1. Introduction

Ancillary relief is the remedy that a court can provide in respect of the financial division of matrimonial property between the parties upon their application for divorce, judicial separation or nullity. The majority of cases which find themselves before the courts relate to the division of matrimonial property. The court is bound by legislation contained mainly in the Matrimonial Proceedings and Property Ordinance (Cap 192) (MPPO). Sections 4, 5, 6 and 6A of the MPPO specifies the orders a court can make and the power of the court is limited to these types of orders. Under s 7 MPPO the factors which a court are bound to take into account are set out. The court must bear in mind each of the factors listed in this section before exercising its discretion as to matrimonial property division. The courts have, over the years, interpreted the factors differently but ultimately each case must be viewed within the boundaries of s 7. **4.001**

This chapter will deal with the factors under s 7 of the MPPO. Chapter 5 will deal in turn with each of the orders that can be made by the court under ss 4, 5, 6 and 6A of that ordinance, which relate to financial provision, transfer, sale and variation of property. Chapter 6 will deal with applications for maintenance pending suit or interim maintenance and applications to vary. **4.002**

There is no mathematical formula for the division of matrimonial property, although the s 7 factors are to be viewed in the light of case law, which interprets the legislation. The 2008 Hong Kong Court of Appeal case of *DD v LKW*[1] confirmed in Hong Kong the "fairness approach" following the English cases of *White v White*,[2] *Miller/McFarlane*[3] and *Charman v Charman*.[4] **4.003**

This was upheld by the Court of Final Appeal and will be referred to as *LKW v DD*.[5] In that case, Mr Justice Ribeiro PJ recognized the difficulties presented to practitioners and Judges inherent in the flexibility given in s 7 and provided four clear principles and set out a progression of five distinct steps that parties, practitioners and Judges alike could follow to promote certainty, and thus assist the settlement of cases. Clearly the approach to be taken is one which promotes fairness between both parties but this does not equate to equal division in all, or even probably the majority, of cases. **4.004**

The guidelines provided in *LKW v DD*[6] are regularly referred to throughout this chapter but, by way of introduction, and because this is the finding of Hong Kong's highest court where it was asked to adjudicate on how the family courts should approach the division of matrimonial finance, the essence of the judgment is set out in this introduction below. The CFA found that: **4.005**

(a) In many cases where there are limited resources, the court's consideration will not progress beyond consideration of the parties' needs. It is only in cases where there is a surplus that the following guidelines can be applied.

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1 [2008] HKFLR 119.
2 [2001] 1 AC 596.
3 [2006] 2 AC 618 – joint appeals to the House of Lords.
4 [2007] 1 FLR 1246.
5 (2010) 13 HKCFAR 582; See also *LKW v DD (Ancillary relief: Guidelines)* [2011] HKFLR 106
6 *Ibid.*

(b) Four guidelines were then set out for courts to bear in mind when dealing with the s 7 factors:

(i) the objective of fairness, following the line of English cases set out in more detail below at para 10;

(ii) the rejection of discrimination, which further follows the line of English cases set out below as well as recent Hong Kong cases. Examples of some of these are given at para 11 below;

(iii) the yardstick of equality, clearly taken from *White v White*[7] "with a view to eliminating insidious discrimination and promoting fairness, judges should check their tentative views on distribution against a 'yardstick of equal division' which should be departed from only for good, articulated reasons", citing *White v White*[8] and *Miller/ McFarlane.*[9]

(iv) the rejection of minute retrospective investigations, which has been mentioned below in the context of the conduct of the parties and arguments relating to contribution.

(c) Five steps were then suggested to assist courts in the practical business of dealing with the s 7 factors, briefly as follows:

Step 1: Identify the assets. Having stressed the importance of all of the factors under s 7, it is practical for the court to address and determine the assets, liabilities, income and expenses of both parties.

Step 2: Assessing the parties' financial needs. The court will then have to determine the basic needs of the parties, and of any dependant children and in particular, where the parties will live and how they are to be housed. As mentioned above, in many cases where the assets are only adequate or are inadequate to cover the needs of both parties going forward, the exercise of matrimonial division will stop here. It is only in cases where the assets exceed the needs that there will then be discussion as to how the remaining assets will be divided. This is further dealt with in *LKW v DD*[10]. The court will often have to have regard to the possibility of self sufficiency and whether a clean break is appropriate.

Step 3: Deciding to apply the sharing principle if there are surplus assets, then the sharing principle should be applied, "leaving the 'needs' question previously considered to be dealt with under that principle … In other words, the court should not make an immediate allocation but should return to 'needs' for them to be dealt with alongside all other material factors in the process described below as Steps 4 and 5".[11]

[7] [2001] 1 AC 596.
[8] *Ibid.*
[9] [2006] 2 AC 618 – joint appeals to the House of Lords.
[10] (2010) 13 HKCFAR 582; [2011] HKFLR 106, D2 [54]–[55]of Ribeiro PJ's judgment.
[11] Ribeiro PJ, para 80.

Step 4: Considering whether there are good reasons for departing from equal division. After the court has considered all of the s 7 factors, regard must be had as to whether there is any one of those factors which is more important or significant in this particular case and whether such a factor would merit a departure from equality. At para 85, Ribeiro PJ pointed out that, "while such factors, individually or cumulatively, are potentially 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". Then a list of potential and common "material factors" that may result in a departure from equality were set out (Paras E.5.a to f). They were:

(a) the source of assets as a material factor including assets independently acquired, which, quoting *White v White*,[12] would include "property acquired during the marriage by one spouse by gift or succession or as a beneficiary under a trust" and "property acquired before the marriage", and unilateral assets meaning assets sourced from the business or investment activities solely of one of the parties. It may be helpful at this stage to note that Ribeiro PJ agreed with Lord Nicholls and Baroness Hale in *Miller/McFarlane*[13] that such "refinements are not generally applicable to the matrimonial home and other assets which have been intended for and devoted to family use";[14]

(b) Conduct as a material factor;[15]

(c) Financial needs as a material factor;[16]

(d) Duration of the marriage as a material factor;[17]

(e) Contributions to the welfare of the family as a material factor;[18] and

(f) Compensation as a material factor[19]

Step 5: Deciding the outcome

The weight to be given to the considerations set out in Step 4 is a matter of judicial discretion. If a departure from equality is made, "the court should explain its basis since the articulation of reasons provides a useful check on the fairness of the outcome". 4.006

LKW v DD[20] was heard by the Court of Final Appeal at the same time as *WLK v TMC*[21] (*WLK*) in which the principles set out in *LKW v DD*[22] were applied, although it was 4.007

[12] [2001] 1 AC 596.
[13] [2006] 2 AC 618.
[14] Paragraph 98. More is said about the debate over matrimonial and non-matrimonial property in Ch 5 when what is to be taken into account in respect of awarding a lump sum is discussed.
[15] *LKW v DD* (2010) 13 HKCFAR 582, [99]–[105] ; see also para 4,033 above.
[16] *Ibid,* [106]–[107]; see also para 4.054 above.
[17] *Ibid,* [106]–[107]; see also para. 4.069 above.
[18] *Ibid,* [110]–[118]; see also para 4.086 above.
[19] *Ibid,* [119]–[130]; see also para 4.102 above.
[20] (2010) 13 HKCFAR 582; [2011] HKFLR 106.
[21] (2010) 13 HKCFAR 658; [2011] HKFLR 144.
[22] (2010) 13 HKCFAR 582.

said in *LKW v DD*[23] that the "principles enunciated are guidelines and not strictly binding precedents" and "the exigencies of a particular case may well lead the judge to adopt a modified approach. This is an evolving area of the law and aspects of the proposed framework may require reconsideration in the future".[24]

4.008 Thus there is no rigid rule in respect of the division of matrimonial property other than the guidance given above as each case is so dependent on its own particular facts and rigidity does not promote fairness in many cases. Judicial discretion is very wide and enables the court to have regard to all the circumstances of the individual case to achieve justice for all parties within the ambit of s 7, MPPO. This was dealt with at D1, *LKW v DD*[25]. At para 48, Ribeiro PJ said:

> "The obvious intention is that the court should be able to deal flexibly with a great variety of different cases. However, the price of such flexibility is an inevitable element of legal uncertainty".

4.009 This was a problem identified by Ormrod J in 1978 in the case of *Martin v Martin*[26] and repeated by Wall LJ in *B v B (Ancillary Relief)*[27] and which is still of concern today:

> "that it is difficult for practitioners to advise clients in these cases because the rules are not very firm … It is the essence of such a discretionary situation that the court should preserve, so far as it can, the utmost elasticity to deal with each case on its own facts … It equally means that decisions of this court can never be better than guidelines" *and* "as social circumstances change so the court will have to adapt the ways in which it exercises discretion".

4.010 There has been some concern, which was raised in *LKW v DD*,[28] that judges would seek to simplify the situation by adopting 50 per cent as a starting point. In practice, the problem is more likely to occur with some practitioners and the parties themselves as there is a commonly held public opinion that *White v White*[29] did usher in the concept of equal division as a starting point and that subsequent cases have resulted in giving London the dubious title of "divorce capital of the world" with parties rushing to issue their petitions first in order to have their cases heard in the most favourable jurisdiction for them.

4.011 Ribeiro PJ has dealt with this in para 44: "I do not consider the higher levels of awards necessarily a bad thing since they merely demonstrate the inadequacy of the awards previously confined to 'reasonable requirements' in such cases". In *LKW v DD*,[30] the leading Australian case of *Re Marriage of Figgins*[31] in which 50 per cent was not accepted

[23] (2010) 13 HKCFAR 582.
[24] *Ibid*, [132].
[25] *Ibid*, [48] – [53].
[26] [1978] Fam 12.
[27] [2008] 2 FLR 1627.
[28] (2010) 13 HKCFAR 582.
[29] [2001] 1 AC 596.
[30] (2010)13 HKCFAR 582.
[31] [2002] FamCA 688.

as a starting point was considered but rejected by Ribeiro PJ on the basis that firstly, the Australian courts were interpreting a differently worded statute from that which was considered in Hong Kong and England (para 35), but also because he did not accept

> "the fear that judges will go directly and unthinkingly to a 50/50 award and also the fear that equal division may prejudice spouses having the care of children in cases where the assets are meagre. In my view, those apprehensions postulate a mechanistic misapplication of the principles … and do not constitute grounds for rejecting the approach in *White v White* and *Miller/McFarlane* on principle". *(para 45)*

Suffice to say therefore, that there is no substitute for the words of the statute and the guidance given by *LKW v DD*[32] to assist in the interpretation and the application of statute. 4.012

2. Statute – MPPO s 7

(a) Introduction – Preliminary Matters

As applications for ancillary relief are governed by s 7 of the MPPO, and the court must have regard to each and every factor listed under the section, it is appropriate to set out the section in full and this is done at para 4.024. 4.013

Section 7(1) relates to the factors which must be borne in mind in considering financial provision or property transfer in respect of a party to a marriage ie a spouse, whereas s 7(2) relates to a "child of the family" defined at para 2.007. 4.014

Section 7, MPPO is based on s 25 of the English Matrimonial Causes Act 1973 (MCA) with two notable and important exceptions: under the English Act, the child is specifically the first consideration and secondly there is provision for a clean break.[33] 4.015

(b) Differences between s 25, Matrimonial Causes Act and s 7, MPPO

(i) *The child is the first consideration*

Under s 25(1) it is stated as follows: 4.016

> "It shall be the duty of the court in deciding whether to exercise its powers … to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18".

The duty of the court to consider the child of the family as the first consideration before any of the s 7 factors are taken into account is not in s 7 of the MPPO. Although under s 7(2) the court has a duty to endeavour to ensure that, if there is a child, that child should be kept in the financial position that child "would have been in if the marriage had not broken down". This is of course different to a "first consideration". 4.017

[32] (2010)13 HKCFAR 582; [2011] HKFLR 106.
[33] These exceptions are important when considering English authorities, which are interpreting English statute.

4.018 However, the courts in Hong Kong are bound by s 3 (1) of the Guardianship of Minors Ordinance (Cap 13) which provides that:

> "(a) in any proceedings before any court …the court (i) shall regard the best interests of the minor as the first and paramount consideration …".

4.019 Therefore there is a duty for the court to take into account the needs of the child in all matrimonial cases in Hong Kong as the first and paramount consideration. This will be dealt with in more depth in the section relating to children in Ch 10, and in Ch 5 in respect of their financial provision.

(ii) *Provision as to clean break*

4.020 The other significant departure from s 25, MCA omitted from s 7 of the MPPO, is the provision in respect of a clean break. Section 25A of the MCA provides that:

> "where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under s 23(1)(a), (b) or (c), 24, 24A or 24B above in favour of a party to the marriage …, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable".

4.021 In Hong Kong, there is no duty under the current legislation to consider whether or not a clean break is appropriate, although clearly this is a matter which the courts will have regard in practice. Further consideration will be given to this aspect in the context of periodical payments in Ch 5.

4.022 It is largely because Hong Kong statute in this area is so similar to that of the English statute that Courts and practitioners continue to look closely at developments in England as the courts there struggle to interpret their statute in light of a changing society. This was dealt with in some detail in *LKW v DD*.[34] The problem faced by the Court of Appeal in that case was that they had been bound by a previous Court of Appeal decision (*C v C*[35]) but, since 1997 it was no longer bound by the English precedents. This left Hong Kong with legislature similar to England but with case law that was "stuck" in the early 1990s, which, 20 years on, seemed outmoded. More on this will appear below but in *LKW v DD*,[36] the Court of Final Appeal found that it was appropriate to follow the English case law on the basis that the legislation that the court was bound to follow was, with the exceptions outlined above, similar to that of Hong Kong. Mr Justice Ribeiro PJ dealt with the problem faced by the Court of Appeal in para 20 of his Judgment:

> "Yuen JA and Lam J were understandably concerned as to whether the Court of Appeal was free to depart from *C v C* since they correctly took the view … that it

[34] (2010) 13 HKCFAR 582; [2011] HKFLR 106.
[35] [1990] 2 HKLR 183.
[36] (2010) 13 HKCFAR 582.

> could not do so unless the earlier decision was reached *per incuriam*…. However, they assumed an unorthodox view of the ratio of *C v C*, regarding it as effectively prescribing the adoption of whatever English authorities on s 25 may be in place when construing s 7".

He pointed out that, just over a week after the decision in *DD v LKW*,[37] the Court of 4.023
Final Appeal found that the Court of Appeal could depart from a previous decision if it was plainly wrong. This may have assisted the Court had the decision been known.[38]

Further, the court opted not to follow the precedent of the Australian case of *Figgins v* 4.024
Figgins partly on the basis that the case was interpreting a differently worded statute. Ribeiro PJ said

> "It follows that the Australian authorities, centered as they must be on their own legislative provisions, are incapable of supplying an overall framework to inform our approach to section 7".

(c) The Statutory Provisions – s 7(1) MPPO[39]

> "Matters to which court is to have regard in deciding what orders to make under ss 4.025
> 4, 5 and 6[40]
>
> (1) It shall be the duty of the court in deciding whether to exercise its powers under ss 4, 6 or 6A[41] in relation to a party to the marriage and, if so, in what manner, to have regard to the conduct of the parties and all the circumstances of the case including the following matters, that is to say:
>
> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
>
> (d) the age of each party to the marriage and the duration of the marriage;
>
> (e) any physical or mental disability of either of the parties to the marriage;
>
> (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

[37] [2008] HKFLR 119.
[38] *Solicitor (24/07) v The Law Society* (2008) 11 HKCFAR 117, citing *Young v Bristol Aeroplane* [1944] KB 718.
[39] Subsection (1) only related to a spouse, sub-s (2) to a child of the family (see Ch 5).
[40] ie financial provision namely lump sum and periodical payments, transfer and variation of property or sale of property for a spouse and/or child of the family.
[41] Section 6A relates to the power of the court to order the sale of property.

(g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring".

4.026 Therefore, as well as giving consideration to the specific seven factors under s 7, it is incumbent on the court to have regard to the conduct of the parties and all the circumstances of the case.

4.027 Lam J has summarized the approach a court will take as follows:

> "given the almost infinite possibilities as to the underlying factual matrix that ancillary relief cases may present to the court, the weight and relevance for these specific factors necessarily vary from case to case. In my judgment, s 7(1) gives a very broad discretion to the court to cater for this. The section must be construed in this light and it would be wrong to regard these seven factors as some sort of mechanical formulae to be applied as a sort of catechism in every material case. There are bound to be cases where one or more of the factors might not be of great significance ... I do not think the seven factors should be regarded as exhaustive. The section explicitly directs the court to have regard to all the circumstances of the case".[42]

(d) All the Circumstances of the Case

4.028 The Court must therefore bear in mind all the circumstances of the case including those listed under s 7(a)–(g) but not exclusively so and clearly not one factor is more important than the other. In *LKW v DD*,[43] Ribeiro PJ quoted *Piglowska v Piglowski*[44] to demonstrate this:

> "exercise of the discretion...in accordance with s 25 requires the court to weigh up a large number of different considerations. The Act does not ... lay down any hierarchy".

4.029 All the circumstances can mean past, present or future and will include for example the re-marriage of one of the parties. Consideration will also be given to cultural factors, as in *LKW v DD*.[45]

(i) *Remarriage*

4.030 Although this is not specifically referred to as one of the statutory factors it has been held that it is one of the circumstances into which the court may properly enquire.[46] The prospect of remarriage may be guesswork and findings must be

[42] *L v L* [2006] HKFLR (2) [54].
[43] (2010) 13 HKCFAR 582.
[44] [1999] 1 WLR 1360, 1373.
[45] See also *A v T (Ancillary Relief: Cultural Factors)* [2004] EWHC 471 (Fam), [2004] 1 FLR 977.
[46] *H v H (Family Provision: Remarriage)* (1975) Fam 9; *Wachtel v Wachtel (No.2)* [1973] Fam 72, 86.

supported by some reasonable evidence, and as such the court will generally not take the prospect of remarriage into account so far as capital is concerned, particularly if a claimant has earned her share by her contribution in looking after the home and the children. However, when remarriage is planned or intended and where a lump sum was awarded to a wife who subsequently remarried, it was held that she had a duty to provide a full and frank disclosure of her intentions. In *Livesey v Jenkins*[47] the fact of the wife's engagement to remarry was held to be one of the "circumstances of the case" and was directly relevant to the order made and should have been made clear to the solicitors for the husband before a financial agreement was reached and put into effect. As a result of this non-disclosure, the consent order was set aside.

As regards an income order, remarriage or cohabitation will have an effect on such an order, and this is considered in Ch 5. Generally the prospect of remarriage or cohabitation will be taken into account by the court to reduce the liability of the payer for periodical payments.[48] 4.031

(ii) *Cohabitation*

A period of cohabitation pre-marriage would also be one of the "circumstances of the case" to which the court will have regard. If the parties have been cohabitating for a long period before the marriage, this period of cohabitation can be taken into account when assessing the claimant's contribution, particularly if the claimant has made a contribution to the welfare of the family or financially during the period of cohabitation. There are a number of Hong Kong cases that have dealt with the effect of cohabitation and whether it should be taken into account, notably the High Court case of *F v F*[49] and by the Court of Final Appeal in *WLK v TMC*[50] (*see* paras 4.081–4.084). More recently, the question of cohabitation was considered in detail by the Court of Appeal in *PLTO v KLK*[51]. Here the issue was cohabitation within the marriage. The Court cited s. 11C MCO (Cap 179) that the 'husband and wife shall be treated as living apart unless they are living with each other in the same household'. In this case the fact that the parties remained living together was a material factor in finding in favour of the wife in this aspect of the case. 4.032

(iv) *Agreements – pre or post nuptial*

A further example of an important "circumstance of the case" which is not specified in the statute, but which is nonetheless important, is the existence of a pre or post nuptial agreement between the parties. This is considered in detail in Ch 8. Pre and post nuptial agreements are becoming more common as a result of more generous awards to the financially weaker spouse. They also promote certainty, which can be lacking in this area of the law. In England and Wales, in the case of *Radmacher* 4.033

[47] [1985] AC 424.
[48] *Campbell v Campbell* (1976) [1976] Fam 347. See also the English recent Court of Appeal case of *Grey v Grey* [2010] 1 FLR 1764.
[49] [2006] 1 HKFLR 59.
[50] (2010) 13 HKCFAR 658.
[51] (unrep., CACV 157/2012, [2013] HKEC 1030); see also comments in respect of separation in Chapter 2

v Grantino,[52] the courts held that a prenuptial agreement that was freely entered into by each party with a full appreciation of its implications would be taken into account and was enforceable unless in the circumstances prevailing at the time it would not be fair to hold the parties to the agreement. Although *Radmacher v Grantino* has yet to be tested in Hong Kong, the Court First Instance in *SA v SPH*,[53] suggested that *Radmacher v Grantino* would be followed in Hong Kong in an appropriate case.

(e) Conduct of the Parties

4.034 The court has a duty to have regard to the conduct of the parties to a marriage. In fact, this generally means "misconduct". Clients are keen to include a mass of detail in respect of the misconduct of the other party, be it financial or otherwise. Historically, the courts have been wary of this.

4.035 In *Wachtel v Wachtel (No.2)*[54] Ormrod J said:-

> "As s 25 stands, conduct is to be taken into account as a factor which may modify the result which is arrived at after consideration of all the other factors specified in the section. The court can only approach this issue in a broad way. It should bear in mind the new basis of divorce which recognizes that, generally speaking, the causes of breakdown are complex and rarely to be found wholly or mainly on one side, and that the forensic process is not well adapted to fine assessments or evaluations of behaviour, and that it is not only conduct in relation to the breakdown which may have to be considered. Conduct subsequent to the separation by either spouse may affect the discretion of the court in many ways, eg the appearance of signs of financial fecklessness in the husband or of some form of socially unacceptable behaviour by the wife which would suggest to a reasonable person that in justice some modification to the order ought to be made. In my experience, however, conduct in these cases usually proves to be a marginal issue which exerts little effect on the ultimate result unless it is both obvious and gross".

4.036 This was further upheld by Lord Denning in the Court of Appeal in the same case:

> "There will no doubt be a residue of cases where the conduct of one of the parties is … 'both obvious and gross', so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support

[52] [2010] 2 FLR 1900.

[53] [2012] HKFLR 52 (CFI); Court of Appeal (unrep., CACV99/2012, 3rd February 2013) looked into the principles of a prenuptial agreement but commented that the Court of Final Appeal in Hong Kong has yet to adjudicate on whether *Radmacher* would be followed here; See also *HHML v RYD HCMC* [2012] HKFLR 224 in respect of a forum dispute concerning a Spanish marriage which also involved a Spanish marriage settlement: the marriage settlement was held to be a factor to be taken into account in determining whether the wife would suffer a juridical disadvantage if the matrimonial dispute were to be heard in the Spanish court.

[54] [1973] Fam 72;[1973] 2 WLR 366;[1973] 1 All ER 829.

> or to reduce the support which it would otherwise have ordered. But, short of cases falling into this category, the court should not reduce its order for financial provision merely because of what it was formerly regarded as guilt or blame. To do so would be to impose a fine for supposed misbehavior in the course of an unhappy married life … criminal justice often requires the imposition of financial and indeed custodial penalties. But in the financial readjustments consequent upon the dissolution of a marriage which has irretrievably broken down, the imposition of financial penalties ought seldom to find a place".[55]

4.037 Negative marital conduct, as a material factor which may allow a court to depart from equality, was dealt with in *LKW v DD*[56] and upholds the findings in *Watchel* in respect of the requirement that such conduct should be "obvious and gross" in order to be taken into account.

(i) *Financial and non-financial misconduct*

4.038 A distinction is generally drawn between financial and non-financial conduct. In respect of conduct of a non financial nature, the approach taken in *Wachtel v Wachtel (No.2)*[57] was further endorsed in the case of *Miller v Miller* and *McFarlane v McFarlane*[58] in the House of Lords where Baroness Hale quoted Ormrod J and endorsed the view that his approach was not only just but also "the only practicable one". She did not endorse the view in *Miller v Miller* of both Singer J and the Court of Appeal that the party's conduct should be taken into account.

4.039 Therefore non-financial conduct should be "obvious and gross" and there are a number of cases, generally dramatic in nature, in which a party's conduct was so "obvious and gross" that it necessitated a reduction in an award to that party. In particular, in the case of *K v K (Financial Provision: Conduct)*[59] the wife had assisted the husband with suicide attempts so that she could benefit and set up home with another man. Her lump sum was reduced as a result. In *Evans v Evans*[60] the wife had employed a contract killer to murder her husband. The order in her favour was discharged and the court observed that this was conduct which it would be inequitable to disregard and, had the court not done so, the public "might think we had taken leave of our senses".

4.040 A court would be more likely to take into account financial misconduct as it would often have a direct effect on the net assets of the family. In particular if one party had unreasonably dissipated the family capital, or had done so deliberately to defeat the reasonable claims of the other spouse, this would be conduct which a court could take into account in order to reduce the property distributed to the miscreant. In one case,

[55] *Wachtel v Wachtel (No.2)* [1973] Fam 72. Wachtel has been followed in a number of Hong Kong cases, notably *K v C (Ancillary Relief)* [2008] HKFLR 395, which later went to the Court of Appeal and is reported as *WLK v TMC (Ancillary Relief)* [2009] HKFLR 396 in which the Court of Appeal agreed with the trial judge in this regard.

[56] (2010) 13 HKCFAR 582, [E.5.b].

[57] [1973] Fam 72;[1973] 2 WLR 366;[1973] 1 All ER 829.

[58] [2006] 2 AC 618.

[59] [1988] 1 FLR 469.

[60] [1989] 1 FLR 351 (CA).

in the words of Thorpe J, the husband had "obstinately, unrealistically and selfishly trailed on to eventual disaster, dissipating in the process not only his own money but his family's money, his friend's money, the money of commercial creditors unsecured and eventually his wife's money".[61] In this case, the husband was not deprived of all entitlement but was restricted to the minimum sum needed to house himself. In Hong Kong, in *KMD v PIB (Ancillary Relief – Addbacks)*[62] the Family Court considered whether there should be addbacks into the calculation for ancillary relief to take into account excessive spending. In that case, the husband's excessive spending on his lifestyle as well as his hobby of helicopters was taken into account.

4.041 Financial misconduct was further taken into account in the Court of Appeal case of *ARAV v YP*.[63] In this case, the Court of Appeal was to decide whether the dissipation of assets should be added back into the matrimonial pot for division. Here it was decided that the husband had not dissipated the assets: he had "taken a punt" on an investment which had not paid off.[64]

4.042 The question of conduct, other than over-spending, was considered in detail by the Court of Appeal in the case of *WMC v STW*.[65] In this case, the conduct of a husband, who the wife accused to be in breach of a Consent Order, was not considered to be "gross and obvious" by the Court of Appeal.

(ii) *Litigation misconduct*

4.043 Conduct in the course of proceedings can also be taken into account, although generally speaking misconduct during the proceedings is more properly dealt with in an application for costs.[66] Most recently the Court of Appeal in *LSY v HTF*[67] considered the distinction between litigation misconduct and marital misconduct, holding that in this case the litigation misconduct was to be sanctioned by an order for costs save in exceptional circumstances. Here the court did depart from equal division, but on the basis of the wife's special needs, rather than conduct. There are a number of cases involving non-disclosure, which often leads to an increase in costs as the other party struggles to establish the amount in the matrimonial pot. The leading English case on this is *Gojkovic v Gojkovic (No.2)*[68] in which Bulter-Sloss LJ, as she then was, said:

> "Both parties must make full and frank disclosure of all relevant assets, and put their cards on the table.... There are many reasons which may affect the court in considering costs, such as culpability in the conduct of the litigation; for instance (as I have already indicated earlier) material non-disclosure of documents. Delay and excessive zeal in seeking disclosure are other examples".[69]

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61 *Beach v Beach* [1995] 2 FLR 160.
62 [2011] HKFLR 351.
63 *ARAV v VP* [2011] 2 HKLRD 759; [2011] HKFLR 330.
64 *Norris v Norris* [2002] EWHC 2996 (Fam) [2003] 1 FLR 1142 distinguished.
65 [2010] 3 HKLRD 431; [2010] HKFLR 298.
66 *P v P (Financial Relief: Non-Disclosure)* [1994] 2 FLR 381.
67 [2013] 2 HKLRD 1233.
68 [1991] 2 FLR 233.
69 *Gojkovik v Gojkovik (No.2)* [1991] 2 FLR 233, 236, see also *LGA nee P v LKKD (Costs)* (unrep., FCMC 13921/2010, 15 July 2013); in which *Gojkovik v Gojkovik* was considered.

This was cited in Hong Kong by the Family Court in *SANK v PGN (Costs – Disclosure – Maintenance)*,[70] where the court considered whether the husband's non-disclosure and refusal to mediate should result in a costs award to the wife. 4.044

3. The Financial Resources

(a) The Financial Resources

> *"The income, earning capacity, property and other financial resources which each of the parties to the marriage have or is likely to have in the foreseeable future" (s 7(1)(a) MPPO)* 4.045

Although no one factor is more important than any other, clearly the court must have a detailed consideration of this factor in order to proceed with the case. Until the income and capital have been ascertained, the court will not be in a position to decide as to how these assets should be re-distributed. This has been classified in *LKW v DD*[71] as Step 1: identification of the assets (paras 71–73). Ribeiro PJ specifically states that there is no need at this stage to attempt to distinguish between matrimonial and non-matrimonial assets, that 4.046

> "being an exercise best undertaken (if necessary) when considering distribution of the assets".

The court must determine what is in the "matrimonial pot" now and what the parties are likely to have in the foreseeable future. Therefore it is not simply what the parties have as at the date that they assessed their respective wealth, but the court must also have regard to what the parties may be receiving in the foreseeable future. This may include any potential future wealth such as payment of a bonus,[72] an inheritance, the payment out of a trust fund, any damages due to either of the parties, any payment out of a pension. The list is not exhaustive but it must be "in the foreseeable future". Further discussion on this is at para 4.053. 4.047

The correct date for assessing the value of assets is as at the date of trial.[73] 4.048

Clearly it is important for the court to determine the resources of the parties as mentioned above. Under the Chief Justice's P. D 15.11 on "Financial Dispute Resolution Pilot Scheme" both parties to the marriage must complete Form E, which is a financial statement setting out in detail their financial position. Form E should include, for each respective party, details of their income, expenses, assets and liabilities. The procedure in respect of Form E will be dealt with in more detail in Ch 7 but suffice to say that it is crucial for the court to have Form E filed by each party in order to fulfil its duty under this part. 4.049

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70 [2011] HKFLR 390.
71 (2010) 13 HKCFAR 582, [E.2].
72 In respect of prospective bonuses see *H v H* [2007] 3 FCR (Mostyn QC); *S v S* [2007] 1 FLR 2120 (Singer J) and Ch 5 and also see quote from *Rossi v Rossi* [2007] 1 FLR 790, Ch 5, paras 5.102–5.104.
73 There was some question as to whether it be at the date of separation or the date of trial in *HK v BD (Ancillary Relief)* [2011] HKFLR 66. Here the Court of Appeal adopted the accepted authority that the value should be at the date of trial.

1. Introduction

The orders that the court can make for ancillary relief can be found in ss 4, 5, 6 and 6A of the Matrimonial Proceedings and Property Ordinance (Cap 192) (MPPO). These orders are for "financial provision", which comprises periodical payments, secured periodical payments and lump sum payments for a spouse (s 4), similar financial provision for a child (s 5); property adjustment orders (s 6) and sale of property orders (s 6A). Ancillary relief under these sections relate to all financial relief after decree absolute has taken place. Prior to that, applications for interim maintenance, while the divorce process is ongoing, are known as applications for "maintenance pending suit". These applications are dealt with at Chapter 6 and the power of the court to make such orders can be found in s 3 of the MPPO. It is unusual to obtain a decree absolute until the court is satisfied that all financial disputes have been adequately resolved. Final orders can be made on pronouncement of decree *nisi*, but they cannot take effect until decree absolute. 5.001

2. Financial Provision: Periodical Payments, Secured Periodical Payments and Lump Sum Orders

Financial provision for a spouse is to be found in s 4 of the MPPO and states as follows: 5.002

"1. On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at anytime thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may, subject to the provisions of s 25(1) make anyone or more of the following orders, that is to say-

(a) an order that either party to the marriage shall make to the other such periodical payments and for such term as may be specified in the order;

(b) an order that either party to the marriage shall secure to the other to the satisfaction of the court, such periodical payments and for such term as may be so specified;

(c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified".

Section 25 (1) states that: 5.003

"Where a petition or joint application for divorce or a petition for nullity of marriage or judicial separation has been presented or made, then subject to subs 2, proceedings under ss 3, 4, 5, 6 or 6A may be begun, subject to and in accordance with rules of court, at any time after the presentation of the petition or the making of the application; but:

(a) no order under ss 4, 6 or 6A shall be made unless a decree *nisi* of divorce or of nullity of marriage or a decree of judicial separation, as the case maybe, has been granted;

(b) without prejudice to the power to give a direction under s 26, no such order made on or after granting a decree nisi of divorce or of nullity of marriage, and no settlement made pursuant of such an order, shall take effect unless decree has been made absolute".

5.004 Therefore the court is restricted to making an order for financial provision, once the petition has been presented, until after decree *nisi* has been granted and cannot take effect until the decree has been made absolute.

3. Periodical Payments

5.005 Periodical payments are the payment of regular maintenance from one spouse to the other. They are generally expressed to be payable monthly and the date on which the payments are to commence, and on which day of the month they should be paid subsequently, should be stated clearly to avoid any uncertainty. It is also advisable to set out clearly details of the bank account into which the payments should be made.

(a) Duration of the Order

5.006 As set out above, a periodical payment order cannot begin earlier than the date of the making of an application for the order and does not take effect until after decree absolute. Such an order ceases on remarriage or on the death of either party, whichever is earlier. If the paying party predeceases the claimant, she can make a claim against his estate under the Inheritance (Provision for Family and Dependants) Ordinance (Cap 481), which confers the right to apply for financial relief from the estate of a deceased person as a former spouse is among the class of persons who has a right to make such an application. Periodical payments orders are therefore generally expressed to be until remarriage or for the duration of the claimant's life. In many instances, a party in receipt of periodical payments will seek to insure the life of the payer and this can be done by way of an undertaking incorporated within a final consent order. Periodical payments may also be expressed to cease on the permanent cohabitation with another partner. This again is something which can be agreed between the parties but is not an order the court has power to make in the absence of agreement. The effect of cohabitation is discussed in more detail below.

(b) Index Linking

5.007 Periodical payments are ongoing payments of maintenance and may last many years. It is therefore prudent to ensure that the payments increase in line with inflation. An order which is appropriate today may be wholly inadequate 20 years on. A claimant may always make an application to vary maintenance on the basis of inflation (see Ch. 6), but it is good practice to link periodical payments to the Hang Seng Consumer Price Index or whichever retail price index is applicable to the parties.

(c) Tax

The Inland Revenue in Hong Kong does not tax maintenance payments. Tax is an 5.008
important factor that should be borne in mind if a party intends to live abroad. An expert in the relevant jurisdiction should be consulted as this could have an important bearing on the amount of maintenance a claimant will actually receive.

(d) Important Considerations in Respect of a Periodical Payments Order

The above information relates to the law in respect of periodical payments, namely 5.009
when an application can be made, its duration and some aspects that should be borne in mind when making an application for periodical payments. However, there are a number of important aspects to any case that a court will have to consider and which regularly appears in the context of an application for periodical payments. Periodical payments are, of course, only one type of order that a court can make and in most cases, there will be a mixture of orders to resolve a case. However, in the context of an order for periodical payments, the following situations often arise:

(1) Cohabitation of one of the parties. Should this affect the amount of periodical payments paid, and should they be payable at all?[1]

(2) Whether there should be a clean break between the parties, ie no periodical payments to be made at all.[2]

(3) Whether a nominal maintenance order would be appropriate in the particular case.[3]

(4) Whether the earning capacity of either party should be taken into account to increase or reduce the amount of periodical payments awarded.

(5) What would be the effect of the new fairness approach on the payment of periodical payments?[4] Does equality only refer to capital, or should it be applied to income payments also?

(6) Should there be a limit to the duration of the order?

Orders are made after consideration of the evidence in the light of the factors in s 7 5.010
of the MPPO. Within the context of the s 7 factors, the court must be able to decide whether an order for periodical payments is appropriate and if so, how much would be appropriate and whether the order should be limited in time.

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[1] See *Grey v Grey* [2010] 1 FLR 1764;[2010] 1 FCR 394;[2010] Fam Law 440.

[2] See para 5.036 *et seq.*

[3] Nominal maintenance being HK$1 *per* annum, thus allowing the claimant to make a further application to the court if need be in the future.

[4] See Chapter 4.

(e) Earning Capacity, Cohabitation and Length of Marriage

5.011 These are aspects of any case which could reduce the periodical payments order, or cause the court to order that it is appropriate that there should be no periodical payments order. Although the only absolute bar to periodical payments is remarriage, the court has the jurisdiction to deem that periodical payments are not appropriate in every given situation.

(f) Earning Capacity

5.012 The actual earnings and the potential earning capacity will be taken into account. The earning capacity of any party will depend on a number of particular facts, such as the age of each party or whether one of them, post separation, will be encumbered by looking after small children. However, particularly if there are no children, a court will often deem that both parties have an earning capacity, even if they are currently unemployed.[5]

5.013 There are a number of recent cases in Hong Kong concerning the earning capacity, particularly of the wife, notably the Court of Final Appeal case of *WLK v TMC*.[6] In this case the potential earning capacity of the wife, who was a piano teacher in Malaysia, came to be considered.

5.014 In *KGK v WHL*,[7] the parties had both worked during the marriage and there were two children aged 17 and 10 at the time of the hearing. The wife had decided to move back to Australia and claimed that she was unable to work since the marital breakdown. In this case, it was held that the wife should continue to work after moving back to Australia as there was no compelling medical evidence of any physical or mental disability which would affect her earning capacity. It was held that the wife would be able to support herself and thus only a nominal maintenance order was made.

5.015 In *L v P*,[8] the wife was found to have an earning capacity as she had worked during the marriage, although she was currently ill with tuberculosis and was still on medication. In this case, facts such as the husband's imminent retirement and that his expenses exceeded his income due to his mortgage and his son's university expenses, were taken into account. In this particular case, the judge found that the husband's second wife was assisting in his household expenses and therefore he ordered that the wife should receive periodical payments well in excess of that which was offered by the husband, but less than the sum sought by the wife due to her potential earning capacity.

5.016 In *W v W*,[9] this has been a long marriage of almost 30 years with two adult children. Prior to the ancillary relief hearing, the husband was made redundant and received a significant compensation package. He argued that, given his unemployed status, there should be an order for nominal maintenance only. The judge, HHJ Bruno Chan,

[5] See Chapter 4.
[6] [2010] 6 HKC 571; [2011] HKFLR 144.
[7] [2006] HKFLR 263.
[8] [2006] HKFLR 189.
[9] [2005] HKFLR 53.

considered the wife's earning capacity and considered in detail the relevant case law. At paras 37–40 there is a useful summary:

> "There is no argument that if a wife earns money, the court is required to take into account of the amount received by her when assessing the amount of periodical payments to be awarded to her. On the other hand, it has been said that a wife should not be expected to go to work to reduce a former husband's liability towards her. In the case of *Ward v Ward* [1948] P 62, Lord Merriman P said this:
>
> > 'The justices may think that this wife, having been deserted by her husband and obliged to go out to work instead of being maintained by him in a comfortable home, is entitled at the least to feel that her exertions are not made purely for the husband's benefit; and might feel obliged in her own interests to put money by against the day when, for example, the husband may remarry or incur other commitments'.
>
> 38. The situation of the present case is more difficult to assess when the Wife had not worked during the bulk of the marriage, and has no longer the skills or experience to do the kind of work that she used to do during the early years. The matter was expressed in the case of *Rose v Rose* [1951] p. 29, 30–31, CA when Somervell LJ said:
>
> > 'I do not propose to lay down any general rule or to consider whether or in what circumstances a wife's earning capacity ought to be brought into the calculation of maintenance in the case of a wife who has not been required to earn any money during the matrimonial life. But, in my view, where during the matrimonial life the means of (in this case) the husband (it is not suggested that the wife had any means) are such that the wife has not been required to go out and earn money, then I should say that, in considering the proper sum for maintenance, it would prima facie seem to be wrong that the husband should be able to say: 'Now you must go out and work, and the only sum that I can be ordered to pay is a sum based on you yourself going out to work, which you were not required to do when you were my wife, and which you would not have had to do, if I had not committed adultery and broken up the home', as in this case. That prima facie approach seems to me to be plainly right in a case such as this, where the marriage had lasted for some twenty years; the wife is a woman of forty-one years of age, who has no normal trade or calling, though no doubt she is capable of doing domestic work, and where there is a child of some four-and-a-half years of age for her to look after'.
>
> In the same case, it was also said by Denning LJ:-
>
> > 'I agree … that no general rule can be laid down on the matter, but this wife is certainly under no legal duty to go out to work in order to reduce the maintenance that her husband should pay. It would be quite unreasonable to expect her to do so. She cannot be expected to do it when she has a young child to look after. Of course, if a wife does earn, then her earnings must be taken into account: or if she is a young woman with no children, and obviously ought to go out to work in her own interest, but does not, then her potential earning capacity ought to be taken into account; or if she had worked regularly during the married life, and might

reasonably be expected to work after the divorce, her potential earnings ought to be taken into account. Except in cases such as these it does not as a rule lie in the mouth of a wrong-doing husband to say that she ought to go out to work simply in order to relieve him from paying maintenance'.

And in *Le-Roy Lewis v Le-Roy Lewis* [1951] P 29, 31–32, CA, Barnard J said:-

'It has been suggested that because she was working before the marriage and is still young, and as there is no child of the marriage, she ought at once to go back into the position she was in before the marriage and start earning her living, with as far as I can see only one object, to reduce the amount of money which the husband should pay to her, his wife. I do not accept that view. She may have been lucky, or, at any rate thought that she was lucky at the time, in marrying someone who brought about an improvement in her financial and possibly her social position; but it has been through no fault of hers that their married life together has come to an end, and I see no reason whatever, why the wife should go back to earning in order to reduce the husband's liability to maintain her'.

39. Since the statutory guidelines under s 7 (1) require the court to have regard to the earning capacity which each of the parties has or is likely to have, the principles enunciated above must now be read in the light of the statutory guidelines, and that the court would now expect a wife who is not encumbered by pre-school age children to take, over a reasonable period of time, such steps as are necessary to acquire or increase an earning capacity in order that she should not be financially dependent on her former husband in perpetuity, as Singer J stated in *T v T (Financial Relief: Pensions)*[10]:

'W must be encouraged to overcome the apathy which afflicts her, to put to one side her extremely negative attitude to any suggestion that is made, and to make real attempts to find some reasonably congenial, convenient, interesting and financially rewarding work even if the hours are not ideal, the location is not ideal, the work is not what she would prefer, and she would prefer not to have to do it. For, without for a moment underestimating the difficulties which ladies of her age face in the current employment market, this wife is in my view a lady who, should she wish to do so, would impress a prospective employer with her qualities'.

40. I agree that this Wife does have some earning capacity for jobs like the one she last had working in a bookstore or doing administrative work in a club, and that some employer in York may see the advantage in her over college students who just come and go and change jobs all the time. Besides, as pointed out by counsel for the Husband, it will also help to alleviate her loneliness and give her an opportunity to meet people and socialize. I shall now turn to the Husband's financial position".

[10] [1998] 1 FLR 1072, [1080 E].

5.017 In contrast, the husband was made redundant in April 2003, and had made every effort to find employment, although he was restricted from undertaking a similar job or business activity within 12 months of the termination of his employment.

5.018 In this case, the judge accepted the fact that the proposed 50 per cent of the assets to be transferred to the wife would not be sufficient to meet her future needs and expenses, however the judge was clearly attracted by the husband's offer to pay nominal maintenance while he was out of work, but leaving the door open for the wife to make an application to increase maintenance to a substantial level once his income position improved. Therefore the judge, although he agreed with the wife's counsel that, had the marriage continued, the wife would have had to share in the vicissitudes of life, and hence in his present difficult situation, it would not be fair that he should have to pay substantive periodical payments for the wife from his share of the assets. The judge was sympathetic to the wife who was clearly in the more vulnerable position and as such awarded her 53 per cent of the total assets as a cushion to enable her to meet her immediate needs while waiting for the husband's income position to improve.

5.019 In the case of *W v C*,[11] the wife was found to be intelligent and enterprising and had shown that she wanted to improve herself by obtaining an insurance certificate and a health carer's qualification. Although both she and the husband had health issues (neither were sufficiently substantiated), the court found that the wife, whose level of education was higher than the husband's, had an earning capacity of about HK$5,000.00 per month which could sustain her. The husband's earning capacity was deemed to be HK$11,000.00 per month from which he would sustain himself and out of which he would have to pay rent for his accommodation. The matrimonial property was transferred to the wife and her application for periodical payments dismissed.

5.020 The cases above tend to focus on the earning capacity of the wife, but that of the husband is equally relevant. The Court of Final Appeal in *KEWS v NCHC*[12] considered the question of the husband's earning capacity. In that case the husband was a Harvard graduate and possessed impressive financial qualifications, including obtaining an Executive MBA at Kellogg/HKUST Business School. His career had been restricted by caring for his wife who was chronically ill, but nevertheless the court found that he was failing to utilize his potential: at the time of trial he was employed by a Swiss private bank and was drawing a salary of only HK$14,000 per month. Evidence was brought to court that graduates with such qualifications were ranked amongst those with the top starting salaries worldwide. The CFA found:

"On earning capacity, the Court of Appeal was of the view that the Husband had 'obviously' failed to utilise his potential. The Husband's education and professional qualifications have already been set out (see paras 5.008 and 5.009 above). The Court of Appeal was of the view that for a person like the Husband to be earning only $14,000 a month (as at the date of trial), this represented an obvious under utilisation of his earning capacity. I am in agreement with the views of the Court of Appeal here in reversing the Trial Judge's findings in this regard. It is important also to emphasise one

[11] [2013] 2 HKLRD 592, (CA); [2007] HKFLR 291; see also in *TL v SN (ancillary relief)* [2010] HKFLR 506.
[12] [2013] 2 HKLRD 314.

further matter. Where, as in the present case, periodical payments are contemplated, it is right that the court should be able to look into what the future earning capacity of the paying spouse is likely to be. In the present case, the evidence demonstrated that the Husband was getting significant salary increases (see 5.016). Furthermore, with in particular his EMBA qualification, this would place the Husband in an even stronger position as far as earning capacity is concerned".[13]

5.021 The husband in this case was ordered to pay periodical payments to the wife, which equated to the whole of his anticipated salary for the new year, on the basis that he was under utilizing his earning capacity and also on the basis that his parents had in the past met his own expenses and there was nothing which led the court to believe that they would cease providing such support.

(g) Cohabitation

5.022 Pre-marital cohabitation has been dealt with in the preceding chapter.[14] In certain circumstances, the effect of this has been to increase the duration of the marriage, a factor which the court must take into account under s 7. However, whether a court will order periodical payments to a party who is cohabitating, or who intends to cohabit after the decree, with someone other than his or her former spouse is a matter which the court will take into account in respect of periodical payments.

5.023 It may be irksome to many a paying party that the spouse who is in receipt of periodical payments refuses to remarry his or her partner but simply to cohabit with him or her, thus enabling her (normally) to continue to receive those payments. Prior to the recent English Court of Appeal case of *Grey v Grey*[15], the two leading cases in England were *Atkinson v Atkinson (No.1)*[16] and *Fleming v Fleming.*[17] In *Fleming v Fleming*, the principles from *Atkinson v Atkinson* were upheld. In *Atkinson v Atkinson*, the husband had argued that the wife's long-term cohabitation and decision not to remarry simply to keep alive the maintenance order would warrant a progressive reduction to a nominal amount. This was in the first *Atkinson v Atkinson*. In this case Waterhouse J said:

> "In my judgment, it is clear that the wife's cohabitation constitutes a change of circumstances … I accept also that the cohabitation, the decision not to remarry and the reasons for it are conduct which would be inequitable for the court to disregard … I can find no warrant for equating in this context remarriage with cohabitation, a word which itself presents problems of definition. The effect of remarriage is dealt with separately … governing the duration of a periodical payments order, and the policy that an ex-wife should lose her right to maintenance from her ex-husband on acquiring a new matrimonial status and new matrimonial rights against another man is readily understandable. I do not consider that it is open to the courts to add a gloss to those existing provisions by equating cohabitation, however defined, with remarriage without legislative sanction".

13 [55] (Ma CJ).
14 See Chapter 4, paras. 4.031 and 4.079–4.084.
15 [2010] 1 FLR 1764;[2010] 1 FCR 394;[2010] Fam Law 440.
16 [1988] Fam 93;[1988] 2 WLR 204;[1987] 3 All ER 849.
17 [2004] 1 FLR 667;[2004] Fam Law 174.

5.024 In *Atkinson v Atkinson (No.2)*,[18] the wife began cohabiting with another man four months after the district judge had made an order for a transfer of the former matrimonial home and a periodical payments order of £30,000.00 *per* annum. After new evidence was admitted relating to the strength of the business of the wife's cohabitee, the periodical payments were reduced to £10,000.00 *per* annum. Thorpe J said:

> "In assessing the relevance of the cohabitation factor, it seems to me as much, if not more, weight must be given not to the presence of the cohabitee as to his financial circumstances and his capacity to make a reasonable contribution in return for the benefits to the provision of a home …
>
> … I consider that she is entitled to some financial independence within her relationship with the cohabitee. It is only reasonable that she should have that independence, bearing in mind first that she has devoted 25 years to a marriage which ended for her unhappily and which bore the husband four daughters and secondly in relation to this application to vary the husband elected to avoid disclosure by stating that his income was so excessive as to make disclosure unnecessary".

5.025 In the case of *K v K (Periodical Payment: Cohabitation)*,[19] the judge after recognising that this was a "troubling and messy area of the law and the current legislation enacted against an utterly different social fabric is not adequate to deal with it" ordered that the husband should pay a lump sum to the wife in discharge of her periodical payments order. The rationale of the reduction was to reflect the shorter period for which the husband should now be expected to support his former wife but also took into account the wife's underlying pension entitlement element from the old order. The judge calculated this to be approximately a 20 per cent reduction to reflect the financial impact of her cohabitation.

5.026 In *Grey v Grey*[20], Thorpe LJ reviewed the case law in respect of the effect on periodical payments of cohabitation and allowed the husband's appeal that the wife's relationship should have been taken into account and further that the financial position of the third party should be disclosed.

5.027 Wall LJ further said at para 51:

> "In my judgment, the law has not changed from that which it was when I commenced practice in 1969. Post-separation cohabitation with a third party is a relevant factor for the court to take into account when considering the level of maintenance pending suit and/or periodical payments which cohabiting spouse or former spouse should receive from his or her spouse or former spouse. In some cases, the fact of cohabitation will weigh heavily in the scales; in others, it will not. As Thorpe LJ rightly states in paragraph 28 of his judgement, the real question for the court is usually not what the third party is contributing but – as here – what ought he to be contributing?"

18 [1995] 2 FLR 356;[1995] 2 FCR 353;[1995] Fam Law 604.
19 [2006] 2 FLR 468;[2006] Fam Law 518.
20 [2010] 2 FLR 1848;[2010] Fam Law 1261.

5.028 At present, a cohabitee does not have the benefit of the security of the matrimonial legislation and is therefore currently more vulnerable than a spouse having no entitlement to financial provision from her new partner, thus the justification for continued periodical payments. However, what is clear from the authorities is that the income and capital position of a new partner with whom a spouse in receipt of periodical payments is cohabiting will be taken into account. In Form E there are two areas in which the parties must disclose their intentions in respect of cohabitation: one at the outset where the parties must declare if they are cohabitating and later in the form where the parties must declare whether they have any intention to cohabit and in that part of the form, details of the third party's income and assets must be given. Further, non-disclosure of the fact of cohabitation in *Livesey v Jenkins*[21] caused the consent order to be set aside.[22]

(h) Quantum of Periodical Payments

5.029 It used to be the case that the one-third rule would be the starting point for periodical payments as well as capital.[23] Once the one-third calculation had been made, it was then adjusted to ensure that the wife's needs were met by this amount and whether the husband was capable of paying. The usefulness of the assessment was limited, particularly in cases where the parties were very wealthy, in which case a one-third division may render an over assessment for the wife, or where the family had little income and capital and a one-third division may not adequately reflect the wife's contribution or cover her needs.

5.030 There is no substitute for the consideration of all the s 7 factors in assessing the quantum of periodical payments. Significant debate has taken place as to whether the recent case law in respect of equality and fairness should also apply to periodical payments. This was one of the issues in the combined appeals of *McFarlane v McFarlane*[24] and *Parlour v Parlour*.[25] In *Parlour v Parlour*, Thorpe LJ said "if the decision in *White v White*[26] introduces the yardstick of equality for measuring a fair division of capital why should the same yardstick not be applied as the measure for the division of income".

5.031 In *Parlour v Parlour*[27], the husband was a successful footballer earning a substantial annual salary (£1.2 million). The wife argued that she should be given the same percentage of his annual income as they had agreed in respect of his capital, namely 37 per cent. This would provide her and the three children of the family with the sum of £444,000.00 per annum. The wife's argument was that an earning capacity developed during a marriage was a resource or a thing of value which should be equitably shared, and that an award of period of payments should not be confined to the wife's maintenance

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21 [1985] AC 424.

22 See paras 4.028–4.030 above and paras 5.212–5.217 below.

23 The one-third method used to be calculated for example as follows:
The husband's gross income was HK$50,000 per month. The wife's gross income was HK$10,000 per month. Total of both parties' gross income per month HK$60,000, one-third of joint incomes HK$20,000. As wife's income was already HK$10,000, starting point for maintenance was HK$10,000.

24 [2006] 2 AC 618;[2006] 2 WLR 1283;[2006] 3 All ER 1.

25 [2005] Fam 171;[2004] 3 WLR 1480;[2004] 3 All ER 921.

26 [2001] 1 AC 596;[2000] 3 WLR 1571;[2001] 1 All ER 1.

27 [2005] Fam 171;[2004] 3 WLR 1480;[2004] 3 All ER 921.

needs. The husband argued for restriction to her reasonable needs. Bennett J said that to confine periodical payments to needs or reasonable requirements would be a faulty exercise of discretion, only applying one of the factors in s 25 MCA (s 7 of the MPPO). The judge agreed with the wife and allowed her periodical payments of 37 per cent of the husband's total annual income, but this was to be for a limited period bearing in mind, as a footballer, his ability to earn at this level would necessarily only last approximately four or five years. The order was made accordingly. Thorpe LJ observed:

> "These considerations only underline the obvious need for a substantial proportion of the income in the present fat years to be stored up against the future famines. Again I conclude that it would be wrong in principle to leave the responsibility and opportunity to the husband alone. The wife and the children's needs were put at £150,000.00 by the judge. To award her the global figure of £440,000.00 per annum sought by Mr. Mostyn allows her and obliges her to lay up £294,000.00 per annum as a reserve against the discharge of her periodical payments order. I would in this case order a four year extendable term. Hopefully a clean break will be achievable then on an assessment on the husband's earning capacity at 35 years of age and the wife's independent fortune derived from the original capital settlement augmented by the substantial annual surplus built into her periodical payments order in the interim".

It was generally felt that it was more appropriate not to provide for a date when the periodical payments were to cease. Rather it was more appropriate for the husband to make an application to vary when it was clear that circumstances had changed. This is considered in further detail below under the paragraphs dealing with a clean break. 5.032

Parlour v Parlour[28], *McFarlane v McFarlane*[29] and *Charman v Charman*[30] were all extraordinary cases involving very high income earning individuals. In most cases, it is crucial, when assessing the quantum of periodical payments to calculate the incomes of the parties net of obligations, such as income tax, and balance the net income against their reasonable expenses, all in light of the s 7 factors. 5.033

In *McFarlane v McFarlane*[31], as it was deemed that there was insufficient capital to satisfy the capital claims of the wife, or to give her a clean break, the quantum of periodical payments awarded to her included enough for her to save a capital sum, as a security for the future or for her to leave to her children in her Will, as she deemed fit. 5.034

Therefore, in neither of the two cases mentioned above was the wife restricted to her reasonable needs, but an element of capital was incorporated into the order. 5.035

In *Charman v Charman*[32], the duty of the court was to make findings *seriatim* upon each of the matters set out in s 25 MCA (s 7 of the MPPO) then to balance the factors against one another so as to arrive at an order which was just and reasonable. Failure to adopt such an approach may provide a ground for appeal. This approach was adopted 5.036

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28 [2005] Fam 171;[2004] 3 WLR 1480;[2004] 3 All ER 921.

29 [2006] 2 AC 618;[2006] 2 WLR 1283;[2006] 3 All ER 1.

30 [2007] 1 FLR 1246 [74]–[77], (CA) ;[2007] 2 FCR 217;[2007] WTLR 1151.

31 [2006] 2 AC 618;[2006] 2 WLR 1283;[2006] 3 All ER 1.

32 [2007] 1 FLR 1246 (CA) ;[2007] 2 FCR 217;[2007] WTLR 1151.

by the Court of Appeal in *DD v LKW*[33] and is set out in full in Chapter 4 above and was further clarified by the Court of Final Appeal, in that case.[34]

(i) The Clean Break

5.037 There is a clean break when a party's claims for periodical payments and secured periodical payments are dismissed by the court. Following a clean break, a party is not at liberty to make an application for maintenance at all. Under Hong Kong legislation there is no provision, unlike under s 25A of the MCA, for the court to consider whether a clean break is appropriate, but this tends to be how the court will look at a case if appropriate. It is generally considered to be beneficial to parties to be able to finalise their dealings with each other if they can and to proceed independently into the future unburdened by their past. This is of course not always appropriate as one spouse may be dependent on the other financially and in these cases periodical payment orders will be made.

5.038 A court can also make an order that there should be a deferred clean break, or a periodical payments order for a limited term, generally to enable one party to re-establish himself or herself following the breakdown of the marriage.[35] It is worth reminding a client of this option as it can provide comfort to a spouse who would otherwise be concerned about an immediate clean break, and to a spouse who is hoping to see an end to a liability to pay. If the clean break is to be deferred, the term should be clearly stated.

5.039 A court may also make a nominal maintenance order of HK$1 per annum which, clearly without putting a financial burden on the payer, allows the more vulnerable party to make an application for periodical payments in the future if need be.

5.040 In most cases, a clean break will be considered if there is a possibility of self-sufficiency. In "no money" cases the rationale for the immediate clean break has been that there never was and never would be any prospect of the husband paying periodical payments and so, for the achievement of certainty and the avoidance of further unnecessary litigation, an immediate clean break was the only sensible answer.

5.041 In "big money" cases there is usually sufficient capital to enable both parties to live comfortably on income derived from the capital. Further consideration in respect of big money cases will be dealt with under the paragraph dealing with lump sum payments.

5.042 Clearly therefore the "intermediate" cases are more problematic and there are many cases that demonstrate the use of judicial discretion in this area.[36] In the case of *S v S*

[33] [2008] 2 HKLRD 523.

[34] *LKW v DD* (2010) 13 HKCFAR 582, (2010) 13 HKCFAR 537, [2010] 6 HKC 528; [2011] HKFLR 106.

[35] See *EJB v CJB* [2011] 5 HKLRD 508; [2012] HKFLR 1. Although this was a relatively short and childless marriage, the wife would require time to re-establish her career.

[36] See *Waterman v Waterman* [1989] 1 FLR 380;[1989] FCR 267;[1989] Fam Law 227 term order for five years when the child would be ten, wife working as a secretary, short marriage; *Suter v Suter* [1987] Fam 111;[1987] 3 WLR 9;[1987] 2 All ER 336 nominal order where wife with young children and uncertainties as to her future; *M v M (financial provision)* [1987] 2 FLR 1;[1987] Fam Law 195, 47-year old wife, no prospect of self-sufficiency and no clean break.

(Ancillary Relief),[37] a capital sum of 60 per cent was awarded to the wife after a four-year marriage and nominal maintenance provided to the wife on the basis of her continued care of a young child, thus clean break was not considered appropriate. In contrast, in *B v B (Mesher Order)*,[38] there was no presumption of a term order in a short marriage.

In *Fournier v Fournier*,[39] the husband failed to pay the periodical payments ordered and a clean break was imposed upon the husband to put an end to the process of enforcement. In this case, there were sufficient assets to enable the court to award a lump sum of the wife's capitalised maintenance requirements. 5.043

In *Flavell v Flavell*,[40] the wife was aged 54 and had a limited earning capacity and no pension. Ward LJ agreed with the judge at first instance that it was not usually appropriate to provide for the termination of periodical payments in the case of a woman in her mid-50s as the power of the court (even under s 25A of the MCA) to terminate dependency can only be exercised in the event that an adjustment can be made without undue hardship. It would appear that where the court is in any doubt about the position a clean break order, even a deferred clean break order, should not be made. This could include cases involving shares in a company. If there is any doubt as to the valuation of the shareholding, a clean break may not be appropriate.[41] 5.044

4. Secured Periodical Payments

Under s 4(1)(b) the court has power to make "an order that either party to the marriage shall secure to the other to the satisfaction of the court, such periodical payments and for such term as may be so specified". This means that a periodical payment may be secured against capital. The capital could be a lump sum that produces income for the purposes of satisfying the periodical payment order. Alternatively, it could be secured against an asset such as real property. In such cases, as long as the payer makes regular payments, the underlying security will not be affected. In the event that the payer defaults, however, the claimant can realise the asset for the purpose of satisfying any arrears. A secured periodical payments order terminates on the death or remarriage of the recipient, whichever is earlier. 5.045

Clearly the principle advantage is that the payments are secure. The fund or capital is there to ensure their safety and the payments will survive the death of the paying party or his bankruptcy or disappearance. In *Aggett v Aggett*,[42] the judge was reluctant 5.046

[37] [2006] HKFLR 470.

[38] [2003] 2 FLR 285.

[39] [1998] 2 FLR 990 CA.

[40] [1997] 1 FLR 353 CA; see also *Murphy v Murphy* [2011] 1 FLR 537 where a wife was ordered 65% of the capital in recognition of the husband's greater earning capacity and ability to generate income.

[41] *D v D* [2007] 2 FLR 653; also *W v H* [2009] HKFLR 230 (CA) regarding application to vary a clean break; *P v P* [2010] 1 FLR 1126.

[42] [1962] 1 WLR 183.

to burden the payer's only or main asset with security. It is generally accepted that this order will only be made if the fear of the party seeking the order was justified. Orders for secured periodical payments are rare. The factors that the court will take into account are the same as with unsecured periodical payments.

5. Lump Sum Orders

5.047 The third type of financial provision that a court can order is that of a lump sum or sums and the court's jurisdiction to order a lump sum payment can be found at s 4(1)(c) of the MPPO. As follows:

> "On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter …. the court may … make any one or more of the following orders, that is to say:
>
> … (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified".

5.048 This is the payment of a capital sum of money to the claimant. The court can order more than one lump sum to be paid within a single application but no further application for a subsequent lump sum can be made. The court does not have jurisdiction to vary a lump sum.[43] A lump sum order is normally a means of adjusting the capital resources of the parties on the dissolution of the marriage and is intended to be a final order, although the statutory provision is for lump sum or sums. Many lump sums can be made pursuant to one order but only one order can be made.[44] This has, on occasion prompted the application by one of the parties for an adjournment of the applicant's application for a lump sum, on the basis that the court is not in a position at the time of the hearing to fairly dispose of the capital claims.[45] This may be the case where capital is imminently to be received, as in a share of a farming business,[46] or an inheritance.[47]

5.049 As with other aspects of financial provision, the payment of a lump sum cannot be made until after decree absolute has been given, although, as an exception s 4(2)(a) provides:

> "Without prejudice to the generality of subsection (1)(c) … an order … may be made for the purpose of enabling that other party to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or herself or any child of the family before making an application for an order under this section"

43 Although see para 6.010. It would appear that some variation of a lump sum payable by installments can be made. See Court of Appeal case *CH v MEH (variation of lump sum in Consent Order)* [2012] 1 HKLRD 751 (CA), [2012] HKFLR 89;. The Court of Appeal in that case decided that it could not vary the quantum of a lump sum which was to be payable by installments, although the timing as to the installments may be changed: *Masefield v Alexander (Lump sum: Extension of Time)* [199] 1 FLR 100.

44 *Coleman v Coleman* [1973] Fam 10.

45 See *KEWS v NCHC* (unrep., CACV 75/2011, [2012] HKEC 329), CA; *KEWS v NCHC* [2013] 2 HKLRD 314 CFA. See also *Hardy v Hardy* [1981] 2 FLR 321; *MT v MT (Financial Provision: Lump Sum)* [1992] 1 FLR 362; *Re G (Financial Provision: Liberty to Restore Application for Lump Sum)* [2004] 1 FLR 997.

46 *Davies v Davies* [1986] 1 FLR 497.

47 *Michael v Michael* [1986] 2 FLR 389, where it was said that the uncertainty in facts surrounding an inheritance were such that it would not be possible to hold whether or not the property was likely to be had in the foreseeable future under s 7. See also Chapter 4, s 3.

which suggests that some backdating is allowable in respect of liabilities incurred prior to making the application. 5.050

Section 4(2)(b) refers to the payment of one lump sum by instalments: 5.051

> "An order under this section that a party to a marriage shall pay a lump sum to the other party … may provide for the payment of that sum by instalments of such amount as may be specified in the order …"

Such instalments can be secured. It is often the case that a payer is unable to pay a lump sum in one payment and consequently the lump sum can be expressed to be payable in instalments. If this is the case, all relevant details must be specified such as when the payments are due, the exact amount payable and into which bank account payments should be made. The usefulness of payment of a lump sum by instalments has been well put by HHJ Bruno Chan in *CH v MEH*[48] as follows:

> "This power to make an instalment order may be of use in cases where the parties are of modest means, and need time to pay; but it may also be of use in cases where a spouse has sufficient assets such as shareholding in a company which it would be difficult, impracticable or undesirable to realise quickly. It has in fact become a valuable tool where parties are seeking to achieve a clean break situation by allowing them to overcome liquidity problems and to commit themselves to a clean break so that the paying party knows the total cost to him or her and the receiving party to plan her or his life knowing the size of their settlement and when it will be received. In other words, it enables the parties to achieve certainty and finality".

If the payment is not by instalment, it is common to express the lump sum to be payable on decree absolute, the earliest date on which payment can be made. If, for some reason, a lump sum has been paid prior to decree absolute, credit should be given for it in the order, normally by way of an acknowledgment in the recitals.[49] There is no provision for a court to make an interim lump sum order. 5.052

Normally a court may make a variety of orders: periodical payments, a transfer of property and lump sum following a thorough consideration of the s 7 factors. Often a lump sum is payable in order to achieve fairness and equality after a transfer of property, normally a home or investment property or shares in a business. The lump sum is often the "top-up" cash equivalent. Together with the transfer of property and cash lump sum, the two parties are to continue with their lives with their share of the capital pool of the matrimonial assets. 5.053

48 (FCMC 1969/2007,[2011] HKEC 12) (DC) [26] (see generally [26]–[35]).

49 See warning by HHJ Sharon Melloy in *AY v AKL* (unrep., FCMC 8527/2010, [2013] HKEC 1234) in which she was concerned by the inaccurate drafting of the consent summons that failed to record the payment of two capital sums prior to settling the summons, and that there should have been a dismissal of claims on that basis which would have saved the costs of that hearing.

5.054 If the parties are sufficiently wealthy, the court may capitalize the applicant's periodical payments to achieve a clean break.[50] The calculation to ascertain the appropriate sum is known as a "*Duxbury*" calculation. Such capitalization is common in "big money" cases and therefore the following paragraphs will consider the law in relation to *Duxbury* and big money cases.

5.055 Other important aspects of family case law that regularly come before the court for consideration in the context of lump sum provision are issues in relation to companies, trusts, matrimonial and non-matrimonial property and inheritances, which are considered in turn below.

(a) *Duxbury* Orders

5.056 Although largely discredited as the basis upon which the reasonable requirements criteria was made in previous cases, a court has a duty to assess a party's needs under s 7(1)(a) and the *Duxbury* calculation is a useful tool if a clean break is being contemplated.[51] Most significantly it was used as a method to calculate the wife's needs in the Court of Final Appeal case of *WLK v TMC*.[52]

5.057 The *Duxbury* calculation refers to the use of a computer program or calculation that can calculate the lump sum which, if invested, will produce enough income to meet the recipient's income needs for her life to cover her expenses, by taking into account such factors as life expectancy, rates of inflation, growth of capital, taxation and return on investment. It is usual to instruct an accountant to provide the computation.

5.058 The idea is that a lump sum should be paid that will yield sufficient income for the wife for the rest of her life and that will be entirely exhausted on her death. The calculation is based on the first case in which the technique was used, *Duxbury v Duxbury*.[53]

5.059 It has been said that the *Duxbury* is a useful tool and not a rule. Clearly there are significant limitations, not least the uncertainties in trying to calculate the rate of return for any investment over a long period. In *Fournier v Fournier*[54], the *Duxbury* calculation was held not to be appropriate because the wife had a life expectancy in excess of 40 years. The courts had been troubled by the "*Duxbury* paradox", whereby the older spouse recovered a lower amount than a younger spouse because the calculation is based in part on life expectancy, which was manifestly unfair in the case of a long marriage. Following *White v White*[55], and the replacement of the "reasonable requirements" approach with the yardstick of equality,[56] this anomaly should normally be addressed. It has also been said that it is fundamentally inequitable to calculate a lump sum so that the wife has no capital whatsoever left at her death with the result that she may have to live frugally in her last years and further that she would not be

[50] The clean break is explained at paras 5.037–5.044 above.
[51] See paras 4.142–4.145. See also *Pierce v Pierce* [2003] 2 FLR 1144.
[52] (2010) 13 HKCFAR 618, (2010) 13 HKCFAR 658 [2010] 6 HKC 571, [2011] HKFLR 144.
[53] [1992] Fam 62;[1991] 3 WLR. 639;[1990] 2 All ER 77.
[54] [1998] 2 FLR 990 CA.
[55] [2001] 1 AC 596;[2000] 3 WLR 1571;[2001] 1 All ER 1.
[56] See Chapter 4.

in position to leave any assets to her children by way of an inheritance.[57] It is hoped that the recent decision of the Court of Final Appeal in *LKW v DD*[58] has addressed and clarified this problem.

(b) Big Money Cases

5.060 Chapter 4 contains an analysis of the leading cases considering how the courts have interpreted s 7 MPPO, and particularly the rationale for the exercise of discretion in the division of assets. Big money cases tend to define the law: the courts can concern themselves with legal principles and are not confined to finding the best result in a bad situation. They also tend to go to the higher courts and are thus more readily used as legal precedent. The section here has been included to demonstrate how the higher courts in Hong Kong have made their orders in respect of capital division, which normally includes a combination of lump sum and property adjustment orders.

5.061 In cases that are not "big money cases" the regular daily needs of the family must be considered first. This would normally include the welfare of the children and the priority for the court is often to provide a home for the parent who has care of the children.[59] If there are any surplus funds, the court will try to enable the non-resident parent to be housed and will endeavour to ensure that the residence is not inferior to that of the parent with care. This has now been recognized by the Court of Final Appeal in *LKW v DD*[60] and described as Step 2 of the process.[61]

(i) *C v C*

5.062 In Hong Kong there have been a number of big money cases, and until 2010, the leading case was *C v C*.[62] This was an appeal case, which was heard in the spring of 1990, thus before the handover of sovereignty in 1997. As discussed above in 4.146 the Court of Appeal in Hong Kong followed the current thinking in England, and in particular the guidelines contained in *Preston v Preston*[63] in respect of the wife's reasonable requirements. For the present purposes of considering big money cases, the facts of this case were interesting in that the husband was the main bread winner but he had placed the bulk of the assets into the name of his wife and was in effect claiming a percentage of the capital back from her. It was a long marriage of 29 years and the total assets assessed by the Court of Appeal was in the region of HK$95 million, approximately HK$65 million of which was controlled by the wife. At first instance, the judge ordered that the wife should repay approximately HK$19 million back to the husband. This would result in a division of approximately 55:45 to each of the parties. At the Court of Appeal the court adjusted this to take into account the reasonable requirements

[57] See comments of Singer J quoted in para 4.144.
[58] [2010] 6 HKC 528.
[59] As to what may or may not constitute a "big money" case see *D v D (Financial Provision: Lump Sum Order)* [2001] 1 FLR 633. In that particular case, the total assets were £700,000.00 and the husband earned £230,000.00 per annum net of tax.
[60] [2010] 6 HKC 528.
[61] See 4.005.
[62] [2006] HKFLR 10.
[63] [1982] Fam 17.

of the wife, as well as some financial misconduct by the wife during the course of the proceedings, and adjusted her payment back to the husband to HK$30 million. This left the wife with approximately 37 per cent of the total family assets.

(ii) *F v F*

5.063 The next big money case was *F v F*[64], a case heard in January 2003. This was a High Court case before Hartmann J. This case was post *White v White*[65] and the handover, therefore the Hong Kong court was not bound to follow the principles of *White v White* but, ultimately, as a High Court case it was bound by the earlier Hong Kong Court of Appeal case of *C v C*[66]. Not only does this case contain useful guidelines on the basis upon which an ancillary relief application will be considered by the court, supremacy being given to the factors under s 7, it also gives useful guidance in respect of the *Duxbury* calculation. Here, although the Judge recognized the shortcomings, he did use it to calculate a capital sum for the wife based on the real rate of return of 4.25 per cent, which was the industry standard suggested by the English publication "At a Glance" and referred to in the English judgment of Holman J in *F v F (Duxbury Calculations: Rate of Return).*[67]

5.064 In *F v F*[68], the parties had been married for five years, with two years' cohabitation prior to marriage. The husband was a man of considerable wealth, most of which derived from an inheritance from his father estimated at around HK$450 million, although the wife alleged that the total family assets could be as much as HK$537 million if the husband were not asked to repay a loan to his mother. From that sum the wife sought approximately HK$99 million including HK$25 million for a property for herself and the child of the family to live in. The husband proposed a total sum of HK$25.6 million, which included assets that were in her own name. The judge awarded a total sum of approximately HK$56 million to the wife. This was made up of the provision of a Hong Kong home to be paid by the husband of HK$20 million, a capital sum to finance a *Duxbury* annuity to be paid by the husband of HK$25 million and provision for a car and a club. She was also to retain property that was already in her sole name, of approximately HK$10 million.

5.065 Another interesting aspect of this case was the judge's finding that the wife was not entitled to use the husband's conduct as a "defensive shield" to ward off the husband's submission that the marriage was a short one.

5.066 The judge further did not find that it was necessary to allow a "cushion" as in the Hong Kong Court of Appeal case of *Lee Yau Wing v Lee Shui Kwan*.[69] The provision of such a cushion would depend on the facts of the case and is not to be added automatically as some sort of "value added" tax. The judge was satisfied that, in providing for capitalised periodical payments for the wife and a home for herself and the child of the family that, in terms of the criteria set out in s 7 the orders meet the "required outcome of fairness".

[64] [2003] 3 HKLRD 976.
[65] [2001] 1 AC 596;[2000] 3 WLR 1571;[2001] 1 All ER 1.
[66] [2006] HKFLR 10.
[67] [1996] 1 FLR 833.
[68] [2003] 3 HKLRD 976.
[69] [2007] 2 HKLRD 749.

(iii) *L v L*

L v L[70] was a case before Lam J in 2005. In that case the judge made a detailed analysis of the previous big money cases in the light of *C v C*[71] and *F v F*[72] in Hong Kong and the post *White v White*[73] cases in England. He distinguished *C v C* and *F v F* from *White v White* in one important aspect: in the Hong Kong cases the wives had not worked since the date of the marriage. The judge said: 5.067

> "On the other hand, in *White v White* the parties were partners in the business sense as much as in the domestic sense. Hence, in *C v C* and *F v F* the court was not faced with the problem of the interrelationship between the concept of reasonable requirements and the determination of a fair share of spouse who is also a business partner and how Section 7 should operate in the latter context. In the present case, it is common ground that the two parties had been business partners and I have to grasp the nettle".

In this case, the learned judge also referred to the English Court of Appeal case of *Gojkovic v Gojkovic (No.1)*[74] where the wife made an exceptional contribution to the family assets and consequently the lump sum award was not confined to her reasonable requirements. In *Gojkovic v Gojkovic (No.1)*, the parties had together created a very successful hotel business. It was held that the wife, in addition to her reasonable requirements, was also entitled to sufficient capital to purchase her own hotel to continue the business in which she had excelled. There was clearly sufficient capital in this case to allow both parties to live and work comfortably on this basis.[75] 5.068

L v L[76] also considered the law in *White v White*[77], where the parties were both business and domestic partners. In the Court of Appeal, Thorpe J famously said that it offended his sense of fairness that a wife who had worked for over 30 years equally in partnership should exit with anything less than her legal entitlement in the absence of extraordinary features. Also in the Court of Appeal in *White v White,* Butler-Sloss LJ acknowledged that for spouses in business together, the reasonable requirements approach was not the most appropriate in order to arrive at the post-divorce readjustment of the family finances. On this basis, Lam J in *L v L* distinguished *C v C*[78] and *F v F* as in his view these cases had not dealt with the situation where the spouses were genuine business partners and it should not be the case that reasonable requirements should "set the ceiling for ancillary relief award in big money cases". In fact in the case of *L v L* there were prior agreements in which the parties had agreed to an equal division. Therefore in this case the judge endorsed the principle of equality which has already been agreed 5.069

[70] [2006] 1 HKFLR 121.
[71] [2006] HKFLR 10.
[72] [2003] 3 HKLRD 976.
[73] [2001] 1 AC 596;[2000] 3 WLR 1571;[2001] 1 All ER 1.
[74] [1990] 2 All ER 84.
[75] See also 4.095–4.101 in relation to financial contribution.
[76] [2006] 1 HKFLR 121.
[77] [2001] 1 AC 596;[2000] 3 WLR 1571;[2001] 1 All ER 1.
[78] [2006] HKFLR 10.

between them. Taking into account the business contribution to the family wealth has now been clarified by the Court of Final Appeal in *LKW v DD*. In that case, the Judge was sceptical about the contribution argument, suggesting that this would be creating gender inequality by another door. If the sharing principle were to be properly applied, there would rarely be a need to consider the factors prevalent in *Gojkovic v Gojkovic (No.1)*[79] and subsequent cases.

(iv) *C v F*

5.070 A further interesting big money case is *C v F*[80]. This was a case before HHJ Bruno Chan in the District Court, judgment being given in November 2006. In this case, the facts were that it was a long marriage, with a relationship which began in 1965 and marriage ceremony in 1967. The petition was filed by the husband in February 2000. The parties had come from very humble beginnings and over the years the husband's business had grown to the extent that he valued his assets at approximately HK$36 million with an income of approximately HK$800,000.00 per month. He alleged that he had considerable debts (total liability of HK$45 million) as he was heavily indebted to the company and his business partner. The court ordered a transfer of the former matrimonial home, mortgage free, to the wife and a clean break sum of HK$15 million.

5.071 The leading cases in Hong Kong of *C v C*[81], *F v F* and *L v L* were considered in respect of equality of division and found, that to attain a fair result, equality of treatment of husband and wife was a more universally applicable concept than equality of division. This approach has now been endorsed by the Court of Final Appeal in *LKW v DD*. Section 7 did not require the court to adopt equality of division either as a cross check or as a starting point. The judge found that there was no place for discrimination between husband and wife and further the husband's submissions that he had a special contribution were not accepted by the court.[82]

5.072 It was also held in this case that where property is vested in a company which was in essence the alter ego of the husband, the court would pierce the corporate veil, disregard the corporate ownership and without requiring the company to be joined as a party, make an order which has the same effect as the order that would be made if the property was vested in the husband. The court could and would adopt this approach even where there were minority interests involved.[83]

5.073 In respect of the companies, the judge agreed with the wife that the evidence before the court "supports a strong inference that the husband has for many years used the profits generated by [the company] by means of 'borrowing' from the companies for the sole use and benefit of himself and his family to the exclusion of the minority interest, which is in fact a very effective means of drawing on the profits without having to share with the minority shareholder" (para 22). It was the wife's submission that "the husband was the sole controller of the group of companies and 'once the façade has been pierced' the

79 [1990] 2 All ER 84.
80 [2008] HKFLR 1.
81 [2006] HKFLR 10.
82 *Cowan v Cowan* [2002] Fam 97 and *Lambert v Lambert* [2003] Fam 103, distinguished.
83 *W v H (Family Division: Without Notice Orders)* [2001] 1 All ER 300. This case has been overturned by *Prest v Petrodel Resources Ltd* as set out below.

husband's alleged cash flow problems and financial difficulties" have all become "empty rhetoric".[84] This aspect of the case has yet to be tested by the higher courts, but in light of the decision of the Supreme Court in England in *Prest v Petrodel Resources Ltd*[85], it is likely to be overturned when the appropriate case comes before the court in Hong Kong. In the Supreme Court case, the family court practice of piercing the corporate veil was not approved as it went against the principles of company law. This principle has been upheld in the Court of Appeal in *TCWF v LKKS*[86] who confirmed that the rule in *Salomon v Salomon*[87], that the company is a legal entity distinct from its shareholders and therefore its property was its own, and not that of its shareholders, was equally applicable in matrimonial cases.[88]

A further interesting aspect of *C v F*[89] was that, despite the fact that two properties were held in the name or joint name of his girlfriend, the judge held that, as the husband retained absolute control his full interest in these properties should be treated as part of his assets. The judge found that the husband had retained control because he paid all the purchase money without any contribution from his girlfriend who was at all times maintained by him and did not accept the husband's arguments that they were gifts. Further, the husband could make use of the properties in whatever way he wished, which indicated that they should form part of his assets for the purposes of the matrimonial redistribution.[90] 5.074

The husband in this case relied on the arguments put forward by Cheung JA in the appeal case of *HKCB Finance Ltd v Yuen Yi Wan*[91] pertinent to whether Ms C's beneficial interest may be upheld against the claims of other potential creditors. Cheung JA had the minority view of the Court of Appeal and based his findings on various contributions made by the wife to the former matrimonial home to give her a beneficial share or interest in that property. In this case there was no evidence of any contribution by the girlfriend. On the other hand, there was evidence "that the husband had retained his absolute interest in and control of the properties … in any wish by him to sell, rent or charge either or both the properties, and to utilize such proceeds for the benefit of his companies' needs, all of which go to support the wife's argument that the value of the husband's full interest in these properties should be treated as part of his assets" (para 138). 5.075

(v) *C v T (Ancillary Relief)*[92]

This Court of Appeal case followed *DD v LKW*, finding the wife's contribution to be equal to that of the husband and allowed her appeal for an increase in lump sum. 5.076

84 Paragraph 219.
85 [2013] 2 A.C. 415;[2013] 3 W.L.R. 1;[2013] 4 All E.R. 673. See further at para. 5.091 below in respect of cases involving companies.
86 (unrep.,CACV 154 and 166 /2012, [2014] HKEC 47) [135];
87 [1897] AC 22; [1895-9] All ER Rep 33.
88 But see the current law in respect of third party rights in the Court of Final Appeal in *KEWS v NCHC* [2013] 2 HKLRD 314; and the Court of Appeal in *TCWF v LKKS* (unrep., CACV 154 and 166/2012, [2014] HKEC 47).
89 [2008] HKFLR 1.
90 In *Prest v Petrodel Resources Ltd* [2013] 2 A.C. 415;[2013] 3 W.L.R. 1;[2013] 4 All E.R. 673, the fact that the funds were provided by the husband allowed the Supreme Court to infer a resulting trust.
91 (unrep., CACV 355/2005, [2006] HKEC 1425).
92 [2009] HKFLR 288, see para 4.175 *DD v LKW* is not included here as it was not a big money case, but see paras 4.166–4.174.

(vi) *W v H*[93]

5.077 This judgment at First Instance was handed down in February 2008 by Saunders J therefore only days before the landmark Court of Appeal case of *DD v LKW*. This was a long marriage, the parties having married in 1982 and the parties separated in 2003. There were two children of the marriage and both parties had worked in international merchant banks. Throughout the marriage the parties retained separate finances and conducted their matrimonial financial affairs akin to commercial transactions. The wife in this case was awarded 35 per cent of the total matrimonial assets. The reason given for departure from equality was the "special contribution" of the husband's financial skill which it would be inequitable not to take into account. The judge found that the fact that the parties had kept their financial affairs separately showed an intention that they did not intend their shares in property to be held equally. The net assets held in the wife's name amounted to approximately HK$50 million. The assets in the husband's name, although there was some deduction from this in respect of assets transferred to his partner which were held to be legitimate, amounted to some HK$300 million.

5.078 The Court of Appeal disagreed with the trial judge and adjusted the wife's entitlement to 45 per cent of the total. The case is interesting as the judge at First Instance and subsequently the Court of Appeal, cited the Hong Kong Bill of Rights Ordinance (Cap 383) which became law in June 1991 and also the Basic Law of the Hong Kong Special Administrative Region of the Peoples Republic of China effective as of 1 July 1997. This established in the legislature that all persons are equal before the law, and in particular Art 19 of the Bill of Rights in which it is stated that:

> "(4) Spouses shall have equal rights and responsibilities as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children".

5.079 Further, the judge noted the relevant Articles from the International Covenant on Civil and Political Rights (ICCPR) applied in Hong Kong by virtue of the Basic Law:

> "Article 3: the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present covenant"

5.080 Moreover, under Art 23(4):

> "States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution".

5.081 The discriminatory approach of the reasonable requirements basis adopted in *C v C*[94] the judge found to be "plainly unacceptable in the light of the legislation now in force".

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[93] At First Instance the case was reported as *W v K (Finances – Ancillary Relief)* [2008] HKFLR 329; subsequently it went to appeal where it was reported as *W v H (Financial Relief – Big Money)* [2009] HKFLR 230. See also para 4.176.

[94] [2006] HKFLR 10.

5.082 The judge also referred to what he called "the alternative argument" which was that:

> "The true ratio of *C v C* is not merely that reasonable requirements is the law in Hong Kong, but that whatever the English law was, would also be the law in Hong Kong I find considerable strength in this argument … consequently, even if I am wrong as to the significance of the constitutional provisions relied upon by Mr. Pilbrow in justifying a departure from *C v C*, I am satisfied that in applying *C v C*, I must follow English law as it is presently stated. The end result is the same".[95]

(vii) *LKW v DD and WLK v TMC*

5.083 The arguments raised above in respect of fairness and gender equality, together with the rejection of *C v C*[96], were upheld by the Court of Final Appeal in *LKW v DD*. Also upheld was the argument that it was appropriate to look at English case law as the English courts were interpreting law that was based on an almost identically worded statute to that of the Hong Kong Ordinance.[97]

5.084 As we have seen, *LKW v DD* was not a big money case, although it has defined law in Hong Kong. *WLK v TMC*[98] was a big money case which served to demonstrate the principles set out in *LKW v DD*. The case has been fully analysed in detail in Chapter 4.

(viii) More recent Court of Appeal big money *cases: ARAV v VP*[99], *PLTO v KLK*[100] *and TCWF v LKKS*[101]

5.085 Big money cases since *LKW v DD and WLK v TMC* have followed the formula laid down in those cases. Such cases from 2011 include *ARAV v VP*, which used the guidelines from *LKW v DD* and focused on whether the husband's financial misconduct could justify a departure from equality.

5.086 The Court of Appeal in that case also considered whether the fact that the parties had always kept their finances separate should infer that there was an agreement that such assets would be excluded from the other on divorce. The wife in this case argued that a post nuptial agreement could be inferred from such conduct but this argument was rejected by the court. In the judgment of Fok J, he said:

> "I would agree with the submission made by Mr Shieh that separate finance arrangements apply to many households in Hong Kong and finding that such arrangements give rise to the insulation or quarantine of such assets from division between the parties in the event of a divorce would have far-reaching consequences. Although the present case involves a wife seeking to ring-fence her assets, it is not unlikely that in many marriages where separate finances are kept it is the principle

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[95] Paragraphs 73 and 74.

[96] [2006] HKFLR 10.

[97] See 4.021–4.022.

[98] [2010] 6 HKC 571.

[99] [2011] 2 HKLRD 759, [2011] HKFLR 330.

[100] [2013] 2 HKLRD 1089.

[101] *TCWF v LKKS* (unrep.,CACV 154 and 166/ 2012, [2014] HKEC 47). The judgement came out on 10th January 2014, shortly before this edition was sent to print.

1. Introduction

Following the Civil Justice Reform (CJR) that came into effect on 2 April 2009, the principle that costs "should follow the event" has been preserved with the exception of interlocutory proceedings where such principle is no longer the prescribed usual order and is merely an option for inter-party costs. The reforms significantly changed the landscape and conduct of civil litigation and the procedure on costs have also been extensively reviewed. First of all, one of the most fundamental changes to the civil justice system is the introduction of the new underlying objectives of litigation to which the courts are expressly required to give effect.[1] These underlying objectives form the overarching theme of the CJR and due reference will and should be made to these objectives when the courts exercise their powers under the Rules of the High Court (RHC).[2] 17.001

It is the duty of the parties and their legal representatives[3] to assist the court and further these underlying objectives, which are: 17.002

(1) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the court;

(2) to ensure that a case is dealt with as expeditiously as is reasonably practicable;

(3) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;

(4) to ensure fairness between the parties;

(5) to facilitate the settlement of disputes; and

(6) to ensure that the resources of the court are distributed fairly.

In exercising their powers, it is also the duty of the court to further these underlying objectives whilst bearing in mind that the primary aim of the court is "to secure the just resolution of disputes in accordance with the substantive rights of the parties".[4] In furtherance of these underlying objectives, the court must actively manage cases and this includes, *inter alia*, encouraging parties to co-operate with each other in the conduct of the proceedings,[5] identifying the issues at an early stage,[6] deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others,[7] encouraging the parties to use an alternative dispute resolution procedure,[8] helping the parties to settle the whole or part of the case[9] and considering whether the likely benefits of taking a particular step justifies the cost of taking it.[10] 17.003

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1 RHC O.1A, r.2.
2 (Cap 4A).
3 RHC O.1A, r.3.
4 RHC O.1A, r.2(2).
5 RHC O.1A, r.4(2)(a).
6 RHC O.1A, r.4(2)(b).
7 RHC O.1A, r.4(2)(c).
8 RHC O.1A, r.4(2)(e).
9 RHC O.1A, r.4(2)(f).
10 RHC O.1A, r.4(2)(h).

17.004 Many of these issues have long been guiding principles used by the courts in family proceedings when exercising their discretion on costs. However, with the implementation of the new RHC O.1A, these underlying objectives and case management powers are placed "on a clear and transparent legal footing".[11] As a result of this canonisation, the aim and intention of the reforms are clear and the courts should have no hesitation in ordering costs against parties who fail to uphold or further these underlying objectives.

2. The Principles of Costs

17.005 In respect of costs, the CJR has made significant amendments. Though the principle that costs "follow the event" has remained intact, the power of the court, and the considerations to be taken into account by the court when exercising its discretion has widened. There is a new provision for the summary assessment of costs in respect of all proceedings (as well as interlocutory) and there has been an expansion to third party costs orders.

(a) The discretion of the court

17.006 By O.62, r.3 and s 52A(1) of the High Court Ordinance (Cap 4) (HCO), it is expressly stipulated that the costs[12] of and incidental to proceedings are within the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs are to be paid. Nevertheless, it does not change the fact that the nature of the court's discretion is judicial and it must be exercised in accordance to the rules of reason and justice and not on a private opinion.[13]

17.007 The court in exercising its discretion is also expressly required to take into account special matters specified in RHC O.62, r.5. Under the new regime, the category of special matters has been expanded to include matters such as (i) the underlying objectives in O.1A, r.1;[14] (ii) any written offers which are expressed to be "without prejudice save as to costs" and which relates to any issues of the proceedings[15] or a *Calderbank* offer;[16] (iii) the conduct of all the parties;[17] (iv) whether a party has succeeded on part of his case even if he has not been wholly successful;[18] and (v) any admissible offer to settle made by a party which is drawn to the court's attention.[19]

11 The Final Report of the Chief Justice's Working Party on CJR, Executive Summary, s 4, para 23(d).
12 See RHC O.62, r.1. The definition of "costs" includes fees, charges, disbursements, expenses and remuneration.
13 *Sharpe v Wakefield* [1891] AC 173. See also *Tai Yip Dyeing Factory Ltd v Kong Hoi Sang* (unrep., HCA 2917/2004, [2007] HKEC 654).
14 RHC O.62, r.5(1)(aa).
15 RHC O.62, r.5(1)(d). But the court may not take the offer into account, if, at the time it is made, the party making it could have protected his position as to costs by means of a sanctioned payment or a sanctioned offer under RHC O.22.
16 See para 4(a)(ii) below.
17 O.62, r.5(1)(e).
18 O.62, r.5(1)(f).
19 O.62, r.5(1)(g).

(b) Costs arising from a party's misconduct or neglect

In exercising its discretion, the court can also take into account the misconduct of a party. In any cause or matter whereby something has been done or an omission has been made improperly or unnecessarily by or on behalf of a party, the court has a power to deprive such party of costs or order such party to pay costs to other parties.[20] If the court is satisfied that there has been an omission to do anything which would have saved costs or that a party has incurred unnecessary costs or caused unnecessary delay in the proceedings, there will be costs consequences. 17.008

(c) Costs Orders in Favour of or Against Non-Parties

The courts in Hong Kong have long had the power to award costs in favour of non-parties but lacked the ability to make costs orders against non-parties. However, with the implementation of the new RHC O.62, r.6A, the courts can now order costs in favour of or against non-parties to a proceeding. Both the High Court and District Court have jurisdiction to award costs against non-parties if it is in the interests of justice to do so.[21] When the court is considering whether to exercise its power in favour of or against a person who is not a party to the proceedings, that person must be joined as a party to the proceedings for the purpose of costs only, and that person must be given a reasonable opportunity to attend a hearing in which the court will further consider the matter.[22] 17.009

(d) Wasted costs orders

The court has the power to make a wasted costs order against a legal representative or disallow the costs as between the legal representative[23] and his client, and order the legal representative to repay his client costs, which the client has been ordered to pay to other parties in the proceedings.[24] Section 52A(6) of the HCO defines "wasted costs" to mean any costs incurred by a party as a result of: (a) an improper or unreasonable act or omission; or (b) any undue delay or other misconduct or default on the part of a legal representative, whether personally or through an employee or agent of the legal representative.[25] The purpose of the wasted costs order is to supplement the court's right and duty to supervise the conduct of legal representatives and impose penalties if it is found that the solicitor or counsel has acted improperly without reasonable excuse or for undue delay or any other misconduct.[26] 17.010

20 O.62, r.7.
21 Section 52A(2) of the HCO and s 53(2) of the District Court Ordinance (Cap 336) (DCO).
22 This rule does not apply to wasted costs orders or an order for pre-trial discovery against a likely party under s 41 or 42 of the HCO.
23 As a result of the CJR the definition of "legal representative" has been expanded to include counsel as well as the solicitor conducting litigation on behalf of a party. See: s 52A(7), HCO; s 53(6), DCO.
24 RHC O62, r.8 (1) and (2).
25 See also s 53(5), DCO.
26 Paragraph 62/8/2 of the Hong Kong Civil Procedure 2011. See also *Ho Lee Man v Wong Wai Kai (No.2)* [1993] 1 HKC 193.

17.011 The court's jurisdiction to make a wasted costs order is compensatory and the court should aim at compensating the party concerned, whether it is the solicitor's own client or another party, for costs incurred and wasted. However, when the obligation to pay costs is shifted to the solicitor, the court's jurisdiction should also be regarded as punitive.[27] A mere mistake or error will not generally be sufficient. A solicitor or counsel must be found to have failed to fulfil his duty to the court and to promote the cause of justice in which he is engaged professionally.[28]

(i) *Procedure for making a wasted costs order*

17.012 The court may make a wasted costs order on its own motion,[29] or on an interlocutory application (which will usually only be made and dealt with after the relevant proceedings have concluded, save for exceptional circumstances),[30] but can only make a wasted costs order against a legal representative or its employee or agent if it has caused a party to incur wasted costs and it is just in all the circumstances to order such legal representative to compensate the party for the whole or part of those costs.[31] Further, the court must also bear in mind the significance that there be "fearless advocacy under the adversarial system of justice".[32]

17.013 Although the application may be made orally at a hearing, it should normally be commenced by an *inter partes* summons in the proceedings in which wasted costs have allegedly been incurred.[33] It should also be heard by the judge or master who conducted the proceedings to which the order relates, save for exceptional circumstances or if it is inappropriate.[34] The court is to consider whether to make a wasted costs order in two stages.[35] In the first stage, the court must be satisfied that (a) it has evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made or (b) the wasted costs proceedings are justified notwithstanding the likely costs involved.[36] At the second stage (even if the court is satisfied as to the first stage), the court must consider, after giving the legal representative an opportunity to give reasons why the court should not make the order, to determine whether it is appropriate to make an order.[37] Evidence in support of an application for a wasted costs order must identify what it is that the legal representative is alleged to have done or failed to have done and the costs that he may be ordered to pay or which are sought against him.[38]

17.014 The court's jurisdiction is discretionary and after hearing submissions from the applicant and the legal representative and taking into account relevant materials before

27 *Ma So So Josephine v Chin Yuk Lun Francis* (2004) 7 HKCFAR 300.
28 *KB Chau & Co (Firm) v China Finance Trust & Investment Corp and Shanghai International Capital Ltd* [1995] 2 HKLR 567, *Myers v Elman* [1940] AC 282.
29 RHC O.62, r.8A(1).
30 RHC O.62, r.8A(3).
31 RHC O.62, r.8(1).
32 Section 52(A)(5), HCO and s 53(4), DCO.
33 Practice Direction No.14.5, "Application for Wasted Costs Order", para 14.
34 RHC O.62, r.8(5).
35 RHC O.62, r.8B(1). See also PD.14.5, "Application for Wasted Costs Order", ss F and G.
36 RHC O.62, r.8B(1)(a).
37 RHC O.62, r.8B(1)(b).
38 RHC O.62, r.8B(3).

the court, the judge will decide whether he ought to exercise his discretion in favour of making an order. If he decides to make an order, he will consider how much of the wasted costs are the responsibility of the legal representative, specifying the extent of the costs which are recoverable in the award.[39]

(ii) *A means of intimidation*

17.015 A party must not (by himself or by another person) threaten another party or any legal representative of that party with an application for a wasted costs order for the purpose of coercing or intimidating either of them to do or refrain from doing something.[40] Moreover, a party should not indicate to another party or that party's legal representative that he intends to apply for a wasted costs order unless he is satisfied that he is able to particularise the behaviour of the legal representative from which the wasted costs concerned are alleged to result *and* he can identify the evidence or other materials on which he relies in support of the allegation.[41]

(e) The several bases of taxation[42] and assessment of costs

(i) *The indemnity principle*

17.016 The overriding principle in all taxation *inter partes* is the indemnity principle, which states that a party cannot recover anything more than he has paid or is liable to pay to his solicitors for costs and disbursements on taxation *inter partes*.[43] In all *inter partes* taxation proceedings, the taxing master is not assessing the remuneration of the solicitors, counsel or expert witness, but is determining how much a party should be paid so that he is reimbursed for the reasonably and properly incurred costs in carrying out the proceedings. The principle provides that costs between party and party are given as an indemnity to the person who is entitled to them. It is not a punishment on the paying party or a bonus on the receiving party.[44] On the taxation of a bill, the indemnity principle is to be applied on an item by item basis and not across the board.

17.017 Further, if the receiving party and their solicitors have agreed to limit the maximum hourly rates payable by the receiving parties or limit the maximum costs for any particular item on the bill of costs, that agreement provides a ceiling for the hourly rate or a measure to the maximum amount that can be recovered for that item. If there is an agreement as to the amount of costs to be charged, the receiving party will not be entitled to receive more than the agreed sum upon taxation. This ceiling will be applied at the end of the taxation against the paying party notwithstanding the amount of costs stated in the bill of costs is higher.[45]

39 RHC O.62, r.8(4).
40 RHC O.62, r.8C(1).
41 RHC O.62, r.8C(2).
42 See paras 17.067–17.106 on taxation.
43 *Attorney-General v Leung Ka Ki* [1997] HKLRD 52.
44 *Gundry v Sainsbury* [1910] 1 KB 645, 649 applied in *Holiday Resorts (Management) Co Ltd v Chan Yuk Yan* (unrep., HCA 7665/1998, [2001] HKEC 839).
45 See para 62/App/3 of Hong Kong Civil Procedure 2014.

(ii) *Party and party basis*

17.018 Costs are usually awarded on a party and party basis unless the costs order specifies otherwise.[46] On the party and party basis, all costs which were necessary and proper for the attainment of justice, or for the enforcement and defence of the rights of the party whose costs are being taxed will be allowed and nothing more. In deciding whether the costs incurred were necessary and proper, the judge may determine that costs were properly incurred but not necessary. Ultimately, it is within the discretion of the judge or taxing master who will take into account the circumstances of each case and examine whether costs were both properly incurred and necessary.[47]

(iii) *Common fund basis*

17.019 This is a more generous basis than the party and party basis and a reasonable amount in respect of all the costs which were reasonably incurred will be allowed.[48] The leap from the party and party basis to the common fund basis is not big. Parties can expect that the court will be a little more generous than on a party and party basis. The benefit of any doubt as to whether costs have been reasonably incurred or are unreasonable in the amount must be accorded to the paying party.[49]

17.020 In order to justify the court adopting this more generous approach, there should be some unusual or special feature which satisfies the court that it is appropriate to award costs on this basis.[50] Whilst the scope of costs allowed under the common fund basis is not as wide as the indemnity basis, the court will take a liberal view in determining whether the costs incurred were necessary and proper with a view that all the costs should be properly paid.[51] In the English case *Preston v Preston*,[52] the court was satisfied that the dilatory and un-cooperative manner of the husband's former solicitors had caused the wife's costs to increase. This feature of the case justified the court awarding costs to the wife on a common fund basis. It should be noted that on taxation of proceedings where a party is a legally aided person, the aided party's own costs will always be taxed on a common fund basis.[53]

17.021 In determining costs in taxation on a common fund basis, reasonableness is always the starting point. The basic question for the court to consider is two-fold and the approach was summarised in *Ngan Wun Yeung v Lok Sin Tong Benevolent Society, Kowloon*.[54] First of all, are the costs to be taxed reasonably incurred? If so, is the amount incurred reasonable, and if not, what is the reasonable amount? In looking for the answer, the court will take into account all the relevant circumstances of the case and particularly (a) the complexity of the item or of the cause or matter in which it

46 RHC O.62, r.28(1).

47 In determining whether the costs were properly incurred, it will be determined as at the time the costs were incurred and it will be irrelevant if it turns out that such costs were unnecessarily incurred, see *Bartlett v Higgins* [1901] 2 KB 230. See also *Yeung Shu v Alfred Lau & Co* [2000] 1 HKLRD 231.

48 RHC O.62, r.28(3).

49 See para 62/App/14 of Hong Kong Civil Procedure 2014.

50 See *Overseas Trust Bank Ltd v Coopers & Lybrand (Firm) and Peat, Marwick* [1991] 1 HKLR 177.

51 *Wharf Properties Ltd v Eric Cumine Associates, Architects, Engineers and Surveyors* [1992] 2 HKLR 274.

52 [1981] 2 WLR 619.

53 Section 20A(1) Legal Aid Ordinance (Cap 91) (LAO), see also para 18.053 on taxation for legal aid.

54 [2000] 2 HKC 404, Master Poon.

arises and the difficulty or novelty of the questions involved; (b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel; (c) the number and importance of the documents (however brief) prepared or perused; (d) the place and circumstances in which the business involved is transacted; (e) the importance of the cause or matter to the client; (f) where money or property is involved, its amount or value; and (g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.[55]

(iv) *Indemnity basis*

Pursuant to RHC O.62, r.28(3), the court in awarding costs payable to one party by another has a discretion in any case, which it thinks fit to do so, to also order or direct that the costs be taxed on an indemnity basis. According to O.62, r.28(4A), this means all costs shall be allowed except if they are of an unreasonable amount or have been unreasonably incurred. Any doubt on reasonable shall be resolved in favour of the receiving party. 17.022

In *Choy Yee Chun v Bond Star Development Ltd*,[56] the Court of Appeal reviewed the case law and summarised the laws relating to when courts should properly award costs on an indemnity basis. This included where the proceedings were scandalous or vexatious, or it had been initiated or prosecuted maliciously for an ulterior motive or in an oppressive manner.[57] The principle for the award of costs on an indemnity basis applied equally to both parties who instituted and defended proceedings. If a plaintiff had been forced to institute proceedings by a defendant whose conduct had not only been hostile in the normal litigious sense, but oppressive and with a base ulterior motive, then the court would be justified in awarding costs on an indemnity basis. If costs on an indemnity basis are to be awarded on the grounds of unreasonable conduct, the conduct has to be unreasonable to a high degree.[58] 17.023

To further illustrate the situation whereby the court could award costs on an indemnity basis, the Court of Final Appeal in *Town Planning Board v Society for Protection of the Harbour Ltd (No.2)*[59] confirmed that the court had a broad discretion to determine how costs should be paid and explained that in order to obtain costs on an indemnity basis, the applicant must show that there was some "special or unusual feature" to the case. The court may take into account the reasonableness of the parties' conduct. However, it should be noted that cases in which indemnity costs can be awarded is not restricted to those with ulterior motives, deception or underhand conduct and will also apply in cases where defendants conduct their case in bad faith or as a personal vendetta and which may be described as "disgraceful", "contemptuous" or an "abuse of process".[60] Importantly, parties who cause costs 17.024

55 *Ibid.*, 413–414.

56 [1997] HKLRD 1327.

57 See also para 62/App/12 *Hong Kong Civil Procedure 2014*.

58 *Liam v MGN Ltd No.2* [2002] 1 WLR 2810.

59 (2004) 7 HKCFAR 114. The court awarded indemnity costs upon finding the defence to be clearly bogus.

60 *Sung Foo Kee Ltd v Pak Lik Co* (unrep., CACV 68/1996, [1996] HKLY 1094).

to be "incurred irrationally or out of all proportion as to what is at stake" may also expect to pay costs on an indemnity basis if they lose.[61]

17.025 The power to award indemnity costs evidently extends to the family courts and can be found in the case *LYE v CWW*.[62] In this case, the respondent husband was ordered to pay costs of the petitioner wife on an indemnity basis on several grounds. First, he had refused to accept the wife's reasonable proposals to settle and continued to pay money to his solicitors to defend the divorce using funds that could have been part of the matrimonial assets for distribution. Further, though the husband had previously admitted to committing adultery as well as having been "caught on the spot", he specifically denied his adultery and asked the wife to provide proof. The court found that the husband fought the case unreasonably on what was later revealed to be a "bogus" answer.[63]

(v) *Costs as between a solicitor and own clients basis*

17.026 When a client is of the opinion that his solicitor has overcharged for his services, he may apply to the Court of First Instance for the solicitor's bill to be taxed.[64] The District Court has no jurisdiction to tax a bill on a solicitor and own client basis[65] and this basis of taxation does not apply to a bill to be paid out of the Legal Aid fund or for non-contentious business.[66] All costs will be allowed save for those which are of an unreasonable amount or have been unreasonably incurred. Costs that were incurred on the express or implied instructions of the client must be allowed notwithstanding that such costs were unreasonable. Any costs that were of an unusual nature, which would not be allowed if the bill was taxed on a party and party basis, will be presumed unreasonably incurred unless it can be shown that the solicitor expressly informed his client before it was incurred.[67]

(vi) *Costs on the trustee basis*

17.027 This basis of taxation applies only to taxation of costs where a person who is or has been a party to any proceedings in the capacity of a trustee or personal representative, and who is entitled to be paid out of any fund, which he holds in that capacity.[68] On the taxation of costs of a trustee or personal representative, no costs will be disallowed unless those costs or any part of the amount of costs should not in accordance with the duty of the trustee or personal representative have been incurred by him and consequently should for such reason be borne by him personally.[69]

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[61] *Macmillian v Bishopsgate Investment Trust Ltd (No.3)* [1995] 1 WLR 978. See also *Zheng Lie Lie v Prosperfield Ventures Ltd* (unrep., HCA 4572/2002, [2003] HKEC 558), *Disney v Plummer* [1991] F.S.R. 165, and *Munkenbeck & Marshall v McAlpine* (1995) 44 Con LR 30.
[62] (Unrep., FCMC 14787/2002, [2005] HKEC 1169).
[63] *Ibid.*, at para 26.
[64] RHC O.62, r.29.
[65] Section 67 of the LPO (Cap 159).
[66] Paragraph 62/App/10 of the *Hong Kong Civil Procedure 2014*.
[67] RHC O.62, r.29(3). See also paras 62/App/10 and 62/App/14 of the *Hong Kong Civil Procedure 2014*.
[68] RHC O.62, r.31(1).
[69] RHC O.62, r.31(2).

(f) Litigants in Person

Solicitors and counsel will often come across parties which are litigants in person, especially in family proceedings. Costs of litigants in person are governed by RHC O 62, r.28A, which applies to both taxation and summary assessment of costs.[70] On the taxation of costs of a litigant in person, costs that relate to work and disbursements which would have been done or made by a solicitor on the litigant's behalf, is recoverable.[71] Litigants may also be entitled to reasonable travelling costs incurred for the preparation for and to be present at the hearing.[72] If a litigant in person is allowed costs in respect of attending court to conduct his own case, he shall not be allowed a witness allowance as well.[73] 17.028

If the litigant had been represented by a solicitor in relation to that item, the amount allowed in respect of any item shall not exceed two-thirds of the sum that should be allowed in the opinion of the taxing master. However this rule does not apply to disbursements.[74] Furthermore, if the taxing master is of the opinion that the litigant in person had not suffered any pecuniary loss, he shall not be entitled to recover more than $200 an hour for the time he has reasonably spent on the item to which the cost relates.[75] It has long been established that the burden of proof lies with the litigant in person who must prove that pecuniary loss has been suffered.[76] For the purposes of RHC O.62, r.28A, a litigant in person does not include a litigant who is a practicing solicitor but does include a company or other corporation acting without a legal representative.[77] 17.029

(g) Legal Aid[78] Cases

In respect of legal aid, the entitlement of any legally aided person to indemnity costs will extend to the Director of Legal Aid. In any proceedings to which a legally aided person is a party, if such aided person has the right to be indemnified against expenses incurred in connection with the proceedings, the right of the aided person shall operate to also benefit the Director of Legal Aid as if the expenses incurred by the Director on his behalf was actually incurred by the aided person.[79] This is without prejudice to the effect of indemnity on the contributions made by the aided person to the Director. If the right to indemnity is subject to an agreement with an express condition to any rights in respect of bringing or conducting proceedings and those liable have been 17.030

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[70] RHC O.62, r.28A(7).
[71] RHC O.62, r.28A(1).
[72] *Tse Ming Cheung, Alexander v Wilkinson & Grist* [1991] 1 HKLR 30. The plaintiff was a medical practitioner resident in New York, USA. The Court of Appeal affirmed the taxing master's decision that the costs of his airfare and hotel expenses in travelling to Hong Kong to be present at hearings were necessary and proper and the plaintiff was entitled to these costs.
[73] RHC O.62, r.28A(4).
[74] RHC O.62, r.28A(2).
[75] RHC O.62, r.28A(3).
[76] *Mainwaring v Goldtech Investments Ltd* [1997] 1 All ER 467; *Hart v Aga Khan Foundation (UK)* [1984] 1 All ER 239.
[77] RHC O.62, r.28A(6).
[78] Costs and procedures of legal aid are discussed in detail in Ch 18.
[79] Section 21(3) LAO.

given an opportunity to exercise the right conferred but have not done so, the rights to indemnity shall be treated as if it is not subject to such conditions.[80] These provisions do not strip any person or body of persons of the protection of the law, or confer a larger right to recover money for the benefit of the Director in respect of any expenses the aided person would receive had the expenses been incurred by him.[81] Further, where the Director can take benefit from an aided person's right to be indemnified against expenses, any sum recovered for the benefit of the Director shall be deducted from the total of all sums payable by the Director and the balance remaining shall be the maximum recoverable from such person.[82]

3. Summary Assessment of Costs

17.031 One of the significant changes to the costs regime following the Civil Justice Reform is the introduction of summary assessment and provisional summary assessment of costs in interlocutory proceedings.[83] Whenever the court makes an order on costs, it should consider whether to make a summary assessment of costs; that is to make an order for payment of a sum of money in respect of the costs instead of ordering fixed costs to be assessed immediately or a detailed assessment of costs. In all proceedings apart from interlocutory proceedings, the general rule is that where costs are to be paid to a party, he is entitled to his taxed costs.[84] However, the court is entitled to direct that such party be entitled to a sum of money summarily assessed in lieu of taxed costs.[85] The summary assessment procedure has essentially replaced the concept of gross sum assessments.

(a) Summary Assessment of Costs in Interlocutory Proceedings

17.032 As a result of this new procedure, the provision for interim payment of costs has been repealed. Where the court has determined an interlocutory application at any stage of the proceedings and orders a party to pay costs in respect of the interlocutory application to any other party, it may if it considers appropriate to do so, (i) make a summary assessment of the costs by ordering payment of a sum of money to that other party in lieu of taxed costs; (ii) make a provisional summary assessment of the costs (which is a summary assessment of the costs by ordering payment of a sum of money to that other party in lieu of taxed costs, but subject to the right of either party to have the costs taxed); or (iii) make an order for costs to be taxed.[86]

17.033 The power to order a summary assessment or a provisional summary assessment of costs however is subject to a number of situations. For example, when the sum claimed for costs is disputed by the paying party on substantial grounds and that the dispute

80 Section 21(4) LAO.
81 Section 21(5) LAO.
82 Section 21(6) LAO.
83 RHC O.62, r.9A.
84 RHC O.62, r.9(1).
85 RHC O.62, r.9(4)(b).
86 RHC O.62, r.9A(1).

cannot be dealt with summarily or the receiving party is an aided person and the legal representative acting for the receiving party has not waived the right to any further sum of money in respect of the costs of the interlocutory application.[87] In interlocutory applications, it is clearly stated in Practice Direction 14.3 that the court should give preference to a summary or provisional summary assessment of costs unless there is a good reason not to do so (which includes the aforesaid grounds).[88] This is especially in family cases as the aggravation of detailed assessment may defy the aim of reducing disagreement and achieving a satisfactory resolution of disputes.[89]

It may not always be the case that the amount of the taxed costs equals the amount paid pursuant to the provisional summary assessment.[90] If the amount of taxed costs exceeds the amount paid pursuant to the provisional summary assessment, the taxing master may either direct the party against whom the order was made to pay the shortfall, or set off the shortfall against any other costs to which the party against whom the order was made is entitled and direct payment of the balance.[91] On the other hand, if the amount paid pursuant to the provisional summary assessment exceeds the amount of taxed costs, the taxing master may direct the party in whose favour the order was made to pay the difference or set off the difference against other costs which the party in whose favour the order has been made is entitled, and by a direct payment.[92] 17.034

(b) Procedure

In order to seek summary assessment of costs from court, a party should first prepare a written statement of the costs he intends to claim in the approved format.[93] It is a requirement that the statement is signed by a party acting in person or if he is represented, by his solicitor. A certification by the solicitor that the amount claimed in the statement of costs does not exceed the client's liability for costs to the solicitor's firm must also be included in the statement.[94] If the court makes a direction or order summary assessment, a party must in any event comply with that direction or order within 14 days of the direction or order, or such other date as specified by the court.[95] Subject to other Practice Directions, the statement of costs should be lodged and served on any party against whom the summary assessment is sought, together with the skeleton argument for the substantive application.[96] 17.035

If the party seeking summary assessment of costs is a legally aided person, the legal representative for the aided person must state in the statement of costs that he waives 17.036

87 RHC and RDC O.62, r.9C(1)(a)–(b). Further, no direction or order should be made if the receiving party is a person under disability, see RHC and RDC O.62, r.9C(1)(c).
88 Practice Direction 14.3, para 6.
89 *Q v Q (Costs: Summary Assessment)* [2002] 2 FLR 668, (Wilson J).
90 If it is equal, then the taxing master shall direct that no further amount is payable in respect of taxed costs, see RHC O.9A(3)(a).
91 RHC O.62, r.9A(3)(b).
92 RHC O.62, r.9A(3)(c).
93 Appendix A in PD 14.3, para 7.
94 Practice Direction 14.3, para 10.
95 RHC O.62, r.9B(1). The requirement that payment be made within 14 days does not apply to legally aided persons, see RHC O.62, r.9B(2).
96 Practice Direction 14.3, para 8.

the right to any further sum of money (including common fund costs) in respect of the application, cause or matter.[97]

17.037 The judge or master who dealt with the substantive application is usually the same person who conducts a summary assessment hearing. If it is deemed appropriate, an order *nisi* on the quantum of costs will be made. However, if the Judge or Master is unable to make a summary assessment on the same day the costs order is made, he may give directions as to its disposal including a direction for a further hearing or disposal on paper.[98]

17.038 The court is also obliged to ensure that the final amount claimed is not disproportionate and/or unreasonable having regard to the nature and circumstances of the application in addition to the underlying objectives in O.1A. In the absence of opposition to a figure in a statement of costs, the court can take it as an indication that the sum is reasonable. In these circumstances, the court nevertheless still has the responsibility to challenge or dispute the sum of costs sought and can intervene if it is satisfied that the costs are so disproportionate that it is right to do so.[99] In performing a summary assessment of costs, the courts will take a broad-brush approach and it will not be the equivalent of a mini-taxation.[100] Therefore, a statement of costs should be succinct and prolixity avoided. The costs of collating information and preparing a statement of costs are usually not granted.[101]

4. Costs in Family Proceedings

17.039 Family proceedings often involve multi-faceted issues that require intensive fact-finding exercises. Moreover, the conclusions and orders arising from family proceedings, which in itself can be an emotionally turbulent experience, have far-reaching and profound effects on the lives of the parties and children involved. The reasons for which a party makes an application may be manifold. Consequently, the court will take the facts of each case independently and look to see whether there are exceptional circumstances to justify an exercise of its discretion.

17.040 In considering costs in matrimonial cases, the family courts are bound by the rules in RHC O.62 and 62A and the Rules of the District Court (RDC) respectively as well as PD 14.3, which relates to costs in civil proceedings.[102] Rule 3 of the Matrimonial Causes Rules (MCR)[103] stipulates that the RHC will apply to matrimonial proceedings and to the practice and procedure in matrimonial proceedings (with the necessary modifications) in the Court of First Instance and the District Court. Further, where

97 Practice Direction 14.3, para 9.
98 Practice Direction 14.3, para 11.
99 Practice Direction 14.3, para 14.
100 Practice Direction 14.3, para 13. See also: *Ip Tsz lam v Pearl Wisdom Ltd* (unrep., HCA 2482/2007, [2009] HKEC 759) and *Siemens Aktiengesellschaft v HK Siements Electric Appliance Ltd* (unrep., HCA 399/2009, [2009] HKEC 1170).
101 Practice Direction 14.3, para 13.
102 Practice Direction 15.12, "Matrimonial Proceedings and Family Proceedings", para 25.
103 (Cap 179A).

costs of and incidental to any matrimonial proceedings are directed to be taxed, the procedures under RHC O.62 will be adopted for costs of proceedings in the Court of First Instance, and RDC O.62 will be adopted for costs of proceedings in the District Court.[104]

The general principle of costs in all civil proceedings that costs should follow the event was laid down in the landmark case of *Re Elgindata Ltd (No.2)*.[105] This has long been accepted as the authority and starting point for costs in Hong Kong.[106] This starting point is subject to and may be displaced in the following circumstances: (i) where the court is of the opinion that such other order is appropriate and should be made; (ii) the principle does not cease to apply simply because the successful party has raised issues or made allegations on which it subsequently failed, but where that has significantly caused the length and costs of the proceedings to increase; and (iii) where the successful party has raised allegations unreasonably and improperly. Not only can the court deprive such party of his costs in whole or in part, but it also has the power to order such party to pay, in whole or in part, the costs of the unsuccessful party.[107] The tenor of these principles is reflected in RHC O.62 and these principles equally apply in Hong Kong.[108] 17.041

Further, where a litigant succeeds on appeal but only on a new point, the court can deprive him of the costs below or even order him to pay those costs and the court can also deprive him of the costs of appeal.[109] 17.042

(a) Ancillary Relief

Owing to the nature of applications in family proceedings, the discretion of the court is much wider and as the English Court of Appeal stated in *Gojkovic v Gojkovic (No.2)*, the starting point may be "displaced more easily" than in other civil proceedings.[110] Factors in family cases such as the provision of legal aid to one or both of the parties or the inadequacy of family assets to meet the needs of the family may also affect the costs orders, which would otherwise have been expected to be made. In such circumstances, the issue of who is to bear costs may be purely academic. The Court of Appeal in *Gojkovic v Gojkovic* also added that costs orders could and will have an impact on the availability of assets for the needs of the family and which may significantly "diminish the cake which has to be cut".[111] It is precisely these "special dynamics"[112] that exist in family proceedings that justify the wide discretion bestowed on family courts. 17.043

104 Rule 91A of Matrimonial Cases Rules.
105 [1992] 1 WLR 1207. See also RHC O.62, r.3, s 52A of the High Court Ordinance and *Singer v Sharegin* [1984] Fam Law 58.
106 *Moulin Global Eyecare Holdings Ltd v Olivia Lee Sin Mei* (unrep., HCA 167/2008, [2009] HKEC 907).
107 *Re Elgindata* [1992] 1 WLR 1214.
108 *W v W* [2005] HKFLR 78.
109 *Chard v Jervis* (1881–82) LR 9 QBD 178; *Farquharson v Morgan* [1894] 1 QB 552; *Yip Lai Fong v Sin Tung Hing* [2004] 3 HKLRD 230; *L v C* (unrep., CACV 169/2006, [2008] HKEC 489).
110 [1992] Fam 40.
111 *Ibid.*, 237.
112 *L v C* (unrep., CACV 169/2006, [2008] HKEC 489).

(i) *Unreasonable conduct*

17.044 In considering costs, there are other reasons that may affect the court's judgment such as the culpability of parties in the conduct of litigation.[113] Misconduct in litigation may lead to an unfavourable costs order to the party at fault. Culpable behaviour in litigation such as material non-disclosure of documents, delay or excessive zeal in seeking disclosure[114] will be a relevant factor to be considered in the court's exercise of their discretion as to who should be the paying party. Courts should be "astute to discern meritless tactical posturing such as filibustering, exorbitant demands for disclosure, or the taking of obviously bad points".[115]

17.045 The courts will not hesitate to deprive a successful party of costs. In *L v C*,[116] the case involved a lengthy and complex hearing. After their separation, the parties had entered into two agreements, which divided part of their assets. The judge in ancillary relief proceedings had suggested the assets under the agreement be left as they were and that the court only handle the remaining assets of the parties, which is known as a partial *Edgar* approach.[117] The husband only included the suggested approach in his final submissions and as a result of his late change of position, he was deprived of 50 per cent of his costs although he was the successful party (given the judgment on appeal). The Court of Appeal observed that substantial costs had been incurred and time wasted as a result of the husband attempting to open up the agreements. The costs order *nisi* on appeal was granted save for half of the costs of the proceedings.

17.046 When determining costs, the courts will also take the overall impression of the case and will not award costs by reference to the success of each issue raised by a party and how much time was spent in court dealing with such issue. In *F v F (No.2)*,[118] the wife was the successful party in ancillary relief proceedings and she claimed for costs of and incidental thereto. The husband opposed her application for costs on the ground that she had "unnecessarily prolonged the trial" in her pursuance of issues that were not successful. Through his analysis of the court transcripts, the husband concluded that only 15 per cent of the trial time was spent on issues brought by the wife and which were successful. In rejecting the husband's argument and awarding costs in general to the wife, Hartmann J (as he was then), stated that the wife did not conduct the trial in an unreasonable way and in advancing her case, she had to rely on a broad range of assertions.[119] He explained that despite "an issue advanced by one part has not found favour with the court does not mean that the issue was not necessary, if only peripherally, to assist the court in considering the overall strength of the party's case". It is also the case in ancillary relief matters particularly where a broad range of matters must be considered, so that a full picture is put before the court for an appropriate assessment. When an issue raised does not have relevance or bearing on the real questions of the matter, then it would be proper to deprive a party of his costs in respect of that issue. Though the court did not find in favour of the wife's submissions, Hartmann J held that the issues were relevant and "respectably capable of argument against the complex, multi-faceted history of how the parties came together, lived their married life and separated", and which assisted the court in understanding the matter and exercising its discretion.[120]

[113] See also RHC O.62, r.7.
[114] See *Gojkovic v Gojkovic*[1992] Fam 40.
[115] *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108, [98] (Sir Mostyn QC).
[116] (Unrep., CACV 169/2006, [2008] HKEC 489).
[117] See also *Edgar v Edgar* [1980] 1 WLR 1410.
[118] [2003] 3 HKLRD 976.
[119] *Ibid.*

(ii) *Calderbank offers*

17.047 Another factor that courts may consider is the opportunity of settlement and the use of *Calderbank*[121] offers during negotiation. The concept of a *Calderbank* offer was initially formulated in family proceedings. It has now extended to all civil proceedings and has "assumed central significance in a court's consideration as to whether to make a costs order in favour of one party".[122] Under RHC O.22, r.14, a party at any time in the proceedings may make a written offer marked "without prejudice save as to costs", to any other party in the proceedings which relates to any issues therein.[123] If such offer is not accepted, the court will not be privy to the contents of a *Calderbank* offer until the issue of costs is required to be determined.[124] In the circumstances, if an applicant spouse fails to obtain judgment which exceeds the terms of the offer, he or she will be *prima facie* liable for costs after the date of the communication of that offer.[125] The public policy underlying the *Calderbank* offer as set out by Oliver LJ in *Cutts v Head*[126] is that parties should be encouraged to settle and this may be promoted by instilling "consciousness of a risk as to costs if reasonable offers are refused" into the mindset of parties right from the beginning.

17.048 Whilst the use of *Calderbank* offers has been embraced in civil proceedings, the courts are acknowledging the unsuitability of *Calderbank* offers in family proceedings. In *GW v RW (Financial Provision: Departure from Equality)*,[127] Sir Nicholas Mostyn QC then sitting as a Deputy High Court Judge, stated that *Calderbank* offers "force the parties to engage in a mandatory form of spread betting"[128] and established that in "big money" cases where the assets of the parties exceeded the aggregate needs of the parties, the starting point should be that there be no order as to costs.[129] He explained that the use of *Calderbank* offers in effect required each party to predict the outcome of the case and to make an offer to protect their costs liability in the proceedings accordingly. With a spread bet, the amount the gambler wins or loses is the difference between the result and the position-maker's spread, but in ancillary relief proceedings it is different as it does not "reflect the closeness of the litigant's call" and instead the party who makes the better guess "by even a tiny amount entitles [the party] to call for payment of the entirety of his costs from 28 days after the date of the offer".[130] Similarly, if a party's

[120] *Ibid.*, 984. See also *Re Elgindata (No 2)* [1992] 1 WLR 1207.
[121] *Calderbank v Calderbank* [1976] Fam 93.
[122] *Rayden and Jackson on Divorce and Family Matters, Eighteenth Edition*, (LexisNexis Butterworths, Vol 1(2), 2005), para 52.18.
[123] RHC O.22, r.14(1).
[124] RHC O.22, r.14(2) and RHC O.62, r.5(d).
[125] *W v W* (unrep., FCMC 2348/2002, [2005] HKEC 77).
[126] [1984] Ch 290.
[127] [2003] 2 FLR 108.
[128] *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108
[129] *Ibid.*, para 92.
[130] *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108, [88].

guess is a fraction less than the result, it gives rise to the opposing party to call for all their costs to be paid by the maker of the offer. Consequently, the costs situation in ancillary relief proceedings becomes a gambling game where "vast sums can swing on even the smallest failure to guess accurately" making it "utterly inapt for the resolution of what may be a substantial financial liability at the sad end of a marriage".[131]

17.049 In taking this position, Sir Mostyn QC specified that this was confined to "big money" cases where the pool of assets between the parties was ascertainable and attributable to both domestic and financial contributions from both respective parties. It will *not* apply to cases of a short marriage, where all or the majority of assets are "inherited" or a party's claim for ancillary relief is on a needs basis, or where the aggregate needs of the parties exceed the available assets of the parties.[132] It is also now accepted that courts may consider *Calderbank* offers but are not bound by them.

17.050 Importantly, this new approach should not be taken as an indicator that the parties are discharged from their positive duty to negotiate. The duty to negotiate was set down in *A v A (Costs Order: Appeal)*, where Singer J stated that a spouse who did not respond constructively to a *Calderbank* offer, whether a good, bad or indifferent offer, "stymies whatever chance there is of settlement and such a spouse cannot with impunity expect immunity from responsibility for that".[133] Whilst no one can predict the effect that a *Calderbank* offer has on the prospects of settlement in a case, "inactivity, lack of objectivity, indecision or for whatever other reason makes potentially avoidable litigation inevitable".[134] In this case, the wife sent a *Calderbank* letter offering £75,000 plus costs in full and final settlement of the husband's claims in April 1993. There was no response until three days before the hearing was set down in 1995 when the husband offered to settle at £80,000 plus costs as it had emerged that there was only a difference of £5,000 between the parties and some chattels. On appeal, it was held that the husband should have accepted the offer in 1993 and thus the district judge's order was varied so that the husband had to pay the wife's costs of the ancillary relief application from the date of her initial *Calderbank* letter.

17.051 Being one of the primary themes of the Civil Justice Reform, alternative dispute resolution is one of the factors that courts must consider in actively managing cases.[135] It is important for courts to be able to identify that parties have attempted to settle the matter through negotiations and that the costs incurred at trial were not avoidable. The courts in family proceedings especially are keen to encourage parties to pursue settlement and fulfil its duty to mediate or negotiate through solicitors (which no doubt is one of the fundamental reasons for the implementation of the Financial Dispute Resolution Scheme), and a failure to do so may be characterised as unreasonable conduct[136] and attract penalties in costs.[137]

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131 *Ibid.*, para 91.
132 *Ibid.*, para 96.
133 [1996] 1 FLR 14. The duty to negotiate was also recognised in Hong Kong in *W v K (Costs)* [2008] HKFLR 378, at para 18. See also *FHY v GJS* (unrep., FCJA 973/2004, [2008] HKEC 1028) for the application in children cases.
134 *A v A (Costs Order: Appeal)* [1996] 1 FLR 14, 198. See also *P v P (Divorce: Financial Provision: Clean Break)* [2002] 2 FLR 1075.
135 RHC O.1A, r.4(2)(e).
136 RHC O.62, r.7.
137 *CSP v LCYK* [2009] HKFLR 326.

(iii) *"No order as to costs"*

Though the English Court of Appeal did not agree with the conclusion of Sir Mostyn QC that the English Family Proceedings Rules 1991 (which codified the *Calderbank* law for application in family proceedings) and Civil Procedure Rules (which governed family financial disputes) were incomprehensible, it accepted his general direction in *GW v RW*.[138] In *Norris v Norris*,[139] the court recognised that an urgent review of the procedural rules were required. As a result, the Family Proceedings (Amendment) Rules 2006 in England were produced, which set in stone that no order as to costs would be the general rule in ancillary relief proceedings. The courts will now look at what is fair and reasonable in each case and this includes the conduct and behaviour of parties before, during and after divorce, as well as before and during the course of litigation proceedings.[140] 17.052

Despite not having the same statutory rules in place in Hong Kong, the position in *GW v RW*[141] with regard to *Calderbank* offers has been accepted in the Hong Kong courts. In *W v K (Costs)*,[142] Saunders J agreed entirely with the assessment and analysis that the influence of *Calderbank* offers on the assessment of costs was utterly inapt.[143] He further distinguished between the use of *Calderbank* letters in civil litigation and ancillary relief proceedings. He recognised that there were many factors in ancillary relief proceedings, which "do not easily lend themselves to involvement in a *Calderbank* offer" such as the use of payments into court as a subject of an offer under RHC O.22, r.14(2). Furthermore, the fact is that parties in commercial litigation are customarily at arm's length[144] whereas it is quite the contrary in divorce proceedings. Whilst the court accepted the authority of *L v C*[145] that costs were in the court's discretion, Saunders J commented that the case would not be applicable as the decision in *L v C*[146] was based on the "reasonable requirements" approach. Subsequent to the decision of the Court of Appeal in *DD v LKW*,[147] the "fairness" and yardstick of equality approach has been accepted in Hong Kong courts. Therefore, that decision would not apply in the present case as it was decided on the "needs" approach.[148] Importantly, it was held that though *Calderbank* offers were influential, it did not bind the exercise of discretion of courts and the proper question to ask was whether the party to whom the offer was made ought reasonably to have accepted the proposal made. In answering this question, litigation misconduct or neglect of such offer could be taken into account.[149] 17.053

The Court of Appeal in *Z v X*,[150] affirmed that in ancillary relief applications, the court's approach is that costs should follow the event. However, because of the special 17.054

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138 *(Financial Provision: Departure from Equality)* [2003] 2 FLR 108.
139 [2003] 1 WLR 2960, [28].
140 See also *Butcher v Wolfe* [1999] CPLR 112.
141 *(Financial Provision: Departure from Equality)* [2003] 2 FLR 108.
142 [2008] HKFLR 378.
143 *Ibid.*, [16].
144 *Ibid.*, paras 17–18.
145 [2007] HKFLR 410.
146 *Ibid.*
147 [2008] 2 HKC 134, [2008] HKFLR 119, the judgment of which was adopted by the Court of Final Appeal in *LKW v DD* [2010] 6 HKC 528.
148 *W v K (Costs)* [2008] HKFLR 378.
149 RHC O.62, r.7.
150 [2012] 5 HKLRD 791.

dynamics of family litigation, the court's discretion may be broader than in civil matters generally. The Court acknowledged that the general rule in Hong Kong is now different to the English position where no order will be made requiring one party to pay costs of the another, unless the court considers that the litigation conduct of a party justifies a costs order being made. As the change of approach in the UK was carried out by a prescribed rule, it did not affect the position in Hong Kong and the position in Hong Kong remains unchanged since *L v C* and *TL v SN*".[151]

17.055 The issue of costs ultimately lie in the discretion of the courts. After analysing the case of each party, courts will make an order on costs by way of overall impression. As summarised by Hartmann JA in *HK v BD*[152], costs "are not to be assessed by breaking down the litigation into its many component and interlocking parts in order to draw up some kind of profit and loss account".

(b) Children

17.056 In cases involving children and in particular custody and access cases, the high emotions of the parties often fuel the acrimonious nature of the litigation. The court rightly retains its wide discretion to ensure that the appropriate costs orders are made and that a party is not penalised simply for making an application in an attempt to show the court what is in the best interests of the child. Consequently, the general practice of the courts is not to order costs in such cases.[153]

(i) *The starting point of no costs orders*

17.057 Though it may be uncommon to make costs orders in cases involving children, the court as always retains a discretion to make a costs order in exceptional circumstances where it is justified.[154] The underlying rationale to the costs principles in such cases was explained in *Sutton London Borough Council v Davis (No.2)*.[155] Wilson J in his judgment highlighted the reasoning behind the "proposition" in *Gojkovic v Gojkovic*[156] that it is unusual to order costs in cases involving children.[157]

> "Where the debate surrounds the future of a child, the proceedings are partly inquisitorial and the child is the winner and indeed the only winner.[158] The court does not wish the spectre of an order for costs to discourage those with a proper interest in the child from participating in the debate. Nor does it wish to reduce the chance of their co-operation around the future life of the child by casting one as the successful party entitled to his costs and another as the unsuccessful party obliged to pay them".[159]

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[151] *Ibid.*, [12].
[152] [2011] HKFLR 66.
[153] *K v K (Legal Aid: Costs)* [1995] 1 FLR 259.
[154] *London Borough of Sutton v Davis (Costs) (No.2)* [1994] 2 FLR 569.
[155] [1994] 1 WLR 1317.
[156] [1992] Fam 40.
[157] The use of the word "proposition" to describe the principle was to avoid argument over whether it was a principle or an exception to a principle.
[158] *London Borough of Sutton v Davis (Costs) (No.2)* [1994] 2 FLR 569, 570.
[159] *Ibid.*, see also *B(M) v B(R)* [1968] 1 WLR 1182.

However, this proposition is of course not applicable in the event that a party has conducted the proceedings in a reprehensible manner or has maintained a stance that is "beyond the band of what is reasonable".[160] The appellant in this case, the London Borough of Sutton, appealed against the costs order arising from the decision that the local authority had wrongly refused to register the respondent as a childminder. The local authority submitted that it was wrong in principle for a costs order to be made against them. In dismissing the appeal of the local authority, Wilson J in his judgment confirmed that the principles in *Gojkovic v Gojkovic*[161] applied to cases between local authorities and parents as it applied between parents. Thus, local authorities in making applications for a care order of a child can presume that it will be unusual that a costs order will be made against them, should their application be denied. Nonetheless, the court distinguished between the nature of an application for a care order where the debate surrounded the future of a child and which is partly inquisitorial, and the application for registration to be a childminder where the proceedings are of an adversarial nature. In wrongly concluding that the respondent was unfit to be a childminder and failing to affect her registration, the local authority had infringed the respondent's rights and she was entitled to costs. 17.058

The Court of Appeal in *Re R (Minor) (Legal Aid: Costs)*[162] upheld the decision of Wilson J and put forward reasons as to why the practice of no orders as to costs has developed. It was reiterated that an order of costs may diminish the funds available to meet the needs of the family and that the primary concern of the courts is to ascertain what is in the best interests of the child. Further, there is a possibility that a costs order would somehow "pour salt on the wound" of the losing party and cause greater tension and animosity between the parties, which would most definitely *not* be in the best interests of the child.[163] 17.059

When the court is required to consider whether costs should be awarded in exceptional circumstances, in reality, it is being asked to consider the conduct of the parties and whether there was any unreasonable or reprehensible behaviour. It is important to note that "unreasonable behaviour" relates to the conduct of the parties during litigation and not a party's behaviour towards the welfare of the child. The court is willing to accept that parents should be able to make applications that are *bona fide* in the best interests of the child, notwithstanding that the parties' submissions or arguments are somewhat unreasonable. However, if the application *itself* is fundamentally unreasonable or the party maintains an unreasonable or groundless stance, and by doing so, it may or has already adversely affected the welfare of a child, the court will not hesitate in making a costs order against such party. In *M v H (Costs: Residence Proceedings)*,[164] the mother was awarded 75 per cent of her costs against the father in relation to an application for residence. The judge found that the application should not have been made and the father most certainly should not have persisted it. 17.060

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[160] See also *Havering London Borough Council v S* [1986] 1 FLR 489.
[161] [1992] Fam 40.
[162] [1997] 2 FLR 95.
[163] *Ibid.*, 97.
[164] [2000] 1 FLR 394.