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FCCM 7207/2018
[2019] HKFC 219

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
MATRIMONIAL CAUSES NO. 7207 OF 2018

BETWEEN

LZ Petitioner

and

LY Respondent

Coram: His Honour Judge G. Own in Chambers (Not Open to Public)

Date of Hearing: 15 February 2019

Date of Judgment: 23 August 2019

J U D G M E N T
(Maintenance Pending Suit/Interim Maintenance/
Legal Costs Provisions)

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Introduction

1. The Petitioner is the Husband (“H”) and the Respondent is the Wife (“W”).

2. In June 2018, H filed his petition for divorce relying on the fact of unreasonable behaviour. W filed her Answer in opposition with a Cross Petition on H’s unreasonable behaviour. Parties reached consensus for staying H’s Petition, withdrawing W’s Answer and the suit be proceeded on W’s Cross Petition as an undefended cause. However, as at this trial, the Cross Petition has yet to be set down for the Decree Nisi.

3. On 15 August 2018, W applied for maintenance pending suit for herself, interim maintenance for the child of the family (“Child”) and also legal costs provisions. W has filed two Affirmations and H has filed one Affirmation. Both parties have filed their Form Es followed by exchange of questionnaires.

4. In W’s Summons, she seeks for the sum of HK\$80,000 a month for herself and the Child, such payments to be backdated. In addition, legal costs provisions in the sum of HK\$30,000 a month. Further, H is to continue to pay the Child’s school fees directly and any one-off expenses for the Child such as school trips, electronic devices, music instrument, sport equipment, and medical and dental costs not already covered by the Child’s medical insurance.

5. At the call-over hearing on 24 September 2018, H was ordered to pay interim interim maintenance for the Child at the rate of HK\$40,000 a month from 1st September 2018 and thereafter on the 1st day of each succeeding month until further order.

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Background

6. As at today’s trial, both H and W is aged 36.

7. Parties came to know each other in 2002 whilst they were studying the Bachelor Degree in International Economics and Business in the Netherlands. Upon graduation in 2006, they both went to further studies for the Master Degree in Economics and Finance at the University of Warwick in United Kingdom. They later moved to London where H started his career as an investment banker whilst W searched for work. In 2007, they get married in Beijing China. There is a child of the family, a boy, born in November 2007 now at the age of 11 attending Grade 5 in an international school in Hong Kong. Parties separated in April/May 2018 and the Child has been under the care and control of W.

8. H is an Executive Director in the Business Management Development of an asset management company in Hong Kong earning a fixed base salary with discretionary bonus. His base salary started at HK\$171,100 which was increased to HK\$185,600 with effect from January 2019. For the year 2017, his average bonus per month reported in his Form E was HK\$41,250 when added to the base salary, his average monthly income is around HK\$226,850.

9. W has been a housewife since the parties relocated to Hong Kong from United Kingdom around 2011, some 8 years ago. Admittedly, W is a chartered accountant by profession and had once worked for about 2 years with a reputable accountant firm in the United Kingdom. During the subsistence

A of the marriage, W had been financially dependent on H's income who was the
B sole breadwinner of the family. C

D 10. It is common ground that apart from some bank transfers in cash
E each month by H, W was given 2 supplementary credit cards with Citibank and
F Amex to spend and that H would settle the card payments afterwards. In April
G 2018, H cancelled both supplementary cards as a result of some spending of
H around HK\$70,000 which H disapproved. Further, H ceased making bank
I transfer to W and the last bank transfer made prior to this trial was in February
J 2018 for HK\$50,000. Since April 2018, W had to pay all the expenses for
K herself and the Child out of her own HSBC Hong Kong Dollars savings account
L and also used her own HSBC credit card. It was until around 10 days before
M the call over hearing of the present application that H remitted HK\$90,000 to
N W as 3 months' interim maintenance for the Child for July, August and
O September 2018. P

Q 11. W and the Child once lived in a 3-bedroom apartment at South
R Horizon for a monthly rental of HK\$33,000. H only paid the rental up until
S expiry of the lease at the end of July 2018. Since there was a dog in the family
T which was prohibited by the management of the South Horizon, W rented a 2-
U bedroom apartment in Bel-Air where dogs are permitted upon expiry of the
V lease in South Horizon. The monthly rental for the Bel-Air apartment was
HK\$35,000 to start from 1 August 2018 which W has been paying by herself.
W had also spent HK\$6,000 for the moving company, HK\$880 moving charges
for PCCW network and HK\$3,904 for a new bookcase and storage boxes and
shelves.

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12. Parties once had a property in London which was sold in 2016 with net proceeds of sale around GBP300,000. Around GBP200,000 out of the net proceeds was paid as down-payment of another property also in London which was under construction by the time and was due to complete in summer this year. The remaining GBP100,000 was kept by W in her HSBC bank account.

W's case

13. Basically it is W's case that she has been a housewife looking after the family and the Child during the marriage. In January 2011 when the Child turned 3 years and by that time H was able to secure a position in Hong Kong, it was agreed between them that the whole family should move to Hong Kong from London and that W should stop working and be a full time mother taking care of the Child. In 2013, the investment bank which H had worked for closed down its business in Hong Kong. H then became unemployed. It was decided that H should take a break in his career. H enrolled an 18-month full time MBA programme in Shanghai and it was also agreed that W should remain a full time mother instead of seeking employment since the Child was only 5 years old and had just started his first year in school. By this time a domestic helper was hired to assist W in taking care of the Child.

14. H completed his MBA in January 2015 and returned to start working for his current employer in Hong Kong. Since his work required frequent business trips to Europe and may stay there for 2 to 3 months on a single trip, it was not a good idea for W to seek employment leaving the domestic helper alone to take care of the Child.

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15. Right after H returned to Hong Kong from Shanghai in 2015, there was a fight between the parties and it was the first time that H brought up the idea of a divorce. Nonetheless, the parties’ relationship had once become better when H and his parents invited W and the Child to the Caribbean (where H’s parents are living).

16. On Christmas day in December 2017, H joined W and the Child in their holiday trip to Japan when H started to act strangely for not communicating with W. H gave W the reason that it was because one of his friends passed away which had made him reconsider the meaning of life. The other reason given by H was due to his work pressure. Upon return to Hong Kong in January 2018, H started to avoid any interaction with W and the Child. H turned out to be a completely different person. By this time H confessed to W that he had been unhappy was actually because of the marriage relationship with her.

17. Shortly afterwards H filed his Petition for divorce, H ceased his financial support to W and the Child, and also cancelled the 2 supplementary credit cards given to W.

18. W in her supporting Affirmation under exhibit “YL1-1” sets out the monthly expenses to be HK\$85,806 which consists of the Child and her expenses of HK\$45,806 plus the monthly rental of HK\$40,000. As can be seen from the breakdown shown in exhibit “YL1-1”, there are various activities of the Child such as Badminton, English Writing, Linguistic Therapist, Enopi, Swimming, Maths critical thinking, Junior Band and Trumpet all of which are charged on a “*per-session*” basis. The expenses for W are minimal, which

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consists of her lunch and coffee at HK\$2,500 and clothing and personal care at HK\$2,000. Details of which are as follows :-

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“Child’s activities and Tutors in Grade 5 Per Month

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Badminton coach	\$	5,600
Badminton court	\$	496
English writing	\$	2,800
Linguistic Therapist	\$	4,200
Enopi	\$	800
Swimming	\$	1,240
Math critical thinking	\$	2,600
School CCAs (Junior band, trumpet, Badminton training)	\$	1,670

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Sub-total : \$ 19,406

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Child’s Food – Groceries, school lunch, eat-out (breakfast, lunch, dinner, snack and fruits, and occasional meals out of home in the weekends)

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Helper’s salaries & food allowance \$ 5,600

L

L

Pet - dog \$ 1,300

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M

Child’s books, entertainment, clothes, Presents and toiletry \$ 2,000

N

N

Others – shared utility bills and transportation \$ 3,000

W’s lunch and coffee \$ 2,500

W’s clothes and personal care \$ 2,000

Total : \$ **45,806**

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Monthly rental (dog friendly, school distance, clubhouse facilities, maid room) \$ **40,000**”

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19. W in her Form E (dated 4 September 2018) disclosed that she had around Hong Kong dollars 3.7 million in her HSBC bank account. Actually around Hong Kong dollars 2.25 million was held on trust for her parents in Mainland China; around Hong Kong dollars 1.14 million was held for the Child's education fund. The cash available for her use was thus only around HK\$300,000 (including foreign currency savings) but excluding liabilities. She had once worked as a self-employed insurance broker which only provided her with an income of HK\$30,000 in 2017.

20. Though she had worked for an accountancy firm in London back in 2008 for about 2 years and is a qualified chartered accountant, she considers her earning capacity had considerably diminished since she had not been working for 8 years. She would be required to do re-training if she was to practice as an accountant and have to start at a junior level and also need some technical training.

21. W in her Affirmation said ever since she retained her present lawyers in early March 2018, the legal costs have been on average approximately HK\$40,000 a month. She would have to incur legal costs as these proceedings which were brought by H go along and she would require HK\$30,000 legal costs contribution per month to ensure that there is equality of arms for her to be legally represented.

H's case

22. H disagreed W's case as to her unemployment. In his Affirmation, H said when he started to pursue his MBA in Shanghai which was the time when he lost his job and no income, the family was living in a 2-

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bedroom apartment in Harbourview Horizon (approximately 600 sq ft) for a monthly rental of HK\$20,000. However, not long after he left for Shanghai, W moved to a 3-bedroom apartment also in Harbourview Horizon (approximately 800 sq ft) but for a higher monthly rental of HK\$33,000 although there were only 3 persons living there, namely, W, the Child and the newly hired domestic helper. Despite the fact that during the 18-month period of his MBA studies when there was no income, W had insisted on her way of spending and also did not bother to find a job since a domestic helper was hired who could assist in looking after the Child. As a result, H had spent all his savings of about HK\$1,000,000 and severance payments just to pay for the rental and living expenses of W and the Child during the 18-month period. He himself had ended up to borrow money from his parents and friends for his MBA and related expenses.

23. When H completed his MBA and returned to Hong Kong in January 2015, there was discussion that either W should go back to work or terminate the domestic helper. However, W refused either and also insisted on living in the 3-bedroom apartment and keeping the domestic helper.

24. Thus, it is H's first contention that W should utilise her earning capacity by returning to work rather than seeking maintenance pending suit for herself. W is a very capable and well-educated person who has a Master's degree and a certified public accountant. Thus, W has a very high earning capacity and there is no reason why she should not return to work.

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B	25.	As for the Child's expenses, H's position is that he does not object	B
C		paying them provided the expenses are reasonable and necessarily spent. In	C
D		H's Affirmation, his position to each of the items set forth by W are as	D
E		follows :-	E
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E	"Badminton Coach Badminton Court	- I do not think this is necessary but I am happy to continue paying for this if Child wants to continue to pay badminton. However, I do not agree to the amount claimed by the Respondent as Child is currently attending a group badminton class which is cheaper than in the past when he was having one-to-one sessions with a coach.	E
H	English Writing	- I do not think that this is necessary but I am happy to continue paying for this if Child's teacher believes that it is necessary for him.	H
J	Linguistic Therapist	- The therapist already informed us in the past that Child no longer needed therapy. It has always been the Respondent's unilateral and subjective view that Child still need to have these sessions.	J
L	Enopi Swimming Math critical thinking	- I do not think that this is necessary but I am happy to continue paying for this if Child's teacher believes that it is necessary for him.	L
N	School CCAs	- I do not have objections to this so long as I am consulted and I agree to the same.	N
O	Child's Food	- HKD333 per day is excessive. I propose HKD4,000 per month.	O
P	Helper's Salary and Food Allowance	- I do not have objections to paying for this provided that the Respondent returns to work.	P
Q	Pet – dog	- The Respondent should share this expense as it was a joint decision to purchase a dog for the Child.	Q
S	Child's books, Entertainment, clothes Presents and toiletries	- This is excessive. I propose HKD1,000 per month.	S
T	Other – Shared utilities And transportation	- This is excessive. I propose HKD1,000 per month.	T

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W’s Expenses - I do not agree to pay for the Respondent’s expenses.

Monthly Rent - I do not agree with the lavish flat that the Respondent is currently renting. I propose to pay HKD12,500 per month, which is half of the monthly rent of the two-bedroom flat that the Respondent can reasonably find in the South Horizon neighbourhood.”

26. H contends that the interim interim maintenance of HK\$40,000 ordered by this Court which he is currently paying is sufficient to cover the Child’s expenses. It would be “double-counting” if W is claiming for the individual items listed in addition to the interim interim maintenance. There is no issue for H to continue with his Undertaking to pay the Child’s school fees directly.

27. As for legal costs contribution, W has had cash in the sum of Hong Kong dollars 3.7 million and stocks in the sum of Hong Kong dollars 321,782 which she could utilise for both legal costs and living expenses, not to say there are non-disclosure of her properties in Mainland China and shares where she receives dividends. H also contended that there are valuables such as jewelleryes which W had not disclosed in her Form E. H mentioned there was a pendant which he bought for W’s birthday in or about August 2017 worth HK\$40,000 to HK\$50,000 which W disliked for too small and then returned it and he bought a bigger one for over HK\$100,000.

The statutory provisions and applicable legal principles

28. Section 3 of the Matrimonial Proceedings and Property Ordinance, Cap.192 (“MPPO”) provides the Court with the discretionary power to make interim orders requiring one party to the marriage to make to the other party

A		A
B	periodical payments for his or her maintenance as the court thinks reasonable	B
C	having considered all the circumstances of the case (see <u>HJFG v. KCY [1012]</u>	C
D	<u>1 HKLRD 95</u>). The overriding principle is one of ‘reasonableness’.	D
E	29. It is useful to recite those paragraphs of Hartmann JA (as he then	E
F	was) in the <u>HJFG</u> case :-	F
G	“33. Jurisdiction to award maintenance pending suit to a spouse is	G
H	statutory, being governed by the provisions of s.3 of the	H
I	Matrimonial Proceedings and Property Ordinance, Cap.192.	I
J	By that section the court is given a discretion to make an order	J
K	requiring either party to the marriage to make to the other such	K
L	periodical payments for his or her ‘maintenance’ as the court	L
M	thinks ‘reasonable’, subject to the condition that the duration	M
N	of any such order is limited to the period of what may broadly	N
O	be called the divorce litigation.	O
P	34. By definition, therefore, maintenance pending suit is	P
Q	restricted to payments which constitute ‘maintenance’, which	Q
R	are reasonable in the circumstances and which will endure for	R
S	no longer than it takes to determine the divorce litigation.	S
T	‘Maintenance’ is a broad concept. I do not seek to define its	T
U	exact meaning but it seems to me that it must be restricted to	U
V	those payments necessary to meet the recurring costs of living	V
	at whatever standard of living is appropriate. That being the	
	case, no matter how great the wealth of the parties and how	
	unevenly distributed that wealth may be at the time an	
	application for interim maintenance is made, the court has no	
	jurisdiction to make orders which for all practical purposes	
	result in a form of pre-trial capital re-balancing. In the	
	present case, the judge recognised the long-established	
	approach of looking to the “immediate and reasonable needs”	
	of the wife and son.	
	35. As to the amount of maintenance pending suit that may be	
	paid, the Ordinance provides only that it must be ‘reasonable’,	
	that is having regard to the circumstances of the case, that it	
	must be fair.	
	36. An important factor in determining fairness is a consideration	
	of the marital standard of living. In this regard, each case	
	must be considered according to its own circumstances. It is	
	not simply to be assumed that great wealth equates to great	

A		A
B	extravagance. Some married couples who enjoy great wealth spend with comparative modesty and with a discipline born of discretion, others enjoy consumption on a grand scale.	B
C		C
D	37. The principles that have emerged over time to guide judges in matters of interim maintenance have been fashioned in the main to ensure fairness. This is well illustrated in the judgment of Nicholas Mostyn, QC, sitting then as a deputy High Court judge, in <i>TL v. ML and Others (Ancillary Relief: Claim against Assets of Extended Family)</i> [2006] 1 FLR 1263, at 1289, in which, having looked at earlier authorities, he derived the following principles that speak specifically to fairness or are based on the need to ensure it.	D
E		E
F		F
G	For present purposes, it is sufficient to cite the relevant principles without citing the judge’s reference to the source of those principles :	G
H		H
I	a. The sole criterion to be applied in determining the application is ‘reasonableness’, which is synonymous with ‘fairness’.	I
J	b. A very important factor in determining fairness is the marital standard of living. This is not to say that the exercise is merely to replicate that standard.	J
K		K
L	c. In every maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long-term expenditure, more aptly to be considered on a final hearing. That budget should be examined critically in every case to exclude forensic exaggeration.	L
M		M
N		N
O	d. Where the affidavit or form E disclosure by the payer is obviously deficient, the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources. In such a situation, the court should err in favour of the payee.	O
P		P
Q	38. Finally, it is to be noted that in applications for interim maintenance, when the amount to be paid is for a limited period only and not all of the evidence is necessarily before the court, it is not appropriate, nor indeed in most cases possible, for the court to conduct a detailed investigation into the finances of the parties. While, in order to determine what is or is not reasonable, some analysis is always required, that analysis can be conducted on a ‘broad-brush’ basis.	Q
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30. As for the matters which the court should consider in assessing an application for maintenance pending suit, *Rayden and Jackson on Divorce and Family Matters*, 18th Edition, said as follows:

“16.17 There is no hard and fast rule, and no fixed proportion: each case depends on its own facts. It has been said that the approach to maintenance pending suit should be empirical, and that ‘in the ordinary sort of case the district judges who deal with these applications will have to take a broad view of means on the one hand and income on the other and come to a ‘rough and ready’ conclusion, or take a ‘broad brush’ approach. The overriding consideration is the actual needs of the parties pending suit. Although the provisions of s 25 of the MCA 1973 are expressed to arise only when the court is deciding whether to exercise its powers under s 23, 24 or 24A, the court may nonetheless have regard to the criteria listed in s 25 on an application for maintenance pending suit.

16.18 In practice, as oral evidence is rarely given, it will be unusual for the court on an application for maintenance pending suit to be in a position to make findings of fact on issues in dispute sufficient, for example, to deal with conduct or allegations of non disclosure. However, if it is demonstrated that the paying party has not performed his duty to make full and frank disclosure of his financial resources, then the court can take a broad and robust view of his means, and it does not have to accept and proceed on the basis of the assertions of the paying party as to his means and an inability to pay. The court can look at the reality of the situation and take into account voluntary funding from third parties. Any under provision or over provision in the order for maintenance pending suit can always be corrected when the account comes to be taken at the substantive hearing when there every opportunity to do fairness by set-off.....”

31. In the often cited unreported case of *C v. F* (FCMC No.1701 of 2000), my learned brother Judge Bruno Chan at paragraph 14 of the Judgment said, which I respectfully agree :

“14. Although the sole statutory guideline in considering maintenance pending suit is that the award shall be “reasonable”, the Court will nevertheless bear in mind all the factors drawn to its attention relating to the marriage and the parties to it (my emphasis), and perhaps the 2 most outstanding matters in every case, as in this one, are the standard of living of the parties, and the ability of the husband to pay.”

32. In all maintenance pending suit applications, the Court would not be expected to carry out any detailed and minute investigation of finances and expenditures since there would be no cross examination of the parties' affirmation evidence to determine their credentials for the Court to make any findings of fact on the information produced. Nonetheless, the Court would adopt a so-called '*broad brush*' approach on the information before it and determine whether it is '*reasonable*' to grant such order and; if so, what the amount should be.

33. With these principles in mind, I now consider W's application.

Discussion and Analysis

34. Given the fact that application of this nature is argued upon affirmation evidence without oral evidence whereupon each of the parties' credentials could be assessed, it is not possible for this Court to make any firm view as to the disputed facts and that only a "*broad brush*" approach would be adopted as to H's ability to pay and W's and the Child's reasonable needs.

35. Having said, I will first deal with H's ability to pay.

H's ability to pay

36. H in his Form E disclosed having a liabilities of HK\$3,225,741.45 which includes the balance of purchase price of the property in Netherlands around HK\$1,793,193. As disclosed at Part 2.2c and 5.1 of the Form E, the down payment of this property was paid by H's parents and the property was

A due to complete by the end of 2018. At Part 5.1, H said the balance of the
B purchase price would be paid by him without any explanation why his parents
C paid the down payment and for him to pay the balance. At Part 2.2c, H said
D the Netherland property was registered under H's sole name having 100%
E beneficial ownership without further elaboration as to his parents' beneficial
F interests (if any) after they had made the down payment. Thus, this item of
G liability is uncertain to be that of H's and/or his parents'. For the purpose of
H the present application, this would not be taken into account of when
I determining H's liabilities. With the removal of this item, H's liabilities
J would come down to around HK\$1,432,548.45 (i.e. HK\$3,225,741.45 –
K HK\$1,793,193).

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M 37. As to H's other liability item of the outstanding personal loan from
N Citibank of HK\$781,297.47 and salaries tax of HK\$438,971, H at paragraph
O 38 of his Affirmation said :-

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*“.....I was left with no choice but to cancel her supplementary
credit cards in order to protect myself. I eventually had to take
out a tax loan of HK\$1,000,000 to pay for the credit cards and my
tax liability.”*

P 38. At Part 4.2 of H's Form E, there is an item of monthly repayment
Q of personal loan of HK\$56,356 and also an item of tax payment of HK\$51,179
R built into H's monthly personal expenses. Thus, it is plain and obvious that
S the 2 gross sums of HK\$781,297.47 and HK\$438,971 should not be any
T immediate (*my emphasis*) liability affecting H's ability to pay interim
U maintenance.

39. By further removing the aforesaid 2 gross sums, the net liability of H would be further reduced down to just HK\$212,279.98 (i.e. HK\$1,432,548.45 – HK\$781,297.47 - HK\$438,971).

40. At paragraph 2.3 of H's Form E, he maintained 2 bank accounts at HSBC and Citibank with an accumulated credit balance of HK\$2,107,729.59. Further, at 2.7 of the Form E, the estimated value of his stocks and investments came to the sum of HK\$913,582.84. These sums added up to a credit balance of around HK\$3,021,312.43 (i.e. HK\$2,107,729.59 + 913,582.84).

41. H's monthly expenses as per his Form E dated 5th September 2018 are as follows :-

General Expenses

Rent	\$	20,800
Utilities	\$	500
Food	\$	1,000
Household expenses	\$	3,000
Domestic helper(s)	\$	500
	\$	25,800

Personal Expenses

Meals out of home	\$	8,000
Transport	\$	2,000
Clothing/Shoes	\$	1,000
Personal grooming	\$	1,000
Entertainment/presents	\$	2,000
Holiday	\$	2,000
Medical/Dental	\$	500
Tax	\$	51,179
Insurance premia	\$	6,230
Others	\$	56,356
	\$	130,265

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Children

School fees	\$	22,094
Insurance premia	\$	2,889
		<hr/>
	\$	24,983

Total : \$ 181,048”

42. With an average monthly income of around HK\$226,850, I believe H is financially capable to provide interim maintenance to W and the Child even after taking into discount H’s monthly expenses.

43. Now I will deal with W’s earning capacity followed by W’s and the Child’s monthly expenses.

W’s earning capacity

44. Parties’ affirmation evidence is at sharp divergence as to whether W had ever been asked by H to resume to work as early as in 2011 after a domestic helper was hired but W persistently refused. The answer to this question could only be obtained had this Court been given the chance to assess the parties’ credentials at the ancillary reliefs trial. At this juncture without the chance of assessing parties’ credentials on their respective affirmations, I am inclined to consider the question objectively against the overall circumstances of the case bearing in mind that whatever outcome should be a reasonable one.

45. There is no dispute that W possesses high academic qualifications and is a chartered public account by profession. She has been a full time housewife looking after the Child since 2011 (when the Child was around 4

A years old). As at this trial, the Child is aged 11 years and 3 months attending
B Grade 5 at an international school in Hong Kong.

C
D 46. Whilst I do not have any information as to whether it was the same
E domestic helper since 2011 who assisted W in looking after the Child for the
F past 7 years, the fact that W had once been able to work as an insurance broker
G even though it was on a self-employed basis prior to these divorce proceedings
H were started supported H's contention that W could, if she so wishes, resume
I to work with the help of the domestic helper to look after the Child. The Child
J is no longer a toddler and for the past 7 years or so had been taken care of by
K both W and the domestic helper, rather than only by W.

L 47. Considering W's academic qualifications and she is only aged 36,
M it is unlikely that she could not secure an employment with remuneration
N sufficient to pay her own personal expenses which she claimed to be only of a
O modest sum of HK\$4,500 a month. I accept H's contention that W should and
P be able to return to work, if she so wishes. In maintenance pending suit
Q applications, one's ability to work should not be subdued or overtaken by
R his/her willingness to work.

S 48. In the present case, it is more probable than not that there are
T obvious short term employment prospects around which this Court should not
U turn its eyes shut when considering a party's earning capacity in maintenance
V pending suit applications (see LJ v. LWHH [2003] 3 HKC 455).

49. Whilst I have in mind that the standard of living is one of the 2
important factors to be considered in determining maintenance pending suit
applications (see C v. F (FCMC No.1701 of 2000)), it is my view that standard

A of living would not necessarily be curtailed if the “status quo” was not
B maintained. One does not necessarily follow the other. C

D 50. With my decision of W having to work for her own personal
E expenses, there is no doubt a change of “status” from a full time housewife to
F a working mother. In my view, this would not affect her overall standard of
G living. The only difference is that she has to work for it rather than sits back
H and asks for it. I

J 51. Given my finding against W on her own personal expenses, those
K items adding up to the sum of HK\$4,500 (that is, HK\$2,500 + HK\$2,000)
L would have to be removed from her monthly budget of HK\$85,806 under
M exhibit “YL1-1”. N

O *Child’s Expenses and other expenses*
P

Q 52. I will now refer to the individual items set forth by W (see
R paragraph 18 above) and H’s response to each of them (see paragraph 25 above).
S

T 53. For the expenses for badminton coach and badminton court, I
U believe HK\$3,000 will be a reasonable and realistic figure which is already
V almost half of the amount claimed.

54. For English writing, I am satisfied that it is for the benefit of the
Child since he is studying in an international school. The sum of HK\$2,800
will be allowed.

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55. For Linguistic Therapist, which in essence is some form of treatment or follow up treatment, in the absence of latest report on the necessity of it, this item is disallowed.

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56. For Enopi, swimming and Math critical thinking, I am satisfied that all of which would be for the best interests of a 11-year old boy even though they may not be specifically required. I will allow these 3 items in full totalling HK\$4,640 (i.e. HK\$800 + HK\$1,240 + HK\$2,600).

57. For School CCAs, I allow the amount of HK\$1,670 in full.

58. For Child's food, I do not accept HK\$10,000 a month for a 11-year old boy to be a fair and reasonable amount. I will allow HK\$5,000 a month.

59. For Helper's salary and food allowance, I allow HK\$5,600 to be fair and reasonable.

60. For the pet's food of HK\$1,300, I agree is a reasonable sum and to be paid by H rather than shared between H and W.

61. For the Child's books, entertainment, clothes, presents and toiletries, I allow HK\$1,500.

62. For the shares utilities and transportation, I allow HK\$1,500.

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63. For those one-off expenses for the Child, I do not propose to include in the monthly interim maintenance to be paid by H. No doubt such expenses could be dealt with at the ancillary reliefs trial.

64. Given my assessment of the above, the total amount of interim maintenance for the Child will be HK\$21,410 (i.e. HK\$3,000 + HK\$2,800 + HK\$800 + HK\$1,240 + HK\$2,600 + HK\$1,670 + HK\$5,000 + HK\$1,300 + HK\$1,500 + HK\$1,500).

65. In addition, there is the item of domestic helper's salary and food of HK\$5,600.

66. For the item of monthly rental and others claimed at HK\$40,000, I will fix it at the net rental of HK\$35,000 plus allowance for utilities assessed at HK\$2,000, thus making a sum of HK\$37,000 per month into W's budget. I noted H's contention of W having to equally share the rental expenses which he assessed the monthly rental to be HK\$25,000. However, at the moment, there is no evidence as to exactly how much W would earn after she resumed work. On all fairness, I decided that H should be paying the items of domestic helper and monthly rental for the time being to ensure the Child's care could be maintained and accommodation needs safely secured. It is always open for H to seek variation, but only if so advised, upon evidence coming to light as to exactly how much W earns each month in due course.

67. The total amount of interim maintenance would thus be HK\$64,010 per month (i.e. HK\$21,410 + HK\$5,600 + HK\$37,000).

68. For the sake of convenience, I will round it up to HK\$64,000 (instead of HK\$64,010) a month.

Any back date of interim maintenance ?

69. In the Summons, W is seeking back payment from April 2018 which is clearly unsustainable. These proceedings were only commenced on 8 June 2018. The present Summons was issued on 15 August 2018. Section 3 of the MPPO clearly states that any such maintenance in the interim can only start from either the presentation of the Petition or the date of the application.

70. At the hearing on 24 September 2018, this Court had already granted an interim interim maintenance order to be backdated from 1 September 2018 which is 2 weeks after W's Summons was issued. I decided that the interim maintenance for the Child under this Judgment to also start from 1 September 2018 and credit be given to the interim interim maintenance that H had already paid. The difference shall be paid by H to W within 14 days from the date of this Judgment.

71. In any event, parties should note that any over-provision or under-provision at this stage can be adjusted at the final hearing of the ancillary reliefs proper (see F v. F (Ancillary Relief: Substantial Assets [1996] 2 FCR 397).

Legal Costs Provisions

72. It is trite and no dispute between the parties that Section 3 of the MPPO empowers the Court to include an element of contribution towards a

A party's legal costs in maintenance pending suit applications (see KGL v. CKY & Anor [2003] 2 HKC 512).

73. The guiding principles for making orders for legal costs provisions are set out in the Court of Appeal decision in HJFG v. KCY [2012] 1 HKLRD 95 per Hartmann JA (as he then was) adopting the English Court of Appeal case of Currey v. Currey (No.2) [2007] Costs LR 227 which is commonly called the "Currey" tests.

74. The pre-conditions to be satisfied under the "Currey" tests are :-

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

75. H in his contention submitted that W has funds in credit under her sole name account with the HSBC to the extent of some 3 million Hong Kong dollars which W could reasonably deploy. Even though it is W's case that the bulk of those funds belong to her parents, which H made no concession at this stage, there is nonetheless no reason why W could not borrow from her parents to fund her legal costs.

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76. W's submission in reply is that those are either assets beneficially belong to third parties falling within *TL v. ML* spectrum for determination or at the very least that they are "non-matrimonial assets" which, in any event, are irrelevant to maintenance pending suit applications.

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77. In my view, the first limb of the "*Currey*" tests does not provide any qualification as to the ownership of the assets which could reasonably be deployed had to be beneficially owned by the party seeking legal costs provisions. No application has ever been taken out by W or her parents for joinder in respect of those funds allegedly to be held on trust for W's parents but kept in W's bank accounts, not to say any *TL v. ML* application having been commenced. On the basic principle of whoever alleges must prove, the Court could not rely on the mere "*say so*" of W and formed the view, even on a "*broad brush*" approach, that those funds could not be deployed. Thus, I find W fails in the first limb of the "*Currey*" tests.

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78. Furthermore, putting W's case to the highest that the bulk of the funds are beneficially owned by her parents, I agree with H's submission that there is no reason why W could not borrow from her parents to fund her legal costs.

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79. Since there are substantial sums of ready cash in W's bank accounts, there is no question as to whether W could provide security for borrowing or obtaining legal services by offering a charge on the outcome of litigation under the second and third limbs. W probably may be caught by the last limb of the "*Currey*" tests that the substantial sum of money under her sole name account prevent her from receiving public funding on legal help. As per W's HSBC bank statement dated 14 January 2019, she has foreign currency

A savings of USD 246,570.26 (or HK\$1,933,813.56) and GBP 150,877.55 (or
B HK\$1,518,485.57), totalling HK\$3,452,299.13.

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D 80. Comparing with H's HSBC bank statement dated 1 February 2019,
E H has HK\$240,877.37 in savings account, HK\$2,091.48 in current account,
F GBP 993.77 (or HK\$10,218.32), Euro 37,009.62 (or HK\$332,230.85),
G totalling HK\$585,418.02. In H's Citibank account statement for the period
H from 8/12/2018 to 7/1/2019, the balance is HK\$127,859.50. The total of
HSBC and Citibank balance is HK\$713,277.52 (i.e. HK\$585,418.02 +
HK\$127,859.50).

I 81. Upon reviewing all the circumstances and the pre-conditions of the
J "*Currey*" tests, I find against W in her application for legal costs provisions.

K **Conclusion**

L 82. For all the above reasons, I allow W's application for interim
M maintenance for the Child in the sum of HK\$64,000 to be backdated to 1
N September 2018. I dismiss W's application for maintenance pending suit for
O herself and her claim for legal costs provisions. H's undertaking to pay the
Child's school fees directly shall continue.

P 83. On the question of costs, I decided that it is fair and reasonable for
Q it to follow the event. W has been successful on the interim maintenance issue
R but only to the extent of HK\$64,000 out of HK\$80,000 claimed. W had
S completely lost on her maintenance pending suit claim and the HK\$30,000
legal costs provisions.

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84. On balance and all fairness, I decided that each party shall bear its own costs of this application.

85. This is a costs order nisi which will become absolute if no application to vary it is made within 14 days from the date of this Judgment.

Orders

86. For all the above reasons, I now grant the following Orders :-

- (a) W's (Respondent's) application for maintenance pending suit be dismissed;
- (b) H (Petitioner) shall pay to W (Respondent) interim maintenance for the child of the family at the rate of HK\$64,000 a month commencing 1 September 2018 until further Order;
- (c) Credit be given to any interim interim maintenance paid by H (Petitioner) to W (Respondent) pursuant to the Order dated 24 September 2018 and that any difference be paid by H to W within 14 days from the date of this Judgment;
- (d) H's Undertaking to pay the Child's school fees under the Order dated 24 September 2018 shall continue; and
- (e) Each party shall bear its own costs of this application, including all costs reserved.

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87. Last but not least, I wish to thank both parties' legal representatives and Counsel for their valuable assistance to this Court.

(George Own)
District Judge

Miss Sasha Allison instructed by Messrs. Payne Clermont Velasco, Solicitors for the Petitioner

Mr. Jeremy S.K. Chan instructed by Messrs. Withers, Solicitors for the Respondent