FCMC 11056 / 2017
[2019] HKFC 250

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
MATRIMONIAL CAUSES
NUMBER 11056 OF 2017

BETWEEN

SSLT Petitioner

and

SMFC Respondent

Coram: His Honour Judge I Wong in Chambers (Not open to Public)

Date of Hearing: 9 & 16 October, 21 December 2018 and
15 February 2019 (half-day)

Date of Judgment: 20 September 2019

JUDGMENT
(Ancillary Relief)

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1. This is a trial on ancillary relief upon the divorce of the parties.

The Divorce Petition

2. The parties were married in April 2010. They have 2 children. The elder one is a daughter whom I refer to in this judgment as "**D**". She was born in February 2011 and is now 8 years old. The younger one is a son "**G**", born in September 2014, and is nearly 5 years old.

3. Sadly, the parties' relationship lasted for 6 years only; they separated in the end of July 2016. Subsequently, the wife petitioned for divorce on 25 August 2017 on the ground of one-year's separation with the consent of the husband.

4. In due course, the decree *nisi* was granted on 10 January 2018.

5. On 26 February 2018, by consent, the joint custody and joint care and control of the two children of the family was granted to the parties. The current arrangements are that the children reside with their mother with generous access, including overnight access of up to 2 to 3 nights during the week on an ad hoc basis, to the father. On the top of that, the children stay with each parent on alternate weekends and the summer and school holidays are shared equally between the parties.

Parties' Background

6. The wife is of Chinese descent and a British citizen by birth. Although she was born in London, her family has roots in Hong Kong. Her parents brought her back to Hong Kong at the age of 2 or 3 years old and she

spent her childhood years and attended an international school here. When she was about 12 years old her parents brought her and her siblings back to UK for good. In 2009 her parents relocated back to Hong Kong and are now currently living here. The wife continued to live in UK until December 2010 when she and the husband decided to try their fortune in Hong Kong.

7. The wife is currently 43 years old and is highly educated. She was educated in UK and graduated in 1996 with a bachelor's degree in pharmacy. She then worked as a locum pharmacist in some community pharmacies until 1999 when she returned to full-time study and was awarded a PhD degree in Pharmacognosy in May 2003. Since then the wife worked as a locum pharmacist at various hospitals and pharmacies. In August 2009 she secured a position as a Senior Pharmacist (Clinical Governance Pharmacist) at a National Health Service (NHS) hospital. It was a full-time permanent job with attractive / comprehensive benefits including professional training and pensions. However, for the reason that she had to return to Hong Kong, she just stayed in this position for a short period of time.

8. The husband is from an American Chinese family. He is also 43 years old. He was born in Seattle and educated in an Ivy League university with a Bachelor of Science degree in Engineering. Since then he has been working in the finance and IT industries. His first job was in New York. He worked there from 1997 to 1999. In July 1999 he went to work in London and subsequently acquired his British citizenship. *(Sentence Redacted)* He has also become a Hong Kong permanent resident.

9. The parties met in London in April 2009 when both were 33 years old. Their relationship quickly developed into an intimate one. Just in a year's time, on *(redacted)* April 2010, the husband proposed to the wife and soon thereafter on *(redacted)* April 2010, they got married in Seattle. It is common ground that the promptness of their action was due to the fact that at that time the husband's mother was terminally ill. It was the mother's dying wish to see his son get married. They were able to get married just a few days before the mother's demise.

10. Shortly after the marriage the wife found herself pregnant with D. This was a planned pregnancy. Meanwhile, the husband was able to secure a job in Hong Kong. The parties therefore decided to come to Hong Kong, which they did in December 2010. Initially, the new family stayed with the wife's parents rent-free at their mansion house on the Peak. The house has a separate wing, comprising its own separate entrance, living room, dining room, kitchen, 2 bedrooms and 2 bathrooms, for the parties.

11. In July 2012 the parties left the mansion house and moved into a 792 ft^2 large, 3-bedroom leased apartment at the Florient Rise of Kowloon. The husband said he insisted to move out because he was unhappy for not being able to live as a nuclear family. Meanwhile, G was born in September 2014. Sadly, the Florient Rise was their last home. On 1 July 2016, the husband moved to another leased apartment at the Harbour Green on his own, signifying the breakdown of the marriage. Shortly afterwards, the wife and the 2 children also moved to another leased apartment at Grand Austin. Upon the expiry of the lease, the wife and the 2 children moved to another leased apartment at Island Harbourview in July 2018 at a rental of

$34,000 per month and has since been living there. She is taking care of the children for the greater part of their time with the assistance of a domestic helper.

12. The husband is living in an apartment at the Harbour Green, also rented. He has been making a voluntary maintenance contribution of $40,000 per month to the wife.

13. At the middle of the trial, the husband was dismissed by his employer by reason of redundancy, effective on 30 November 2018. He is now working for a bank on a 6-month contract.

14. The children are spending their time with their parents according to the consent order of 26 February 2018.

Parties' Open Proposals

The Wife's Open Proposal

15. The wife seeks the following:

1. Equal division of the parties' assets, including the full value of their pre-marital and post-separation assets.

2. Maintenance of $22,000 for each child payable by the husband.

3. The husband should continue to pay for the children's school fees and provide for their health care insurance.

4. Spousal maintenance of $32,500 per month for a period of 7 years, or a capitalized lump sum of $2,730,000 ($32,500 X 84 months) to facilitate a clean break.

The Husband's Open Proposal

16. The husband has revised his proposal on 19 December 2018 after he was made redundant in November 2018. His current proposal is:

1. The parties' respective pre-marital assets should be ring-fenced and retained solely by each party.

2. The husband's bonus that was accrued post-separation should also be excluded from division for being non-matrimonial.

3. After the assets in (1) and (2) have been excluded, the matrimonial assets are to be divided equally.

4. With regards to the children, he proposes that, for the duration that his severance payment is intended to cover (ie until May 2019) he agrees to pay:

   (a) $3,710 per month to each child for their general expenses;

   (b) $7,500 per month per child as contribution towards their rent until they no longer reside with the wife, or the wife no longer pays rent, or until further order.

5. If the husband successfully secures employment with compensation commensurate to what he previously received, he would continue to pay the maintenance as para 4(a) and (b) on the same terms. He would also include the children on any insurance he may receive through his future employment.

6. The husband also agrees to pay the agreed costs, after reasonable notice and the provision of documentary evidence, of the children's schooling expenses, and the agreed costs of extra-curricular activities until July 2021.

7. As from 1 August 2021, regardless of whether the wife has secured part-time or full-time work, the wife should contribute 30% of the agreed costs of the children's schooling expenses and agreed costs of the children's extra-curricular activities.

8. If the husband is unable to secure employment with compensation commensurate to what he previously received, from 1 July 2019 he would cease paying *any* maintenance for the children. He also proposes that in such a scenario, the parties should share the agreed costs of the children's schooling expenses and extra-curricular activities equally.

9. In any event, each party is to bear their respective holiday expenses when travelling with the children.

10. Finally, there is no spousal maintenance payable by the husband.

17. It is not necessary for me to go into the parties' open proposal in any detail. The only observation I have is that the husband's proposal is seemingly unattractive in that it is unnecessarily complicated and lacks certainty. It is uncertain as it depends on a number of contingencies; as such, it is a good recipe for continued litigation.

Issues in Dispute

18. As in any ancillary relief proceedings where division of assets is involved, the most problematic part is always on whether there are any factors that warrant a departure from equal division. The following issues have been strenuously contested:

1. Whether the parties' non-matrimonial assets should be included in the pot for division?

2. Whether the wife should be given 'compensation for relationship-generated disadvantage'?

3. Whether the wife's family as a financial resource should be taken into account and if the answer is in the positive, what is the weight to be given to this factor?

4. Whether the wife would receive any inheritance from her parents in the future?

19. All these issues will be conveniently elaborated and dealt with in Step 4 of the exercise, ie whether good reasons exist for departing from equal division.

The Rule in Browne v Dunn

20. Before I proceed to deal with the substantive issues, there is a minor point regarding the rule in *Browne v Dunn* (1893) 6 R 67 (HL) that I need to dispose of at this stage. This point of procedural unfairness was raised by Ms Chan, who submitted on behalf of the husband, that according to rule in *Browne v. Dunn*, if in the course of a case it is intended to suggest that a witness is not speaking the truth upon a particular point, his attention must be directed to the fact by cross-examination showing that that imputation is intended to be made, so that he may have an opportunity of making any explanation which is open to him, unless it is obvious to him that his evidence is being challenged. Ms Chan argued that in the present case save and except those evidence in relation to the wife's expenditure, Ms Booth did not put the wife's case to the husband during cross-examination on various matters upon which, presumably, submissions would be made on behalf of the husband. Ms Chan mentioned, by way of examples, Ms Booth did not put the wife's case regarding the husband's earning capacity or her case that the pre-marital or *post*-separation assets must be included to meet the needs of the children and the parties. As a matter of procedure, this would affect the very basis for the submissions being made on behalf of the wife. She therefore argued that without putting all these matters to the husband in cross-examination upon which the wife made her submissions in

relation to ancillary relief, effectively, the husband's evidence was not specifically challenged, and must be taken to be accepted.

21. The Court of Appeal dealt with this rule in the context of a trial on the determination of a preliminary issue in an application for ancillary relief. In her judgment for the Court of Appeal in *LWYA v KYW*, CACV 151/2013 (unreported; date of judgment: 4 December 2014), Kwan JA (with Cheung and Yuen JJA) said as follows,

> 89. Mr Wong and Mr Coleman both raised a point based on *Browne v Dunn* (1894) 6 R 67 HL, making complaints that it was unfair to the father, the wife and the witnesses called in that various matters were not put to them in cross-examination and particular aspects of their evidence were not specifically challenged. It was not put to them that a trust arrangement never took place, that their evidence regarding a trust was deliberately untrue, or that the shares transferred to the wife were a gift.
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> 90. At the trial, the father's counsel Mr Grossman, SC had also made the point that it was not suggested by the husband's counsel in cross-examination that the father or the wife was not telling the truth when they said the shares were held by the wife as a trustee. The judge did not think it necessary to put to the father or the wife they were lying. As stated in §44 of the judgment,
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> > "Everybody knows where they have stood in this regard. … The issue is well and truly joined and if I find for the husband, I am afraid that the basis of such a conclusion will be that the father's and the wife's evidence has not been truthful. The fact that such a suggestion was not in terms put to them is in my view neither here nor there. Everybody knows that their evidence is under the severest challenge."
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> 91. I agree with the judge. I am satisfied there was no procedural unfairness. The parties knew their respective positions regarding the issue plainly in contest. The father and the wife knew the imputation intended to be made against them and had the opportunity to make any explanation open to them. There was no need to put to them what was obvious.

22. In the present case, everybody knew where he or she stood regarding the issues in dispute which have clearly been set out not only in their affirmations but also in their Statement of Issues in Disputes signed by the parties. Further, I take the view that this rule is not strictly applicable to family proceedings for the reason that the court's role is quasi-inquisitorial in this type of litigation. As was said by Thorpe LJ in *Parra v Parra* [2003] 1 FLR 942 at [22],

> "... the outcome of ancillary relief cases depends upon the exercise of a singularly broad judgment that obviates the need for the investigation of minute detail and equally the need to make findings on minor issues in dispute. **The judicial task is very different from the task of the judge in the civil justice system whose obligation is to make findings on all issues in dispute relevant to outcome. The quasi-inquisitorial role of the judge in ancillary relief litigation obliges him to investigate issues which he considers relevant to outcome even if not advanced by either party. Equally he is not bound to adopt a conclusion upon which the parties have agreed.** But this independence must be matched by an obligation to eschew over-elaboration and to endeavour to paint the canvas of his judgment with a broad brush rather than with a fine sable. Judgments in this field need to be simple in structure and simply explained." (emphasis added)

23. Given that the court has a duty to investigate issues which it considers relevant and is not bound to adopt a conclusion that the parties have agreed, I cannot accept Ms Chan's contention that where there are issues Ms Booth did not put to the husband in cross-examination, the wife should be taken as accepted.

The Law and Legal Principles

24. The jurisdiction of the court in granting financial provision for a party and for a child of the family is governed by sections 4 and 5 of the Matrimonial Proceedings and Property Ordinance, Cap 192 ("**MPPO**").

Pursuant to sections 6 and 6A of the same legislation, the court has the power to grant orders for transfer, settlement or sale of properties.

25. The principles upon which this case is to be considered are the conventional ones, namely those set out in section 7 of MPPO which confers a broad discretion on judges dealing with ancillary relief. That said, these principles are to be interpreted in the light of the Court of Final Appeal judgment in *LKW v DD* (2010) 13 HKCFAR 537. In that case, Riberio PJ referred to the four principles which are applicable to all ancillary relief proceeding, *viz*, (1) the objective of fairness: [56], (2) rejection of discrimination: [57], (3) the yardstick of equal division: [58] – [61] and (4) avoidance of '*minute retrospective investigation*': [62] – [69].

26. Ribeiro PJ further set out the steps to be taken by the courts in undertaking the exercise. In brief, they are:

(1) The ascertainment of the financial resources of each of the parties calculated as at the date of the hearing: [71] to [73];

(2) The assessment of the parties' financial needs. If the total resources are not enough to meet the parties' needs, the s.7 exercise should stop at this step and there is no room to apply any sharing principle: [74] to [79];

(3) If surplus assets would remain after the parties' needs have been catered for, the next step should normally be for the court to apply the sharing principle to the parties' total assets, with a yardstick of equal division as part of that principle. This means that the total assets should be

divided equally between the parties unless there is good reason for departing from an equal division: [80] to [82];

(4) In considering whether good reasons exist for departing from equal division, the answer is to be found in the terms of s.7 and the implicit objective of a fair distribution of the assets. Factors like source of the assets, conduct, financial needs, duration of the marriage, contribution to the family and compensation are all material considerations: [83] to [130]; and

(5) The weight to be given to each of the factors is a matter of discretion for the court: [131].

27. Lastly, I do bear in mind the reminder given by Thorpe LJ in *Parra v Parra* that I quoted in [22] above that the proper judicial task of the court is to exercise a singularly broad judgment that obviates the need for the investigation of minute detail.

Step 1 – Ascertainment of the Financial Resources

28. At this stage the financial resources of each of the parties calculated as at the date of the hearing have to be ascertained; a broad brush approach will be all that is required: *Rossi v Rossi* [2006] EWHC 1482 (Fam), [2006] 3 FCR 271, at [24.1]; and *LKW v DD*, at [72].

Non-Matrimonial Assets

29. The wife maintained that the parties' investments and pensions accrued prior to the marriage and the husband's *post*-separation bonus should be included at their full value for the purpose of division together

with all the matrimonial assets. On the contrary, the husband considered that these assets should be ring-fenced. That said, Ms Chan accepted that at this stage, the court needs not attempt to distinguish between matrimonial and non-matrimonial property, that being an exercise best undertaken – if necessary – under Step 4, ie whether there are good reasons for a departure from equal division*: LKW v DD,* at [71].

Post-Separation Receipts

30. I consider it is appropriate to deal with the post-separation receipts at this stage, leaving the pre-marital assets to be dealt with in Step 4.

31. Two sums are involved here; the first is a discretionary bonus of $1,006,400 that the husband received on 25 May 2018 and the other is a deferred share profit payment of $311,900 that he received on 24 December 2018 upon the termination of his employment.

32. Ms Booth contended that these post-separation earnings derive from an earning capacity built up during the parties' marriage. She further argued that the discretionary bonus and the deferred payments are a discretionary contractual right, sourced from a contract entered into when the parties first moved to Hong Kong. The right to a bonus is not a new or unusual feature of the husband's employment that suddenly arose during separation. Hence, these sums were in no way the result of any new endeavour or "stellar effort" by the husband but instead the results of a financial continuum.

33. On the other hand, Ms Chan argued that the bonus was paid for the husband's performance in 2017, by then the parties had already separated for over a year. The bonus did not represent the fruits of any joint matrimonial efforts.

Discussion

34. In the celebrated judgment in *Rossi v Rossi* Mostyn QC, sitting as a Deputy Judge in the English High Court, after having reviewed the authorities, summarized the relevant principles,

> [24] Doing the best I can to draw the various threads together I think that the following principles can be deduced:
>
> 24.1 The statute requires all the assets to be valued at the date of trial.
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> 24.2 For the purposes of establishing the matrimonial property in respect of which the yardstick of equality will 'forcefully' apply the value of assets brought into the marriage by gift and inheritance (other than the former matrimonial home), together with passive economic growth on those assets, should be excluded as non-matrimonial property.
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> 24.3 Assets acquired or created by one party after (or during a period of) separation may qualify as non-matrimonial property if it can be said that the property in question was acquired or created by a party by virtue of his personal industry and not by use (other than incidental use) of an asset which has been created during the marriage and in respect of which the other party can validly assert an unascertained share. Obviously, passive economic growth on matrimonial property that arises after separation will not qualify as non-matrimonial property.
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> 24.4 If the post-separation asset is a bonus or other earned income then it is obvious that if the payment relates to a period when the parties were cohabiting then the earner cannot claim it to be non-matrimonial. **Even if the payment relates to a period immediately following separation I would myself say that it is too close to the marriage to justify categorisation as non-matrimonial. Moreover, I entirely agree with Coleridge J when he points out that during the period of separation the domestic party carries on making her non-financial contribution but cannot attribute a value thereto which**

> **justifies adjustment in her favour. Although there is an element of arbitrariness here, I myself would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period which commenced at least 12 months after the separation.**
>
> 24.5 By this process the court should, without great difficulty, be able to separate the matrimonial and non-matrimonial property. The matrimonial property will in all likelihood be divided equally although there may be deviation from equal division: (a) if the marriage is short; and (b) part of the matrimonial property is 'non-business partnership, non-family assets' (or if the matrimonial property is represented by autonomous funds accumulated by dual earners).
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> 24.6 The non-matrimonial property is not quarantined and excluded from the court's dispositive powers. It represents an unmatched contribution by the party who brings it to the marriage. The court will decide whether it should be shared and, if so, in what proportions. In so deciding it will have regard to the reality that the longer the marriage the more likely non-matrimonial property will become merged or entangled with matrimonial property. By contrast, in a short marriage case non-matrimonial assets are not likely to be shared unless needs require this.
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> 24.7 In deciding whether a non-matrimonial post-separation accrual should be shared and, if so, in what proportions, the court will consider, among other things, whether the applicant has proceeded diligently with her claim; whether the party who has the benefit of the accrual has treated the other party fairly during the period of separation; and whether the money-making party has the prospect of making further gains or earnings after the division of the assets and, if so, whether the other party will be sharing in such future income or gains and if so in what proportions, for what period, and by what means.

35. In *Kan Lai Kwan v Poon Lot To Otto* (2014) 17 HKCFAR 414, Ribeiro PJ preferred the summary of these principles as it points to various factors relevant to deciding whether a post-separation accrual justified departure from equality, including the length of the marriage and separation, the nature of the property accruing and the means or efforts by which it was acquired: [133].

36. According to the husband's employment contract the bonus was entirely a discretionary one. It is up to the decision of his employer as to whether a bonus was payable in a particular 12-month period, being from 1 April to 31 March of the following year. I therefore cannot agree with Ms Booth who seemed to have suggested that the husband had some contractual right to the bonus. That said, the undisputed evidence is that the parties separated in around July 2016 and in that particular 12-month period (ie from 1 April 2016 to 31 March 2017) no bonus was payable. Ms Chan placed heavy emphasis on the fact that the bonus in question related to the husband's work for the year from 1 April 2017 to 31 March 2018 which was after the parties had separated. I accept that but another way of looking at it would mean there was only a lapse of about 8 to 9 months after the parties had separated when the particular bonus period commenced (ie from around July 2016 to April 2017). Mostyn QC took the view that a post-separation bonus would not be classed as non-matrimonial unless it related to a period which commenced at least 12 months after the separation. I acknowledge in so saying, he expressly cautioned that there is an element of arbitrariness. It is clear what was said was not intended to be any rigid principles but rather to be just some general guidance which may or may not be applicable to a particular case. The husband's service was undoubtedly a continuous one and probably that was the reason why Mostyn QC arbitrarily took a 12-month period. I find some force in Ms Booth's argument that the bonus was received for work done within the short separation period and the period of separation was not substantial. In my view, the lapse of time is not long enough to deem the entire bonus as non-matrimonial. As has been reminded by Ribeiro PJ in *LKW v DD* effort and expense should not be wasted in

trying to establish what is and what is not matrimonial property as fairness has a broad horizon: [88]. Doing the best I can, I consider it is fair that half of the bonus should be included.

37. As for the deferred share profit payment of $311,900, it is true that by the time the husband received it on 24 December 2018 it was already 2 ½ years after the parties had separated. However, the husband's evidence is that this was in fact part of the bonuses being held back in the previous years and would be liable to be forfeited if an employee resigns from his job and a deferred share profit payment could be money from a bonus given as early as 4 years ago. On that view, it cannot be argued that the money does not relate to any time during the relationship and is not the result of the parties' marital acquest.

38. Ms Booth tried to argue that the husband did not behave fairly towards the wife during the period of separation. Despite earning substantial income, the husband offered $40,000 to $46,000 per month only as interim maintenance for both the wife and the children which was barely sufficient. I do not have to come to any conclusion as to whether or not the interim maintenance was barely sufficient as alleged. Even if it was the case, I do not think it would assist the wife for the reason that she had already resorted to the monies sitting in her bank account so much so that the balance has depleted by around $900,000 which otherwise would have been available for division.

39. Another point made by Ms Booth is that the wife has continued to make her non-financial contribution to the family. Again, I do not think

much can be made out of it. The undisputed evidence is that the husband is also a very 'hands-on' father. He has been having overnight access of up to 2 to 3 nights during the week on an *ad hoc* basis; and on the top of that, the children stay with each parent on alternate weekends and the summer and school holidays are shared equally between the parties.

40. For the reasons aforesaid, I am satisfied that at least part of the deferred share profit payment relates to the time before the parties separated. Again, doing the best I can and taking into account of all the circumstances of the present case, I would include half of this sum as matrimonial.

Illiquid Assets

41. Another issue is the value of the parties' pensions and MPF. The husband's stance is that for the purpose of this stage due to their illiquidity and the tax liabilities upon withdrawal there should be a 50% discount of the present face value of these assets.

42. It is submitted by Ms Chan that a pension cannot be sold, commuted for cash or offered as security for borrowings. The husband's pensions and retirement accounts would only be realized when he retires at the age of 65, or later. It would be artificial to say that the husband's pensions are capital assets worth the value as stated on paper. Further, in future, tax will be payable on his UK pension. The way it works is that 75% of the pension would be subject to UK income tax and the tax rates are in the region of 20% to 45%.

43. The wife maintained that the full values of these assets as at the date of trial should be used. The blanket application of a 50% discount is arbitrary and unsupported; there has been no basis for the suggestion. The husband has also failed to suggest any proper cash equivalent value for these assets. He cannot be allowed to rely on these overly simplified figures, simply because the assets are illiquid, to the wife's detriment. Further, the husband admitted in cross-examination that the Vanguard Roth IRA account is not taxable under the US law upon withdrawal.

Discussion

44. It is not in dispute that the pensions and the retirement accounts could only be realized upon the parties' retirement, probably when they reach the age of 65. Both are now 43 years old; there are still more than two decades to go before the money could actually goes into their pockets. It must be correct that a distinction must be drawn between an asset, which can be realized for cash and thus freely available and one, that is not realisable and non-transferrable. Regardless of whether it is in the form of a provident fund or a pension (ie a lump sum or an income stream), the money that the parties would receive on retirement is not an available capital asset.

45. It is thus necessary for the court to have regard to the extent to which an asset is freely available or whether it is attended by a particular handicap or risk. If the full value of these assets are taken, given that the husband has far more assets of this nature than the wife; in all likelihood he would end up of having more illiquid assets. I agree with Ms Chan that this would be unfair to the husband. A similar case can be found in *Martin-Dye v Martin-Dye* [2006] 1 WLR 3448.

46. In *DGB v SDGK*, FCMC 12078/2013 (unreported, date of judgment: 12 March 2014) where the husband in that case was 47 years old, I gave a discount of 40% on the face value of the husband's MPF.

47. In another case *S v S*, FCMC 6574/2003 (unreported, 14 March, 2005) Deputy Judge C.K. Chan (as he then was) accepted the husband's case that his pension fund is illiquid and the judge included a nominal 10% of the present value of the pension into the calculation.

48. It is of course axiomatic that the facts of every case are different and so the two cases cited in the foregoing paragraphs are for reference purpose only. It is rather unfortunate that the parties, in particular the husband, have chosen not to adduce any professional actuarial assessment. However, for the reasons that I have elaborated and bearing in mind Riberio PJ's advice that a broad brush approach is all that is required at this stage: *LKW v DD*, at [72], I consider it is not unreasonable that a 50% liquidity discount should be applied. I would give a 50% discount across the board on assets of this nature.

Other Items

49. As both parties would have legal costs incurred in the present proceedings I would exclude the husband's unbilled legal costs for the present purpose.

50. Apart from the above, all other items are largely not in dispute. The parties' assets and liabilities are accordingly set out in the following schedules.

The Wife's Schedule of Assets and Liabilities

Nos	Assets / Liabilities (Non-Matrimonial: Pre-marital)	Amount (HK$) (round up to nearest 100)	Total (HK$) (round up to nearest 100)
1.	UK Bank Accounts	842,200	
2.	UK Investments	261,600	
			1,103,800
	Assets / Liabilities (Matrimonial)		
3.	Bank Accounts	275,100	
4.	MPF (50%)	5,500	280,600
5.	Credit Cards	(13,700)	(13,700)
		Sub-Total	**1,370,700**

The Husband's Schedule of Assets and Liabilities

Nos	Assets / Liabilities (Non-matrimonial : Pre-marital / Post Separation)	Amount (HK$) (round up to nearest 100)	Total (HK$) (round up to nearest 100)
	Pre-marital		
	Bank Accounts		
6.	UK & US	83,400	
	Securities Accounts		
7.	UK & US	1,102,500	

		Life Insurance & Pensions		
8.	Fidelity UK Pension (50%)	1,188,100		
9.	Vanguard IRA (USA) (50%)	516,000		
			2,890,000	
		Post-Separation Accruals		
10.	Post-separation Bonus (half of $1,006,400; see item no. 15 below for the other half)	503,200		
11.	Post-Separation Deferred Profit Share (half of $311,900; see item no. 16 below for the other half)	155,950		
			659,150	
		Assets /Liabilities (Matrimonial)		
		Assets		
12.	Bank Accounts	355,700		
13.	Securities Accounts	12,728,600		
14.	MPF(50%)	158,500		
15.	Post-separation Bonus (half of $1,006,400; see item no. 10 above for the other half)	503,200		
16.	Post-Separation Deferred Profit Share (half of $311,900; see item no. 11 above for the other half)	155,950		
			13,901,950	
		Liabilities		
15.	Salaries Tax	(256,000)		
16.	Credit Card	(9,600)	(265,600)	
		Sub-total	**17,185,500**	

51. The parties' total net assets are therefore worth $18,556,200 ($1,370,700 + $17,185,500), of which $4,652,950 (the wife's $1,103,800 + the husband's $3,549,150) are non-matrimonial and $13,903,250 (after deducting total liabilities) matrimonial. The non-matrimonial assets constitute about 25.07 % of the total assets.

The Wife's Earning Capacity

52. Before returning to Hong Kong, the wife worked as a pharmacist for 8 years; the first 7 years as a locum pharmacist and the final year as a Senior Pharmacist with a NHS hospital. As said above, this is a permanent position with pensions and comprehensive benefits.

53. Upon returning to Hong Kong, she soon gave birth to D; she had since became the primary caregiver of the daughter and did not take up any full-time job. This continued to be the situation after the arrival of the younger son G. In the meantime, she re-qualified as a registered pharmacist in Hong Kong in April 2012 and in September 2012 worked as a part-time pharmacist at a private hospital for around 2 weeks. She then worked as a part-time lecturer for a post-secondary institute teaching Higher Diploma in Hospital Dispensing from September 2012 to August 2014. She secured another part-time teaching contract with another institute which gave her $6,000 to $12,000 per month from September 2015 to August 2016. Unfortunately, her contract was not renewed. That was about the time when she broke up with the husband.

54. The wife said the pharmacist job market in Hong Kong is extremely oversubscribed and competitive. She relied on a letter dated 19

March 2018 from the Pharmaceutical Society of Hong Kong to the Pharmacy & Poisons Board which stated that there is an oversupply of pharmacists in Hong Kong and accordingly urged the Board to respond immediately. The Pharmaceutical Society proposed various barriers including decreasing the frequency of licensing examination and the introduction of an internship programme for all pre-registration candidates in order to ease the situation. In addition, what goes against her is her limited Cantonese skill. Few companies would consider an applicant who cannot speak, read and write Cantonese proficiently. That is the reason why she was only able to secure some part-time lecturing jobs that did not require any knowledge in Chinese.

55. The wife said she had made consistent efforts to secure other jobs, not purely limited to the pharmaceutical field, on a part-time basis, but this had been unsuccessful. In December 2016, her application for a part-time job as a pharmacist with the Hospital Authority was unsuccessful. The interview was conducted in Chinese which she found it very difficult. Her application for a position of full-time lecturer with the University of Hong Kong in May 2017 was also proved to be futile. As from September 2017 she started providing English tutorial classes once a week to a two-year old child for $350 per class. She also tried to obtain more tuition placements via two English tuition schools but was not offered any work. At about the same time, she set up an online tutorial school to assist people preparing for pharmacists' qualifying examinations. In April 2018, she managed to secure a temporary job to provide holiday cover for two weeks at a local pharmacy as a locum pharmacist for which she earned $21,000.

56. In gist, the wife's evidence is that she had been trying to return to the profession on a full-time basis but was prevented by her language barrier and the oversupply of pharmacists. At trial, she said she was earning a combined income of about $4,000 per month from the English tutorial class and the on-line tutorial school.

57. The wife confirmed, in evidence, that while previously she was trying to return to the profession her intention is not so much anymore. She felt the pharmacy profession is not as developed in Hong Kong as it is in UK. Many local community pharmacies just require a pharmacist for legal reasons. There would be little room for her to be hands-on with the community. So even if she is able to communicate fluently in Cantonese she may not be interested in returning to the profession. Another reason is that she wanted to find a career where she can work for herself and also look after the children at the same time. With that in mind, in January 2018, she enrolled in a 9-month postgraduate diploma course on Investment and Finance which went from 2018 to mid-2019; and she also attended some property investment courses including one in London in October 2018. Part of the course involved looking at some distressed or rundown properties with a view to purchase and then sold them for profit or turn them to income property after some touching-up work. She is hoping to make use of the capital split she is going to receive in the investment venture.

58. It has been submitted by Ms Chan that at the age of 43 the wife is still young and has very impressive qualifications and background, including a PhD degree, and she managed to pass the qualifying examination in first go. In response to the wife's assertion that there has been an over-

saturation of pharmacists, Ms Chan referred to a leaflet published by the Food and Health Bureau in June 2017 giving a summary of the Strategic Review on Healthcare Manpower Planning and Professional Development conducted by the government. According to the leaflet, there is a slight shortage of or just-sufficient manpower of pharmacists in the short-term. It is, so she submitted, incredulous that the wife quantified her earning capacity at $4,000 per month.

Discussion

59. The wife said it was always her intention to stay professional active, in her own words, "*keep her foot in the door*". Thus, all along she was a full-time mother and targeted part-time jobs only. The only full-time job she ever applied for was as a lecturer at a university; that was after the parties had separated.

60. There is some dispute over the pharmacist' market situation. I consider that neither side's evidence is entirely satisfactory. The only evidence that the wife adduced was just a letter from the Pharmaceutical Society of Hong Kong. The husband was no better; indeed, in my view, it was even worse; for the evidence was just a leaflet giving a very brief outline of what appeared to be a very comprehensive review on the manpower planning of healthcare industry. Accordingly, I would not give much weight to this evidence.

61. There is no challenge from the husband against the wife's claim regarding her limited Cantonese ability. On the inconvertible evidence before me, I accept she has been somewhat handicapped by her limited

Chinese language ability. She is not able to communicate effectively in Cantonese or Chinese, not to mention Mandarin, and this deficiency has adversely affected her job seeking in the past. At the same time, I do take note of her latest direction - since the pharmacist profession in Hong Kong is not as advanced as that in UK, she is not interested in returning to the profession. In future, this language barrier is unlikely to be an impediment as great as before.

62. At trial, there were enquiries from the court on, apart from openings offered by community pharmacies and hospitals, whether or not other businesses such as importers or manufacturers of drugs would require the service of pharmacists. From her answers it is apparent that she was not too familiar with the local market situation. It is indicative that even after her separation with the husband she has not been too enthusiastic in finding ways to return to the pharmacist profession on a full-time basis.

63. The wife agreed that her online tutorial school has been doing well. She had to recruit a partner to assist her with the increasing workload. There is an increasing potential with her online school, and she would continue to work on it.

64. In cross-examination, the wife admitted she is a real go-getter and would like to improve herself. She is trying to diversify beyond pharmacy to other fields such as finance and property investment and that she is very ambitious, hardworking and studious and has a lot of potential ahead of her. I have no doubt that the wife is a highly intelligent and capable person. Given time, she should be able to develop her career, either

being employed in pharmacy or other fields or setting up her own investment venture. The wife said in evidence that she was trying to return to the profession on a full-time basis but was only prevented by her language barrier and the oversupply of pharmacists. She did not say that she was prevented to do so because of her role as a mother of two children. I consider that with the help of the domestic helper and occasionally from her mother the wife should be able to work full-time.

65. Though the issue of financial independence or when the wife saw herself should be able to achieve financial independence or how much she anticipated should be able to earn in short or medium term was not put to her in the witness box, I agree with Ms Chan that the wife should be able to earn a lot more than $4,000 per month.

66. The court has recently been informed by the parties by way of a joint letter of 19 August 2019 on how much the wife has been earning recently by working as a part-time locum pharmacist, from her online tutorial school and from giving English tutorials. I reckon that her income in April, May and June 2019 was $32,679, $38,774 and $37,944 respectively. In July, 2019 she earned $15,607 only; I believe this was due to her vacation trip to UK with the children from 12 July to 27 July 2019. As for August 2019, up to 19 August she earned $25,261.

67. It seems to me that on these figures the wife has been doing very well on her road back to financial independence. Considering all the above in a round, I believe the wife should be able to earn around $35,000 per month.

The Husband's Earning Capacity

68. The husband is now 44 years old. He used to work as an IT Developer for an investment bank in Hong Kong. This was a job that he had been with ever since his arrival in Hong Kong. As said above, he was laid off on 1 December 2018.

69. There is some dispute over the husband's receipts in the last 2 years. Ms Booth's calculation is that his annual receipts in 2017 and 2018 were $2,262,000 and $3,211,600 respectively, these do not include $408,000 odd dividends that he received every year from his stocks investments. Ms Chan's corresponding figures are $2,237,000 and $3,069,660 respectively. Looking at the figures alone, the discrepancies are not really significant. Given that the husband will not be working for the same employer, these figures would at best be indicative of the range of income the husband would be earning.

70. The husband lost his original job in December 2018; that was due to the restructuring of the investment fund that he had been serving and was unrelated to his performance. I am informed by the parties that the husband has now managed to obtain a 6-month employment contract with a bank, earning $125,000 per month. In evidence, the husband confirmed he has been looking for jobs and has engaged recruitment agencies. I am sure he would continue to do so. I do not have a crystal ball into which I can gaze to tell how much the husband would be earning after the current contract. Yet, the objective facts are that he has good credentials, has been in his field for 20 years and his last position was an associate director. All

these are indicative that he would be earning something comparable to what he did in the past. I believe it would not take long for the husband to be back to the track and he should be able to earn a remuneration package of around $150,000 to $200,000 per month. In coming to the assessment, I have already taken the likely economic downturn occasioned by the lately social unrest into account.

71. I would give a notional income of $175,000 for the husband.

72. I have not forgotten the dividends that the husband has been receiving out of his stocks investment. I am certain that after the capital split as a result of the present proceedings the husband would be receiving much less from this source.

Assessing the Parties' Needs

The Wife's Financial Needs

73. In her affirmation of 31 August 2018, the wife stated her monthly general expenses (including the 2 children) are $46,500 and her personal expenses are $9,500, totalling $56,000. On that basis, she needs $25,000 per month. This represents 1/3 of the general household expenses at $15,500 ($46,500 ÷ 3 persons) plus her personal expenses of $9,500. The general household expenses already include rentals and costs of the domestic helper. The current domestic helper is being employed by the husband but the wife prefers to hire her own.

74. At trial, there was no challenge from the husband on the reasonableness of any of the items. During the marriage the parties

enjoyed a good standard of living, with regular dinning out and vacation trips. Giving due regard to the standard of living of the parties at the time of the relationship and bearing in mind that needs have to be generously interpreted (see: *LKW v DD*, at [79]), I consider $25,000 is a reasonable amount.

The Husband's Financial Needs

75. The husband stated in his Form E of 28 July 2017 that his general expenses are $34,500 per month and his personal expenses are $100,500, totalling $135,000. At trial, he clarified that the general expenses include the costs of the domestic helper at $6,500 that he has been hiring for the wife and the personal expenses include the $40,000 interim maintenance he has been paying. If these 2 sums are excluded, his monthly expenses would be $88,500, inclusive of his tax liability averaged out to be about $49,900 per month. If the tax liability is excluded, the husband would need about $38,600 per month. Considering that he has his own rental expenses ($22,500) and he is working; and so has to incur more meals out of home I have no doubt that $88,500 is a reasonable sum.

The Children's Financial Needs

76. The children's share of the wife's general expenses are not in disputed. These are quantified at $31,000 ($46,500 X 2/3).

77. As for their personal expenses, since the children are spending substantial time with their parents, both parties have to spend on the children. The wife's affirmation dated 31 August 2018 stated that on the top of their

share of general expenses, the children's expenses are $20,600, the breakdown of which is as follows,

The Children's Expenses

Item	Amount (HK$)
School fees	8,300
School books and stationery	200
Transport to school (including school bus)	500
Medical / Dental	1,000
Extra-Curricular Activities (Including speech therapy for G)	5,000
Entertainment / presents	700
Holidays	2,500
Clothing / Shoes	500
Lunches and pocket money	500
Other Transport	200
Uniform	200
Others (Meals out with the children)	1,000
Total:	**$20,600**

78. The school fee of $8,300 is G's; D is attending free local primary school.

79. At trial, it has been put to the wife that since the school fees, medical/dental and the speech therapy expenses will be paid by the husband, the wife should not have included these items. As I see it, it is immaterial as

to whether these items are put under the wife's schedule or that of the husband's. What is relevant is how much the children need per month.

80. As for the husband, he stated that the children's expenses are $3,500 which are essentially those that he needs to spend when the children are with him. Given that there are only 4 items and the sums are relatively insignificant, it is not necessary for me to set them out here. Further, for the reason that is evident below, I would not include the children's share of the husband's general expenses for the purpose of the assessing the children's needs here.

81. Thus, taking the parties' figures together, the children's personal needs are $24,100 ($20,600 + $3,500).

82. The particular items were not seriously challenged by the parties. Considering the level of income of the husband and the standard of living of the parties enjoyed during the marriage, I have no doubt that $24,100 for the 2 children is a reasonable sum. Adding the children's share of the wife's general expenses in the sum of $31,000 to $24,100 would bring their total monthly expenses to $55,100 ($31,000 + $24,100).

Deciding to Apply the Sharing Principle

83. The parties are at their prime age. It is clear from the above analysis that both are able to meet their and their children's daily needs from their total income; and accordingly there are surplus assets available for division by the parties. The court generally decides, at this stage, that the sharing principle applies to the total assets, so that they should be divided

equally between the parties unless good reason exists to the contrary: *WLK v TMC* (2010) 13 HKCFAR 618, at [82]

Whether good reasons for a departure from equality exist

84. The following issues as possibly bearing on equal division have been contested by counsel: (i) the parties' premarital assets; (ii) compensation; (iii) financial assistance from the wife's family; (iv) the wife's future inheritance and (v) the duration of the relationship.

Whether the Parties' Pre-Marital Assets should be included in the Pot for Division?

85. At centre stage of the trial is whether the parties' pre-marital and post-separation assets should be included for division. It is with regret that the parties are poles apart on this issue.

86. As I have already dealt with the husband's post-separation accruals in [30] to [40], I shall now focus on the parties' pre-marital assets.

87. The wife maintained that the parties' investments and pensions accrued prior to the marriage should be included in their full value for the purpose of division together with all the matrimonial assets.

88. On the contrary, the husband considered that these assets should be ring-fenced; and accordingly, only those assets that were acquired during the marriage would be available for division.

Non-Matrimonial Property – Legal Principles

89. Matrimonial property is said by Lord Nicholls as being "property acquired during the marriage otherwise than by inheritance or gift", such property being "the financial product of the parties' common endeavour": *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618, at [22].

90. It is well recognised that the source of an asset, being one of the matters under s 7(1)(a) of MPPO, may provide a reason for excluding it from the sharing principle on the basis that it is not an item of matrimonial property: *LKW v DD*, [87]. However, it has been warned that effort and expenses should not be wasted in trying to establish a sharp dividing between what is and what is not matrimonial property as it has been said by Lord Nicholls in *Miller v Miller, McFarlane v McFarlane* that fairness has a broad horizon: see also *LKW v DD,* at [88]. Further, even where a property is identified as 'non-matrimonial', there is no hard and fast rule that such property should be excluded. It is very much a matter within the judge's discretion to be exercised taking account of all the circumstances of the particular case: *LKW v DD,* [91]. The court may consider other relevant factors such as the duration of the marriage or whether the property was acquired post-separation in the balancing exercise: *LKW v DD*, [92] – [94]. It is a balancing exercise that is fact-specific and discretionary.

91. In deciding whether to apply the sharing principle in respect of 'non-matrimonial' property, there are two different approaches in the English cases: the 'telescoped approach' and the 'two stage approach'. The 'telescoped approach' is simply to adjust the percentage from 50% to take into account non-matrimonial assets, eg *Charman v Charman* (No 4) [2007]

1 FLR 1246; and the 'two stage approach' is to identify the scale of the non-matrimonial property to be excluded, leaving the matrimonial property alone to be divided in accordance with the equal sharing principles, eg *Jones v Jones; FZ v SZ (ancillary relief: conduct)* [2010] EWHC 1630, [2010] Fam Law 1259, [2011] 1 FLR 64; *N v F (Financial Orders: Pre-Acquired Wealth)* [2011] EWHC 586 (Fam), [2011] Fam Law 686, [2011] 2 FLR 533, [2012] 1 FCR 193.

92. Hong Kong favoured the 'telescoped approach'. In the Court of Final Appeal case of *WLK v TMC* Riberio PJ said in [84],

> 84. I do not agree with the Judge's suggestion that the sharing principle is capable of being "displaced" by such considerations, even where there are substantial assets surplus to the parties' needs. There is nothing in *White v White* or *Miller/McFarlane* to support that view. If the Judge's approach were to be adopted, one would have to define the conditions for such displacement, which in my view, introduces unnecessary complications. The better approach is to regard the sharing principle as always applicable when there are assets surplus to needs but accepting that, as part and parcel of that principle, an equal division should indeed be departed from if good reason exists for so doing. The shortness of a marriage, the absence of marital acquest and similar matters can all be considered as possible reasons for such a departure. The circumstances of a particular case may lead the court to decide, for example, that equal division should be departed from to the extent of restricting the award to a sum sufficient to meet one of the parties' needs. But that is not to say that the sharing principle has been "displaced".

93. The Court of Appeal also remarked that non-matrimonial property does not have the status of a golden rule. It is just one out of a number of possibly relevant factors potentially capable of giving rise to good reason for departing from equality: *PW v PPTW (Ancillary relief; non-matrimonial property)*, [2015] HKFLR 213 at [50].

94. In *PW v PPTW (Ancillary relief; non-matrimonial property)*, the Court of Appeal said whatever approach the court chooses to adopt, the same relevant factors apply. Even with the two-stage approach, questions of duration of the marriage and intermingling are relevant in determining how much of the pre-marital property should be excluded. The court will look at the extent of intermingling, springboard effect and passive economic growth in the same way as the telescoped approach: [72] – [73].

> 72. Thus, in applying the telescoped approach regarding non-matrimonial property, and in deciding to what extent equal division should be departed from where needs have been satisfied, according to the guidance given by the courts relevant factors may include: **the duration of the marriage; the nature and value of the non-matrimonial property; the way the parties organized their financial affairs; their standard of living and the extent to which it has been afforded or enhanced by drawing on the non-matrimonial assets; the way the non-matrimonial property was preserved, enhanced or depleted during the marriage.**
>
> 73. Similarly, in applying the two-step approach, in deciding whether it is fair and just that the existence of non-matrimonial property should be reflected, as stated in *N v F* at §14, this "depends on questions of duration and mingling". **And if it does decide that reflection is fair and just, in considering how much of the pre-marital property should be excluded, the court would be looking at factors such as the historic sum, the extent of mingling, springboard effect and passive economic growth, not dissimilar to some of the relevant factors considered in the telescoped approach. In any event, the fairness of the award in applying the two-step approach is to be tested by the "overall percentage technique".** (emphasis added)

95. In *ATV then known as MAM v VNT* (CACV 234/2014) (unreported, date of judgment: 3 July 2015), Lam VP, referring to *WLK v TMC*, said at [6.9],

> 6.9 Personally I do not find the argument in the English cases about which is the preferred approach helpful. More importantly the Court of Final Appeal has already given guidelines on how non-matrimonial property should be dealt with under the sharing principle in a short marriage which I will deal with in the following paragraphs. Hence the starting point of excluding the matrimonial property from consideration will be contrary to the Court of Final Appeal judgment which this Court must follow. But for the purpose of discussion, my view is that the second approach which may eventually include the non-matrimonial assets should not be regarded as the touchstone to the solution of the problem. Words such as 'insufficient logical rigour' or 'risk of palm-tree justice' used by the proponents of the second approach to criticise the first approach are really, with respect, not helpful at all. **This is after all a discretionary relief to be exercised by reference to well defined perimeters and established principles. Further, under the second approach the determination of how much of the non-matrimonial property is to be included is very much a discretionary decision as well.** (emphasis added)

96. Thus, the fact that a property being non-matrimonial would not automatically lead to the conclusion that it should be ring-fenced and excluded from distribution. It is only a factor that the court may consider when deciding whether to depart from equal division. As has been pointed out by Riberio PJ in *LKW v DD*, there is no hard and fast rule as to whether any property should be excluded. It is very much a matter within the judge's discretion to be exercised taking account of all the circumstances of the case. Apart from the fact that a property being 'non-matrimonial', the court may also consider other facts such as the duration of the marriage, the extent of intermingling, springboard effect and passive economic growth. Ultimately, it is a question of fairness whether non-matrimonial asset or the extent of which ought to be excluded from the sharing principle.

97. *K v L (Non-Matrimonial Property: Special Contribution)* [2011] EWCA Civ 550, [2011] 2 FLR 980 was a case concerning a relationship

lasting for 21 years with 3 children. The wife inherited substantial offshore shares before she started her relationship with the husband and the shares were said to have always been held as a discreet asset. Neither the husband nor the wife had worked during the marriage because the dividends from the shares had been sufficient for the needs of the family. The husband's claim for a share of the assets on the top of his needs was dismissed by the English Court of Appeal. Wilson LJ said, with respect to what Baroness Hale said in *Miller v Miller; McFarlane v McFarlane*, he believed the true proposition is the importance of the source of the assets may diminish over time. He stated 3 scenarios at [18]

> (a) Over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property.
>
> (b) Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult.
>
> (c) The contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name, has – as in most cases one would expect – come over time to be treated by the parties as a central item of matrimonial property.

98. Wilson LJ held there is nothing in the facts of *K v L (Non-Matrimonial Property: Special Contribution)* "*which logically justifies a conclusion that, as the long marriage proceeded, there was a diminution in the importance of the source of the parties' entire wealth, at all times ring-fenced by share certificates in the wife's sole name which to a large extent were just kept safely and left to reproduce themselves and to grow in value*": [18]

99. On the question of whether the shares are a special contribution to the welfare of the family, Wilson LJ said the phrase "a special contribution" is a term of art in the law of ancillary relief which is used to describe a contribution entirely different from that of non-matrimonial property. At [21] his Lordship said,

> **[21]** Thus a special contribution arises in circumstances in which a spouse's contribution, direct or indirect, to the creation of *matrimonial* property has been so *extraordinary* as to dictate a departure within the sharing principle from the *ordinary* consequence of its equal division. It is therefore no accident that this court's reference, at [90], to the unlikelihood of departure from equality further than to 66.6%–33.3% was of 'division of matrimonial property'. By contrast, although non-matrimonial property also falls within the sharing principle, equal division is not the ordinary consequence of its application. The consequences of the application to non-matrimonial property of the two other principles of *need* and of *compensation* are likely to be very different; but the ordinary consequence of the application to it of the *sharing* principle is extensive departure from equal division, often (so it would appear) to 100%–0%. Although Mr Pointer recognises the difference between the 'special contribution' which this court addressed in *Charman* and the contribution of non-matrimonial property exemplified by the present case (who could be more cognisant of it than he?), his attempt to represent the difference as immaterial is entirely unconvincing.

100. It was noted by Wilson LJ at [22] that when counsel for the husband was asked to show the court a reported decision in which the assets were entirely non-matrimonial and in which, by reference to the sharing principle, the applicant secured an award in excess of her or his needs, counsel confessed to be unable to do so: see also *PW v PPTW*, at [67].

101. *AR v AR (Treatment of Inherited Wealth)* [2011] EWHC 2717 (Fam), [2012] 2 FLR 1 was a first instance case where almost all the assets had been gifted to or inherited by the husband. During the marriage that lasted for almost 20 years the income from these inherited resources had been used by the family to supplement the husband's earned income. In resisting the applicant wife's claim on these assets on the sharing principle, the husband argued that given the source of the assets, there should be no sharing. It was held by Moylan J (as he then was) that the sharing principle could apply to non-matrimonial property if such an approach was justified by the circumstances of the case. Such circumstances were not restricted to the exceptions identified in *K v L (Non-matrimonial Property)*. The court should not apply the guidelines identified by the House of Lords in *Miller v Miller; McFarlane v McFarlane* with undue rigidity; fairness required a broader approach. That said, the judge found in that case, nothing had happened to the bulk of the non-matrimonial wealth to change it into matrimonial property, or to diminish the weight to be attached to it as a factor: [77], [81] - [82]. He said in [81],

> [81] Turning then to the facts of this case, Miss Bangay submits that, in particular, the length of the relationship and the wife's contributions justify her being awarded a sum that includes an 'element of sharing'. It is clear to me that the bulk of the wealth in this case is accurately described as non-matrimonial, in other words, it is not the product of the parties' endeavours during the marriage. The form of the wealth has in some respects changed, in particular following the realisation by the husband of his interests in the family company. The former matrimonial home has been lived in and the family have clearly in part used the invested income generated from the husband's inherited wealth. But nothing has happened to the bulk of the wealth which has changed it into matrimonial property or diminished the weight to be attached to it as a factor in this case.

102. His Lordship concluded that the sharing principle did not justify any additional or enhanced award above the wife's needs. He considered that the principles which best guided him in the exercise of his discretion to the determination of a fair award is that of need and that the length of the marriage, the wife's contributions and the standard of living, are all factors which can be given appropriate and sufficient weight within the principle of need: [82] - [83].

103. In *S v AG (Financial Orders: Lottery Prize)* [2011] EWHC 2637 (Fam), [2012] 1 FLR 651, Mostyn J, upon a review of the authorities about sharing, said it will be rare for the sharing principle to lead to any distribution of non-matrimonial property except in the case of meeting the needs of the applicant. At [7] the learned judge said,

> **[7]** Therefore, the law is now reasonably clear. In the application of the *sharing* principle (as opposed to the needs principle) matrimonial property will normally be divided equally (see para [14](iii) of my judgment in *N v F (Financial Orders: Pre-acquired Wealth)*). By contrast, it will be a rare case where the sharing participle will lead to any distribution to the claimant of non-matrimonial property. Of course an award from non-matrimonial property to meet needs is a common place, but as Wilson LJ has pointed out, we await the first decision where the sharing principle has led to an award from non-matrimonial property in excess of needs.

104. In *B v S (Financial Remedy: Marital Property)* [2012] EWHC 265 (Fam), [2012] 2 FLR 502, Mostyn J restated his opinion and said as far as the sharing of non-matrimonial assets is concerned, it is likely only to be applicable in the exceptional kind of case exemplified by *Miller v Miller; McFarlane v McFarlan*e: see [73] & [74].

Discussion

105. Prior to coming to Hong Kong, the wife worked in UK and the husband worked in US and later on, in UK where he met the wife. The pre-marital assets, which are mainly in the form of pension savings and securities investment, were accumulated by the parties through their separate effort prior to the marriage. The value of these assets have growth over time; and as can be seen in the Schedules above, the total value is about $3,993,800, of which $1,103,800 is under the wife's name and the remaining $2,890,000 belongs to her husband.

106. Ms Booth's primary argument is that since the pre-marital assets take up a substantial part of the total assets, to exclude them from division would disregard the overarching principles of equality, fairness and non-discrimination.

107. Another point relied upon by Ms Booth is that the husband's pre-marital assets have accrued substantially over the course of the marriage. This is not attributable to passive growth, but his management of the accounts over the course of the marriage.

108. A relating point is that, as has been submitted on the wife's behalf, she has very minimal amounts in terms of pensions and securities herself. She forfeited her chance to build up savings or a pension when she left her position with NHS in 2010 for the husband's benefit. She has lost out on nearly a decade of time in building her own pension.

109. Ms Chan argued that the pre-marital assets were never intermingled with any matrimonial assets and that the increase in values in these accounts are passive economic growth. In support of the latter contention, she referred to *Jones v Jones* [2011] EWCA Civ 41, [2012] Fam 1, 3 WLR 582, [2011] 1 FLR 1723.

110. It is not in dispute that by and large there were no contributions to or withdrawals from these accounts; in other words, no money ever went in, or went out of the accounts and accordingly these assets have never been intermingled with any matrimonial assets or any part of them has ever been used for the benefit of the family. The wife admitted that she made no contribution whatsoever to the husband's pensions and as a matter of fact, she was not aware of their existence before the present proceedings. The only matter that may be considered to be in the wife's favour is the fact that the husband "*managed*" the accounts on infrequent basis (once or twice a year) by changing the investment portfolio within the accounts but there had never been any involvement on the part of the wife. The increase in the value of these assets cannot be said to be the product of the parties' endeavours. In my view, fairness requires that these assets should be separately held by them upon divorce. I tentatively conclude that these assets should be excluded.

Compensation for Relationship-Generated Disadvantage

Legal Principles

111. Any discussion on this subject must start from *Miller v Miller*, *McFarlane v McFarlane* where Lord Nicholls spoke of the requirements of fairness. Apart from the welfare of the children which is the first

consideration, Lord Nicholls identified three elements or strands, namely (1) financial needs, (2) compensation and (3) sharing.

112. On compensation, His Lordship said,

> 13. Another strand, recognised more explicitly now than formerly, is compensation. This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and child-carer.
>
> 14. When this is so, fairness requires that this feature should be taken into account by the court when exercising its statutory powers. The Court of Appeal decision in *SRJ v DWJ (Financial Provision) [1999] 2 FLR 176* , 182, is an example where this was recognised expressly.

113. The judge then reminded us that compensation and financial needs often overlap in practice, so double-counting has to be avoided: [14]. His Lordship then dealt with the question of whether periodical payments orders may be made for the purpose of providing compensation as distinct from maintenance. His Lordship said,

> **Periodical payments and the clean break principle**
>
> 30. …Two issues arise in this regard. The first concerns the reach of periodical payments orders. The question is whether periodical payments orders may be made for the purpose of providing compensation as distinct from maintenance.
>
> 31. I see no difficulty on this point. There is nothing in the statutory ancillary relief provisions to suggest Parliament intended periodical payments orders to be limited to payments needed for

maintenance. Section 23(1)(a) empowers the court, in quite general language, to order one party to the marriage to make to the other "such periodical payments, for such term, as may be specified in the order". In deciding whether, and how, to exercise this power the statute requires the court to have regard to all the circumstances of the case: section 25(1) . The court is required to have particular regard to the familiar wide-ranging check list set out in section 25(2) . These provisions, far from suggesting an intention to restrict periodical payments to the one particular purpose of maintenance, suggest that the financial provision orders in section 23 were intended to be flexible in their application.

32. In particular, **I consider a periodical payments order may be made for the purpose of affording compensation to the other party as well as meeting financial needs. It would be extraordinary if this were not so. If one party's earning capacity has been advantaged at the expense of the other party during the marriage it would be extraordinary if, where necessary, the court could not order the advantaged party to pay compensation to the other out of his enhanced earnings when he receives them. It would be most unfair if absence of capital assets were regarded as cancelling his obligation to pay compensation in respect of a continuing economic advantage he has obtained from the marriage.**

…

35. This leads me to the second issue regarding periodical payments orders. It concerns the impact of the clean break principle on periodical payment orders made to provide compensation to a disadvantaged party. There is of course a significant practical difference between providing compensation by appropriate division of existing capital assets and providing compensation by means of a periodical payments order. Of its nature a lump sum payment is once and for all. A lump sum payment represents, to that extent, the financial closure of a failed marriage. It draws a line under the past. Periodical payments represent the opposite. Future earnings and future payments lie in the future. They are a continuing financial tie between the parties. Today the undesirability of such continuing ties is regarded as self-evident. The modern approach was expressed succinctly by Lord Scarman in his familiar words in *Minton v Minton [1979] AC 593*, 608: "An object of the modern law is to encourage [the parties] to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down." (emphasis added)

114. *McFarlane v McFarlane* was a marriage that lasted for 16 years with 3 children. The husband was a chartered accountant and the wife a solicitor and both had pursued lucrative careers. Before the birth of the second child, they agreed that the wife should give up work to concentrate on raising their children. Upon divorce, a division of the family's capital was agreed but the capital was insufficient to effect an immediate clean break. However, there was a substantial excess of income. The income of the husband well exceeded the parties' expenditure and his income was expected to continue to rise until his retirement and accordingly, a periodical payment order was given by the court. The Court of Appeal fixed the order for a term of five years. On appeal, at issue was the duration of the order. The wife sought a joint lives order.

115. Lord Nicholls noted that the high level of the husband's earnings after the breakdown of the marriage was the result of the parties' joint endeavours at the earlier stages of his professional career. On the other hand, the wife gave up her career to devote herself to making a home for them both and for the children: [91]. The judge also took note of the fact that the career foregone by the wife was a professional career as successful and highly-paid as the husband's: [92]. His Lordship took the view that it would be manifestly unfair if the periodical payment order were to confined to her financial needs. He considered that the case was a paradigm case for an award of compensation in respect of significant future economic disparity, sustained by the wife, arising from the way the parties conducted their marriage: [93].

116. Baroness Hale took a similar view. At [154] Her Ladyship said,

> 154. …The main family asset is the husband's very substantial earning power, generated over a lengthy marriage in which the couple deliberately chose that the wife should devote herself to home and family and the husband to work and career. The wife is undoubtedly entitled to generous income provision for herself and for the sake of their children, including sums which will enable her to provide for her own old age and insure the husband's life. She is also entitled to a share in the very large surplus, on the principles both of sharing the fruits of the matrimonial partnership and of compensation for the comparable position which she might have been in had she not compromised her own career for the sake of them all….

117. Baroness Hale considered that the wife was undoubtedly entitled to generous income provision for herself and for the sake of their children, including sums which will enable her to provide for her own old age and insure the husband's life in the event of the latter's premature death. She was entitled to share the income surplus on the principles both of sharing the fruits of the matrimonial partnership and of compensation for the comparable position which she might have been in had she not compromised her own career for the sake of the family: [155].

118. For these reasons, the House of Lords held that a joint lives order should be made. Further, it is important to note that both Law Lords took the view that the burden should be placed on the husband to seek a variation when the circumstances made that appropriate: [97] & [155].

119. It should be borne in mind that *McFarlane v McFarlane* was a case where the capital was insufficient to effect an immediate clean break but there was a substantial excess of income. It was because of this that the court needed to address the issue of whether a periodical payments order may be made to provide for compensation.

120. Despite *McFarlane v McFarlane*, Mostyn J commented in *B v S (Financial Remedy: Marital Property)* that the law in this regard was not so clear. He then reviewed the opinions of Lord Nicolls and Baroness Hale in *Miller v Miller; McFarlane v McFarlane* and concluded that the only factor that would ever justify an uplift of the periodical payments over need would be compensation. He drew support from what Lord Nicholls said at [93] in *Miller v Miller; McFarlane v McFarlane*,

> 93. Clearly in this situation the wife is entitled to a periodical payments order in respect of her financial needs. She needed money to live in the former matrimonial home which was to be the continuing home for her and the children. But it would be manifestly unfair if her income award were confined to her needs. This is a paradigm case for an award of compensation in respect of the significant future economic disparity, sustained by the wife, arising from the way the parties conducted their marriage.'

121. Mostyn J remarked that the dictum of Baroness Hale at [154] of *Miller v Miller; McFarlane v McFarlane* was the high point of the theory that the sharing principle is sometimes as being applicable to a periodical payments claim and an earning capacity built up during the marriage which is, in some intangible way, a piece of matrimonial property to be equitably or fairly shared. He took the view that this theory is problematic because at the end of the day the only reason there is income after separation is because of work done after separation. The payer (usually the husband) has to '*fill the unforgiving minute*' in his work:

> [76] The reason that the sharing principle is sometimes advocated as being applicable to a periodical payments claim is to reflect the theory that post-separation earnings derive from an earning capacity built up during the marriage which is, in some intangible way, a piece of matrimonial property there to be equitably or fairly shared. The high point of that theory is the dictum of Baroness

> Hale of Richmond which I have quoted above, viz 'the main family asset is the husband's very substantial earning power, generated over a lengthy marriage'. As a theory it is problematic, because at the end of the day the only reason there is income after separation is because of work done after separation. A footballer who earns £100,000 per week earns that because he is on the pitch playing football. Certainly, the skills he was born with, and the development of those skills (which may well have happened during his marriage), are all reasons why he can command his salary, but he will not get paid it unless he plays football. The footballer has to fill the unforgiving minute with sixty seconds' worth of distance run after the marriage.

122. The judge then referred to what Thorpe LJ said in *Hvorostovsky v Hvorostovsky* [2009] EWCA Civ 791, [2009] 2 FLR 1574 at [59],

> 'Second, on the exit from the marriage, the partnership ends and in ordinary circumstances a wife has no right or expectation of continuing economic parity ("sharing") unless and to the extent that consideration of her needs, or compensation for relationship-generated disadvantage so require.'

123. Mostyn J concluded in [79],

> [79] In my judgment simplicity and clarity are just as much needed in this part of the field as in the part designated 'division of capital'. Simple and fair guidance is needed so that the majority of cases can be settled. Settlement is almost always better than adjudication for a divorcing couple. And the functioning of the family justice system depends on a high rate of settlement of these cases. **Save in the exceptional kind of case exemplified by *Miller v Miller; McFarlane v McFarlane* a periodical payments claim (whether determined originally or on variation) should in my opinion be adjudged (or settled), generally speaking, by reference to the principle of need alone. Of course needs are elastic in concept and there is much room for the exercise of discretion in their assessment. But to allow consideration of the concept of sharing to intrude in the assessment of a periodical payments award seems to me to be based on a doubtful principle, and is replete with problems of quantification by any sure standard.** The sharing principle in relation to matrimonial property is simple enough: it is usually 50/50, because in the division of the marital acquest equity (or fairness) is (usually)

> equality. But if the concept of sharing is going to uplift above the assessment of need a periodical payments award which will be paid from post-separation earnings, how does a judge set about doing it? Is it a third? Or 40%? Or 20%? There are not even any signposts along the road to a fair award. (emphasis added)

124. A more recent case is *Waggott v Waggott* [2018] EWCA Civ 727, [2018] 2 FLR 406 in which the English Court of Appeal held in [121] – [128] that an earning capacity is not capable of being a matrimonial asset to which the sharing principle applied entitled the spouse to share. Any extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break. It would apply to every case in which one party had earnings which were greater than the others, regardless of need and that could well be a very significant number of cases. It would inevitably require the court to assess the extent to which the earning capacity had accrued during the marriage. The sharing principle applied to marital assets, being "the property of the parties generated during the marriage otherwise than by external donation". An earning capacity was not property and, it resulted in the generation of property after the marriage.

125. Moylan LJ considered that if an earning capacity is capable of being a matrimonial asset subject to the sharing principle, it would significantly undermine the "importance aspect of fairness". He explained the point in [126],

> [126] Mr Turner had no answer as to what factors would determine either the percentage of any award or its duration. He made general submissions (as summarised in paras [51] and [52] above) but was unable to articulate any principles by which, for

> example, the court (i) should determine the percentage division of the income which is, of course, only generated by actual work (the 'unforgiving minute' referred to by Mostyn J in *B v S (Financial Remedy: Marital Property Regime)* [2012] EWHC 265 (Fam) , [2012] 2 FLR 502 , at para [76]); (ii) should determine how long the relevant earned income should be deemed to continue (would it be based on some notional 'retirement' date considered to be 'fair' or would it require a factual determination?); or (iii) should determine whether any changes in employment were reasonable (if resulting in a lower income) or were, or were not, sufficient to make the new job of a different 'character' to the earning capacity claimed as having been developed during the marriage (see para [28] above). This lack of clarity supports the conclusion that to apply the sharing principle in this way would significantly undermine the 'important aspect of fairness' referred to by Lord Nicholls of Birkenhead (at para [3] above), namely to achieve an 'acceptable degree of consistency of decision'. This is in part because this branch of the road to achieving a clean break would be devoid of clear signposts.

126. Finally, Moylan LJ held that the compensation principle is to be applied when the applicant had sustained a financial disadvantage in his or her prospective career but does not apply where the respondent had sustained a financial benefit. It is clear from *Miller v Miller; McFarlane v McFarlane* that compensation is for the disadvantage sustained by the party who had given up his or her career: [139]. Moylan LJ explained the significant conceptual and evidential difficulties if the compensation principle applies also to the situation where a respondent has sustained a financial benefit:

> [96] It is not altogether easy to understand how the extent of the enhancement or benefit/advantage would be established if Mr Turner was right. As Sir James Munby P postulated during the hearing, was it being proposed that the court would have to seek to determine what each of the parties would have been earning if there had been no marriage and then calculate the quantum of, respectively, the advantage and the disadvantage? Otherwise, how was the advantage and/or the disadvantage to be determined? The submissions provided no clear answer, perhaps understandably

> because of the evidential difficulties. Whilst the evidence might provide some route to determining how an abandoned or diminished career would have been likely to develop, I find it hard to envisage what evidence would enable a court to conclude how a spouse's career would have developed absent the marriage or to what extent it was, in fact, enhanced by the marriage.
>
> [97] I mention, in passing, that Charles J referred to some of these difficulties when determining Mrs McFarlane's application for a variation of the periodical payments order: *McFarlane v McFarlane* [2009] EWHC 891 (Fam) , [2009] 2 FLR 1322 .
>
> [98] Similar problems would arise if the court had to determine the extent to which an earning capacity was the product of marital endeavour. I have already referred to the difficulties mentioned by Wilson LJ in *Jones v Jones* [2011] EWCA Civ 41 , [2012] Fam 1 , [2011] 3 WLR 582 , [2011] 1 FLR 1723 when he rejected the whole notion of the court seeking to determine, let alone evaluate, what had contributed to a spouse's earning capacity at the end of the marriage. Further, despite what I have said above (see para [32]), would this require the court, in fairness, to embark on considering whether, as can sometimes be asserted, any alleged continuing economic advantage was obtained or developed despite rather than because of the marriage? There would clearly be significant conceptual and evidential difficulties if Mr Turner was right and the court had to determine whether and, if so, the extent to which a spouse's earning capacity was the product of marital endeavour.

127. That said, it does not mean that an earning capacity is not relevant to a fair distribution of assets pursuant to the sharing principles. At [132] Moylan LJ quoted what Wilson LJ said in *Jones v Jones*,

> "Even if, however, an earning capacity may also sometimes be relevant to a fair distribution of the assets pursuant to the sharing principle, it does not follow that the earning capacity should itself be treated as one of those assets, still less that an attempt should be made to capitalise it."

128. Locally, *WLK v TMC*, which went all its way from the Family Court to the Court of Final Appeal, was a case where the total assets of the parties were significantly greater than the amount required to see the parties'

needs. Ribeiro PJ provided guidance on how to approach the compensation issue when (as is usually the case) there is uncertainly of the applicant's success if he or she had continued to pursue the career.

129. The husband and wife there met young when the husband was doing his A-levels and the wife was at university reading music in UK. The wife gave up her aspirations to be a concert pianist and worked instead as a part-time music teacher in order to accompany the husband even before the parties were married. After their marriage, the wife did not work and mainly kept her mother-in-law and sister-in-law company, as well as travelling with the husband. Notwithstanding the trial judge had no doubt of the wife's ability and talents as a pianist and of her desire to pursue her career in Paris or New York, the wife's claim for compensation for giving up her career was rejected: see *K v C*, FCMC 5508/2005 (unreported; date of judgment: 14 July 2008) at [38], [40] – [42] & [53]. On appeal, the Court of Appeal reversed the decision and found in favour of the wife on the ground that her claim was "*compensation for 'loss of a chance*'". The Court of Final Appeal affirmed the Court of Appeal decision but based its decision on different grounds and provided guidance on how to approach this issue. Ribeiro PJ said the following in [114] – [121]:

> 114. It therefore appears plain that the wife had given up her career ambitions in order to fall into line with the husband's wishes in contemplation of their getting married, a situation which persisted up to and during the marriage. One would have thought this was a clear case where an element of compensation ought to be recognized.
>
> ***G.2.b The Judge's rejection of compensation as a material factor***
>
> 115. Yet the Judge rejected compensation as a material factor. In my view, this was because he erroneously treated the question

of compensation, not as an element of the sharing principle (which he thought was not engaged), but as if it were the equivalent of a separate civil claim for damages for financial loss. He found that cogent evidence of quantifiable financial loss was missing, and so concluded that the claim was "speculative" and that there was nothing "upon which she can base her claim for compensation".

116. Thus the Judge stated that the absence of "firm evidence of her abilities and earning capacity [and a] proven track record of a career" were "ultimately fatal to her claim for compensation for loss of career..." He pointed to the uncertainty of her success as a pianist, adding: "even if successful, this does not [necessarily] mean financial success". He concluded:

> "...even assuming the Wife would become a concert pianist, renowned or otherwise, had she not decided to give it up for the relationship, there is simply no evidence before me as to how much she would have been able to earn from giving concerts, let alone other sources of income such as recordings and endorsements. In other words, there was simply no career as a concert pianist upon which she can base her claim for compensation."

117. As acknowledged in *LKW v DD*, and as Coleridge J pointed out:

> "... it is simply not possible (and highly undesirable and costly) to conduct ... a speculative 'what if ...?' exercise to reconstruct the parties marriage on a different basis."

118. Accordingly, to approach the question of compensation as if it were a damages claim, as the Judge did, is to engage in an inherently speculative and "impossible" exercise. But that does *not* mean that the question of compensation should be ruled out. What it *does* show is that the question of compensation was wrongly conceived to involve a "claim for compensation for loss of career" which must fail for want of "firm" evidence "as to how much she would have been able to earn from giving concerts [and] ... other sources of income such as recordings and endorsements". An answer was found lacking because the wrong question had been asked.

119. The proper view, as explained in *LKW v DD*, is that the element of compensation ought to be approached as an aspect of the sharing principle's application and not as a separate claim for financial loss. The court should proceed on the footing that compensation for relationship-generated disadvantage is usually factored in when applying the sharing principle to an extent determined by the nature, certainty, permanence and other qualities of the disadvantage incurred, and that it will only be in exceptional

> cases that a separate and further element of the award should be dedicated to such compensation.
>
> 120. It is also explained in *LKW v DD* that where it *is* necessary to address compensation as a separate element of the award, it should still not be treated it like a civil damages claim, but that a broad brush attribution of some percentage of the overall award to the element of compensation (as appropriate on the particular facts) would generally be sufficient.
>
> ***G.2.c Conclusion as to "compensation"***
>
> 121. It is accordingly my view that the Judge wrongly excluded compensation as a material factor. He should have applied the sharing principle, allocating a proportion of the award as compensation for relationship-generated disadvantage as a result of the wife abandoning her career aspirations to accept the role preferred by the husband in their marriage. Such an allowance could not be great as, on the facts, those aspirations involved a high degree of uncertainty. But fairness nevertheless dictates that her abandonment of those aspirations be recognized as a genuine disadvantage she incurred as a result of the marriage.

130. Pulling the threads together, the conclusions that can be drawn from the authorities are:

1. Fairness requires that any significant prospective economic disparity between the parties arising from the way they conducted their marriage has to be addressed but it has to be borne in mind that double-counting has to be avoided.

2. Where it is necessary to address compensation as a separate element of an award, it should not be treated it like a civil damages claim, but that a broad brush attribution of some percentage of the overall award would generally be sufficient.

3. Where the total assets are insufficient for the needs of the parties, periodical payments order may be made to provide for compensation for relationship-generated disadvantage in addition to providing needs for the receiving party. Otherwise, periodical payments order should only provide for needs of the receiving parties (generously assessed).

4. Earning capacity is not an asset that can be shared but is a factor that the court may consider whether to depart from equal division of the matrimonial assets.

The Parties' Case

131. There was considerable debate before the court over this issue.

132. The wife's contention is that she has sacrificed her career in UK and become a full-time care giver in order to accommodate the husband's relocation to Hong Kong for his better career prospect. It was the husband who wanted to move to Asia for better career prospect and lower tax-rate. That was the reason why the husband applied for jobs and secured his employment in Hong Kong soon after their marriage.

133. The wife said things were moving fast before they got married. It was probably within the first 6 months of their relationship that they started talking about marriage. The husband was always talking about moving to Asia. The husband did not make the move then because he was waiting for his British citizenship.

134. The wife was open to the idea but she was not ready to move yet. At that time, she had just secured a permanent position as a Senior Pharmacist (Clinical Governance Pharmacist) with a NHS hospital. This was a full-time permanent job with attractive / comprehensive benefits including professional training and pensions. She wanted to stay for at least one more year so that she may complete her Diploma in Clinical Pharmacy offered by NHS. Had it not been for the husband's relocation, she would have developed and advanced her career in UK. Accommodating the husband's ambition meant she had to start from scratch in Hong Kong. As of now, the reality is that she is still in the midst of developing her career and by attending some courses in Investment Management and Financial Intelligence she is trying to retrain herself in the hope of being able to re-enter into the workforce in a different field.

135. Added to all the above was the language barrier. She had very limited ability to communicate in Cantonese. Yet, the husband did not wish to lose the job opportunity and made it clear that if the wife could not get a job, he would still support her. The husband was very compelling and persuasive and was just telling her that it was a good opportunity for him. In the result, though she was not ready to leave, she did it in support of the husband.

136. Again, the husband takes a polarized view. The decision to relocate to Hong Kong was in any event a joint-decision at that time. Both agreed at that time it would be best for the whole family and their future children to relocate to Hong Kong and the wife's parents were very happy to see this happened. It was a unilateral decision on her part to choose to work

part-time after the return to Hong Kong. It was an unnecessary decision insofar as the husband was concerned given that the family had a full-time domestic helper and the husband was a 'hands on' father. Back in UK, the wife worked as a full-time pharmacist for 8 years until September 2010 and worked part-time in Hong Kong till August 2016. Given that she is fully qualified as a pharmacist in Hong Kong and has a doctorate degree, the wife ought to have returned to work following the parties' separation and should in any event return to work as soon as possible. The wife has the benefit of a domestic helper and can, therefore, pursue full time employment and there are no reasons why she should be restricted to part-time work. Further, there is no reason why the wife should be restricted to work within the pharmaceutical field as she is highly intellectual and highly qualified who should be able to find employment in many fields.

Discussion

137. Regarding her position with NHS which was a Band 8 position within the organization, the wife explained that she did not go through the conventional banding system under which a junior pharmacist would normally have to start from Band 6.

138. The wife said the entry level for a pharmacist at NHS is Band 6. After a few years of service and after having gone through some assessments and courses, a Band 6 pharmacist may be elevated to Band 7 which is considered as a more clinically advanced pharmacist. From Band 7, again, one would have to go through a few more years of working and training and obtain a Diploma in Clinical Pharmacy in order to become a Band 8 pharmacist. The wife did not go through these banding steps. Before she got

the position as a senior pharmacist, she was working as a locum pharmacist and later on as a contracting staff of NHS. She did not have a Diploma in Clinical Pharmacy. Hence, it was very lucky for her to have obtained the direct appointment to the Band 8 position.

139. That was in August 2009. But then because of the idea of coming to Hong Kong she considered leaving the job in April 2010. The wife said the position with NHS not only provided her with a steady job, it also offered professional development opportunities, a pension and above all, very generous maternity leave. That said, she mentioned that a lot of women, after a long maternity leave, would choose to return to work on part-time basis because they prefer to spend more time with their children.

140. She said if she had stayed in her role as a senior pharmacist, and completed her diploma in clinical pharmacy, she would have potentially progressed in her career with NHS and earned a greater income, as well as any commensurate benefits.

141. The wife also made the point that pharmacy in UK is far more advanced than that in Hong Kong. Pharmacists in UK have a more advanced role to play in medical and health field.

142. These evidence have not been challenged by the husband.

143. However, when being asked by her own counsel regarding her promotional prospect, specifically, what the banding steps beyond Band 8 are, surprisingly, the wife's reply was she is not sure and is not able to give

any particulars nor are there any evidence on the expected level of remuneration.

144. There is admittedly a relative high degree of uncertainty here. It is not merely a case where the wife has given up her own professional career for the benefit of the husband, it is a case where she has given up her own professional career plus her home for the benefit of the husband, and perhaps to be more exact, for the benefit of the family.

145. The wife said when she was working as a locum pharmacist in UK she was making around £45,000 per annum before tax but her job with NHS was only £38,000 before tax. She said, in evidence, that she was able to bring home around £2,000 per month (ie about £24,000 per annum). I am of course aware that one should not look that the monetary figure alone; the NHS job was an attractive one because of the accompanied remuneration package, pension and professional development opportunities. The wife has made the point that pharmacists in UK have a more advanced role to play in medical and health field. Again, this has not been challenged. On the other hand, the evidence is not entirely clear as to what an average pharmacist similar to the wife would earn in Hong Kong. In any event, the socio-economic system and the labour market for pharmacists in Hong Kong are very much different from those in the UK. In my view, it is unhelpful to try to make a comparison. Engaging in such an exercise would be just like comparing "*apples and oranges*".

146. It seems that both have a reason and a motive to come to Hong Kong. The husband had just obtained his UK citizenship and was eager to

come to Asia for better prospect. The wife was pregnant and would have the benefit of having a domestic helper and her parents around if returning to Hong Kong. Ms Chan argued that the decision of coming to Hong Kong was a joint one. They made a joint decision to stay in UK at least until the husband obtained his UK citizenship in around 2009 and then made a joint decision of coming to Hong Kong. With respect, I do not think coining it as a joint decision is helpful. It is of course a joint decision. It has never been suggested that the wife was unwilling to leave for Hong Kong. The wives in the authorities such as the one in *McFarlane v McFarlane* were all willing to give up their career for the sake of the family. The objective fact is while the wife had to start from scratch the husband had been doing the same job and enjoying the position as an associate director of his company till he was laid off in December last year. The outcome is, career-wise, coming to Hong Kong has been proved to be a right move for the husband, as can be seen from the remuneration package he enjoyed and the significant wealth that the family was able to amass during the 6-year relationship.

147. In my judgment, fairness nevertheless dictates that the abandonment of her career in UK in order to accommodate the husband's ambition should be recognized as a genuine disadvantage she incurred as a result of the relocation to Hong Kong shortly after she had taken up a promising job with NHS.

148. In approaching the question of whether compensation for "relationship-generated disadvantage" may be a departing factor in the present case, it is important to bear in mind Ribeiro PJ's caution that the parties' respective contributions, and compensation for "relationship-

generated disadvantage" are already factored in as an intrinsic part of applying the sharing principle, and there is a real risk of double counting if a party is awarded an additional sum or premium in recognition of some special or stellar contribution to the welfare of the family: *LKW v. DD,* [116] & [126).

149. I have already referred to the significant assets generated by the family during their relationship. Given that the wife was only working part-time occasionally, there is little doubt that the matrimonial assets generated during the period were from the earnings and investments of the husband which otherwise could not have been made possible if it had not been for the choice taken up by the wife. In other words, these assets are the fruits of their matrimonial partnership. On this view, there is a real risk of double-counting if an additional sum is awarded on the top of equal division.

150. That said, the analysis does not stop here. I am sure I should take two further matters into consideration.

151. The first is it would be wrong for me to ignore the great prospective economic disparity between the parties arising from the way they conducted their marriage. It is true that the wife has recently been earning $35,000 per month which, when compared to what was in the past, have seemingly made big strikes but on any view, the wife has sustained a financial disadvantage in her prospective career.

152. As I have referred to *Waggott v Waggott* where it was held that earning capacity is not capable of being a matrimonial asset to which the

sharing principle applied entitled the wife to share but earning capacity, in appropriate cases, may be relevant to a fair distribution of the assets pursuant to the sharing principle. Moving forward after the divorce, the husband in all likelihood should be able to generate his wealth in the same fashion he did during the relationship but it may not be the case for the wife. In my view, the great disparity in the parties' earning capacity is a relevant consideration in the present case and accordingly, it is a departing factor that I should take into account.

153. Another matter is the fact that while the husband had been able to build up his MPF during their relationship, the wife had not been able to do so. She had forfeited her chance to build up savings or a pension when she left her position with NHS.

154. In my view, this unfairness against the wife has to be addressed. As I have said in [83] above, the present case is not one where the total assets are insufficient for the needs of the parties so that periodical payments order may be given to redress the financial disadvantage suffered by the wife. Accordingly, what I should do is to depart from equal sharing in the division of the assets. Taking a board brush approach, I would tentatively allow the wife 5% of the total matrimonial assets.

Financial Assistance from the Wife's Family

155. Ms Chan placed much emphasis on the fact that the wife comes from a very wealthy family and that the parties were well provided for by the wife's parents when they moved to Hong Kong. For nearly 2 years from November 2010 to July 2012, the new family lived rented free in a 8-

bedroom mansion house on the Peak with the wife's parents, her paternal grandmother and younger brother and being served by 3 domestic helpers. They did not have to pay any financial contribution at all and all meals – whether at home or dinning out – were paid for by the wife's parents.

156. Ms Chan also referred to the financial assistance that the wife's parents gave to her younger sisters. The wife has a sister who lives in a 5-bedroom property in UK. That property was bought with the financial assistance of the wife's parents, including the down payment which was paid for by the wife's mother. The wife's another younger sister who lives in USA also received similar financial assistance when she purchased her home. Ms Chan submitted it is more likely than not that the wife's father will purchase a home for her and the children after the divorce. She also drew support from the evidence that shortly before the breakdown of the relationship the wife's father was willing to provide financial assistance for the parties to purchase the property that was then rented by them.

157. The wife accepted that over all these years she has had money gifts from her family members, including roughly $300,000 that the husband gave her shortly upon moving to Hong Kong and $60,000 from the husband's father, and the rests were from her father. This explained why as at 25 September 2017 when she filed her Form E she still had about $1,180,000 in her bank accounts notwithstanding that she had not been working full-time since November 2010 and by the time of her Form E it was already more than 2 years after she had separated with the husband during which she received around $40,000 per month as maintenance from the husband for which she said was barely sufficient to meet her needs. She

further explained that part of the money given by her father by way of a cheque for $100,000 was for G's kindergarten school fees for 2017-2018. The wife's father also paid $100,000 for the wife's 7-day London property investment course in October 2018 as mentioned in [57] above.

158. In *KEWS v NCHC* [2013] 2 HKLRD 314, Mr Chief Justice Ma clarified the approach that the court should take. He said as follow,

> **E.2 The identification of the parties' financial resources**
>
> 33. Section 7(1)(a) is stated in wide terms. Two points are of note:-
>
> (1) The court is not restricted to taking into account *only* those assets which in law represent the property of either spouse. Section 7(1)(a) is widely drafted to include "other financial resources" of the parties. These resources will therefore include those assets or resources to which the relevant spouse has or is likely to have access but to which he or she may not have a legal entitlement.
>
> (2) Nor is the court constrained to look only at the present position. The court looks into the financial resources which a party actually has (or should have) at present or which that party is likely to have in the foreseeable future.
>
> **E.3 Treatment of financial assistance from third parties under s 7(1)(a)**
>
> 34. The width of the wording of s 7(1)(a) of the MPPO will include financial assistance made by third parties to the parties to a marriage. Accordingly, such assistance made by a third party to the husband or wife may be taken into account in the computation of that party's overall financial resources.
>
> 35. As stated in para 2 above, such third party assistance may take various forms. The authorities, to which I shall presently turn, show commonly trust situations or where relatives have provided financial assistance. There are of course other factual situations.
>
> 36. In every case where third party assistance is involved, there are two critical evidential questions for the court to consider:-

> (1) What is the extent of the financial assistance provided by the third party to the husband or wife?
>
> (2) What is the likelihood of such financial assistance continuing in the foreseeable future?
>
> 37. It goes without saying that in the fact finding exercise, the court must look at the reality of the situation and have regard to matters of substance and not just form. In looking at reality, the court can take into account not only what a party actually has, but also what might reasonably be made available to him or her if a request for assistance were to be made. In *O'D v O'D* [1976] Fam 83, which involved the court taking into account the financial support given to the husband by his father, Ormrod LJ said at 90 D-E "In making this assessment the Court is concerned with the reality of the husband's resources, using that word in a broad sense to include not only what he is shown to have, but also what could reasonably be made available to him if he so wished".
>
> 38. In addition, in looking at what may occur in the foreseeable future, past conduct is often a useful guide: see *SR v CR (Ancillary Relief: Family Trusts*) [2009] 2 FLR 1083, at 1091 (para 27).
>
> 39. Having ascertained the extent of the financial assistance provided by the third party and then finding on the evidence on a balance of probabilities that there is a likelihood of the continuation of such financial assistance in the foreseeable future, the court is then in a position in law first to take this into account in the identification of the financial resources of the parties and secondly, in determining the appropriate ancillary relief to be granted. This is an approach that is entirely consistent with the court's duty under s 7(1) of the MPPO. Needless to say, the outcome in any given case is inevitably fact-sensitive.

159. Thus, the court needs to ascertain the extent of the parents' financial assistance to the wife and the likelihood of such assistance continuing in the foreseeable future. In doing so, the court needs to look at the reality of the situation and has regard to matters of substance and not just form. The court could take into account not only what the wife actually had, but what might reasonably be made available to her if a request for assistance were to be made.

What is the extent of the financial assistance provided by the parents to the wife?

160. To start with, the extent of financial assistance provided by the parents to the couple in the first 2 years upon their arrival was clearly in 'kind' rather than in any monetary form. This came mainly in the form of provision of lodging, meals and the sporadic service of domestic helpers.

161. The undisputed evidence is that the wife has been receiving some money gifts from her father from time to time and the money gifts from her father-in-law appeared to be one-off and in any view it was not a substantial sum. I have grave doubt over the wife's evidence that $300,000 was given to her by the husband because it was not mentioned in any affirmation. There is no reason why she would not have said so when the case was being prepared for trial. Though it has not been so suggested by Ms Chan, in rejecting the wife's evidence in this regard, I would infer that this sum was also a gift from her father. Parties have not been able to provide me with any average figure (not even a ballpark one) on roughly how much the wife has been receiving on a monthly basis. On the evidence before me, the money that could be traced in her account as coming from her father after separation up to May 2017 was merely about $140,000. I do bear in mind the wife's evidence that money gifts of smaller amounts (in the region of $2,000 to $3,000 each) were given to her in cash and that there were $100,000 odd that she transferred from UK. Taking a board brush approach, it is clear that on the evidence before me the figure should not be a substantial one. Doing the best I can, I believe on average it was probably just around $10,000 to $20,000 per month. It also has to be borne in mind

that some of the monies were gifts to the children and probably, on many occasions, given at the father's own initiative, and he is likely to have given a bit more of these money gifts after the parties' separation when the husband's interim maintenance was apparently insufficient to meet her needs.

What is the likelihood of such financial assistance continuing in the foreseeable future?

162. I am sure that money gifts have been given to the wife out of the father's love for her and the children. They are a token of the father's love and concern for his daughter and grand-children. This is entirely understandable. As I see it, there is nothing special at all and some of them may not even linked to financial needs. As has been observed by Ma CJ, past conduct is always a useful guide: *KEWS v NCHC* at [38]. I am sure that these money gifts would continue in the foreseeable future.

163. It is true that the wife's father assisted her younger sister to purchase a house in US but it is unclear as to whether the assistance was in the form of an outright gift or a loan; and it should not be forgotten that there is the undisputed evidence that the wife's parents have not bought or provided any assistance to her younger brother in purchasing any property. In my view, what is important is that it has never been the wife's case, or for that matter the husband's case as well, that to purchase a home is part of her financial needs and so she should be given sufficient money out of the matrimonial assets to purchase one. In fact, the parties have never owned any property and both have been living in rented properties since moving out of the mansion house on the Peak.

164. The fact that the family lived in the mansion house for about 2 years upon arrival in Hong Kong was certainly a form of assistance. I believe this provided much convenience to the newly wedded couple who were new to the place and it was more so with the arrival of G to the family. However, this has ceased in July 2012 at the insistence of the husband. Leaving the assistance in 'kind' aside, it is clear that even before the family's moving out of the mansion house, all along the husband has taken up the role as the sole breadwinner of the family and this has been the case up to this day. It is significant to note that when it was pointed out to the husband that the wife's father had paid G's school fees for 2017-2018, he was ready to take up the responsibility. Further, it is not the husband's case that now the marriage has come to an end the wife could move back to live in the mansion house. Accordingly, I do not consider the assistance that the family received in the first two years is relevant at all.

165. The fact that all along it was the husband's sole responsibility to take care of the family's finance conveniently brings me to an important point which both counsel have missed. It has to be pointed out that starting from *Thomas v Thomas* [1995] 2 FLR 668, all the authorities on this subject (that used to be called "judicious encouragement") appeared to be cases where the beneficiary/recipient of third party assistance was being claimed for ancillary relief. The question before the courts was whether and to what extent the beneficiary/recipient could look to a third party's assistance in order to satisfy any payment he or she may be ordered to pay: see *Rayden and Jackson, Vol 1*, at [11.223] to [11.229]. The present case is on the reverse; the husband is trying to make use of this ground as a "shield", if I may put it this way, to resist the wife's claim. I should not be misunderstood

to have taken the view that the principles established by these authorities are not relevant. It has to be emphasized that the principles are relevant and indeed this court is bound by the Court of Final Appeal judgment in *KEWS v NCHC*. However, given that the parties are in a reverse position, the true question to be determined, in my view, is whether and to what extent the wife's financial assistance from her parents would legitimately be a departing factor in the section 7 exercise?

166. I have come to the findings that the money gifts were not substantial, that they were on many occasions given by the grandfather on his own initiative and love for the wife and the children, and that the husband took up the sole financial responsibly of the family. All these findings have driven me to the tentative conclusion that financial assistance from the wife's parents should carry little weight in this distributive exercise.

The Wife's Future Inheritance

167. Whilst Ms Chan accepted that the wife has not discussed and has not thought of discussing the inheritance issue with her parents, she argued it does not mean that the wife will not be receiving any inheritance. The husband's case is that the wife is stand to receive substantial inheritance from her parents; and this is a financial resource that she is likely to have in the foreseeable future: section 7(1)(a), MPPO.

168. In *Michael v Michael* [1986] 2 FLR 389, it was held by the English Court of Appeal that on its proper construction, in the light of its broad and informal language, the English equivalence of section 7(1)(a), MPPO (ie section 25(2)(a) of the Matrimonial Causes Act 1973) was not

intended to be exclusively confined to property or financial resources in which there is a vested or contingent interest but could extend, in certain circumstances, to a mere expectancy or *spes successionis*, such as an interest which might be taken under the will of a living person. However, Nourse LJ said the following in page 396 of the judgment,

> I have already expressed the view that s. 25(2)(*a*) of the Act of 1973 as amended could in certain circumstances extend to an interest which might be taken under the will of a living person. Suppose, for example, a case where there was clear evidence, first, that the respondent's father was suffering from a terminal illness, secondly, that his will left property of substantial but uncertain value to the respondent and, thirdly, that it was highly improbable that he could or would revoke it. In such a case it could hardly be doubted either that the property was property which the respondent was likely to have in the foreseeable future or that the application should be adjourned to abide the death of the father. **However, those facts, being extremely special, demonstrate that the occasions on which such an interest will fall within s. 25(2)(*a*) of the Act of 1973 as amended are likely to be rare. In the normal case uncertainties both as to the fact of inheritance and as to the time at which it will occur will make it impossible to hold that the property is property which is likely to be had in the foreseeable future.** (emphasis underlined)

See also *Rayden and Jackson on Relationship Breakdown, Finances and Children*, at [11.337].

169. Returning to the present case, the only evidence that the husband has, in gist, are that the wife's parents, who own substantial real properties from their earlier generation, are wealthy and they are already in their 70's. The wife, being one of their children, is stand to receive their inheritance in the future. I am sure this is profoundly insufficient to support the husband's case. The wife's evidence that her parents, who are now in the age of 71 or 72, are in good health has not been subject to challenge;

nowadays people at 70's are regarded as young seniors and many of them remain active socially and economically. The wife has 2 younger sisters and a younger brother and her father has two brothers and a sister. There is no evidence as to whether the wife's parents have made any will and if they did, who the beneficiaries are. I have no doubt that this matter is too remote and uncertain and cannot be regarded as a financial resource that the wife is likely to have in the foreseeable future for the purpose section 7 exercise.

Duration of Relationship

170. From the parties' marriage in April 2010 up to their separation in June 2016, it is in reality a relationship lasting for 6 years. This is neither a long nor a short period of time but the parties have raised two children. In any event, the parties have agreed on equal division of their matrimonial assets.

171. There is a minor dispute over the duration of the parties' relationship. Ms Booth argued that there was a period of one month before the marriage when the parties cohabitated with each other. This period should also be taken as part of the duration of their marital relationship. As I see it, this point is entirely unmeritorious and is advanced in defiance of naked evidence. It is somewhat unfortunate and indeed unnecessary for counsel to have argued over this trivial matter. The evidence is that their workplaces in London were in different directions so it made them difficult to live together under the same roof. Yet it is not a case where the parties were unable to cohabitate. As a matter of fact, the evidence compellingly shows that either one could have moved to live with the other in such a manner that approximated to cohabitation as a married couple but they had

not done so: *WLK v TMC*, at [98]. There was simply no common household to share and the relationship did not move seamlessly from cohabitation to marriage without any major alteration in the way the couple live: *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108, at [33] and *WLK v TMC*, at [98].

Deciding the overall outcome

172. While the factors that have been discussed above are individually or cumulatively capable of resulting in a departure from an equal division, a finding that one or more of those factors are engaged does not necessarily mean that a departure must occur. The court is required to give an examination of the overall picture.

173. I have come to the tentative view that the pre-marital assets of the parties are not to be included, that the wife should be given an extra 5% of the matrimonial assets as compensation for her relationship-generated disadvantage and that the financial assistance from the wife's family and her potential inheritance should carry no weight. If the tentative adjustment discussed above is given effect, it would give the following result.

174. If the wife is given 55% of the total matrimonial assets, she would have $7,646,788 ($13,903,250 X 55%) and the husband would have the remaining $6,256,462.

175. A clean break is to be encouraged wherever possible: *VP v JP* [2008] EWHC 112 (fam), [2008] 1 FLR 742, at [59]. At the same time, I do bear in mind the remarks made by Baroness Hale in *Miller v Miller and*

McFarlane v McFarlane that too strict an adherence to equal sharing and the clean break can lead to a rapid decrease in the primary carer's standard of living and a rapid increase in the breadwinner's: [142].

176. The wife already has pre-marital assets of $1,103,800, it would mean she would have assets of $8,750,588 - this is about 47.16% of the total assets of the parties. I am conscious that the result represents a departure from an equal division of the total assets. In my view, given the circumstances of this case and on the basis of the above analysis, I believe this is a fair financial outcome on a clean break basis.

177. The total net matrimonial assets are $13,903,250 (see: [51] above). The wife already has $280,600. The husband should therefore pay the wife $7,366,188 ($7,646,788 - $280,600). I would round it up to $7,366,200 and give the husband 28 days to liquidate his assets for payment.

Maintenance

178. The wife accepted that she needs $25,000 per month for her living expenses. Her records since April 2019 consistently show she has been earning well above this amount and so she does not need a periodical payment order to make up the shortfall of her monthly needs.

179. I have assessed that the children’s monthly needs at $55,100: see [82] above.

180. The wife has been making well over $30,000 in the last few months, in fairness she should be responsible for part of the children’s

expenses. I would assess it at $5,000 which should be comfortably within the wife's affordability. As the children are spending a greater portion of their time with the wife, I consider it would be more convenient for regular payments such as the medical and dental fees to be made by her. I am conscious that in future when the husband obtains a permanent job it is likely that the medical and dental fees may be covered by the employer's insurance. When this happens, it is hopeful that the parties may be able to make sensible adjustments by themselves, failing which intervention from the court may be required.

181. The husband is already paying $3,500 for the expenses incurred by him when the children are staying with him and has already made arrangements for the payments of school fees ($8,300), speech therapy and extra-curricular activities ($5,000), these should remain undisturbed. I would hold the husband onto these expenses. After excluding $3,500 expenses, $8,300 school fees and $5,000 extra-curricular activities and speech therapy, the net sum comes down to $38,300 ($55,100 - ($3,500 + $8,300 + $5,000)). I have already determined that the wife should be responsible for $5,000, the remaining $33,300 should be on the husband's account; this sum should be payable by the husband as monthly periodical payments to the wife for the benefit of the children in equal shares.

Orders

182. For the reasons aforesaid, I give the following orders:

1. The respondent do pay the petitioner a lump sum of $7,366,200 within 28 days;

2. The respondent do pay the petitioner periodical payments in the sum of $33,300 for the maintenance of the two children of the family ($16,650 each), the first payment to be made on 1st October 2019 and thereafter on the 1st day of each and every month until the children respectively attain the age of 18 or finish full time education, whichever is the later.

Costs

183. In terms of the awards given neither party can be considered as entirely successful in his or her application. Judging from who has been successful on the issues in dispute, the wife has been successful in her claim for compensation and in resisting the husband's grounds of third party financial assistance and future inheritance. She has too been successful in part on the husband post-separation bonus. Yet she has failed on the duration of the relationship. Meanwhile, the husband has been successful in his case on pre-martial assets and in obtaining a discount on the illiquid assets but his ground of future inheritance is as unmeritorious as the wife's ground of duration of the relationship. All in all, on any view, neither party can be regarded as the overall winner.

184. Hartmann J (as he then was) has mentioned in *F v F (No 2)* [2003] 3 HKLRD 976 at [22] that "*the long-established principle that costs are determined not by dividing litigation into quantifiable subjects and figures, like a profit and loss account, but rather by way of overall impression*".

185. Taking a broad-brush approach, for the reasons that neither party can be regarded as the winner, I consider that the appropriate costs order should be no order as to costs. I give an order *nisi* that there be no order as to costs of the ancillary relief proceedings, including all costs reserved with counsel certificate.

Section 18 Declaration

186. Lastly, I am satisfied that the arrangements made in respect of the children of the family to whom section 18 of MPPO applies for their welfare are satisfactory or are the best that can be devised in the circumstances and I accordingly make a declaration to this effect.

I. Wong
(District Judge)

Ms Madeleine Booth, instructed by Payne Clermont Velasco, solicitors, appeared for the petitioner
Ms Lareina Chan, instructed by CRB, Solicitors, appeared for the respondent