the children should be dealt with. Nor did he give any consideration as to whether there should be a variation despite the ability of the Respondent to afford the payment of maintenance on the same level and the earning capacity of the Respondent (notwithstanding his cessation of his employment).”

17. With respect, we are of the view that in so doing the Judge fell into error. ...”

The proper approach was summarised by Cheung JA in *AEM v VFM* §14:

“4.

The modern approach, as required by section 11(7), is for the Court to consider all the circumstances of the cases. The Court is not required to proceed from the starting point of the original order but look at the matter afresh : *Flavell v. Flavell* [1997] 1 FLR 353 at 357B following *Lewis v. Lewis* [1977] 1 WLR 409 and *Garner v. Garner* [1992] 1 FLR 573.

5.

Any change in any of the matters to which the Court was required to consider when making the original order was one of the circumstances to be considered.

6.

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

7.

An increase in the wealth of the husband was a relevant factor to be taken into account : *Primavera v. Primavera* [1991] 1 FLR 16 and *Cornick v. Cornick* (No. 2)[1995] 2 FLR 490.

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

Where the payer spouse has remarried

A party entered into a new relationship with increased financial obligation does not, by itself, mandate a downward variation of the previous maintenance order, as a new family or second marriage does not terminate a husband's financial obligations to his first marriage.

The English Court of Appeal has reiterated in *Vaughan v Vaughan* that “a spouse must on marriage be presumed ... to take the other subject to all existing encumbrances, whether known or not – for example ... an obligation to support the wife or child of a dissolved marriage”. This is not to say that the court will ignore the reality of the increased financial obligations. The totality of the relevant facts shall be considered when applying the above principles. See also *CMK v CPK* §§46-47.

In the context of an ancillary relief application, HHJ Bruno Chan (as he then was) summarised in *N v C* the principles where a party has remarried as follows:

“39. It is well established in law that remarriage by a person against whom an order for periodical payments has been made does not terminate the order or of itself entitle that parties to a reduction in the amount ordered, and as regard the position of the after-taken wife, she must, on general principle, be presumed to take the other spouse subject to all existing encumbrances, whether known or not, including an obligation to support the wife or child of a former dissolved marriage, as per Hodson LJ in Cockburn v Cockburn [1957] 1 WLR 1020, CA when he said:-

“The law being as it is, it is quite impossible for the courts to ignore the just claims of the first wife because the man has taken on himself other obligations, although the courts have to take into account these obligations, as involving a reduction in the capacity of the man to pay for the upkeep of his first wife and child”.

40. So in the case of *Cowie v Cowie* (1983) 13 Fam Law 250 where the husband had remarried, had a child, and obtained increased mortgage, but his former wife was still able to obtain increase in periodical payments. On appeal by the husband, it was held that he had increased his obligations with his eyes open: and in *Moon v Moon* (1980) 1 FLR 115 where the husband has remarried and his second wife was pregnant, it was held that he must cut his coat according to his responsibilities to his first family.”

On the relevance of the new spouse’s financial resources, the learned author of Rayden and Jackson on Relationship Breakdown, Finances and Children, Issue 14, has said in §11.237:

“11.237

The court cannot redistribute assets which belong to a third party. Accordingly, where the payer’s new spouse or partner has resources, the court cannot make an order against them. However, the fact that the existence of those resources relieves the payer from outgoings or obligations which he might otherwise have to meet, and thus frees his income to make periodical payments to his former spouse, is a circumstance of the case which the court is entitled to take into account. Thus, if a husband has made a settlement on his second wife and vested the matrimonial home or business in her, the fact that he shares the advantage of that home or business leaves, with respect to financial provision for his first wife, a greater proportion of his income available to be dealt with by him and by the court. ...”

(emphasis in bold added)

Similarly, in Jackson’s Matrimonial Finance, (10th Edn), §3.127:

“3.127 Remarriage means that the payer spouse has assumed new financial burdens and responsibilities, and pro tanto his or her means may decrease; prima facie there is a decrease in the available resources out of which he or she can make provision for his former spouse and family; but, bearing in mind this consideration the court will try to give the former spouse and the children such orders as will protect their standard of living: it is ‘bearing in mind this consideration’, not ‘subject to it’.

In some cases the payer’s income may increase after his remarriage, and he may attribute this increase to the domestic, social or business gifts of his new spouse: that might well be a matter to be taken into account. It may be that the new spouse has an income of her own, and this likewise must to some extent be taken into account. The second spouse’s (or cohabitant’s) income cannot be taken into account as part of the payer’s income available for distribution to the former spouse and children. It can and should be taken into account when undertaking the ‘net-effect’ calculation so to determine the residual incomes of the respective households after payment of a hypothetical order by the payer. The court will assume that the second spouse will make a proper contribution from his income to the outgoings of the payer’s household.”

(emphasis in bold added)

Whether adverse inference should be drawn for not calling Madam C as a witness

Ms Joyce HY Lee, counsel for W, relying on *Tullett & Tokyo International Ltd v APC Securities Co Ltd* [2001] 2 HKLRD 356 argued in her closing submission that “H’s failure to call Madam [C] to testify in this application gives rise to an adverse inference that Madam [C] will attest to her earning capacity, and/or confirm that she herself has substantial assets that may be used for the family, and/or the amount of financial support paid by H to her is unnecessarily high.”

Ms Fiona Chong, counsel for H, argued that it is unfair to draw the aforesaid adverse inference against H because he was not given an opportunity to explain the reason for not calling Madam C to give evidence. Ms Chong cited two cases:

Cheung Kwong Yuen v Sun Hui Fang DCCJ 743/2016, 6 September 2017 §§26-34 where HHJ MK Liu refused to draw an adverse inference from the failure to call a witness who have personal knowledge of the matter in issue because it would be unfair to do so when the party had not been given an opportunity to explain the reason for not calling that witness; and

Wong Chak Wing & ors v Camelo Investment Limited & ors [2021] HKCFI 3710 §41(g) where K Yeung J acknowledged the aforesaid principles applied in *Cheung Kwong Yuen*.

In reply, Ms Lee relied on *Prest v Petrodel* (2013) UKSC 44 at pp 492-493, and *CH v TTHM v Well Bond Property Management Limited & ors* [2024] HKFC 17. She argued that the court has a wider discretion in matrimonial cases.

I first set out the relevant legal principles on the drawing of adverse inference where a party fails to call a witness whom might be expected to have material evidence to give on an issue.

In *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, Lord Brooke LJ derived the following principles at 340 after reviewing a line of English authorities from *McQueen v Great Western Railway Company* (1875) LR 10 QB 569 to *R v IRC ex parte TC Coombs & Co* [1991] 2 AC 286:

“From this line of authority I derive the following principles in the context of the present case:

- (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
- (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
- (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

- (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

It is therefore necessary to examine with some care the evidence adduced by the plaintiff on the issue as to what Dr Renninson would have done if he had attended Mrs Wisniewski and examined her, and the circumstances surrounding his failure to attend the trial to give evidence.”

(emphasis in bold added)

In *Tjang Siu Thu v Profield Construction Engineering Ltd* [2015] 5 HKC 22, the Court of Appeal reviewed the principles in *Wisniewski* and held that:

“33. The following propositions can be derived from the case law:

- (i) the *Wisniewski* principles do not constitute a presumption; consequently, the mere failure of a party to call a witness does not automatically confer an evidential benefit on the opposing party;
- (ii) the *Wisniewski* principles concern the drawing of inferences and whether any inference is drawn will depend upon the quality of the primary facts on which the inference is based; this is necessarily a fact sensitive matter and will vary from case to case;
- (iii) the primary facts must allow of the inference to be drawn in the sense that the inference logically flows from those facts;
- (iv) in the circumstances of the case the judge must be persuaded that it is appropriate to draw the inference; and
- (v) one circumstance where it will not be appropriate to draw the inference is where there is an explanation for the party's failure to call the witness.”

...

36. ... the Master was faced with a bare assertion made by an unreliable witness supported by explanations which were inherently incredible and contradicted by the plaintiff's own conduct. These are all circumstances relevant to whether any adverse inference should be drawn against the defendant. ... The Master was entitled to decide that in the light of these circumstances it was not a proper case for the drawing of an adverse inference.”

(emphasis in bold added)

As discerned from the above authorities, there are at least two matters to be satisfied by the court before an adverse inference is drawn by reason of a party's failure to call a witness, viz.: (1) there is some evidence that establishes a primary fact on which the witness is expected to give evidence, and the primary fact can logically give rise to the inference; and (2) there is no explanation for the party's failure to call the witness. With respect to the latter, the party against

whom the adverse inference is to be drawn should be given an opportunity to explain why that witness was not called to testify. If there is some credible reason for not calling that witness, the court should refrain from drawing the adverse inference. (See also: *South China Securities Ltd v Lam Kwen Yuen* [2012] 5 HKLRD 524 at §7; *Jiang Zhong v Up Cheer Limited & ors* [2017] 6 HKC 339 at §§48-52; *Cheung Kwong Yuen* at §§26-34, and *Wong Chak Wing v Camelo Investment Ltd* at §41(e) and (g).)

Ms Lee has no disagreement to the above principles. She argued that the above are general civil cases. Citing §45 of *Prest v Petrodel*, she said that the court has a wider discretion in matrimonial cases, judges can “draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing”. Hence, she submitted that this court can draw the adverse inference even though W had not put to H at cross examination the issue on his failure to call Madam C to give evidence.

§45 of *Prest v Petrodel* should be read together with §44:

“44 ... The courts have tended to recoil from some of the fiercer parts of this statement, which appear to convert open-ended speculation into findings of fact. There must be a reasonable basis for some hypothesis in the evidence of the inherent probabilities, before a court can draw useful inferences from a party’s failure to rebut it. For my part I would adopt, with a modification which I shall come to, the more balanced view expressed by Lord Lowry with the support of the rest of committee in R v Inland Revenue Comrs, Ex p Coombs (TC) & Co [1991] 2 AC 283, 300:

“In our legal system generally, the silence of one party in face of the other party’s evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party’s failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified.”

Cf *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324, P340.

45 The modification to which I have referred concerns the drawing of adverse inferences in claims for ancillary financial relief in matrimonial proceedings, which have some important distinctive features. There is a public interest in the proper maintenance of the wife by her former husband, especially (but not only) where the interests of the children are engaged. Partly for that reason, the proceedings although in form adversarial have a substantial inquisitorial element. The family finances will commonly have been the responsibility of the husband, so that although technically a claimant, the wife is in reality dependent on the disclosure and evidence of the husband to ascertain the extent of her proper claim. The concept of the burden of proof, which has always been one of the main factors inhibiting the drawing of adverse inferences from the absence of evidence or disclosure, cannot be applied in the same way to proceedings of this kind as it is in ordinary civil litigation. These considerations are not a licence to engage in pure speculation. But judges exercising family jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative

husband is likely to be concealing. I refer to the husband because the husband is usually the economically dominant party, but of course the same applies to the economically dominant spouse whoever it is.”

With respect, I disagreed with Ms Lee on this point. Although the cases cited by Ms Chong are not matrimonial cases, I do not see any reason why the principles on drawing adverse inference as expounded in those cases do not apply to matrimonial proceedings.

It was elucidated by the Court of Appeal in Tjang Siu Thu that the mere failure of a party to call a witness does not automatically confer an evidential benefit on the opposing party.

The authorities (including the two cases cited by Ms Lee) reckoned that the reason for not calling the witness to testify is a relevant consideration on the question of whether an adverse inference should be drawn.

The “modification” that Lord Sumption referred to in §45 of *Prest v Petrodel*, in my view, should not be taken to mean that judges can proceed to draw the adverse inference in matrimonial cases without exploring the reason for not calling the witness. Lord Sumption has warned that consideration of the distinctive features in family disputes is not a licence to engage in pure speculation. There ought to be some basis to substantiate the drawing of an adverse inference.

In *CH v TTHM v Well Bond Property Management Limited & ors* (another case cited by Ms Lee), HHJ S Lo said in §37(5) that it will not be appropriate to draw the adverse inference where there is an explanation for the party’s failure to call the witness.

As such, the party should be given an opportunity to provide explanation for not calling the witness before an adverse inference is drawn. In practice, this is often done by putting the issue to the party at cross-examination. If the court received some evidence on the reason for not calling Madam C, the court can assess whether such evidence is credible.

Ms Lee had the opportunity to cross-examine H but she had not raised this issue with him. This issue was only raised at the written closing submission. There is no evidence why Madam C was not called to testify. In such circumstances, it is unfair to draw the adverse inference as submitted by Ms Lee.

H adduced some evidence on the earning capacity and financial needs of Madam C, the reliability and weight of which would be evaluated accordingly.

Parties’ assets and liabilities

The parties agreed that they have the following assets and liabilities:

W (HK\$)

H (HK\$)

Taipo Property

5,200,000

-

Zhongshan Property

680,000

-

Bishan Property (jointly owned by H and Madam C)

-

50% = 4,037,109

100% = 8,074,217

Jewel Property

(jointly owned by H and Madam C)

-

50% = 1,482,970

100% = 2,965,939

Money at bank

1,978,267

259,858

Investment

248,715

4,298,492

Life insurance

1,403,303

1,678,216

Personal valuables

50,000

343,800

Credit cards

(1,163)

(56,934)

Sub-total:

9,559,122

12,043,511 or 17,563,588

MPF/CPF

683,466

2,115,573

Total:

10,242,588

14,159,084 or

19,679,161

H's earning capacity

H1.

Employment income

In August 2023, H declared in his Form E an employment income of SGD21,964.60 net of 15% for CPF contribution, with breakdown as follows:

basic monthly salary of SGD16,883.75;

double pay of SGD1,260;

bonus of SGD1,445.85; and

travel/transport allowance of SGD2,375;

During cross-examination, H admitted that since the filing of his Form E, he had salary increments twice. He did not recall the exact amount of his current salary. He accepted that a 4% increase twice on his salary, double pay and bonus is a reasonable estimate of his current salary.

Hence, it is fair to take that his current average employment income (including basic salary, double pay and bonus) net of 15% CPE should be at least SGD21,188.11 (i.e. SGD19,589.6 x 1.04 x 1.04) plus travel allowance of SGD2,375, which adds up to a total of SGD23,563.11 or HK\$135,016.62.

H2.

Dividend income

H was holding a portfolio of stocks (including AXXX shares acquired at a discounted value under the Employee Stock Purchase Plan (“ESPP”) offered by his employer) for investment purpose. H admitted that his updated dividend income was higher than the sum declared in his Form E.

It was shown from the documents provided by H that, on average, he earned a dividend income of about HK\$6,286 per month (without counting the dividends that he might have received from the other public listed shares such as XiaoMi Corp, Apple Inc etc).

H3.

Rental income from the Jewel Property

H disclosed in his Form E a 50% rental income earned from the Jewel Property. There were some arguments on whether 50% or the entire rental income should be counted as H’s income. This argument is academic because the parties agreed that the entire rental income has been used for the settlement of mortgage payment. It is anticipated that the mortgage payment for the Jewel Property will be fully settled in about 2030.

H4.

Other income

W identified several substantial deposits into H’s bank account between December 2021 and December 2022, including:

a sum of HK\$57,320 deposited in December 2021, and

4 other deposits being HK\$80,000 in January 2021, HK\$100,000 in August 2021, HK\$100,000 in January 2022 and HK\$100,000 in December 2022 (a total of HK\$380,000).

H explained that the sum deposited in December 2021 was a one-off remuneration for a part time project undertaken by him when he was unemployed. The other 4 sums were gifts (red packets) from his elder brother, who is a shareholder of a listed company in Hong Kong. They were either Christmas and New Year gift or a gift to him when he lost his job. H had also confirmed that his elder brother had invited H to contact him when in need.

I accepted H’s testimony on the source and purpose of these sums, thus did not count these as his regular income. Nevertheless, the above indicated H’s ability to undertake part time work, and a real likelihood of having financial support from his elder brother when in need. The availability of these financial resources and assistance may alleviate H’s concern of financial difficulty after retirement, which will be addressed below.

H5.

H's total income

H's total average monthly income is therefore at least HK\$141,302.62 or SGD24,660.14 (HK\$135,016.62 employment income + HK\$6,286 dividend income).

It was found in the 2011 Decision that H had an average income of about HK\$147,700. Applying the exchange rate at that time, this is equivalent to SGD23,907.8.

H's current total income in Singapore currency is higher than his average income in 2011. His current total income in Hong Kong currency is about HK\$6,400 less than the 2011 figure because of the difference in exchange rate. This difference is a small one and is unlikely to have a real impact on H since the majority of his expenses was spent in Singapore currency.

H's financial needs

H claimed a total monthly expenses of SGD24,197 or HK\$138,648.81. I shall not conduct a minutiae examination of each items of the expenses but shall assess their reasonableness on a broad-brush approach. Below are the major items in issue.

I1.

Payment to Madam C (SGD3,500 / HK\$20,055)

In addition to the general expenses on mortgage payment, household expenses, food expenses, holidays, medical/dental expenses and insurance premium for the benefit or use of Madam C, H claimed a sum of SGD3,500 (HK\$20,055) payment to Madam C. H had not provided any particulars or documentary proof for this sum. It appeared that this amount was for Madam C's personal use, yet H has not proved that Madam C was in financial needs of this sum in addition to the other expenses.

On H's evidence, Madam C had her own savings. She had the ability to pay from her bank accounts in advance for family expenses, for example SGD8,356.19 (HK\$47,880.96) for the Son's tuition expenses in January 2023.

As accepted by Ms Chong, the obligation to maintain H's current family does not take priority to his prior legal obligation to pay maintenance to W under the 2011 Order (see the legal principles in Section E above). This item of additional payment to Madam C should be disregarded when assessing H's ability to pay W's maintenance.

I2.

Contribution to mother-in-law (SGD2,000 / HK\$11,460)

H has not adduced any evidence to show that his mother-in-law had a financial need of SGD2,000.

It may be H's moral obligation to maintain his mother-in-law. This cannot be a reason to defeat H's legal and moral obligation to pay W's maintenance under the 2011 Order. I agreed to the view of HHJ KW Wong on H's contribution to his own parents as set out in §37 of the 2011 Decision:

"37. ... In any event, I do not consider that these obligations are mutually exclusive. Accordingly, if in honour of filial piety he intends to make contribution of \$8,000 per month to his parents, I am afraid he has to make adjustment to his other expenses in order to accommodate this head of expense."

This item should be disregarded for the purpose of this application.

I3.

Car expenses and transport expenses (SGD2,030 or HK\$11,631.90)

H claimed SGD830 for car expenses and SGD1,200 for transport expenses. H explained in oral testimony that the car expenses were spent for his private car which was used during weekends and holidays, and the transport expenses were expenses spent during workdays. The transport expenses (SGD1,200 or HK\$6,876) is 34 times higher than the expenses claimed in 2011 (HK\$200) while the car expenses are roughly the same. These expenses shall be adjusted downwards to SGD1,300 for both items.

I4.

Medical and dental expenses (SGD200 / HK\$1,146)

H and his family members were entitled to medical insurance provided by H's employer capped at about SGD2,200 annually. According to H, the sum claimed under this item was to cover the medical and dental expenses not claimable under the insurance provided by his employer.

Ms Lee prepared the following analysis from the documents provided by H and submitted that the amount that H might have to pay for medical / dental expenses not claimable under the insurance provided by the employer are only SGD12.41 per month, far less than SGD200 claimed by H:

Date

Patient

Amount incurred (SGD)

Amount paid (SGD)

Difference (SGD)

Ref

06.09.2022

Madam C

72

60

12

C1/198

20.11.2022

Madam C

32

22

10

C1/200

13.01.2023

Madam C

28

18

10

C1/202

08.02.2023

Madam C

64.25

54.25

10

C1/204

03.07.2023

H

106.90

0

106.90

Total:

148.9

= 12.41/m

There was no evidence to show that H or his family members were suffering from chronic illness. With the benefit of the medical insurance provided by the employer, this item should be reduced to SGD100.

I5.

Holiday expenses (personal: SGD670 / HK\$3,839.10 and Son: SGD330 / HK\$1,890.90)

H claimed an annual sum of SGD12,000 or HK\$68,760 for holiday expenses for 3 persons (himself, Madam C and the Son). He envisioned these expenses would pay for 1 to 2 trip a year, including a trip in Europe. In the past year, his family had travelled to Southeast Asia only but not Europe. There was little justification for spending more on holiday while H was asserting a financial pressure. The holiday expenses for all 3 should be adjusted to about SGD800 per month.

I6.

Others (SGD300 or HK\$1,719)

It is H's case that half of the sum under this item (SGD150) was for miscellaneous expenses, for example having meal with colleagues, haircut and buying household items such as batteries.

The nature of these types of expenses should have been included under the other specific items. H had not provided any breakdown nor proof to show the additional need for these miscellaneous expenses. There may be double counting.

The other SGD150, according to H, was expenses for dinners with and present given to the Daughter. The Daughter is a working adult having her own income. It is hard to see how this sum should take priority to maintenance payment.

The sum under this item should be adjusted to SGD100.

I7.

Mortgage payment

W contended that since Bishan Property and Jewel Property are owned by H and Madam C in equal share, only 50% (but not 100%) of the mortgage payment should be counted as H's expenses.

There was no dispute that Madam C did not have any employment income. I was prepared to accept in this application the entire amount of mortgage payment as H's expenses. Having said that, in all fairness, it would be unconvincing if H seeks to argue a segregation of Madam C's 50% interest in these two properties should there arises a need to raise funds to meet W's maintenance payment.

I8.

H's reasonable needs

As analysed above, there should be a reduction of at least SGD6,730 from H's expenses, and therefore H's reasonable financial needs is SGD17,467 or HK\$100,085.91 (i.e. SGD24,197 – SGD6,730).

W's earning capacity and financial needs

W was earning about HK\$22,500 from her work as an insurance agent. She has an investment income on fixed deposit, bonds and stocks at an average monthly sum of HK\$5,108.53. Her total monthly income was HK\$27,608.53.

I found the above monthly income reasonable given W's age, the extended period she has left her work as a merchandiser, the absence of evidence to show that she could secure an employment as a merchandiser or she would obtain a higher salary by working as a merchandiser. It is of note that W's current financial condition should be more stable than in 2011 as she no longer has the need to pay rent or mortgage.

W claimed general and personal expenses of HK\$46,346 plus HK\$250 for the Daughter's entertainment, i.e. a total of HK\$46,596.

W's recent bank statements did not reflect the level of expenses claimed by her. I accepted her evidence that this was because she was forced to tightly control her expenses after H's failure to pay her maintenance. She should be entitled to her reasonable needs but not at a reduced amount which she was forced to spend because of H's non-payment.

I found some of the items, such as food (HK\$2,500) and meals out of home (HK\$6,500); clothing/shoes (HK\$3,500) and personal grooming (HK\$4,000); entertainment/present (HK\$3,000) and holiday expenses (HK\$2,500) could be adjusted downwards by reducing around HK\$6,000.

Without disrespect to the parties' wishes to honour their filial piety, for the same reasons set out in Section I2, W's contribution of HK\$5,000 to his father and HK\$2,000 to his sister should also be disregarded for the purpose of this application.

Taking into account the above, her reasonable financial needs was about HK\$33,596 (i.e. HK\$46,596 – HK\$6,000 – HK\$5,000 – HK\$2,000).

Should there be a variation

The above analysis illustrated that H (who has an income of HK\$141,302.62 and reasonable financial needs of HK\$100,085.91) has the ability to pay W's maintenance.

I also found that he had the ability to pay during the period after September 2019 (when he had a fluctuation of employment income due to job change and unemployment) having regard to the following:

Since 2011, H had accumulated wealth and purchased two landed properties.

H was paid a lump sum of SGD95,232.54 or HK\$545,682 on 8 October 2019 when he left his employment with JXX. He then worked at XXXXXXXX in October 2019 with a net salary of about SGD23,313 to SGD23,720 save a pay cut in two months due to Covid-19.

In January 2020 (while he was employed by XXXBXX XX), H had the financial ability to purchase a new family car. The document showed that he paid SGD44,408.13 or HK\$254,459 as deposit for purchasing a new family car.

He received another lump sum of SGD83,186.73 or HK\$476,659.96 in lieu of notice when he left XX BXX XXX in July 2021.

He received HK\$57,320 remuneration from a part time project in December 2021.

He received gifts of about HK\$380,000 from his elder brother on several occasions during 2011 to 2022.

From 5 May 2020 to 23 September 2021, he spent a total of SGD119,225.13 or HK\$683,160 for purchasing stocks.

Although his salary at AXXXXXXXXXXXX was initially lower than his salary earned from JXX, there had been annual upward increments.

Hence, there should be no variation of maintenance payable to W during this period.

After retirement

What about after H's retirement?

The usual retirement age in Singapore is 63 years. There is a policy for re-employment in Singapore until the employee reaches the age of 68 if certain conditions (including work performance and physical condition) are met.

H agreed that his performance at work was good. There was no sign suggesting that he could not continue work after he turns 63 years old. These showed a probable chance of his re-employment after he reaches the retirement age.

H's total income will be substantially reduced when he ceases to work on retirement.

The mortgage for Jewel Property will be fully paid in 2030. By that time, H will have the rental income generated from the Jewel Property. The mortgage for Bishan Property will also be fully settled in about April 2032. These will substantially relieve H's financial obligations.

The Son should commence secondary school studies in 2025. If necessary, Madam C, who is relatively young, would have the capacity to engage in part time or full time employment when or before H retires. Her income can contribute to the family expenses. Although Madam C has left the workforce for a substantial period of time, the salary she could earn would still be higher than the costs of an experienced domestic helper which H said was about SGD1,267 per month.

H had accumulated assets, including landed properties, stock investment and the CPF. He has been using about HK\$13,000 per month from his salary to buy AXXX Shares under the ESPP scheme. The worth of these shares (now more than HK\$3 million) together with the CPF (about HK\$2 million) and the Jewel Property could be used to meet the financial needs (including W's maintenance) during his retirement.

Further, on H's evidence, his elder brother will assist him financially if he is in need.

W, who has accumulated some wealth and secured her own accommodation, should be able to cover a more substantial part of her expenses by that time.

Having balanced all factors, W's maintenance should be reduced to HK\$10,000 when H ceases to have any gainful employment after his retirement.

Disposition

By reasons of the above, no variation to the periodical payment under the 2011 Order shall be made until after H reaches the retirement age in Singapore or ceases to take up any employment, whichever is the later, from that point in time, the amount of periodical payment be reduced to HK\$10,000 per month to be paid by H to W during the joint lives of the parties or until W remarries, whichever is the shorter.

H shall pay W all due and unpaid maintenance. If necessary, leave is granted to W for claims of arrears of payment.

The parties do jointly lodge a draft order to reflect this decision for the court's consideration within the next 21 days.

W successfully defended the Summons except for the period after H retires. On a nisi basis, H do pay W 70% of W's costs of the Summons to be taxed if not agreed, with certificate for counsel.

I thank Ms Lee and Ms Chong for their helpful assistance.

(Elaine Liu)

District Judge

Ms. Joyce HY Lee instructed by Alvin Cheng & Rosaline Choy for the Petitioner

Ms. Fiona Chong instructed by Chainé Chow & Barbara Hung for the Respondent

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