

(Uploaded Vision)
**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
MATRIMONIAL CAUSES
NUMBER 4820 of 2018**

BETWEEN

T

Petitioner

and

T

Respondent

Coram : Deputy District Judge M Lam in Chambers (not open to public)

Date of hearing : 26 March 2019

Date of judgment : 20 December 2019

Decision
(Maintenance pending suit/interim maintenance
& litigation funding)

The Wife's Claim

1. This is the Respondent's ("wife") application by way of a summons issued on 30 May 2018 seeking against the petitioner ("husband") on an interim basis for the maintenance of herself and their 2 daughters of the following:

(a) maintenance pending suit of HKD428,397.53 plus medical insurance per month for the first year and thereafter HKD342,900 plus medical insurance per month, commencing on 1 May 2018, or such period and amounts as the Court deems fit;

(b) pending determination of the maintenance pending suit, interim maintenance at the rate of HKD428,397.53 plus medical insurance per month;

(c) in the alternative, for the medical insurance, the husband undertakes to continue to pay medical insurance for the children and the wife;

(d) litigation fund of HKD200,000 per month (exclusive of counsel's fees) commencing on 1 May 2018, or such period and amounts as the Court deems fit.

2. On 16 July 2018, Deputy District Judge D. Cheung made an order ("July Order") that the husband shall, pending the determination of the present summons, pay the wife HKD55,000 per month for her interim maintenance and HKD45,000 per month for the interim maintenance of their two daughters (HKD22,500 per month per each child). The first payment was to be made on 1 August 2018 until further order of the court.

3. The July Order was made upon the undertaking of the husband to pay the following expenses as interim-interim order for the maintenance of the wife and their two daughters : -

(a) the monthly rental of HKD58,000 of a residential flat in the Southern district of the Hong Kong Island (“Rented Flat”), inclusive of a car parking space, from 31 July 2018 onwards (“Rental Undertaking”);

(b) security deposit for the Rented Flat of HKD108,000 on or before 20 July 2018 (“Deposit Undertaking”);

(c) utilities of the residence of the wife and the 2 children on reimbursement basis within 14 days upon production of receipt (“Utilities Undertaking”);

(d) school fees, school bus fees and school-related expenses (other than extra-curricular activities taken at school) of the children as and when it falls due (“School Undertaking”);

(e) medical and dental expenses of the children (which include medication for the younger daughter) on reimbursement basis within 14 days upon production of receipt (“Medical Undertaking”);

(f) medical insurance currently paid by the wife (“Insurance Undertaking”);

(Collectively as the “July Undertakings”)

4. At this hearing, a schedule (“Agreed Schedule”) is helpfully produced by the parties summarizing the present positions of both parties. The wife’s claim for maintenance pending suit/interim maintenance has dropped from her original claim to HKD309,281 per month, whereas the

husband is only willing to pay for part of the claim for the children but none for the wife.

5. In addition, the Wife now seeks a lump sum payment of HKD2 million for her anticipated legal costs. The husband refuses to pay.

6. In summary, their positions are: -

(A) of the July Undertakings, the husband only agrees to continue the following undertakings until the determination of ancillary relief application or further order of the court: -

Of the July Undertakings	for the present summons, both parties agree the reasonable expenses for such items are (HKD)
(a) rental for the children	36,000 (for the children's share of the agreed rental : 2/3 of 54,000)
(b) utilities for the children	2,000 (for the children's share of the agreed utilities : 2/3 of 3,000)
(c) the School Undertaking	38,264 (being school fees 30,064 + school bus 5,200 + school lunch 3,000)
(d) the Medical Undertaking	in full (for children only)
(e) the Insurance Undertaking	1,000 (for children only)

(B) of the wife's claim for maintenance pending suit for herself, the husband refuses to pay any. He also disputes the reasonable needs of the wife as follows: -

Item	Wife's Claim	Husband alleges her reasonable needs to be
(1) rent	18,000 (1/3 of the agreed rental payment of 54,000 ; the wife abandons the claim	not dispute the quantum

	for car parking space : wife ceased driving)	
(2) utilities	1,000 (1/3 of the agreed expenses for utilities of 3,000)	not dispute the quantum
(3) Food	3,550 (1/3 of the agreed expenses for food and meal out of home)	not dispute the quantum
(4) household	2,000 (1/3 of 6,000)	1,666.7 (1/3 of 5,000)
(5) transportation	4,650	4,000
(6) domestic helper	1,872 (1/3 of 5,616)	1,666.7 (1/3 of 5,000)
(7) medical insurance	1,000	not dispute the quantum
(8) Medical	48,000	5,000
(9) clothing/ grooming	61,000	8,000
(10) entertainm ent/ present	5,000	not dispute the quantum
(11) holiday	5,600	5,000
(12) buffer	25,000 (financial buffer : mortgage and other expenses for a landed property in Hong Kong held in the wife's sole name ("HK Property"))	0
Total	176,672	The husband refuses to pay

(C) of the Wife's claim for interim payment for the 2 daughters, the husband's position is as follows : -

Item	Wife's Claim	Husband alleges the children's reasonable needs to be
(13) rent	36,000 (2/3 of the agreed rental of 54,000)	undertake to pay

(14) utilities	2,000 (2/3 of the agreed expenses for utilities of 3,000)	undertake to pay
(15) Food	7,100 (2/3 of the agreed expenses for food and meal out of home)	not dispute the quantum
(16) household	4,000 (2/3 of 6,000)	3,333.3 (2/3 of 5,000)
(17) transportation	9,300	1,000
(18) domestic helper	3,744 (2/3 of 5,616)	3,333.3 (2/3 of 5,000)
(19) medical insurance	1,000	undertake to pay
(20) Medical	3,000	undertake to pay
(21) clothing/ grooming	4,000	2,000
(22) entertainment/ present	6,000	3,000
(23) holiday	11,200	10,000
(24) school bus	5,200	undertake to pay
(25) school fees	30,064	undertake to pay
(26) lunch/ pocket money	3,000	undertake to pay
(27) ECA	7,000	6,700
Total	132,608	116,730.7

(For the items that the husband does not dispute the quantum of them, they are collectively defined as the “Agreed Items”)

Background

7. The Husband is 4X years old and the wife is aged 4X. They married in XXX 2008. Their 2 daughters were born in XXX 2009 and XXX 2012 respectively.

8. The Husband holds a Bachelor of Medicine, Surgery and Medical Science. He is a registered medical practitioner in Hong Kong and has over 18 years of practice. He had worked for hospitals as general practitioner until 2012. He also used to work as part-time doctor for a number of beauty clinics.

9. In or around XXX 2012, the husband, with the assistance of the wife, set up his own general practitioner clinic, which specialized in aesthetic treatments, weight management and anti-aging treatments. Since its inception, the clinic has been operated through a limited company (“Company”). The husband has been the sole director and shareholder of the Company as well as the sole authorized signatory of the bank account of it. The Company business has been the sole income of the whole family from the setup of the Company.

10. The wife earned her Bachelor of Commerce XXXXXX. She had worked in the marketing field until around 2013. She assisted the husband in the set up and overall operation of the Company while the husband concentrated on the medical aspect of the business. In September 2014, the Company formally employed her as its Managing Director.

11. Their relationship turned sour no later than the end of 2017. The wife was told not to go to the clinic by then. Her access to the Company business was completely cut off in February 2018. The husband moved out of the former matrimonial home on 28 March 2018. In April 2018, the wife was served with the divorce petition, a notice of termination of employment and a demand note (“Demand Note”) for repayment of a debt purportedly owed to the Company of HKD745,745.75. The Decree Nisi was granted on 21 June 2018.

The Wife's Grounds

12. It is common ground that the wife played an integral role in conceptualizing, setting up and running of the Company business from the outset. She handled all aspects of the business (except medicinal part) while being the carer of the children. From her formal employment with the Company, she had been paid substantial amounts over the years by way of salary, bonus and commission. She also had the use of prestigious credit cards for the family expenses as well as her personal expenses. The husband was used to settle or reimburse her those payments.

13. It is the wife's case that she had all along been enjoying high quality of life until the commencement of the present action. In 2017, the husband was introduced to a Mr. Lee ("Mr Lee") who claimed himself to be a Tibetan Buddhist Master. The husband subsequently became obsessed with the worship promoted by Mr Lee and his personality began to change dramatically : making a number of substantial payments to Mr Lee and some unidentified individuals as well as making unjustified allegations against her. Since about December 2017, the husband had tried to discuss divorce with her. On 28 March 2018, he moved out of the former matrimonial home.

14. On 26 April 2018, the day before the 10th wedding anniversary, she was shockingly served with a divorce petition, a termination notice of employment, and the next date, the Demand Note. Not only that she lost her husband and job in one day, she was going to be homeless as the tenancy of the former matrimonial home would soon be expired in the following few days. She finally managed to have the tenancy extended for two months at the monthly rental of HKD71,000. Thereafter,

she and the children had to move to a smaller flat (of 1037 sq. ft) in the southern part of the Hong Kong Island (“New Home”) for cheaper rent at HKD54,000 plus HKD4,000 for car parking space.

15. Even though she managed to secure part-time employment at a monthly salary of HKD45,000 with her former employer in September 2018, she lost her job in January 2019 and has remained unemployed since then. Given she is the primary carer of the 2 daughters, who are under her care and control most of the time, with no regular income or solid assets, she needs the financial support from the husband. Because of the husband’s reluctance to financially support them as he did in the past, she had no choice but to enlist her father’s financial assistance and to take out the present Summons.

The Husband’s Position

16. The husband denies any change of personality. He says that the deterioration of the relationship between the parties was due to the irreconcilable difference in their personalities. The wife’s personality has made him feel fear and stressful.

17. He agrees that the family had enjoyed a relatively high living standard but not as high as the wife has suggested. Since the filing of the divorce petition, he has offered to pay a monthly sum of HKD100,000 in addition to a number of direct payments which rounded up to approximately HKD200,000 as maintenance for the wife and the children. The July Undertakings amounted to approximately HKD98,264 per month.

18. For the present application, he is only able to pay for the reasonable expenses of the children. He insists the wife to maintain herself,

not only because she has sufficient means and earning capacity to do so, it is also because his income has been reduced to HKD200,000 per month for he had sold the Company business to a limited company (“Buyer”) in December 2018 which has since employed him as its doctor for the business at a monthly salary of HKD200,000 plus commission if the business turnover generated from his service exceeds HKD1.5 million per month.

19. He does not agree to contribute towards the wife’s legal costs. He nevertheless offers his consent to the selling of the two properties in Australia, which are held by the wife as legal owner, in order to free up funds to cover her projected legal costs.

The legal principles

20. Jurisdiction to award maintenance pending suit to a spouse is governed by s.3 of the Matrimonial Proceedings and Property Ordinance, Cap. 192 (“Ordinance”). The court is empowered to order a party to the marriage to make to the other such periodical payments for his or her ‘maintenance’ as the court thinks ‘reasonable’, subject to the condition that the duration of any such order is limited to the period up to the final resolution of the ancillary relief dispute and the grant of the decree absolute.

21. In the Court of Appeal decision in *HJFG v KCY* CACV 127/2011, 28 October 2011, the following principles were reiterated with respect to maintenance pending suit/interim maintenance applications : -

- (a) ‘Maintenance’ is restricted to the recurring costs of living at whatever standard of living is appropriate to meet the “immediate and reasonable needs” of the other party and the children.

- (b) The amount must be ‘reasonable’, that it must be fair, having regard to the circumstances of the case. An important factor in determining fairness is a consideration of the marital standard of living. This is not to say that the exercise is merely to replicate that standard.
- (c) No matter how great the wealth of the parties and how unevenly distributed that wealth may be at the time an application for interim maintenance is made, the court has no jurisdiction to make orders which for all practical purposes result in a form of pre-trial capital re-balancing.
- (d) 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. That budget should be examined critically in every case to exclude forensic exaggeration.
- (e) 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 a situation, the court should err in favour of the payee.
- (f) The analysis should be conducted on a ‘broad brush’ basis for the amount to be paid is for a limited period only. If there is any overpayment or underpayment, it can be rectified at a final ancillary relief hearing. Normally not all of the evidence is necessarily before the court, it is not appropriate, nor indeed in most cases possible, for the court to conduct a detailed investigation into the finances of the parties.

22. When the short-term employment and business prospects of a party is a matter of concern, the parties’ earning capacity should also be considered. See *LJ v LWHH* [2003] 3 HKC 455

The Analysis

23. With these principles in mind, I now turn to consider the arguments between the parties.

Standard of living

24. It is agreed that this is not a big money case. The living standard during marriage could not be regarded as luxurious or extravagant. That said, the following evidence shows that the family enjoyed a reasonably comfortable lifestyle : -

- (a) the family lived in a 2,100 sq. ft apartment in the Mid-Levels and enjoyed the use of a 7-seater van;
- (b) they enjoyed overseas trips several times a year;
- (c) they had liberal use of prestigious credit cards and enjoyed the benefits associated with the membership of such cards, including access to clubs and travel lounges. One of those credit cards (“Special Card”) required minimum annual expenditure of USD100,000 and minimum annual income of USD1 million;
- (d) the wife was used to buy designer clothes, shoes and bags;
- (e) she had relaxed spending on beauty and personal care treatments and products;
- (f) The children studied at an international school.

25. The wife used to receive a monthly remuneration of approximately HKD160,000 (inclusive of bonus and allowance) from the Company. She also had the unlimited use of the Special Card and the husband would settle the payments for her. The Demand Note actually asked the wife to return HKD745,745 to the Company, being payment settlement for her for the period between April 2015 and August 2017.

The Expenses

26. Of the Agreed Items, the husband does not dispute the quantum of them. I accept those figures as the reasonable needs of the wife and the children. The argument on those items is limited to whether the husband should also pay for the wife's share of them. Such argument will be dealt with further below.

27. As to the remaining items (the quantum are in dispute), they should be judged according to the standard of living the family enjoyed before separation.

28. Of the household expenses, domestic helper expenses and holiday expenses, the differences between the parties on each item are several hundred dollars only. In light of the standard of living of the parties before separation, I accept the wife's figures on these items as reasonable, in particular, I find no reason why the wife should not continue to employ the domestic helper, who has served the family and taken care of the children since 2013, at a slightly higher salary. The family were also used to enjoy regular overseas trips during the marriage.

29. Of the wife's claim for transportation expenses, I allow HKD4,000 for the wife and HKD3,000 for each child. I have taken into account of the wife's cessation of use of the 7-seater van and of the traveling expenses required for taking the children to attend extracurricular activities, social functions, medical treatments and entertainments.

30. The wife's claims for medical and dental expenses (mainly beauty treatments), clothing, shoes, handbags, jewelry and grooming can be dealt with together. As evidenced by the bank statements, the wife was

used to receive frequent aesthetic and medical beauty treatments, to purchase designers' clothing, bags and shoes, to do shopping in relatively high-end market. She also received free beauty treatments from the Company.

31. No doubt the marital standard of living and spending pattern in the past must be taken into account in assessing the wife's claim. This is however not to say that the exercise is merely to replicate that standard. The reality is the parties, upon separation, have split into two households and hence have two sets of living expenses to meet instead of one during the marriage, not to mention the escalating legal costs which definitely add further burden on them. This is not a big money case and it is unrealistic to expect a budget to maintain exactly the same living standard as in the past when the parties are separated and are engaging in a conflicting and protracted litigation.

32. Coupled with the fact that the wife is no longer working as a Managing Director or in the beauty industry. She is not in the job market, at least not for the time being, and thus there is reduced need for her to maintain her managing director image by buying brand-named items or receiving intensive aesthetic treatments in order to mingle with the social circle. Her expenses spent on these items can be adjusted downward.

33. By taking a broad brush approach and in looking at the matters in the round, I take the view that it will be fair and reasonable to allow HKD20,000 per month for her medical and dental expenses and HKD15,000 for her clothing, shoes, handbags, jewelry and personal grooming.

34. For the claims for the children, I should take into account the fact that the children are going through puberty. Puberty development necessitates frequent purchase of clothing, busy social activities and increment of extracurricular activities. I am of the view that HKD2,000 for clothing, shoes and personal grooming, HKD3,000 for entertainment and presents and HKD3,500 for extracurricular activities for each child per month to be reasonable.

35. I nevertheless do not find any valid basis for the wife's claim for "financial buffer". Mortgage repayments and other expenses for her landed properties fall out of the scope of "maintenance". They are obviously not recurring costs of living. Maintenance pending suit budget has to exclude capital or long-term expenditure, more aptly to be considered at the ancillary relief hearing.

36. Broadly apportioned and rounded off the numbers, the wife's total monthly expenses are HKD59,000 and the children expenses are HKD51,000 in addition to : -

(a) the undertakings given by the husband to pay for : -

- (i) the School Undertaking;
- (ii) the Medical Undertaking for the children; and
- (iii) the Insurance Undertaking for the children

(b) the rental payments for the residence of the wife and children

The wife's financial position

37. The husband seeks to argue that the wife is a capable person who has solid experience in working in various marketing positions at several well-established companies in Hong Kong. She also contributed to

A the set-up of the Company and oversaw its operation except the medicinal
B part of it. After the separation, she was gainfully employed at a monthly
C salary of HKD45,000 from September 2018 to January 2019. However, I
D am not convinced that she will be able to quickly join the workforce and to
E make her own living as suggested by the husband.

F 38. In my view, her post-separation employment demonstrated
G her eagerness to make a living. The employment was nevertheless short-
H lived. Being the primary carer of two young children, who are under her
I care most of the time, her chance to obtain employment with flexible
J working hours (as the Company allowed in the past) is understandably
K flimsy. The non-renewal of her employment contract in January 2019 is a
L pointer to such difficulties. Her then employment required frequent
travels, overseas duties and overtime work which is not uncommon in the
marketing field in Hong Kong. It is obvious that she has real difficulty in
re-entering into the job market at this stage.

M 39. I am not persuaded that the wife's overseas trip with some
N staff and an investor of a beauty business or that her knowledge about an
O investor of a beauty business not staying in Italy in early 2019 afford a
P finding of her financial association with beauty clinics. From the itinerary
Q and the photos of the trip, I have no reason not to believe that she was just
R joining her friends in a pleasure trip in the Chinese New Year of 2019. The
husband's mere suspicion does not justify a finding of hidden financial
resources of the wife.

S 40. Absent any new source of solid income in the near future, she
T will have difficulty in meeting the needs of the children and herself with
U
V

her realizable liquid assets, which was reported to be less than HKD325,000 (mainly cash savings in bank).

41. Truly there are three landed properties held in the wife's sole name as follows : -

(a) The HK Property was purchased at the price of approximately HKD6.91 million in July 2014. Down payment of HKD 2.71 million was paid by the husband. The net value was estimated to be HKD4.68 million in the wife's Form E filed on 26 June 2018 ("Her Form E"). It is rented out at the monthly rate of around HKD16,000 which is more or less sufficient to settle the monthly mortgage repayment of around HKD15,000 to 16,000.

(b) A property in Australia was purchased at the price of approximately HKD9.962 million in May 2017. So far only 10% of the purchase price was paid (by the husband). The property was under development to be completed in or around 2023.

(c) A property in Australia was purchased at the price of HKD3.538 million in May 2017. So far only 10% of the purchase price was paid (by the husband). The property was under development to be completed in or around 2023.

(collectively as the "Three Properties")

I however find no valid basis for immediate disposal of these landed properties to pay for the interim maintenance of the wife and the children at this stage, when the husband has ability to pay for such maintenance.

The disposal of the Three Properties will be considered in the claim for litigation fund as elaborated further below.

The Husband's Ability to Pay

42. It is the husband's allegation that he has no ability to pay for the wife's maintenance and part of the children maintenance because of drastic decline of his income and rapid depletion of his assets.

43. He says that the reduction of his monthly income to less than HKD200,000 since February 2018 resulted in his entering into a contract dated 1 December 2018 ("Sales Contract") for the sale of the Company business ("Sale") to a company ("Buyer") as well as his entering into an employment contract with the Buyer dated 28 November 2018 ("Employment Contract").

44. He explains that he would be benefited from the Sales Contract and the Employment Contract (collectively as the "Two Contracts") for the Buyer has undertaken to :

(A) take over the liabilities of the Company estimated to be HKD9,000,000, including: -

item	Description	estimated value
(a)	motor vehicle ("Car") with underway mortgage	HKD1 million
(b)	medical equipment with underway mortgage	HKD2.5 millions
(c)	facial or weighting treatments paid by customers but unfinished	HKD5.5 millions

(B) employ the husband to continue to work for the clinic for the Buyer for four years at a monthly salary of HKD200,000, plus 20% bonus on gross profit of the clinic if its monthly turnover generated from the services rendered by the husband exceeds

HKD1.5 million. In addition, the Buyer would provide him with housing allowance at a monthly rate of HKD54,000 and the personal use of the Car.

(C) set up and renovate a new clinic as the Company's lease with the existing landlord would come to an end by 30 April 2019. He estimated the relocation cost would be no less than HKD3.2 million.

45. He says that since the signing of the Two Contracts, his monthly income has been limited to a monthly salary of HKD200,000 for the monthly sales turnover of the business was less than HKD1.5 million. He claims that he has no confidence in earning more than HKD200,000 per month and accordingly is unable to satisfy the wife's claim.

46. He further explains that the family capital would be exhausted very soon because of some unwise decisions of the parties including the following :-

(a) drawing out cash from the Company in a sum of more than HKD8.5 million between May 2017 and June 2018, leaving the company with low cash flow;

(b) his spending of approximately HKD2 million for meditation sessions and donations to Thai temples from July 2017 to March 2018;

(c) his loan of HKD2,321,544 ("Father's Loan") to his father for the purchase of a landed property in Hong Kong ("Father's Property") in mid-2017. He has also been responsible for the mortgage repayments since September 2017;

(d) his acquisition of the shares of a listed company in Hong Kong at HKD0.166 per share but the share price has since dropped for over 60% to HKD0.063 per share.

(e) the wife's imprudent purchase of the Three Properties and another landed property (the purchase of the latter was aborted with the deposit forfeited);

47. On the evidence before me, I am not convinced that the husband has no ability to maintain the wife and the children as he alleges. To start with, I shall first deal with the financial history of the husband.

48. According to the Company's financial statements signed by the husband from 2015 to 2018, the Company has the record of :

(a) annual turnover of : -

Item	2015	2016	2017	2018 (HKD)
annual turnover	14,368,004	23,356,290	23,673,722	22,701,076
retained profits	5,823,020	5,439,003	8,214,309	14,053,933

(b) providing the husband with :

Item	2015	2016	2017	2018 (HKD)
director's income	3,600,000	5,834,483	3,680,801	3,575,327
interim dividend	2,000,000	5,000,000	3,000,000	nil
Total	5,600,000	10,834,483	6,680,801	3,575,327

(the husband declared in his Form E affirmed on 26 June 2018 ("His Form E") that he received dividends from the Company at HKD3.5 million and HKD2 million in May 2017 and January 2018 respectively.)

(c) settling the payments of some personal and family expenses of the parties, including the rentals of their residences as well as their credit cards expenses.

49. According to His Form E, the total value of his interest in all holdings and insurance policies was more than HKD7.87 and HKD2.4 million respectively. The loans and bank facilities granted from banks was less than HKD2.75 million. Apart from full settlement of all the credit card bills every month, he was able to grant the Father's Loan to his father.

50. In light of such positive financial background, his allegations of drastic deterioration of financial conditions to the extent as stated as follows requires further justification: -

(a) a decline of 40.64% of the turnover of the Company since February 2018 : turnover from February to October 2017 as compared to that from February to October 2018.

(b) an increment of the loan from the Company (the loan reached a sum of HKD8.537 million as of 26 June 2018 as alleged in his answer to the questionnaire). Such figure does not sit comfortably with that reported in His Form E (loans from the Company in the total amount of HKD3.04 million for the period between January and June 2018).

(c) a drop of his total interest in equities from approximately HKD7.87 million in or around June 2018 to approximately HKD2.54 million in or around October 2018 and further to an overall negative equity in his bank account as alleged in his affirmation dated 8 January 2019.

(d) withdrawals of HKD2 million between January and April 2018.

51. I accept the submissions of Mr Hughes, the Counsel for the wife, that the husband has yet provided sufficient information and documents to justify his allegations of the sudden drop of the Company business and his income in 2018. The husband's general statements that the decline of the business was caused by the wife making "defamatory statements" against him (which is devoid of particulars) and his low mood are far from convincing.

52. The husband fails to account for the details about the loans from the Company. The purposes, the use and the flow of fund of each of such loans have not been sufficiently provided for. A general statement that those loans were mainly for the husband's personal and family use and investments is unconvincing. The allegation that those were interest-free loans without maturity dates raises further doubts on the genuineness of such loans. It also begs the question of how those interest-free loans without maturity dates would have weakened the husband's ability to pay interim maintenance. There is simply no pressing need for immediate repayment.

53. The husband's allegations of the audited financial statements of the Company in the past years have misleadingly booked the "income from unperformed treatment packages" as income instead of liabilities, ending up with the parties using the "future income" for their own use is in lack of detailed particulars or adequate documentary proof.

54. Of the significant drop of the value of his share portfolios i.e. from HKD7.87 million in his Form E to HKD 2.54 million in or around October 2018, there was only limited disclosure of documents of his shares portfolios.

55. Likewise, his alleged donation of HKD 2 million to the Thai Temples are unsupported with particulars or documentary proof. When he was asked how much cash he currently owned, whether legally, equitably or beneficially in the questionnaire, he evaded the question by simply referring to his bank balance.

56. In the absence of sufficient proof at this stage, the husband's allegations of the Company business having swung from record profits in previous years to substantial debts in 2018 appears to be too much of a coincidence, bearing in mind of his declared intention to divorce in late December 2017 and his cut-off of the wife's access to the business in February 2018. Being the sole director, shareholder and signatory of the bank accounts of the Company, the incomes, assets, books and accounts of the Company are at his absolute control and disposal. Undoubtedly he has actual means to justify his allegations with adequate information and documents but he chose not.

57. Furthermore, the way he disclosed the Two Contracts has raised further doubts about the husband's case. Despite the wife's repeated demands, it was only until 4:43p.m. on 22 March 2019 (Friday), one working day before this hearing, the Sales Contract was disclosed. So far, the following matters have not been sufficiently accounted for : -

- (a) the Sales Contract refers to "business contracts" (clause 1.6) and "financial, legal, tax, environmental, intellectual property, labor records and agreements of the business". (clause for 4.2). However, none of these documents have been provided.

- (b) how the purported loans between the husband and the Company have been dealt with or will be dealt with in the purported sale of the business.
- (c) the plan for the imminent relocation and renovation of the Company business and the source of funds for the costs of it.
- (d) the proof of the liabilities of the Company as alleged by the husband. Whether the liabilities of the Company exceed its assets which warrants the sale of the business;
- (e) any evidence showing the fair market value for the Company business and the husband's efforts in seeking investors or purchasers.

58. Similarly, the disclosure of the Employment Contract also weakens the husband's case. In the husband's solicitor's letter dated 12 December 2018, it is stated that the husband "*has recently been negotiating employment contracts with potential employers and is reaching a final stage of negotiation.*" However, the Employment Contract was indeed dated 28th November 2018 and the Sales Contract dated 1 December 2018. The said letter also runs counter to the husband's allegation of a closure of his clinic in his affirmation filed on 8 January 2019. It was only when he was asked specifically for the arrangements for closing down the Company and for the documentary proof on around 28 February 2019, he suddenly claimed to have, not a closing or winding up of the business, but a sale of the business to the Buyer under a sale and purchase agreement.

59. In light of the fact that the husband is a 18-year experience medical doctor specialized in beauty treatments who has run a profitable business with an established patient base of thousands of patients for more

than four years, it is difficult to understand why the husband would have entered into the Two Contracts which leave him with a unreasonably low income (as compared with his past income) : -

(a) the husband purported to transfer the Company business (including the assets and clientele of the Company) to the Buyer at nil cost, but he agreed to repay to the Company approximately HKD8 million loans he purportedly took from the Company business. The “evaluation period” in the Sales Contract has not been defined;

(b) the husband is to receive a monthly salary of only HKD200,000, a figure far less than the amounts earned by him as the sole director and shareholder of the Company for doing the same type of work for the same patients. Such earnings are also far less than what he earned in 2012. The wife refers to the husband’s testimony in a criminal trial (against his former employer) in the High Court in 2017 that he earned around HKD400,000 per month by working only 10 hours per week for a beauty clinic in 2012 (“Criminal Trial Testimony”). The Criminal Trial Testimony was not challenged by the husband.

60. Inexplicably, even though the husband has purportedly been receiving monthly salary from the Buyer since the signing of the Two Contracts, a search of the Company’s record with the Companies Registry in March 2019 shows that the husband remains the director of the Company, which is still in operation at the same premises. Moreover, the registered doctors’ directory of the Hong Kong Medical Council also shows that the husband is still working at the original registered address of

the Company. The husband's explanation that the Buyer would not like to repay all the loans due from the Company to banks and companies in one go and therefore the Company would not be closed until all the loans have been fully repaid is illogical which runs counter to the purported terms of the Sale.

61. Given the Company has yet been closed down, the husband has not accounted for the following: -

(a) the operation and income of the Company since November 2018.

(b) the fact that the Buyer was a company newly incorporated after the commencement of the present proceedings in August 2018 which did not itself operate out of any business premises adds further doubt on the genuineness of the Sale. The Buyer's reported address is an address of a company which offers "virtual office" services and facilities to other companies, there is no evidence that it has any office space for clinical services or treatments for patients. The place of work of the Husband under the Employment Contract has not been accounted for.

(c) the current premises of the Company was due to expire in April 2019. The actual arrangements for the closure of the Company, the transfer of the business, assets and liabilities as well as the loan arrangements among the Company, the Buyer and the husband have not been accounted for.

(d) the relocation of the clinic after expiration of the lease of the current premises of the clinic and the fund for such arrangement has not been accounted for.

62. Apart from his insufficient disclosure of his dealings with the Buyer, the husband has failed to give full and frank disclosure of his other financial arrangements as follows : -

(a) his unexplained cash withdrawals and wire transfers, including documented bank transfers to Mr. Lee and his associates of HKD305,500 as well as cash withdrawals of over HKD2 million from his bank account between January and April 2018. He failed to provide sufficient particulars, still less of evidence, of the dates, purposes, modes of payment and the payees of such payments. A general statement that HKD2 million was for donation to Thai temples amounts to no more than bare assertions which require verification;

(b) his dubious personal loans with the Company : according to the Company's financial statements, the husband has entered into considerable personal loans with the Company. Given the substantial increases in both income and retained profit of the Company over the years before the financial year during which the wife was removed from the Company business, such loans demand justification.

63. Given the deficient disclosure by the husband, this court should not be slow to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the husband as to the extent of his income or resources.

64. In any event, for the present purpose, on the assumption that the husband's dealings with the Buyer is genuine and bona fide transaction

and that his income has been substantially reduced as he alleges (which I do not so find for lack of sufficient evidence and documents at this stage), I am of the view that he still has ability to pay for the reasonable maintenance for the wife and the children with the following resources.

65. There is no reason why he could not ask for repayment of the Father's Loan in the sum of HKD2,321,544 and stop settling the mortgage repayments for his father. It could be arranged by repayment of cash by his father or by requesting his father to sell, mortgage, or in any way dispose of the Father's Property. I find no valid basis for the husband lending substantial money to his father for investment, instead of maintaining the reasonable needs of the wife and children.

66. Moreover, the liberal spending style of the husband tends to indicate his ability to pay maintenance. He has been able to maintain his lifestyle of renting a flat at a monthly rental of HKD55,000 recently, continuing his membership of the Special Card, taking business-class flights, luxury holidays, expensive meals and household expenses, and paying monthly training fee of HKD15,600 to a world-class senior weightlifting trainer. His monthly credit card bill consistently exceeds HKD100,000. In June 2018, it amounted to more than HKD180,000 (with only part of the payment for business purpose). In the period between April to August 2018, he spent HKD11,514 on a meal, HKD41,010 on beddings, HKD49,378 on audio equipment, HKD18,490 on business class flights tickets to Japan, HKD18,998 on resorts in Thailand. Apparently, some of the husband's own expenses are capable of some reduction.

67. As complaint by the wife, the husband, in order to keep the Special Card, has to pay around HKD58,500 for the card fees as well as a

spending of at least HKD778,000 per year. His monthly earnings should not be less than HKD650,000.

68. The husband's spending pattern sits comfortably with the wife's allegations about his earning capacity as well as the Criminal Trial Testimony. Such evidence indicates his ability to earn more than the remuneration package offered by the Buyer.

69. Furthermore, according to paragraph 69 of the husband's answer to questionnaire dated 28 February 2019, the husband has, under the Two Contracts, an option to be seconded to other establishments to perform his service and would be entitled to 50% of the income generated from his service. Apparently he actually has various financial means and resources open to him.

70. On the evidence before me, I am not satisfied that the husband has fully and frankly disclosed his financial resources. I form the view that adverse inference should be drawn against him. I cannot resist the temptation of Mr Hughes' argument that the evidence as it now stands tends to indicate the husband's deliberate decrease of his income and the value of the Company bearing in mind that he is the sole director, shareholder and person in charge of the Company. The assets and operation of the Company is at his absolute discretion and disposal.

71. For the reasons aforesaid, I find the husband is able to pay reasonable maintenance for the wife and the children

72. I have to emphasize that the maintenance pending suit order is only an interim measure pending the substantive ancillary relief hearing,

and that the amounts awarded could be reviewed retrospectively, so that any over or under-provision as a result of this order could always be rectified at the substantive ancillary relief trial.

Litigation funding

73. The wife is seeking a lump sum payment of HKD2 million for her legal costs from the husband. The husband strongly opposes.

Legal principles

74. Section 3 of the Ordinance is wide enough to empower the Court to include an element towards a party's legal costs in an order for maintenance pending suit. See *KGL v CKY & Anor* [2003] 2 HKC 512. The leading authority is *Currey v Currey* [2007] 1 FLR 946, which is adopted by the Hong Kong Court of Appeal in *HJFG v KCY*. Aside from the fundamental requirement of supplying a sufficiently detailed breakdown of the anticipated costs to give details of the nature, extent and purpose of the contributions sought, the applicant has to satisfy the conditions for costs allowances are as follows:

- (1) the applicant has no assets, or none that can be reasonably deployed;
- (2) she can provide no security for borrowing, or none which could reasonably be offered;
- (3) she cannot reasonably obtain legal services by offering a charge on the outcome of the litigation;
- (4) she cannot secure publicly funded legal help at a level of expertise apt to the proceedings.

75. In *HJFG v KCY*, the Court of Appeal made it clear that there should be an initial and overarching enquiry into:

“...whether the applicant for a costs allowance can demonstrate that she cannot reasonably procure legal advice and representation by any other means. Thus, to the extent that she has assets, the applicant has to demonstrate that they cannot reasonably be deployed, whether direct or as the means of raising a loan, in finding legal serves.”

76. Despite the extent of the contribution sought, the wife has not given any detailed breakdown of her estimated fees and disbursements other than a few general statements with a few items of rough figures. No detailed bill of costs and receipts have been provided. The very brief estimated legal costs simply deprive this Court of any real assessment to determine the reasonableness of her claim.

77. In any event, the fact is that the wife is holding the Three Properties under her sole name. All of them were purchased solely for investment purpose. The husband confirms, in writing and in Court, that he has no objection for the wife to sell the two properties in Australia to split the proceeds equally for her to fund her litigation. The wife has raised no solid objection to such suggestion. Further, the fact that the HK Property is now with sitting tenants will unlikely pose any obstacles to the selling of it in a booming market. The wife has an option to sell it with tenancy or in vacant possession by the expiry of the existing tenancy after 31 May 2019. The wife declared that the net value of her interest in the HK Property amounts to around HKD4.78 million.

78. Furthermore, I cannot ignore the fact that despite unemployment, the wife managed to apply for bank loan of HKD140,000

to settle her credit card bills, tax payments and legal fees. She has also received a total sum of about HKD1,154,000 as a gift as well as a loan of HKD324,000 for her tenancy deposit from her father. She obviously has the means to borrow for her litigation funds.

79. For the reasons aforesaid, I take the view that the wife has 3 landed properties at her disposal and actual means to borrow. It would not be unreasonable to expect her to sell her properties or to use them as collateral to borrow funds. She has not satisfied the conditions set out in the *Currey* test. Her application for litigation funding is refused.

Conclusion

80. Having considered all the evidence before me and the submissions of both parties, I am of the view that the husband has not, at this stage, fully and frankly disclosed his financial resources. I should adopt a robust assumption about his ability to pay. In any event, there is solid evidence that he actually has the ability to pay the wife and children's maintenance.

81. Taking into account all the relevant circumstances, I conclude on a broad brush approach that it is fair to order him to pay the interim maintenance to meet the children and the wife's recurring costs of living as set out in paragraph 36 above. I am satisfied that, pending a final determination of the ancillary relief dispute, this will enable the wife and the children to maintain more or less the standard of living which they enjoyed before the breakdown of the marriage.

82. The husband should pay such maintenance from 1 June 2018. This is subject to the condition that any payments made by the husband to

the wife to provide support under the July Order during this period are to be offset against the backdated payments.

Order

83. I order that : -

(1) the husband shall pay to the wife for her maintenance pending suit in the sum of HKD59,000 per month with the first payment to be date-backed to 1 June 2018 and thereafter on the 1st day of each and every month until further order of the court.

(2) the husband shall pay to the wife for interim maintenance of the two daughters in the sum of HKD51,000 per month (HKD25,500 for each of the daughter) with the first payment to be date-backed to 1 June 2018 and thereafter on the 1st day of each and every month until further order of the court.

(3) the husband shall pay the monthly rental of the residence of the wife and the children in a sum of not more than HKD54,000 within 14 days upon production of the relevant invoices or receipts to him.

(4) The above payments to be deposited into the Wife's designated bank account.

(5) Credit be given to any sums that the husband has paid to the wife for the maintenance of the wife and the two children under the July Order; the difference (if any) shall be paid within 28 days from the date hereof;

84. I shall hold the husband to his continued undertaking that he shall pay : -

- (a) the school fees, school bus fees and school-related expenses (other than extra-curricular activities taken at school) of the children as and when it falls due; and
- (b) the medical and dental expenses of the children (which include medication for the younger daughter) within 14 days upon production of receipt.
- (c) the medical insurance of the existing policies of the children within 14 days upon production of the relevant invoices or receipts to him.

85. For completeness and avoidance of doubt, subject to the terms as stated above, his undertaking given previously on the interim financial provisions for the maintenance of the wife and the children should be discharged.

Costs

86. The wife has not been entirely successful in this application. However, having considered all the relevant circumstances in this case, including the wife actually had no option but to make the present application, and the fact that she has beaten the husband's open offer by a significant amount, I make an order nisi that the husband do pay the wife's costs of and occasioned by the present Summons, including all costs reserved, on a party and party basis, in any event, to be taxed if not agreed, with certificate for counsel.

87. This Order Nisi shall be made absolute within 14 days from the date of this decision unless either party applies to vary the same by way of summons.

88. I thank Counsel for their assistance.

(M Lam)
Deputy District Judge

Ms. Christina Tseng instructed by Chaine, Chow & Barbara Hung, for the Petitioner

Mr Sebastian Hughes instructed by Payne Clermont Velasco for the Respondent