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FCMC 9824 / 2015

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**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

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MATRIMONIAL CAUSES

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NUMBER 9824 OF 2015

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BETWEEN

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Petitioner

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and

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Respondent

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Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to public)

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Date of Hearing: 19 April 2017

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Date of Judgment: 23 June 2017

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(Maintenance Pending Suit/Interim Maintenance/
Litigation funding)

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V*Introduction*

1. This is an application by a Petitioner wife for maintenance pending suit pursuant to section 3 of the *Matrimonial Proceedings and Property Ordinance* Cap 192 (MPPO) and for interim maintenance for the only child of the family, a little girl called C who was born on the XX August 2011 under section 5 of the same ordinance. In addition, the wife seeks litigation funding. Further there is an issue concerning the costs arising out of the Discovery judgment dated the 25 January 2017. On that occasion costs were reserved for further directions at this hearing.

The main issues

2. Consequently, the primary issue to be determined at this stage is how much should the husband pay to the wife for her interim provision and that of the child of the family in circumstances where to date he has made provision on a Charman basis to the tune of HK\$3.75 million? Secondly, should the court entertain the wife's application for litigation funding both in respect of her litigation costs to date and in relation to the cost of the proposed litigation going forward, from now until the date the FDR hearing, which is scheduled for the 29 September 2017. I have since also been told that the parties are due to engage Mr Justice Saunders in a private Financial Dispute Resolution procedure prior to the FDR date. Costs will be associated with this also.

3. On the wife's case she now needs HK\$167,195 per month (originally HK\$183,695 per month) plus the continuation of the husband's undertakings in the sum of HK\$50,372 per month plus litigation funding. Although there was some confusion surrounding the litigation funding, in broad terms the wife seeks a backdated sum of

HK\$1.7 million plus a further HK\$121,000 per month spread over 9 months designed to take her up to the FDR hearing.

4. The husband for his part has offered to pay HK\$57,975 per month inclusive of an increased figure of HK\$3,000 to cover all utilities. (He wishes to be released from his undertaking in this respect). In round figures then, he offers HK\$58,000 per month plus the continuation of his undertakings otherwise. In total this amounts to approximately HK\$108,372 per month. He does not agree to contribute towards the wife's legal costs save that he says that consideration should be given to selling a property owned by the parties jointly in South Horizons, in order to free up funds inter alia to cover both parties' projected legal costs. The property, which is mortgage free and unoccupied at present, is said to be worth in the region of HK\$8.34 – 8.42 million. The husband says that the net proceeds could be divided 50/50 or alternatively that they should be paid into court.

The wife's summons

5. In the wife's restored summons dated the 25 October 2016 she set out her claim as follows:

1. the Petitioner's Notice of Application for Ancillary Relief dated 25th September 2015 for the Respondent to pay the Petitioner maintenance pending suit for the benefit of the Petitioner and the child of the family, namely C, a girl, born on XX August 2011, in such manner and at such rate as the Court thinks fit, to be backdated to 1st August 2016, which was adjourned by the Court Order dated 24th November 2015 be restored for argument;

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2. the Respondent do pay the Petitioner legal costs maintenance in such manner and at such rate as the Court thinks fit, to be backdated to the date of the Petition;
3. costs of and incidental to this application be to the Petitioner, to be taxed if not agreed.

6. It is not disputed that to date the husband has paid the wife three payments totalling HK\$3.75 million on a Charman basis. In other words, these funds are given to the wife on the premise that they will be deducted from any final award that she may receive. The payments were made on the following dates:

- (1) 24 November 2015 – HK\$1,500,000;
- (2) 28 April 2016 – HK\$1,500,000;
- (3) 4 November 2016 – HK\$750,000;

7. These payments were also made on the premise that the husband undertakes to continue to make a number of other payments direct as follows:

- A. **AND UPON** the Respondent Undertaking to continue to settle the following monthly payments direct:
 - i. Mortgage repayment of the former matrimonial home known as ... (“the Former Matrimonial Home”) (HK\$25,891);
 - ii. Utilities of the Former Matrimonial Home (approximately HK\$6,931), save and except gas;
 - iii. School fees of the child of the family, C, a girl, born on XX August 2011 (“C”) (approximately HK\$15,900); and
 - iv. All vehicle expenses aside from petrol and car parking rental (approximately HK\$1,650);

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8. Although the wife has accepted the Charman funds and the husband's undertaking, it is her case that the husband has not maintained her and C appropriately during the period of separation. She now seeks an order for maintenance pending suit/interim maintenance/litigation funding, which by its very nature will not be deducted from any final award that she might receive. She says that the husband has deliberately and strategically kept her short of funds and that he is controlling by nature.

9. This is of course denied by the husband, who in contrast maintains that the wife is spending recklessly and with little thought for the future. He says that her current spending patterns are not reflective of the way in which the parties conducted their married life. He likewise accuses the wife of upping her spending for litigation effect. In particular, he complains of extravagance on her part, including complaints concerning a 5th birthday party for C for 150 guests including 60 children. More recently he has taken issue with the wife staying in five star hotels in Hong Kong with C for short periods of time, seemingly for no good reason. There was also complaint over the purchase of two or three high end handbags in the sum of over HK\$100,000 in total. The wife says simply that this is reflective of the standard of living enjoyed by the parties during the marriage and that the Charman funds are now gone – spent on litigation costs and general living expenses. She denies that she has been extravagant.

Background

10. By way of background reference can be made to the judgment on discovery dated the 25 January 2017 and in particular to

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paragraphs 3 – 6, which in turn refers in part to the Ruling on Education dated the 22 August 2016.

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11. In short the parties met in 1996 in Hong Kong and married on the XX October 1999. Both sides of the family had emigrated to Australia in the 1980's and both parties were educated in Australia as a result. It seems that the marriage was not a particularly happy one, with periods of separation and subsequent reconciliation. The parties finally separated for good in July 2014 when the husband moved out of the former matrimonial home. On the 31 July 2015 the wife issued a divorce petition based on the husband's alleged unreasonable behaviour. This was initially defended, but thankfully the parties were able to come to terms on this aspect of the case at least and in November 2015 the particulars were amended to ones that were more agreeable to the husband. The divorce petition then proceeded on the basis of mild unreasonable behaviour particulars. The decree nisi was pronounced on the 21 December 2015.

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12. The parties have one child C who will shortly turn 6 years of age. Unfortunately, there has been a great deal of disagreement concerning the arrangements for C and the parties have been in and out of court on a fairly regular basis since the petition was issued arguing over arrangements for her care, access and schooling. In the event that the parties are not able to reach consensus it is anticipated that this aspect of the case will need to be set down for trial. The father has made it clear that ultimately he would like an order for joint custody and either shared care or joint care and control. This is resisted by the mother, although there seems to be a tacit understanding that there should be an order for

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joint custody. However, to date no consent summons has been filed to this effect. It is hoped that the parties will now be able to narrow their issues with respect to C and that the matter can then be set down for trial without further ado. The parties have already attended one Children's Dispute Resolution hearing and there has also been a further hearing on education.

13. There has also been a lot of disagreement with respect to the parties' finances and there have been ongoing issues with respect to discovery. It is the wife's case that the husband is a man of great wealth and that this wealth emanates from a number of family companies. She maintains her position that the husband has not been full and frank in his disclosure to date. On a smaller scale there have also been issues with respect to monies held by the wife, which she maintains are ultimately beneficially owned by her father.

14. The wife is presently a 46-year-old full time housewife. The husband is also 46 years old and he currently has a very senior role in a financial technology company. He is required to travel on a regular basis.

The law

Maintenance pending suit

15. The law is well known and not in dispute. Section 3 *MPPO* Cap192 states that the only governing principle is that the court shall make such order as it considers reasonable in all of the circumstances of the case. Consequently, applications such as these are approached on a broad-brush basis. A detailed examination of the parties' means may be examined at a later date at a full ancillary relief hearing if there is no

agreement in the meantime, when there is then every opportunity to achieve fairness by means of set off. In other words, if there is any overpayment or underpayment that can normally be rectified at a final ancillary relief hearing.

16. Both counsel have referred inter alia to the Court of Appeal decision in *HJFG v KCY* (CACV 127/2011, 28 October 2011, where the following principles were reiterated with respect to maintenance pending suit/interim maintenance applications:

- a. The sole criteria to be applied in determining the application is “reasonable” which is synonymous with “fairness”.
- b. A very important factor in determining fairness is the marital standard of living.
- c. In every maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long term expenditure, more aptly to be considered on a final hearing.
- d. Where the affidavit or form E disclosure by the payer is obviously deficient, the Court should not hesitate to make robust assumptions about his ability to pay. The Court is not confined to the mere say-so of the payer as to the extent of his income or resources. In such situation, the Court should err in favour of the payee.

17. In so far as this particular case is concerned the reference to the marital standard of living previously enjoyed by the parties is particularly pertinent.

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Litigation funding

18. *Currey v Currey* [2006] EWCA Civ 1338 continues to be the governing authority on litigation funding in Hong Kong. This states inter alia that:

“the conditions for a ‘costs allowance’ are as follows:

- (1) That the applicant spouse has no assets, or none that can reasonably be deployed (at para [19], [20]).
- (2) That she can provide no security for borrowing, or none which can reasonably be offered (at paras [19], [20]).
- (3) That she cannot reasonably obtain legal services by offering a charge on the outcome of the litigation (at para [20] and see *Sears Tooth*, per Wilson J).
- (4) That she cannot secure publicly funded legal help ‘at a level of expertise apt to the proceedings’ (at para [20])”

19. There is also a requirement to undertake an overarching enquiry:

At para [20], Wilson J held that the initial, overarching enquiry should be into whether the applicant for a costs allowance could demonstrate that she cannot reasonably procure legal advice and representation by any other means. Therefore, to the extent that an applicant has assets (as in *C v C*), she has to demonstrate that they cannot reasonably be deployed (whether directly or as the means of raising a loan) in funding legal services Other factors may well come into play. **The subject matter of the proceedings would always be relevant, as would the reasonableness of the applicant’s stance in the proceedings.**

20. Reference can also be made again to *HJFG v KCY* [2012] where it was stated that:

78. Section 3 of the Ordinance, of course, still required the Judge to be satisfied that any contribution towards the wife’s ongoing legal costs was reasonable. That meant that he had to be able to conduct some analysis of the nature and extent

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and purpose of the contributions sought. On the part of the wife, that required some breakdown of her anticipated costs.

79. Aside from the fundamental requirement of supplying a sufficiently detailed breakdown of anticipated costs, I am of the view that the following principles articulated by Wilson LJ in *Currey v Currey* should in future be adopted as providing prudent guidance to both judges and practitioners in this jurisdiction.

21. It is therefore essential, in any application for litigation funding, that the applicant is able to supply the court with “a sufficiently detailed breakdown of anticipated costs”. Further

82. The period over which an allowance for legal costs was to be paid was also considered by Wilson LJ to be a factor of considerable relevance. Applications should not therefore expect that an order that the allowance be paid until the final determination of all proceedings will be the inevitable order. It was observed that if the application for an allowance for legal costs was made before the FDR hearing, it may well be wise to order that the costs allowance should fund the applicant only up to that hearing:

In that case the Court of Appeal ordered that the wife should receive HK\$500,000 per month by way of a contribution towards her litigation funding, such sum to be paid until the FDR hearing or until further order.

22. It goes without saying that the court has no power to make an interim lump sum order or an interim order for sale, to cover the cost of litigation or otherwise. Consequently, the husband’s suggestion that South Horizons should be sold or the wife’s claim for partial litigation funding in the sum of HK\$1.7 million has to be seen in this light.

How much maintenance should the husband pay to the wife as maintenance pending suit for herself and interim maintenance for N?

The reasonable needs of the parties and the husband's ability to pay

The wife's needs

23. During the hearing a schedule was helpfully produced summarizing the present position of the parties. The wife's claim for maintenance pending suit/interim maintenance had dropped from her original claim of HK\$183,695 per month to HK\$167,195 per month, whereas the husband's position was that he should contribute HK\$57,975 per month in addition to his continued undertakings as set out in paragraph 7 above (subject to the caveat re the utilities). The schedule stated as follows:

General

Item	Amount being claimed by the W (HK\$)	Amount being offered by the H (HK\$)
Utilities	1,600	3,000 (all inclusive)
Food	15,000	7,500
Household Expenses	14,000	7,000
Car Expenses	25,320	6,000 (gas and car parking rental only)
Domestic Helper	4,500	4,500
TOTAL:	60,420	28,000

Personal

Item	Amount being claimed by the W (HK\$)	Amount being offered by the H (HK\$)
Meals out of Home	7,000	4,000
Transport (Octopus)	600	500
Clothing/Shoes	8,000	3,500
Personal Grooming	5,500	3,500
Entertainment/ Presents	2,500	1,000
Holidays	35,000	6,000
Medical/Dental	5,000	0 (covered by

		insurance)
Insurance premia	6,000	0
Others (mobile phone)	800	400
Others (church offering)	10,000	0
TOTAL:	80,400	18,900

Children

Item	Amount being claimed by the W (HK\$)	Amount being offered by the H (HK\$)
Tuition (including ECA)	7,975	7,975
School books and Stationery	1,200	1,000
Medical/Dental	5,000	0 (covered by insurance. Our client will settle this at first instance if jointly appointed.)
Entertainment/Presents	4,000	1,000
Clothing/Shoes	4,000	1,000
Insurance premia	4,200	0
Other Transport	0	100
TOTAL:	26,375	11,075

TOTAL of All Expenses:	HK\$167,195	HK\$57,975
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The items in dispute

Utilities

24. The husband proposes paying the wife HK\$3,000 per month on the premise that she be responsible for all of the utilities on the former matrimonial home and that he be released from his undertaking in that regard. At present the husband is responsible for paying for all utilities save for the gas bill plus the Government rent and rates. This proposal is a matter of some concern, given that the estimate for utilities of the former matrimonial home in the original order of the 24 November 2015

was for HK\$6,931 per month. This was reiterated in the orders of the 28 April and 4 November 2016. The wife for her part maintains that in addition to paying the gas bill in the sum of HK\$600 per month, that she is also responsible for a number of other expenses including bills for Hong Kong Telecom, Now TV and the internet and that altogether these total HK\$1,600 per month. I accept what she says in this respect. In such circumstances I will not release the husband from his undertaking with respect to the utilities and I will allow the wife the additional sum of HK\$1,600 per month sought.

Food

25. There is a dispute about the cost of food. The wife asks for HK\$15,000 per month and the husband says that the cost should be no more than HK\$7,500 per month. I have noted the fact that the husband's original estimate for food for his household in his Form E and in his subsequent affidavit dated the 29 December 2016, is for HK\$3,000 per month. This is probably reflective of the fact that he is required to travel for work. In addition, he now claims HK\$10,000 per month for eating out and the wife claims HK\$7,000 per month. On the face of it I accept that HK\$15,000 per month for one adult and one child seems a little on the high side. Consequently, on a broad brush basis I will allow HK\$10,000 per month. In doing so I accept that the wife and N enjoy and should continue to enjoy, good quality organic food stuffs.

Household expenses

26. The wife seeks HK\$14,000 per month and the husband offers HK\$7,000 per month. The wife's claim does appear to be on the high side and I am particularly concerned that her budget included the

replacement of curtains and other appliances etc. which are more in the nature of a capital expense. In such circumstances I will accept the sum of HK\$7,000 per month offered by the husband. It is of note that the husband has offered to reimburse the wife for the cost of the repair of pipes at the former matrimonial home in the sum of HK\$13,132. In the event that that sum has not yet been paid I will hold the husband to his promise to make this payment. This should be included as an acknowledgment/agreement in the order. I will expect that payment to be made forthwith.

Car expenses

27. There has been considerable argument over the car expenses and in particular the cost associated with hiring a driver. It does not appear to be disputed that the parties originally had a part time driver which they shared with the husband's mother. The husband strongly objects to paying for a full time driver, claiming that it was never intended that the parties would hire a driver on a long term basis during the marriage. He says that the part time driver was employed on a trial basis as there had originally been some concern about the availability of parking when dropping C off at school. He also points out that the wife is a full time nonworking mother who also has a driving licence. The wife for her part says that as it is not now possible to share a driver with the husband's family that she has no option but to hire a full time driver and that this is a reasonable expense in the circumstances. Consequently, the wife seeks a staggering HK\$25,320 per month inclusive of the cost of a driver in the sum of HK\$16,250 per month for car expenses.

28. Having considered all of the above it seems to me that on a broad brush basis it would be reasonable for the wife to employ a part time driver only. There may also be other alternatives including the possibility of employing a domestic helper who can also drive. Consequently, I will allow HK\$7,000 per month for this expense, which is in line with the original estimate given by the wife. In addition, the wife seeks HK\$9,070 per month for other car related expenses, whereas the husband offers HK\$6,000 per month. It is also of note that the husband has undertaken to pay for all the vehicle expenses aside from the petrol and car parking rental in the sum of HK\$1,650 per month. On the premise that this undertaking is to continue and on a broad brush basis I will allow the wife an additional sum of HK\$8,000 per month.

The wife's personal expenses

Meals out of the home

29. The wife claims an additional HK\$7,000 per month for herself for meals outside of the home. As I have said the husband now seeks HK\$10,000 per month but correspondingly a far less amount for food within his household. I accept that HK\$7,000 per month for a non-working parent seems a little on the high side. I will allow HK\$5,000 per month for this expense.

Transport

30. I accept that HK\$600 per month for an octopus card is a reasonable sum and should be allowed. I too find it hard to understand why this sum could not be agreed.

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V*Clothing/Shoes**Personal grooming**Entertainment/Presents*

31. There has been a lot of dispute about this and the wife's so called extravagant behaviour. In total the wife claims HK\$16,000 for these items. The husband offers HK\$8,000 per month. I will allow HK\$12,000 per month.

Holidays

32. There is also a significant dispute over this item. The wife claims HK\$35,000 per month for herself and C or HK\$420,000 per annum stating that the parties used to go on holiday up to 9 times per year, that she was used to travelling business class before she had C and that she was a X Diamond card holder. In contrast the husband says that they went on holiday a couple of times per year and that he used points to get upgrades.

33. By any standard HK\$35,000 per month is a very high figure indeed for holidays, especially when going forward it is anticipated that C will be spending half of her holidays with each of her parents. By the same token the sum of HK\$6,000 per month proposed by the husband seems on the low side. I will allow HK\$20,000 per month to cover the holiday costs for both mother and child.

Medical/Dental

34. Given that the husband has insurance which presently covers the medical and dental requirements of both the wife and C, I will not allow the sum of HK\$5,000 in addition. I do not think it reasonable on an

interim basis for the wife to seek an emergency fund for medical and dental expenses. I will though hold the husband to his undertaking to reimburse the wife for these items. The wife suggests that the husband shall reimburse her within 7 days of her providing him with the invoice. This seems reasonable. Consequently, this undertaking shall be included in the order.

Insurance premia

35. The wife maintains that originally she had eight insurance policies for a number of different items that lapsed because of non-payment by the husband etc. She has since purchased other insurance policies. The husband says that these are not required if they are for medical/dental insurance and that if there is a savings element attached for C then this is something that should be discussed between the parties as opposed to being unilaterally imposed by the wife. Longer term I accept that the wife is unlikely to be able to claim against the husband's corporate insurance for her own medical and dental needs. The husband says that he will nevertheless reimburse the wife for her reasonable expenses. I will hold him to that. This should include the cost of the wife's counselling/therapy for herself. Consequently, the sum of HK\$6,000 per month in addition shall not be allowed on an interim basis.

Others

36. I will allow the additional sum of HK\$800 per month for the wife's mobile phone but I will not allow HK\$10,000 per month as a church offering. It does not seem to me that it would be reasonable to expect the husband to pay this sum as part of an order for maintenance pending suit given that this is not actually a maintenance item.

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C's other expenses

Tuition and school books and stationery

37. A sum of HK\$7,975 per month is agreed in addition to the cost of school fees etc. I will allow an additional sum of HK\$1,000 per month for school books and stationery as suggested by the husband.

Medical/Dental

38. As with the mother's claim I will not allow the sum sought for medical and dental expenses in addition to the provision by the father of insurance for this purpose.

Entertainments/presents

Clothing/shoes

39. I will allow HK\$5,000 per month to cover C's other expenses. The mother seeks HK\$8,000 and the father offers HK\$2,000 per month. I accept that C probably goes to a lot of children's birthday parties and that as is customary it would be expected that she buys a birthday present and card. This can become expensive. Further I accept that the mother will wish to continue to buy good quality clothes and shoes for C.

40. The mother also says that she is paying for C's therapy. For the avoidance of doubt it seems to me that the husband should be paying for these items on the same premise that he is also paying for C's other medical/dental expenses. This should also be included in the husband's undertaking and the mother should be reimbursed for these expenses within 7 days of production of the relevant invoice.

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V*Insurance*

41. As indicated above the cost of insurance premia for C will not be allowed.

The husband's needs and his ability to pay

42. There is little doubt that the husband can afford to pay a reasonable sum for maintenance. On his own evidence his salary, including a discretionary bonus for the year ended August 2016, amounted to HK\$376,380 per month. In addition, he receives income from his rental properties plus dividends and interest on stocks and bonds. According to his Form E this amounts to an additional HK\$154,700 per month (see paragraph 3.6 of the husband's Form E). Thus the husband's income appears to be in excess of HK\$530,000 per month. In addition, he originally had cash savings of about HK\$5 million plus stocks and shares of nearly HK\$22 million plus properties etc. This is without the other significant assets that the wife maintains belong to the husband beneficially.

43. The husband maintains that his own outgoings amount to HK\$187,532 per month which at that stage included some provision for the wife and C which should be removed from the schedule for the purposes of this calculation. It seems to me that some of the husband's own expenses are also capable of some reduction. However even without that the husband has additional income of approximately HK\$343,500 per month. Thus I agree that he should be able to afford whatever the wife reasonably requires.

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Summary

44. In summary then the following sums shall be provided to the wife and C by the husband.

a) The husband's undertaking shall continue as set out in paragraph 7 above namely that he shall continue to pay:

- a. Mortgage repayment of the former matrimonial home known as ... ("the Former Matrimonial Home") (HK\$25,891);
- b. Utilities of the Former Matrimonial Home (approximately HK\$6,931), save and except gas;
- c. School fees of the child of the family, C, a girl, born on XX August 2011 ("C") (approximately HK\$15,900); and
- d. All vehicle expenses aside from petrol and car parking rental (approximately HK\$1,650);

As indicated above this amounts to approximately HK\$50,372 per month.

b) Further the husband shall undertake to reimburse the wife for the cost of medical/dental expenses for herself and C, plus the cost of any therapy/counselling for herself and C within 7 days of the production of the invoice for the same.

c) In addition, the husband shall pay the sum of HK\$13,132 as a one off expense for the reimbursement to the wife for the cost of replacing pipes at the former matrimonial home. This sum shall be paid forthwith if it has not been paid already and shall be included in the order as an acknowledgment/agreement.

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d) The husband shall also pay maintenance pending suit/interim maintenance in the total sum of HK\$90,500 per month. This is made up as follows:

General

Utilities	1,600
Food	10,000
Household Expenses	7,000
Car Expenses	7,000 8,000
Domestic Helper	4,500
TOTAL:	38,100

Personal

Meals out of Home	5,000
Transport (Octopus)	600
Clothing/Shoes	
Personal Grooming	12,000 (in total for three items)
Entertainment/ Presents	
Holidays	20,000 *
Medical/Dental	0
Insurance premia	0
Others (mobile phone)	800
Others (church offering)	0
TOTAL:	38,400

Child

Tuition (including ECA)	7,975
School books and Stationery	1,000
Medical/Dental	0
Entertainment/ Presents	5,000 in total

Clothing/Shoes	
Insurance premia	0
Other Transport	0
TOTAL:	13,975

TOTAL of All Expenses:	HK\$90,475
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Of this sum HK\$47,500 shall be paid to the wife and HK\$43,000 shall be paid to the wife as maintenance for C, such sum to be paid into the Petitioner's bank account namely HSBC account no 0XX-0XXXXXX-8XX. (*Please note that the allowance for holidays has been divided equally between mother and child)

Litigation funding

45. The wife seeks the sum of HK\$1.7 million being her outstanding legal costs as follows:

<u>Invoice Date</u>	<u>Amount (HK\$)</u>
27 th April 2016	270,179
22 nd June 2016	445,899
5 th August 2016	472,882
15 th September 2016	524,569
Total:	1,713,529

46. Of this sum the wife says that she had to borrow from her father in order to pay for the first three bills and that the sum of HK\$524,569 is still outstanding. She now wishes to repay her father and to settle the last bill. She also seeks funds to pay for her costs between the date of the hearing and the FDR hearing in the sum of HK\$121,000 per month spread over 9 months. She estimates her legal costs going forward as follows:

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39. I am advised and verily believe that my estimated legal costs up to and including the FDR is HK\$1,090,000 which are as follows:-

	Item	Estimated Costs	HK\$
1.	Preparation and attendance of specific discovery hearing on 6 th November 2016	Counsel's fees – HK\$250,000 Solicitor's costs – HK\$170,000	420,000
2.	Professional charges of Messrs. KLC Kennic Lui CPA		120,000
3.	Preparation and attendance of FDR	Counsel's fees – HK\$300,000 Solicitor's costs – HK\$250,000	550,000
		Total:	1,090,000

If the discovery process is completed shortly after the specific discovery hearing, it is my hope that we will be able to proceed to an FDR in about 9 months. Based on this assumption, the monthly legal costs maintenance I require is around HK\$121,000.

47. The first difficulty with the wife's estimate is that it includes preparation for and attendance at the Discovery hearing given that that hearing was still pending at that time. I queried this during the hearing and was told that item 2 as well as item 1 related to the issue of discovery. Consequently, it seems to me that this should not now be included in the estimate of costs given that this is supposed to provide the wife with funding for and up to and including the Financial Dispute Resolution hearing. The issue of costs pertaining to discovery will need to be dealt with separately and although I appreciate that an order for costs is not the same thing as litigation funding meant to cover solicitor and own client costs, there will nevertheless be significant overlap. Thus I am only concerned with the third item – namely the estimate of HK\$550,000 for preparation and attendance at the FDR hearing.

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The Currey protocol

- (1) That the applicant spouse has no assets, or none that can reasonably be deployed (at para [19], [20]).

48. I accept that the wife only has limited assets at her disposal and that these cannot be reasonably deployed for litigation costs going forward. She is living at the former matrimonial home that she owns jointly with the husband and there is no agreement that South Horizons be sold. In the context of this case I also accept that it would not be reasonable to expect her to sell South Horizons in the short term or to for her to continue to borrow funds from her father.

- (2) That she can provide no security for borrowing, or none which can reasonably be offered (at paras [19], [20]).

- (3) That she cannot reasonably obtain legal services by offering a charge on the outcome of the litigation (at para [20] and see *Sears Tooth*, per Wilson J).

49. I also accept that it would be difficult for the wife to borrow from a bank or from other financial institutions given that she is not currently working and that the only forms of security that she might be able to offer are the same assets that she jointly owns as set out above. Just as it does not seem to me that it would be reasonable for her to sell the former matrimonial home or South Horizons I also accept that it would not be reasonable for her to borrow funds using these assets as collateral. I further accept that it would not be feasible for her to obtain legal services by offering a charge on the outcome of the litigation – which would be very unusual in a Hong Kong litigation context in any event.

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- (4) That she cannot secure publicly funded legal help ‘at a level of expertise apt to the proceedings’ (at para [20])”

50. The wife applied for legal aid on the 8 September 2016 and perhaps not surprisingly in the circumstances was unsuccessful. Therefore, it is not possible for her to secure publicly funded legal help.

Overarching enquiry

51. The wife also complains that she had no option but to take the stance that she has with respect to some of the issues before the court. She says that she should not be denied her choice of legal representation. I accept what she says in this respect. It is of note that both sides accuse the other of being unreasonable. For the avoidance of doubt I accept that the mother has had no choice but to seek further information from the father with respect to his finances. Both sides have also had some valid concerns with respect to C who continues to be caught in the “miserable middle”.

52. Having considered all of the above I will not make an order with respect to the sum of HK\$1.7 million. I will though order that the husband do contribute the sum of HK\$550,000 as litigation funding i.e. HK\$110,000 per month for a five-month period to be back dated to the 1 May 2017 and to be paid directly on account to the wife’s solicitors for five consecutive months (May – September 2017). This should take the parties through to the FDR hearing. In the event that there is no settlement then this matter can be further reviewed.

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V*Backdating*

53. The wife asks that the maintenance be backdated to the 1 August 2016. However, given the fact that she requested and was given significant funds on a Charman basis, meant in part to cover her maintenance and litigation funding needs, it seems to me that it would not be appropriate to backdate the order to that date. By the time the matter came back to court the wife's position, rightly or wrongly, was that she was out of funds. She did not want a further Charman order and was probably concerned about the impact that this might have on any final award. However, she did accept a further sum of HK\$750,000 on the 4 November 2016, shortly after she restored this hearing on the 25 October 2016. In such circumstances there will not be significant backdating. The order will take effect from the 1 April 2017, credit to be given for any sums paid by the husband other than the Charman amounts.

Costs

54. Neither party has been entirely successful here. However, given that the wife really had no option but to make this application, and the fact that she has beaten the husband's open offer by a significant margin, I shall make an order nisi to be made absolute in 14 days' time that the husband shall also pay the wife's costs of and occasioned by this application on a party and party basis to be taxed if not agreed. There shall be certificate for all counsel involved.

55. In addition, I would now like to deal with the issue of the costs arising out of the Discovery judgment, prior to the Financial Dispute Resolution hearing. It seems to me that this issue may be dealt

with on paper. Consequently, leave is given for both sides to file and serve a short written submission on this issue within the next 28 days.

Order

56. Upon the Respondent's undertakings and acknowledgment and agreements as set out in paragraph 44 above:

- 1) The Respondent shall pay maintenance pending suit to the Petitioner for herself in the sum of HK\$47,500 per month, such sum to be back dated to the 1 April 2017 and thereafter to be paid on the 1st day of each succeeding month until further order, such sum to be paid into the Petitioner's bank account namely HSBC account no 0XX-0XXXXXX-8XX.
- 2) The Respondent shall also pay maintenance pending suit to the Petitioner in the sum of HK\$110,000 per month as litigation funding for a five-month period commencing on the 1 May 2017 and thereafter to be paid on four further consecutive months, such sum to be paid directly on account to the Petitioner's solicitors.
- 3) The Respondent shall pay interim maintenance to the Petitioner for the child of the family in the sum of HK\$43,000 per month the first payment to be backdated to the 1 April 2017 and thereafter to be paid on the 1st day of each succeeding month until further order, such sum to be paid into the Petitioner's bank account namely HSBC account no 0XX-0XXXXXX-8XX.
- 4) There shall be an order nisi to be made absolute in 14 days' time that the Respondent do pay the Petitioner's costs of and

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occasioned by this application on a party and party basis to be taxed if not agreed. There shall be certificate for all counsel involved.

- 5) The parties shall file and serve written submissions on costs arising out of the Discovery judgment dated the 25 January 2017 within the next 28 days.

(Sharon D. MELLOY)
District Judge

Mr Richard Todd and Ms Sasha Allison instructed by Payne Clermont Velasco for the Petitioner

Mr J Chan instructed by Withers the Respondent