
HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Instructions to candidates for the practical assessment

Introduction

This document and its attachments comprise your instructions for the two parts of the practical assessment. The following are attached:

1. Instructions in relation to the Interim Application (including copy case law)
2. Instructions in relation to the Mini-Trial
3. Trial bundle for Interim Application and Mini-Trial

In the accompanying email you have been advised which party you are representing.

Dress

You will be expected to dress appropriately, that is, as a solicitor would dress when appearing in open court in the High Court: you should therefore wear a gown and bands.

Getting to the heart of the matter

It is important to note that, with each candidate given only a limited time span to complete each allocated exercise, it is important to adhere strictly to the following guidelines:

- Addresses to the court or to the jury must be structured and succinct, getting to the heart of the matter without delay.
- It is to be assumed that the court or jury have a very good understanding of the background facts and accordingly, while arguments must of course be put into factual context, there is no need for long, time-consuming recitations of the background facts.
- Remember, in addressing the jury it is not the role of a solicitor-advocate to instruct them on the law, that is the function of the judge.

Analysis and structure

Candidates are expected to demonstrate a structured and analytical approach in all of the exercises required of them. The Examining Panels are required to pay special attention to whether or not a structured approach has been clearly evidenced, that is, a presentation which demonstrates that it is based on careful analysis and a choice of approach best suited in the limited time available to advancing the case that is advocated.

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Interim Application

As will appear from the evidential material, Mr. Andrew Fong ("**Mr. Fong**"), has instituted an action by way of writ in the District Court, Hong Kong. Mr. Fong's claim is for compensation for the costs of repair of his Ferrari ("**Ferrari**"), which was involved in a minor collision with a lorry ("**Lorry**") driven by the 1st Defendant and registered in the name of the 2nd Defendant at the material time. The 1st and 2nd Defendants in the action are respectively Mr. John Smith ("**Mr. Smith**") and his employer Industrial Goods Limited ("**IGL**"). A brief summary of the parties' respective substantive cases is contained in the Instructions for the Mini-Trial.

Candidates will note in particular that the Defences of Mr. Smith and IGL are identical. They contend that Mr. Smith was driving the Lorry at a reasonable speed at the time and he was not sleep deprived as alleged by Mr. Fong. To the contrary, the accident was caused by Mr. Fong. Mr. Fong was driving whilst intoxicated and also distracted by a heated argument with his wife Martha Fong which resulted in the car accident.

Incidentally, Mr. Fong and his ex-wife Christina Fong are currently involved in on-going divorce proceedings in the Family Court of Hong Kong. For reasons unknown, Mr. Smith was very recently informed that Christina Fong had made serious accusations that Mr. Fong was an alcoholic in the matrimonial proceedings. Mr. Smith was also given a list of Family Court documents which point to the conclusion that Mr. Fong is a frequent and heavy drinker.

Amongst those Family Court documents include an interview described in a report by Social Welfare Officer Madam Lee Yuet Ming with Christina Fong, who had explained the habit of heavy drinking of Mr. Fong. There was also a report by the Social Welfare Officer Mr. Lai Ya Wen who concluded that the frequent heated arguments between Mr. Fong and Christina Fong at home would cause negative impact on their only child and it was

recommended to the Family Court that the sole custody, care and control of the only child should be granted to Christina Fong with reasonable access to Mr. Fong.

Since Mr. Smith is not a party to the matrimonial proceedings which are private in nature and are heard *in camera*, Mr. Smith has no access to and does not have a copy of the aforesaid Family Court documents.

Two weeks before the first day of trial (which was set down for 3 days), Mr. Smith instructed his solicitors to issue an application in the District Court action for leave to make use of the Family Court documents under rule 121 of the Matrimonial Causes Rules (Cap. 179A) and/or the inherent jurisdiction of the Court. The substantive hearing of Mr. Smith's application has been set down to be heard by a different judge to the trial judge 1 week before trial.

Christina Fong has been served with the summons as an interested party. To save costs, for the purposes of Mr. Smith's application only, she has agreed to be represented by the legal representatives of Mr. Fong.

Mr. Fong and Christina Fong do not dispute that the documents sought by Mr. Smith in the summons exist. They also do not dispute the description of the reports of Mr. Lai Ya Wen and Madam Lee Yuet Ming stated above.

For the purpose of this contested interlocutory application, you may refer to the following evidential material which is to be used in this application only and should not be used in the mini-trial:

1. *Inter partes* summons for disclosure of the Family Court materials
2. Supporting affidavit of Mr. Smith
3. Opposing affidavit of Christina Fong
4. The Family Court documents sought to be disclosed by Mr. Smith

The evidential material to be used in the mini-trial consists of the following witness statements:

1. The witness statement of Andrew Fong for the Plaintiff;

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2. The witness statement of Martha Fong for the Plaintiff;
 3. The witness statement of John Smith for the 1st Defendant;
 4. The witness statement of Jane Chan for the 2nd Defendant.

In addition, certain evidence and matters have been agreed or are not contested in the interim application. The matters as agreed between the parties and other procedural background are as follows:

1. Assume that the circumstances of how Mr. Smith obtained information about the matrimonial proceedings are irrelevant to the application.
2. The Family Court documents which Mr. Smith seeks to use are those set out hereinbelow in the summons and supporting affidavit. Assume that the 'Form E' was duly filled out in accordance with the standard form attached to PD 15.11 (made available with the materials annexed to these instructions), with the contents as described in paragraph 11 of Christina Fong's Supplemental Witness Statement (below).
3. To assist the Court in resolving the interim application, Mr. Fong and Christina Fong have agreed to disclose the Family Court documents to Mr. Smith, upon Mr. Smith undertaking not to use those documents for purposes other than the interim application, without leave of the Court. Mr. Smith agreed to give this undertaking. Candidates can assume that Mr. Smith and his solicitors otherwise had no access to and have never inspected or taken copy of any of the Family Court documents.
4. Mr. Smith only intends to seek leave from the District Court to disclose and adduce the Family Court documents as evidence. No leave has been sought from the Family Court seized of the matrimonial proceedings between Mr. Fong and Christina Fong.

For the purpose of this application, you may refer to the following, all of which will be available to the Judge and your opponent at the hearing:

- i. Evidential material set out below for the purpose of this striking out application and the evidential material for the mini-trial.
- ii. The following cases, copies of which are attached:

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- a. *Wong Kwok Hin v. Wong Lai Fan & Anor (No 1)* [2001] 3 HKC 656, per Cheung J. (as Cheung JA then was);
 - b. *Re Baldwin Construction Co. Ltd. & Others* [2003] 2 HKLRD 237, per Kwan J. (as Kwan JA then was);
 - c. *Horst Joachim Franz Geicke v. 1-Onasia Ltd & Others* HCA 2379/2009 (17 October 2011), per DHCJ Lok (as Lok J then was);
 - d. *DJ v. LRM FCMC* 8507/2013 (7 July 2015), per Deputy District Judge KK Pang
- iii. The 'Form E' annexed to PD 15.11.
 - iv. Rules 2 and 121 of the Matrimonial Causes Rules, Cap. 179A.

Evidential Material

A. Summons for leave to disclose and to make use of the family court documents

DCCJ 1234/2016

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

CIVIL ACTION

ACTION NO. 1234 OF 2016

BETWEEN

ANDREW FONG

Plaintiff

and

JOHN SMITH

1st Defendant

INDUSTRIAL GOODS LIMITED

2nd Defendant

and

CHRISTINA FONG

Interested Party

INTER-PARTES SUMMONS

Rule 121 of) LET ALL PARTIES concerned attend before HHJ
the MCR)
(Cap.) in Chambers (not open to the public) sitting at the
179A);) District Court of Hong Kong, Wanchai Tower, 12 Harbour Road,
Inherent) Wanchai, Hong Kong on day, the day of 2017, at
Jurisdiction) o'clock in the fore-noon on the hearing of an application on the part
of the 1st Defendant for an Order that:

1. Leave be granted to the 1st Defendant to inspect, take copies of, and disclose and adduce as evidence in the present action the following documents filed and lodged in the Family Court registry, namely:

(1) the Social Welfare Report prepared by Mr. Lai Ya Wen, Social Work Officer (filed in FCMP 186/2015) dated 28.04.2015;

(2) the Social Welfare Report prepared by Madam Lee Yuet Ming, Social Work Officer (filed in FCMC 197/2015) dated 20.10.2015 and

(3) Financial Statement (Form E) of Andrew Fong (filed in FCMC 197/2015 on 6 July 2015) dated 05.07.2015 respectively

(**"Family Court Documents"**) and

paragraphs 7-11 of the Supplemental Witness Statement of Christina Fong filed on 28th June 2017 which contain extracts of and/or references to the Family Court Documents and have adduced the Family Court Documents as evidence

2. Costs of the application be to the 1st Defendant.

Dated the day of 2017

Registrar

Supporting Affidavit of John Smith in support of the application

AFFIDAVIT OF JOHN SMITH

I, JOHN SMITH, of [Hong Kong address], do make oath and say as follows:

1. *I am the 1st Defendant in the present action. I make this Affidavit in support of the 1st Defendant's Summons issued on _____ 2017 which seeks leave from this Court to inspect, take copies of, disclose and adduce as evidence in the present action the following documents filed and lodged with the family court registry, namely:*

(1) the Social Welfare Report prepared by Mr. Lai Ya Wen, Social Work Officer (filed in FCMP 186/2015) dated 28.04.2015;

(2) the Social Welfare Report prepared by Madam Lee Yuet Ming, Social Work Officer (filed in FCMC 197/2015) dated 20.10.2015 and

(3) Financial Statement (Form E) of Andrew Fong (filed in FCMC 197/2015 on 6 July 2015) dated 05.07.2015 respectively

*(**"Family Court Documents"**) and*

paragraphs 7-11 of the Supplemental Witness Statement of Christina Fong filed on 28th June 2017 which contain extracts of and/or references to the Family Court Documents and have adduced the Family Court Documents as evidence

2. *I am advised that the Family Court Documents and the witness statement are highly relevant to the issue in the present High Court Action.*

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3. *The 1st Defendant's case is that the car accident was caused by the fault of the Plaintiff himself who was intoxicated at the time and was also distracted whilst driving since he was engaged in some heated arguments with his wife.*
 4. *One week before this application was made, I found out about the allegations made by the Plaintiff's ex-wife against him in their divorce proceedings. The Family Court Documents (such as the Social Welfare Reports and the Form-E) will show that the Plaintiff is a heavy drinker and spends extravagantly on alcohol. They will further show that given his drinking habits, the Plaintiff oftentimes engages in heated arguments with his ex-wife on trivial matters. It is likely that he would do the same with his current wife. Accordingly, these Family Court Documents are compelling evidence in support of the Defendants' case.*
 5. *In light of the reasons above, I respectfully request the Honourable Court to grant leave for the 1st Defendant to adduce the Family Court documents as evidence in exercise of the inherent jurisdiction of the Court and/or pursuant to rule 121 of the Matrimonial Causes Rules (Cap. 179A).*

SWORN at the office of Messrs. Cathay)
Pacific & Partners of Suites 2808-2810, St.)
George's Building, 2 Ice House Street,)
Central, Hong Kong this 6th day of February)
2017.)

Before me,

B. Extracts From the Opposing Affidavit of Christina Fong

...

6. *The legal reasons for opposing the 1st Defendant's application shall be explained by my legal representatives at the forthcoming hearing.*
7. *My son and I will suffer real prejudice if the Family Court Documents and my Supplemental Witness Statement are disclosed in public. My ex-husband and I are well known amongst our large social circle and regularly attended charity events and balls together. As far as our friends and acquaintances are aware, our divorce was amicable. They know nothing about the real reasons for our divorce, and for the sake of the privacy of me and my son, I want to keep it that way.*

...

C. The Supplemental Witness Statement of Christina Fong

Extracts from the Supplemental Witness Statement of Christina Fong

Supplemental Witness Statement of Christina Fong

Paras. 7-11

7. *For reasons explained below, I honestly believe that the sole custody, care and control of our only child should not be granted to the respondent Mr. Andrew Fong ("Respondent").*
8. *By way of background, the Respondent and I have been involved in on-going divorce proceedings in the Family Court of Hong Kong. In particular, a decree order nisi was made absolute by the Family Court in relation to the petition for divorce on the ground of "2-year separation".*

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9. *Following the decree order made absolute, the Respondent and I are involved in contested family court proceedings in relation to the custody of our son. According to the Social Welfare Report prepared by the Social Welfare Officer Mr. Lai Ya Wen, which concerns the custody, care and control of our son, the said Social Welfare Officer recommended that sole custody of our son be granted to me for the following reasons:*
- (1) *"The Respondent would have at least 4-5 drinks per day. The Respondent would consume alcohol both at home and outside home. The wife was also of the view that the Respondent would not spend sufficient time with the son because the Respondent would rather spend his time after work with his colleagues drinking beer until late."*
 - (2) *"Oftentimes, by the time the Respondent got home after having drinks with his friends and colleagues, the Respondent was very drunk. It was past midnight when the Respondent came home."*
 - (3) *"Since their only child needs to attend primary school in the morning session, the son would rarely have the chance to get to see the Respondent in the evening and have any kind of parent-child interaction with the Respondent."*
 - (4) *"The wife therefore believes the sole custody, care and control should be granted to her alone, with reasonable access to Respondent. I agree."*
10. *In another updated Social Welfare Report compiled by the Social Welfare Officer Madam Lee Yuet Ming, I wish to point out to the Court that it was observed by the Social Welfare Officer during her interview with our son and our domestic helper that Respondent appeared to be a heavy drinker.*
- (1) *"The son complained to me that he could smell alcohol on his father's breath when his father comes home from work. The son also admitted to that his mother and father would have heated arguments frequently. That will normally happen every day."*

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- (2) *"Sometimes, the son told me that his parents would have arguments over some very trivial matters. The domestic helper also told me that the Respondent had quite a violent character when he was drunk."*
- (3) *"The domestic helper recalled that on one occasion, the Respondent was drunk when he came home. The son was playing TV games at home. When the Respondent came home, he insisted that he should be able to watch football on the TV and therefore stopped the son from playing TV games. The son was extremely upset and had a fight with the Respondent and as a result, the son suffered bruises and injuries to his left eye and right arm."*
- (4) *"Although that was a one-off incident, I therefore recommend to the Family Court that the custody of the child should not be granted to the Respondent."*
11. *Further, the Respondent has stated in his updated Form-E (financial statements) that he spends quite a lot of money as part of his monthly expenses on wines and alcoholic drinks.*
- (1) *According to Part 4 of the Form-E, in particular Sections 4.1 and 4.2, the Respondent spends roughly HK\$20,000-30,000 per month on food and drinks. For "meals out of home", it was stated that the monthly budget of the Respondent reaches HK\$60,000 per month.*
- (2) *Under Part 5 of the Form-E, Section 5.3 (standard of living) enjoyed by the Respondent during marriage, the Respondent stated therein that he would spend up to HK\$200,000 purchasing expensive and vintage wines and champagne from all over the world.*

BEFORE the Interim Application

You must prepare a skeleton argument in relation to the application supporting the positing of the party you are representing. You will have been advised separately which party this is. The skeleton should be typed. It should not exceed 4 pages (A4, one-sided, 12 font, single spaced).

You may refer to the attached case authority as you think appropriate. You do not need to attach it to the skeleton; the Judge will have a copy of it at the hearing. You may also refer to the White Book as you think appropriate.

Please note that for the purpose of this assessment, your arguments must be limited to the case authorities attached and the White Book only.

It is very important that you email your skeleton argument in MS Word format to the Secretariat of the Higher Rights Assessment Board at info@hrab.org.hk by no later than 3pm of the Wednesday prior to the day of the assessment. Upon receipt, the Secretariat will ensure that the party opposing you in the interim application is given a copy of your skeleton argument. The members of your Examining Panel will also receive copies so that they can be considered before the assessment itself takes place. You will therefore understand that, if you submit your skeleton late, it will not be marked and will place you at real risk of failing the assessment.

THE CONDUCT of the Interim Application

- i. You will argue the application from the perspective of the role you have been assigned. You will have a maximum of 15 minutes to make your submissions.
- ii. No reply submissions will be conducted.
- iii. You should be prepared to deal with the Judge's interventions and questions in relation to your submissions.
- iv. You should be prepared to address the Court on the issue of costs as a matter of principle.

WONG KWOK HIN v WONG LAI FAN & ANOR (NO 1)

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COURT OF FIRST INSTANCE
ACTION NO 5199 OF 1999
CHEUNG J
11-12, 13 JUNE 2001

Evidence – Admissibility – Irregularly obtained document – Affirmation filed in matrimonial proceedings – Non-party acquired affirmation of means irregularly – Correct test to apply when considering admissibility in separate action – Matrimonial Causes Rules (Cap 179A) r 121(2)

B

證據 – 可接納性 – 循不當途徑得來的文件 – 在婚姻法律訴訟中存檔的誓章 – 非訴訟方循不當途徑得到關於經濟能力的誓章 – 考慮在另一獨立的訴訟中的可接納性時適用的測試 – 《婚姻訴訟規則》(第 179A 章) 第 121(2) 條

C

The plaintiff was in possession of two documents, a divorce petition and an affirmation of means of the first defendant. He sought to rely on the affirmation in his cross-examination of the first defendant in a property dispute arising from a 1998 Family Court order. The plaintiff was not a party to the matrimonial proceedings. The court heard submissions from counsel as to the admissibility of the evidence sought to be adduced.

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Under r 121(2) of the Matrimonial Causes Rules the affirmation was confidential to non-parties to any matrimonial proceedings. The second defendant, who was the first defendant's husband and brother of the plaintiff, had taken no part in the divorce proceedings. In May 2001 the second defendant instructed his solicitors to write to the Registrar of the Divorce Registry asking for permission to make copies of the petition and affirmation of means of the first defendant. Approval was given. However, he did not provide copies to the plaintiff or authorize his solicitors to provide the copies. The plaintiff subsequently obtained the documents from the second defendant's solicitors. He accepted that the documents were irregularly obtained but sought leave to regularise the position. Counsel for the plaintiff submitted that the use of the document would be limited to showing that the first defendant relied on the affirmation when she obtained the order.

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Held, allowing the application:

(1) Affirmations filed in matrimonial proceedings must be subject to special treatment by virtue of r 121(2) of the Matrimonial Causes Rules. Those affirmations were clearly confidential to non-parties and intended to be so. While the circumstances in which the plaintiff came to have the documents were not fully explained, this was not the basis on which the application to admit the document should be considered. The true test was whether leave would be granted if the plaintiff sought leave to obtain the document in the first place (at 658E, 659B).

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(2) The purpose of using the affirmation in this case was to support the plaintiff's case that the first defendant had not disclosed the full facts when she

- A obtained the order for the property. On this basis, the affirmation was relevant and leave would have been granted to the plaintiff to use the document if such an application were made (at 659C-E).

Cases referred to

- B *Medway v Doublelock Ltd* [1978] 1 All ER 1261, [1978] 1 WLR 710 (Ch D)
R v R (Disclosure to Revenue) [1998] 1 FLR 922
S v S (Disclosure to Revenue) [1997] 3 FCR 1, [1997] 1 WLR 1621 (Fam D)

Legislation referred to

- Evidence Ordinance (Cap 8) s 14
C Matrimonial Causes Rules (Cap 179A) rr 47A(3), 95(3), 121

Other sources referred to

Halsbury's Laws of England Vol 17 para 196
Phipson Evidence (15th Ed) para 22-07

- D **Preliminary ruling**

The plaintiff sought to use an affirmation of means filed in an earlier matrimonial proceedings in which he was not a party. The document was obtained irregularly and he sought leave to admit it. The hearing of merits is reported hereafter in *Wong Kwok Hin v Wong Lai Fan & Anor (No 2)* [2001] 3 HKC 660. The facts appear sufficiently in the following ruling.

Andy Hung (Chan & Tsu) for the plaintiff.
William Allan (Paul Kwong & Co) for the first defendant.
Second defendant in person.

- F **Cheung J:** The plaintiff is in possession of two documents, namely, a divorce petition and an affirmation of means of the first defendant. The first defendant was the petitioner in a divorce proceedings of which the second defendant was the respondent. Mr Hung, counsel for the plaintiff, intends to rely on the affirmation in the cross-examination of first defendant. Mr Allan, counsel for first defendant, objects to its use.

- G Rule 121 of the Matrimonial Causes Rules (Cap 179A) provides that a party to any matrimonial proceeding may, among other things, bespeak a copy of any document filed in the registry of those proceedings. As to non-parties, r 121(2) provides that: 'Except as provided by Rules 47A(3) and 95(3) and paragraph 1 of this rule, no document filed or lodged in the registry other than a decree or order made in open court, shall be opened to inspection by any person without leave of the court, and no copy of any such document, or of an extract from any such document, shall be taken by or issued to, any person without such leave.'

- H The provisions of rr 47A(3) and 95(3) are not relevant to this case. By virtue of r 121(2), the affirmation is clearly confidential in nature and intended to be so.

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The second defendant had taken no part in the divorce proceedings. On 31 May 2001, CD Kan & Co, solicitors, wrote to the Registrar of the Divorce Registry of the Family Court, stating that they acted for second defendant and asked the Registrar to allow their clerk to make copies of the petition and affirmation of means of the first defendant. Approval was given by the court to make copies. The second defendant said that he had indeed instructed the solicitors to obtain the documents. He received photocopies of those documents from his solicitors. He, however, did not provide copies to the plaintiff, who is his elder brother, and he did not authorize his solicitors to provide the copies.

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Mr Hung said that his solicitors obtained the documents from the second defendant's solicitors and he produced the letter of 31 May 2001. Belatedly, Mr Hung accepts that the documents were irregularly obtained but asks for leave to regularize the possession.

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Phipson on Evidence (15th Ed) at para 22-07 stated that: '... once affidavit has been served and filed, it would have been hard to imagine that it was possible to assert a claim for privilege even against the third party in subsequent proceedings.' And also, 'No implied undertaking arose in the case of an affidavit once served not to use it for collateral purpose, save in those situations where the affidavit will require for a compulsion, where it was established that undertaking not to use the affidavit for collateral purpose would be implied.'

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In my view, affirmations filed in matrimonial proceedings must be subject to special treatment because of the terms of r 121(2). It would be absurd if a non-party which had not obtained leave in the first place to inspect or copy the documents would nonetheless be able to use the documents in subsequent proceedings as if r 121 does not exist.

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There were cases in which documents relevant to family proceedings were supplied to a third party by either the immediate parties or their privies in the matrimonial proceedings, examples are, *Medway v Doublelock Ltd* [1978] 1 All ER 1261, where the wife in a matrimonial proceeding supplied her husband's affidavit of means to parties who were engaged in litigation with the husband; *S v S* [1997] 3 FCR 1 and *R v R* [1998] 1 FLR 922 are cases where the Inland Revenue received documents of family proceedings in which there was evidence that the husbands had underdeclared their income. The court in these cases had to consider the nature of the case before deciding whether the third party could make use of the documents.

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In the present case, CD Kan & Co had ceased to act for the second defendant on 16 August 2000 and the second defendant has been acting in person. Apart from filing a witness statement, he had not filed any acknowledgement of service or any list of documents, although the plaintiff had not applied for judgment in default against him. Why the second defendant should instruct solicitors on 31 May 2001 to obtain

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A copies of documents in the divorce proceedings is baffling. It is equally baffling that the second defendant's solicitors should release the documents without the authority of the second defendant.

B While the circumstances in which the plaintiff came to have these documents are in my view not fully explained, this is not the true basis in which the plaintiff's application should be considered. The true test is, if the plaintiff had applied for leave in the first place to obtain the affirmation, would leave be granted?

C Leaving aside the question whether the plaintiff would succeed in his action, one of the grounds relied on by the plaintiff in this action is that the first defendant had not made full and frank disclosure on the true ownership of the property when she obtained the property transfer order in the Family Court. Mr Hung said that he is not using the affirmation to cross-examine the first defendant on her credibility because of her previous inconsistent statement in the affirmation on how the property came to be acquired: see s 14 Evidence Ordinance (Cap 8). He is also not relying on the affirmation as proof of the facts stated in it see *Halsbury's Laws of England*, Vol 17, para 196. He is also not suggesting that the content is untrue or that her oral testimony is untrue. He said that he is relying on the affirmation to show that the first defendant relied on the affirmation when she obtained the property transfer order. In other words, this goes to support the plaintiff's case that she had not disclosed the full facts when she obtained the order.

E On this basis, in my view, the affirmation is relevant and leave would have been granted to the plaintiff to use the document. Accordingly, I will allow the affirmation to be used on the basis as indicated by Mr Hung.

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Reported by Lindy Course

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A **Re Baldwin Construction Co Ltd & Others**

(Court of First Instance)
(Companies (Winding-up) Proceedings Nos 340, 345 and 346 of 2002)
B (High Court Action No 1036 of 2002)

Kwan J in Chambers
25–26 July, 1, 29–30 August and 31 October 2002

- C *Company law — provisional liquidators — appointment — principles — first, must be good prima facie case for winding-up — petitioner must show by believable evidence, facts which were not disproved at present hearing and which, if eventually proved, would entitle petitioner to winding-up order — second,*
D *must be right for provisional liquidators to be appointed in all circumstances*

[Matrimonial Causes Rules (Cap.179, Sub.Leg.) r.121]

- E 公司法 — 臨時清盤人 — 委任 — 原則 — 首先，必須有良好表面理據支持清盤 — 呈請人必須藉可信證據證明在現階段聆訊中未被推翻的事實，而該等事實最終若得到證實，將令呈請人有權獲批予清盤令 — 第二，在所有涉案情況下，委任臨時清盤人必須是正確的做法

[《婚姻訴訟規則》(第179章，附屬法例)第121條]

- F H was married to W, though matrimonial proceedings had been commenced. They were the directors and/or the shareholders of a group of companies. W was also the shareholder of a company, WC. WC, as a contributory and creditor of Cs, three of the companies in the group, commenced proceedings to wind-up C1 and C3 on
G the just and equitable ground and applied for the appointment of provisional liquidators for these companies. WC claimed that H had breached his fiduciary duties as a director resulting in WC and W losing all trust and confidence in his good faith and competence. W alleged: H had made large withdrawals from the funds of Cs for
H his personal investments and to buy a property, and had purported to pass resolutions paying himself bonus salaries; there had been no annual general meetings of C1 held since its incorporation and none held for C2 since 1996; and as H and W were the sole directors of C3 a complete deadlock on the boards existed. H opposed the
I appointment of provisional liquidators arguing that as he had sold his entire shareholding in C2 to W, there was no partnership-type relationship between H and W so as to have given rise to mutual trust and confidence, thereby the petition to wind-up C2 was bound to fail; and that H's handling of the financial affairs of Cs was in accordance
J with a long-standing practice accepted throughout the years by all concerned. WC also presented a petition for a worldwide *Mareva* injunction against H.

Held, allowing the applications, that:

- (1) The discretion under s.193 of the Companies Ordinance (Cap.32), to appoint a provisional liquidator was wide and unfettered and depended on the particular circumstances of each case. Two matters had to be considered by the court. First, whether a good *prima facie* case for winding-up had been made. The petitioner must show by believable evidence, facts which were not disproved at the present hearing and which, if eventually proved at the hearing of the petition, would entitle the petitioner to a winding-up order. The court would look at the evidence of both sides and then form a provisional view as to whether there was a reasonable prospect that the petition might succeed. Unless the evidence by the opposing party was so “obviously cogent”, any conflict of evidence would be left to be resolved at the hearing of the petition. The court’s view on the merits at this stage were only provisional as the affidavit evidence remained untested by cross-examination. Second, whether it was right for a provisional liquidator to be appointed in all the circumstances. Such circumstances included commercial realities, the degree of urgency and need established by the petitioner and the balance of convenience (*Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105, *Re Five Lakes Investment Co Ltd & Multiford Co Ltd* [1985] HKLR 273, *Re Yick Fung Estates Ltd & Shui Hing Investment Co Ltd* [1986] HKLR 240, *Re Club Mediterranean Pty Ltd* [1975] 11 SASR 481 considered). (See pp.246F–247E.)
- (2) Here, on the evidence, W had established good *prima facie* cases for winding-up orders. First, the winding-up jurisdiction was not confined to such circumstances as would affect a person in his capacity as a shareholder. It was not necessary that the person against whom complaints were made as giving rise to a loss of confidence had to be a shareholder, or that there had to be a partnership-like relationship between the shareholders to give rise to trust and confidence in the manager of the company. Lack of confidence in the conduct and management of a company’s affairs as a ground for winding-up was not confined to quasi-partnership (*Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 followed; *Re San Imperial Corp Ltd* [1980] HKLR 649, *Re Greater Beijing Region Expressways Ltd (No 3)* [2000] 3 HKC 608 considered). (See pp.248I–249H.)
- (3) Second, directors could not help themselves to the funds of a company for personal investments. Whether H’s case of an accepted practice was made out, was a matter to be resolved at trial. In addition, the resolutions to pay bonus salaries were *prima facie* in contravention of the articles of association and s.162(1) of the Companies Ordinance (Cap.32). Further factors were the complete deadlock at board meetings and the fact that the mutual trust and confidence no longer existed. Also, as there had been no annual general meetings held, C1 and C2 were in breach of s.111. (See pp.252H–255A, 256F–J, 257H, 267J, 269J–270C, G.)

- A (4) On the balance of convenience, it was appropriate in all the circumstances to appoint provisional liquidators for C1 and C3. There was a need to displace H from his position of authority to deal with the assets of C1 and C3 in view of his misfeasance and breaches of fiduciary duty, to ensure the *status quo* of the assets
- B was preserved pending the resolution of the dispute (*Re Company (No 000596 of 1986)* [1987] BCLC 133 considered). (See pp.273D–275J, 278D–E.)
- (5) For the same reasons it was appropriate to grant the *Mareva* injunction against H. This was granted having regard to whether
- C there was a good arguable case, the risk of dissipation of assets, and on the balance of convenience. (See p.278E.)
- (6) WC’s application to strike out certain evidence adduced by H as contravening r.121 of the Matrimonial Causes Rules (Cap.179, Sub.Leg.) would be granted. Rule 121 prohibited the inspection
- D of documents in matrimonial proceedings by third parties without leave of the District Court. There was no reason why the High Court would allow such documents to be exhibited in other proceedings unless the leave of the District Court had been obtained. (See pp.244F–246F.)

E

Application

These were four applications heard together, three being for the appointment of provisional liquidators under s.193 of the Companies Ordinance (Cap.32), and the fourth for a worldwide *Mareva* injunction.

- F The facts are set out in the judgment.

Mr Winston Poon SC, and Ms Linda Chan, instructed by Baker & McKenzie, for the respective petitioners in HCCW Nos 340, 345 and 346 of 2002, and for the plaintiff in HCA No 1036 of 2002.

- G Mr Denis Chang SC, Ms Selina Lau, Mr Samuel Chan and Ms Isabella Chu, instructed by Ng & Partners, for Mr Chan Shiu Chick in HCCW No 340 of 2002, and for the same as the opposing contributory in HCCW Nos 345 and 346 of 2002, and as the second defendant in HCA No 1036 of 2002.

- H The Official Receiver, attendance excused.

Legislation mentioned in the judgment

Buildings Ordinance (Cap.123)

Companies Ordinance (Cap.32) ss.111, 121, 122(1), 122(1A), 122(2),

I 157, 162(1), 179(1), 182, 193, Sched.1 Table A regs.68, 73–76, 88

Matrimonial Causes Rules (Cap.179, Sub.Leg.) rr.2(2), 121, 121(2)

Cases cited in the judgment

- J Bank voor Handel en Scheepvaart NV v Slatford (No 2) [1953] 1 QB 248, [1952] 2 All ER 956, [1952] 2 TLR 861
- Bodega Co Ltd, Re [1904] 1 Ch 276

- Club Mediterranean Pty Ltd, Re [1975] 11 SASR 481 A
 Company (No 000596 of 1986), Re [1987] BCLC 133
 Consolidated Nickel Mines Ltd, Re [1914] 1 Ch 883
 Duomatic Ltd, Re [1969] 2 Ch 365, [1969] 2 WLR 114, [1969] 1 All
 ER 161
 Ebrahimi v Westbourne Galleries Ltd [1973] AC 360, [1972] 2 WLR B
 1289, [1972] 2 All ER 492
 Fildes Bros, Re [1970] 1 WLR 592, [1970] 1 All ER 923
 Five Lakes Investment Co Ltd and Multiford Co Ltd, Re [1985] HKLR
 273
 Greater Beijing Region Expressways Ltd (No 3), Re [2000] 3 HKC C
 608
 Ho Tung v Man On Insurance Co Ltd [1902] AC 232
 Mareva Compania Naviera SA v International Bulk Carriers SA
 (Mareva, The) [1980] 1 All ER 213, [1975] 2 Lloyd's Rep 509
 Morris v Kanssen, sub nom Kanssen v Rialto (West End) Ltd [1946] D
 AC 459
 San Imperial Corp Ltd, Re [1980] HKLR 649
 Swiss Screens (Australia) Pty Ltd v Burgess (1987) 11 ACLR 81
 Union Accident Insurance Co, Re [1972] 1 All ER 1105, [1972] 1
 Lloyd's Rep 297 E
 Yick Fung Estates Ltd & Shui Hing Investment Co Ltd, Re [1986]
 HKLR 240

Other materials mentioned in the judgment

- Buckley on the Companies Acts* (11th ed.) p.745 F
Gore-Browne on Companies (44th ed., 1986) Vol.2, para.26.5

Kwan J in Chambers

The applications

1. There are a total of four summonses before me. Three of them, issued on 16 May 2002, are for the appointment of provisional liquidators in HCCW Nos 340, 345 and 346 of 2002, under s.193 of the Companies Ordinance (Cap.32). The fourth summons, issued on 6 June 2002, is for a worldwide *Mareva* injunction against Mr Chan Shiu Chick (CSC), H
 the second defendant in HCA No 1036 of 2002.

2. In HCCW No 340 of 2002, the petition was presented on 2 April 2002 by a contributory and creditor, Junestar Investment Corp (Junestar), to wind-up Boldwin Construction Co Ltd (Boldwin) on just and equitable grounds. It is the petitioner's case in these proceedings I
 that Madam Law Wai Duen Nina (LWD) is the registered and beneficial owner of all the shares in Junestar. LWD was married to CSC in 1964. CSC has petitioned for divorce in May 2001 on the ground of LWD's desertion since 27 May 1999. At the time of the hearing of the present applications, it would appear that the marriage has not been J
 dissolved. CSC has brought proceedings in HCA No 2623 of 2001 against LWD in June 2001, seeking declarations that he is the beneficial

- A owner of 1,199 shares in Baldwin through his ownership of all the issued shares in Junestar. In the winding-up proceedings, and in HCA No 1036 of 2002, he has asserted that LWD held all of the shares in Junestar on trust for him, or alternatively, only 50% of the shares in Junestar on trust for him. CSC claims that his beneficial ownership
- B of 1,200 shares in Baldwin, or alternatively, 1,199, shares in Baldwin, gives him the *locus standi* to appear on the petition including the application for appointment of provisional liquidators. Notwithstanding the dispute as to the beneficial ownership of 1,200 shares in Baldwin, Junestar does not oppose the appearance of CSC on the ground that
- C as all the complaints in the petition were directed against him, he is entitled to defend himself against the allegations.

3. Of the seven creditors who have given notice of intention to appear on the petition in HCCW No 340 of 2002 and to oppose it, none of them has filed evidence to oppose the application for the
- D appointment of provisional liquidators. Although an affirmation was filed on behalf of Baldwin, on 8 July 2002, to oppose the petition and the application to appoint provisional liquidators, Baldwin did not appear at the present summons.

4. The petition in HCCW No 345 of 2002 was presented on
- E 2 April 2002 by LWD as a contributory and creditor to wind-up Maintain Profits Ltd (Maintain Profits) on just and equitable grounds. On the same day, LWD presented a petition in HCCW No 346 of 2002 as a contributory and creditor to wind-up Myriad Gold Corp (Myriad Gold), also on just and equitable grounds. LWD and CSC
- F are the only shareholders of Maintain Profits and Myriad Gold, each holding one of the two issued shares in each company. The sole asset of Maintain Profits consists of 600,000 shares out of 1 million fully paid shares in BF Construction Co Ltd (BF). The remaining 400,000 shares in BF are held by Myriad Gold as its sole asset. CSC appears in these
- G two petitions as the opposing contributory. No other party has given intention to appear in these two petitions. As in the case of Junestar, there is dispute as to the beneficial ownership of the shares in Maintain Profits and Myriad Gold. CSC has sought declarations in HCA No 2623 of 2001 that LWD holds one of the two issued shares in each
- H of these companies on trust for him and the dispute in that action has not been resolved.

5. HCA No 1036 of 2002, in which the application for a *Mareva* injunction is made, is a derivative action brought by Junestar against Baldwin and CSC seeking damages for breach of fiduciary duty owed
- I by CSC to Baldwin as a director, various declarations, injunctions and other reliefs arising out of alleged wrongful acts done by CSC to Baldwin.

J *The companies*

6. Baldwin was incorporated on 17 August 1976 under Cap.32 as a private company. It has been carrying on business as a building

contractor. When it was incorporated, two subscriber shares of HK\$100 each were issued to LWD and CSC. They were the only directors of the company. In February 1977, Baldwin acquired the status of a registered building contractor under the Buildings Ordinance (Cap.123), and LWD was the only authorised signatory to sign statutory forms and other prescribed documents under the Ordinance between February 1977 and November 1999. In the early days of its operations, Baldwin had carried out a number of construction projects for the Great Eagle Group of companies, as LWD's father is the founder of the Great Eagle Group. It is not in dispute that at all material times, CSC had the day-to-day management of Baldwin as its managing director.

7. In November 1977, one of LWD's sisters, Madam Lo Hung Suen, and her husband, Mr Chan Wai Lim, were appointed as additional directors of Baldwin. They held their appointment until they resigned on 22 March 2002. Mr Chan Wai Lim had business contacts in the Cheung Kong group of companies and introduced construction work to Baldwin from the Cheung Kong Group. Since about 1978, with the exception of two projects, all the construction projects undertaken by Baldwin as the main contractor were of the Cheung Kong Group.

8. On 1 December 1978, a total of 1,998 shares of Baldwin were issued and allotted to CSC, Madam Lo Hung Suen and Mr Chan Wai Lim, as a result of which its shareholding structure was changed as follows:

	<u>Before 1/12/78</u>	<u>On 1/12/78</u>	
(1) LWD	1 share (50%)	1 share (0.05%)	F
(2) CSC	1 share (50%)	1,199 shares (59.95%)	
(3) Lo Hung Suen	—	200 shares (10%)	
(4) Chan Wai Lim	—	600 shares (30%)	
	2 shares (100%)	2,000 shares (100%)	G

9. Junestar was incorporated on 14 January 1983 under the laws of the Republic of Panama as a company of limited liability with an authorised capital of US\$10,000 divided into 100 shares of US\$100 each, of which two shares were issued to the two subscribers. On 27 May 1983, the 100 shares in Junestar were issued in the form of bearer shares and a general power of attorney was given by Junestar in favour of LWD, CSC and another sister of LWD to act as general attorneys of Junestar. On 30 May 1983, the two subscriber shares in Junestar were assigned and transferred to LWD. From 30 May 1983 to 17 March 1999, all the issued shares in Junestar in the form of bearer shares were kept by LWD. On 18 March 1999, the 100 bearer shares in Junestar were converted into registered shares and were registered in the name of LWD. As mentioned earlier, LWD claims that she was, and is, the sole legal and beneficial owner of all the issued shares in Junestar, whereas CSC claims that LWD held all of the shares in Junestar, or alternatively half of the shares, on trust for him. On

A 19 March 1999, LWD, her daughters Ms Chan Nga Wai Ann and Ms Chan Nga Mei Amy, were appointed as directors of Junestar. On 23 July 1999, LWD, CSC and LWD's sister ceased to be general attorneys of Junestar when their powers of attorney were revoked pursuant to a resolution passed by the directors of Junestar.

B 10. On 11 February 1985, CSC and LWD, in consideration of payment by Junestar of HK\$119,900 and HK\$100 respectively, transferred all of their shareholdings in Baldwin to Junestar and Junestar has since remained the holder of such 1,200 shares of Baldwin. It is the case of LWD that she had provided all the funds for payment by Junestar for the above transfer of shares. This is disputed by CSC.

C 11. On 26 September 1985, Mr Chan Wai Lim and Madam Lo Hung Suen transferred all of their shares in Baldwin to Rocky Ltd (Rocky), and Rocky has since remained the registered shareholder of the remaining 800 shares in Baldwin.

D 12. On 24 September 1997, BF was incorporated under Cap.32 as a private company. It is also in the business of a building contractor. As in the case of Baldwin, all the building projects undertaken by BF as the main contractor are of the Cheung Kong Group. LWD and CSC were appointed as the only directors of BF. CSC occupied the position of managing director and had the day-to-day management of its business. Initially, 10 shares out of 10,000 shares in BF were issued, six were held by Andreas Investment Corp (Andreas; a company incorporated in Liberia and acquired by LWD and CSC in 1987, its shares were held by them in equal proportions, and of which LWD, CSC, their two daughters Ms Ann Chan and Ms Amy Chan, are the only directors) and four were held by Gainfort Holdings Ltd (Gainfort; a company incorporated in Hong Kong in 1993 with two issued shares, one held by Junestar and the other by Andreas).

E 13. On 15 October 1997, Maintain Profits was incorporated in the British Virgin Islands with an authorised capital of US\$50,000 divided into 50,000 shares of US\$1 each, of which only two shares have been issued and are registered in the names of LWD and CSC as to one share each. Myriad Gold was incorporated in the British Virgin Islands on 1 December 1997 with an authorised capital of US\$50,000 divided into 50,000 shares of US\$1 each, of which two shares have been issued and are registered in the names of LWD and CSC as to one share each.

F 14. On 2 March 1998, Andreas and Gainfort transferred their entire shareholdings in BF to Maintain Profits and Myriad Gold. On 3 March 1999, the authorised share capital of BF was increased from HK\$10,000 to HK\$1 million, and on the same day, all of the shares of HK\$1 each were issued, 600,000 shares to Maintain Profits and 400,000 shares to Myriad Gold.

G 15. There is effective deadlock on the board of directors of Maintain Profits and Myriad Gold as LWD and CSC are the only directors of these two companies.

H I J

16. The present directors of Baldwin are CSC, LWD, Mr Tang Chun Sing (appointed on 1 April 1999) and Mr Yu Ho Yuen (appointed on 8 July 1999). Mr Tang and Mr Yu are employees of Baldwin. It is alleged by LWD that they are accustomed to act in accordance with the wishes of CSC. A

17. The present directors of BF are CSC, LWD, Ms Ann Chan (appointed on 16 February 1998) and Mr Yip Hing Wah Henry (appointed on 1 April 1999). Mr Yip is an employee of BF and it is alleged by LWD that he is accustomed to act according to the instructions of CSC. Ms Ann Chan left the family home with LWD and has apparently taken the side of LWD in the legal proceedings involving LWD and CSC. B C

18. It is not in dispute that in early 2000, Baldwin had completed all contracted building works, save and except for remedial works within the defects liability period in respect of the projects undertaken. The last tender Baldwin submitted was in July 2000. It has not entered into any new construction contracts. D

19. As for BF, it was the main contractor for three projects which have been substantially completed: STTL 446 in Area 108 Ma On Shan, New Territories; 661 to 665 King's Road, North Point, Hong Kong; and KIL 11056 Phase 2 Hung Hom, Kowloon. In addition, it has taken up a project at KIL 11056 Phase 4 Hung Hom, Kowloon (Hok Un Phase IVA & IVB), which is in the final phase of construction. All these are construction projects of the Cheung Kong Group. E

The preliminary application to strike-out part of the evidence F

20. I propose, first, to deal with a preliminary application made by Mr Poon SC, on behalf of Junestar and LWD, that certain parts of the evidence adduced by CSC in these applications should be struck-out as they are in contravention of r.121 of the Matrimonial Causes Rules (Cap.179, Sub.Leg.), which reads as follows: G

121. Inspection etc of documents retained in court

- (1) A party to any matrimonial proceedings or his solicitor or the Secretary for Justice may have a search made for, and may inspect and bespeak a copy of, any document filed or lodged in the registry in those proceedings. H
- (2) Except as provided by rr.47A(3) and 95(3) and para.(1) of this rule, no document filed or lodged in the registry, other than a decree or order made in open court, shall be open to inspection by any person without leave of the court, and no copy of any such document, or of an extract from any such document, shall be taken by, or issued to, any person without such leave. I J

The word "court" in r.121(2) is defined in r.2(2) to mean "the District Court".

A 21. The evidence sought to be struck-out relates to the evidence adduced or documents filed in the matrimonial proceedings between CSC and LWD (FCMC No 4917 of 2001) and other documents that came into being as a result of the matrimonial proceedings, such as correspondence between solicitors, skeleton submissions of counsel, B transcript of a hearing in chambers, and are as follows:

- (1) The first affirmation of CSC in HCCW No 340 of 2002, filed on 4 July 2002 — paras.22–24, 42, 59, 60 and 62;
 - (2) The following exhibits to the aforesaid affirmation of CSC: Exhs.12, 21, 41–52.
- C

22. Mr Poon accepts that certain parts of the evidence filed on behalf of Junestar in HCA No 1036 of 2002 are likewise in contravention of r.121(2), being the first affirmation of LWD filed on 7 June 2002, D paras.12, 13 and 15 and the exhibits referred to in those paragraphs. He is content to have these parts of the evidence struck-out.

23. Mr Poon has drawn my attention to the fact that in previous proceedings involving LWD and CSC (HCMP Nos 702 and 703 of 2001, proceedings brought by LWD to seek access to the books and E records of Baldwin and BF), he had raised a similar objection to the inclusion of documents filed in the matrimonial proceedings in the hearing bundle and it was directed by Cheung J (as he then was) that the documents in the matrimonial proceedings should be removed and the affidavit exhibiting such documents should be re-sworn.

F 24. It was pointed out by Mr Poon that in HCCW No 340 of 2002, there are other parties who have given notice of intention to appear, such as the seven opposing creditors. The other contributory, Rocky, has indicated in a letter, dated 11 July 2002, that it opposes the winding-up of Baldwin. There are other directors in Baldwin G apart from LWD and CSC. Mr Poon submitted that as there are other parties involved, or who may take part in the winding-up proceedings, it would not be appropriate for the documents or evidence in the matrimonial proceedings to be filed as evidence in these applications, and thereby open to inspection by other parties, particularly as this is H in violation of r.121(2) of the Matrimonial Causes Rules and no leave of the District Court has been sought.

25. Mr Chang SC, who appeared for CSC, disputed that that was the effect of r.121(2). He submitted that r.121(2) relates only to the inspection of documents in matrimonial proceedings retained in I the District Court and prohibits inspection by third parties without the leave of the District Court. This provision does not restrict the High Court in dealing with matters relevant to an application before it, and that the High Court does have power to admit evidence which is relevant.

J 26. I do not agree with Mr Chang that r.121(2) should be read or applied in such a restrictive manner. As there is provision prohibiting the inspection of documents in matrimonial proceedings by third

parties without leave, I see no reason why the court should allow such documents to be exhibited in other proceedings where they would be available for inspection by other parties, unless the leave of the court seized with the matrimonial proceedings has been obtained. A

27. On this basis, I would strike-out those parts of the affidavit evidence in contravention of r.121(2). I would also exercise my discretion to strike-out certain parts of the evidence notwithstanding that they are not, strictly speaking, in violation of r.121(2) as they are not documents filed or lodged in the registry in the matrimonial proceedings. Such parts of the evidence relate to the conduct of the matrimonial proceedings and are of peripheral relevance to the present applications. It is quite unnecessary for CSC to go to great lengths in what had happened in the matrimonial proceedings in order to make the point that the present applications were made by LWD for an ulterior purpose. What he has stated in para.61 of his first affirmation in HCCW No 340 of 2002 is quite sufficient for his purpose. B C D

28. I order the following parts of the evidence to be struck-out:

- (1) The first affirmation of CSC in HCCW No 340 of 2002 — paras.22–24, 42, 59, 60 and 62;
- (2) The following exhibits to the first affirmation of CSC in HCCW No 340 of 2002 — Exhs.12, 21, 41–52; and E
- (3) The first affirmation of LWD in HCA No 1036 of 2002 — the last sentence in para.12, paras.13 and 15.

The law on the appointment of provisional liquidator F

29. I turn to the authorities relating to the principles upon which the court exercises its discretion to appoint a provisional liquidator. The relevant principles are not in dispute and may be stated as follows: G

- (1) The court has a wide and unfettered discretion under s.193 of Cap.32 whether or not to appoint a provisional liquidator. It is not confined to the situations where there is jeopardy to the assets of the company or obvious insolvency or the company has admitted that there is no defence to the petition. How this general power is to be exercised would depend on the particular circumstances of each case (*Re Union Accident Insurance Co* [1972] 1 All ER 1105 at p.1109E–H; *Re Five Lakes Investment Co Ltd and Multiford Co Ltd* [1985] HKLR 273 at p.283F–I). H
- (2) As regards the exercise of this power, it would be relevant to consider two matters. The first is whether the petitioner has made out a good *prima facie* case for a winding-up order at the hearing of the petition. If so, the next matter that falls to be considered is whether it is right for a provisional liquidator to be appointed in all the circumstances (*Re Union Accident Insurance Co* [1972] 1 All ER 1105 at p.1110A–C; *Re Five Lakes Investment Co Ltd and Multiford Co Ltd* [1985] HKLR 273 at pp.283J–284A). I J

- A (3) In order to establish a good *prima facie* case for a winding-up order, the petitioner must show, by believable evidence, facts which are not disproved at present stage and which, if eventually proved at the hearing of the petition, would entitle the petitioner to a winding-up order. To decide this question, the court looks at not merely the petitioner's evidence, but also the evidence put in by those opposing the application. The court must then form a provisional view and decide, as the matter then stands, if there is a reasonable prospect that the petition might succeed. Unless the evidence put in by the opposing party is so "obviously cogent", any conflict of evidence should be left to be resolved at the hearing of the petition. Any views expressed by the court on the merits of the petition at this stage are provisional only, as the views are formed on the basis of affidavit evidence untested by cross-examination (*Re Five Lakes Investment Co Ltd and Multiford Co Ltd* [1985] HKLR 273 at p.284A, D-E; *Re Yick Fung Estates Ltd & Shui Hing Investment Co Ltd* [1986] HKLR 240 at p.252F-H).
- D (4) As to whether it is right for a provisional liquidator to be appointed in all the circumstances, this is to be decided on the basis of commercial realities, the degree of urgency and need established by the petitioner, and the balance of convenience according to the circumstances (*Re Club Mediterranean Pty Ltd* [1975] 11 SASR 481 at p.484; *Re Five Lakes Investment Co Ltd and Multiford Co Ltd* [1985] HKLR 273 at p.284B).
- E
- F 30. It was contended by CSC that Junestar and LWD have not satisfied any of the two matters required to be considered. There is the absence of a good *prima facie* case that a winding-up order would be made on their petitions, and it is not right for provisional liquidators to be appointed for any of the three companies.
- G

The petitioner's case in each of the winding-up proceedings

- H 31. It was submitted on behalf of CSC that the petitioner is confined to the heads of complaint set out in the petition and cannot rely on any new head not fairly covered by the petition (*Re Fildes Bros* [1970] 1 WLR 592 at pp.597G-598D). The question, therefore, is whether on the pleaded case there is a good *prima facie* case for a winding-up order to be made for each of the companies on the just and equitable ground.
- I 32. In respect of Baldwin and BF, it is alleged in the petitions that it was the basic understanding of both LWD and CSC, and certainly the expectation of LWD, that she would participate in the general management of these companies and be consulted on general policies and other major decisions, as Baldwin was formed as a result of her decision to establish a company to engage in the construction business to take advantage of her family background and business connections in real estate development, and BF was formed as a result of a decision
- J

made by her and CSC that a new company, owned by them alone, was to take over the business of Baldwin. In each of the petitions, it is alleged that CSC has acted in breach of his fiduciary duties as a director and the basic understanding and expectation of LWD and Junestar as aforesaid, causing LWD and Junestar to lose all trust and confidence in his probity, good faith and competence. It is further alleged that CSC has refused to allow LWD to take any effective part in the management of either Baldwin or BF, that the affairs of Baldwin and BF have been conducted and continue to be conducted by CSC in a manner oppressive and unfairly prejudicial to the interests of the petitioners, and that the mutual co-operation and participation which formed the underlying basis for the formation of all these companies have been replaced by suspicion and hostility. In the case of Maintain Profits and Myriad Gold, there is complete deadlock on the board of directors as LWD and CSC each holds one of the two shares in these companies and they are the only directors.

33. The contention was made, on behalf of CSC, that the petition to wind-up Baldwin on just and equitable grounds (where no deadlock on the board of directors is alleged) is bound to fail, and the argument is as follows:

- (1) Junestar's complaints are in substance directed against CSC, who is only a director of Baldwin on Junestar's case as pleaded in the petition. On this pleaded case, since 1984, there was no longer any "quasi-partnership" between LWD and CSC after CSC had allegedly sold his entire shareholding in Baldwin to LWD by transferring his shares to an offshore corporate vehicle beneficially owned by LWD, namely Junestar.
- (2) It has not been alleged in the petition that Baldwin is a "quasi-partnership" between Junestar and Rocky, the only shareholders of the company, or that there is any breakdown in mutual trust and confidence between Junestar and Rocky (or between their controlling shareholders), or that Rocky has excluded LWD and Junestar from participating in the management of Baldwin.
- (3) In the absence of any plea of a partnership-type of relationship between the shareholders of Baldwin, upon which the company was formed, so as to give rise to mutual trust and confidence and equitable considerations, it was submitted that Junestar's petition to wind-up Baldwin on the just and equitable ground is bound to fail.

34. I reject the above submission. The winding-up jurisdiction is not confined to such circumstances as have affected, or would affect, a person in his capacity as a shareholder (*Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at p.375A). As stated by Lord Wilberforce in that case, it would be impossible, and wholly undesirable, to define the circumstances in which equitable considerations of a personal character may arise between individuals, which may make it unjust or inequitable

- A to insist on legal rights, or to exercise them in a particular way (at p.379E). It is not necessary that the person against whom complaints are made as giving rise to a loss of confidence must be a shareholder. Nor is it necessary for there to be a partnership-like relationship between the shareholders to give rise to trust and confidence being reposed in
- B the individual charged with the management of the company. I agree with Mr Poon that the three elements stated by Lord Wilberforce at p.379F–G as giving rise to equitable considerations relate to just one type of company that has been conveniently labelled as “quasi-partnership”. Lack of confidence in the conduct and management
- C of a company’s affairs as a ground for winding-up is not confined to quasi-partnership. It may warrant a winding-up in other cases if the lack of confidence is based upon sufficiently grave misconduct by those in control of the company, and in particular, if it foreshadows grave misconduct in the future (*Re San Imperial Corp Ltd* [1980] HKLR 649
- D at pp.653–654).

35. My attention was also drawn to the decision of *Re Greater Beijing Region Expressways Ltd (No 3)* [2000] 3 HKC 608 at pp.621–623, in which Le Pichon J (as she then was) rejected a submission on an application to strike-out a petition that there was no room for the
- E operation of the equitable principles in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 merely because independent third parties had become shareholders of the company. It was held that *prima facie* there is “no obvious legal impediment” to the equitable principles being applicable upon the admission of independent shareholders.

- F 36. The petition to wind-up Baldwin was put on two bases. First, there is the allegation of loss of confidence in the conduct and management of the company’s affairs due to grave misconduct of CSC. Second, there is the allegation of a partnership, like relationship
- G and expectation on the part of LWD to participate in the general management and be consulted on important matters, and that there was breakdown of trust and confidence and wrongful exclusion of LWD from any effective part in the management. On either basis, I am not satisfied that the petition to wind-up Baldwin on just and
- H equitable grounds is bound to fail.

The beneficial ownership of shares

37. As I have mentioned earlier, there is a dispute as to the beneficial
- I ownership of the shares in Baldwin registered in the name of Junestar, and the one share in Maintain Profits and in Myriad Gold held by LWD, and this is the subject-matter of HCA No 2623 of 2001. It was submitted by Mr Poon that the dispute in the beneficial ownership of these shares is irrelevant to the applications for appointment of
- J provisional liquidators. There is no dispute that all three petitions were presented in compliance with s.179(1) of Cap.32 in that each petition was presented by a contributory and creditor.

38. CSC has filed evidence in these applications deposing to matters in support of his case that he is the beneficial owner of all, or virtually all, of Junestar's shares in Baldwin, or alternatively 50% of these shares, and his contention that LWD holds one share each in Maintain Profits and Myriad Gold on his behalf. I do not propose to set out his evidence in this respect. On the documentary evidence, it is not in dispute that CSC's shares in Baldwin were sold to Junestar in February 1985, and that LWD is the registered shareholder of all the shares in Junestar. What CSC has alleged in his affirmations has yet to be tested in cross-examination. I am unable to accept at this stage that the evidence he has adduced is so "obviously cogent" as to render LWD's assertion that she is the beneficial owner of all the shares in dispute wholly unbelievable.

39. The dispute as to the beneficial ownership of the shares is to be resolved in HCA No 2623 of 2001. For the purpose of the applications that I am concerned with, so long as I am not satisfied that the strength of LWD's allegation on beneficial ownership is weakened to such an extent that a *prima facie* case is not made out for a winding-up order, it would not be relevant here. Nor do I think it relevant in the present applications to have regard to the rule of practice that where there is a genuine dispute on the ownership of shares, that dispute should be resolved before the winding-up petition is heard, although the court retains a discretion whether to allow that issue to be determined in the context of the petition.

Allegations of misconduct

40. I turn to the allegations of grave misconduct and misfeasance alleged against CSC. It is necessary to go into them in some detail as it is disputed by CSC that LWD has made out a good *prima facie* case for a winding-up order on the basis of these allegations. Also, the allegations of grave misconduct serve an additional purpose here in that LWD relies on them to justify the appointment of provisional liquidators and the granting of a *Mareva* injunction in that there is a need to displace CSC from his position of authority to deal with the assets of Baldwin and BF in view of his misfeasance and breaches of fiduciary duty to ensure that the *status quo* of the assets is preserved pending the resolution of the dispute.

41. It is the case of LWD that she was first alerted to CSC's misconduct in the management of Baldwin and BF in about late May 1999 when she learned through her daughter Ann that CSC had deposited into Baldwin's account a substantial number of banknotes totalling in excess of HK\$35 million. This caused LWD to take steps to investigate the affairs of Baldwin and BF. Initially, she wrote to CSC seeking information and explanation on various matters. Later, she instructed solicitors to write to CSC. When CSC replied by his solicitors refusing LWD's request to inspect the books and records, LWD brought proceedings against CSC in February 2001 in HCMP

- A Nos 702 and 703 of 2001 to assert her right to inspect the books and records as a director of Baldwin and BF. By the orders made by the Court of Appeal on 7 September 2001, LWD was allowed to inspect the books and records of both companies. The orders were amended on 17 September 2001 to enable the agents of LWD to
- B take copies of the documents and accounts stored in computer disks. PricewaterhouseCoopers (PwC) were engaged by LWD to assist her in reviewing the books and records of the companies and they set out their findings in a report dated 7 February 2002 (the PwC report), and a supplemental report dated 4 March 2002 (PwC's first supplemental
- C report). The writ in HCA No 1036 of 2002 was issued on 15 March 2002 and the petitions for winding-up were presented on 2 April 2002. The allegations of misconduct against CSC pleaded in the petitions and the amended statement of claim in HCA No 1036 of 2002 are based on the results of investigations in the reports of PwC.
- D 42. I will deal with the allegations of misconduct against CSC in respect of Baldwin, followed by the allegations of misconduct concerning BF.

E *Allegations of misconduct as regards Baldwin*

Alleged misappropriation of over HK\$40 million

43. I will first set out the basic facts, which are not in dispute.
44. On 27 May 1999, CSC caused to be prepared and delivered
- F to the Hang Seng Bank Ltd (Hang Seng) a document entitled "Extract from the minutes of the meeting of the Board of Directors of Baldwin Construction Co Ltd", which is to the effect that a meeting of the board of directors of Baldwin had been held on 27 May 1999 at its registered office, and that it had been resolved by the directors that Hang Seng
- G be requested to allow Baldwin to withdraw two fixed deposits in the respective sums of HK\$20,015,342.47 and HK\$20,075,890.90 before their dates of maturity, and that CSC be authorised to sign the requests for the premature withdrawal and to accept the terms imposed by Hang Seng for such withdrawals. The extract from the minutes was
- H signed by CSC, purportedly as the chairman of the meeting, and by Miss Choi Shun Lai Sally, purportedly as the company secretary. No board meeting of Baldwin was held on 27 May 1999 and the company secretary of Baldwin at the time was GE Secretaries Ltd, a subsidiary of Great Eagle Holdings Ltd. Miss Choi was the financial controller
- I of Baldwin.
45. On the same day, CSC also caused to be prepared and delivered to Hang Seng documents instructing Hang Seng to credit the proceeds of the two fixed deposits to the account of Andreas at Hang Seng.
46. In accordance with the above documents, Hang Seng terminated
- J the two fixed deposits of Baldwin on 27 May 1999 before their dates of maturity, and credited the aggregate sum of HK\$40,091,233.37 to the bank account of Andreas.

47. Upon receipt of HK\$40,091,233.37, Andreas, on the same day by way of a cheque drawn on its account with Hang Seng and signed by CSC as its authorised signatory, paid to Worldsec International Ltd (Worldsec), a securities trading company at which CSC or companies controlled by CSC maintained securities trading accounts, the sum of HK\$39,354,023.05, in settlement of sums owed to Worldsec by CSC or Silver Cumulus Holdings Ltd (Silver Cumulus). Silver Cumulus is a shelf company incorporated in the British Virgin Islands; it was acquired by GE Secretaries Ltd for CSC on 24 May 1999 and is solely controlled by him. A B

48. The sum of HK\$40,091,233.37, which was paid to Andreas, was not recorded in the account of Andreas in the ledgers of Baldwin. Instead, this was entered and recorded in the books of account of Baldwin as payments made to Junestar in the form of debits to the account of Junestar with Baldwin. C

49. It is alleged by LWD that at no time was CSC authorised by Baldwin or its board of directors to request the premature termination of the two fixed deposits or to give instructions to Hang Seng to transfer the proceeds to the account of Andreas. The premature termination of the fixed deposits and the diversion of the proceeds were made for an improper purpose, namely, to benefit CSC personally. It is further alleged that the debit entry in the current account of Junestar with Baldwin was in breach of CSC's duty as a director to keep proper books of account, under s.121 of Cap.32, and was done to conceal the misappropriation of funds. Mr Poon has submitted that this misappropriation of funds demonstrates the blatant disregard by CSC of the distinction between the assets of a company and those of his own, and this distinction, which is of supreme importance, must be observed and maintained between an incorporated company's legal entity and its actions, assets, rights and liabilities on the one hand, and the individual shareholders and their actions, assets, rights and liabilities on the other hand (*Bank voor Handel en Scheepvaart NV v Slatford (No 2)* [1953] 1 QB 248 at pp.269–271). D E F G

50. CSC's answer is that his handling of the financial affairs of Baldwin was in accordance with the long-standing practice accepted throughout the years by all concerned. In his defence in HCA No 1036 of 2002, he pleaded that LWD had by conduct assented to and authorised his practice to draw from Baldwin against the shareholder's account of Junestar for his personal use and investments. There was also an accepted practice, reached as a result of an "understanding" between CSC and Mr Chan Wai Lim in about April 1994, that Junestar and Rocky would keep deposited in their respective accounts with Baldwin the very substantial amounts of dividends declared by Baldwin from 1994/95 onwards, and the shareholders would be at liberty to draw on their respective accounts as long as they were in credit and provided that the drawings would not create any cash flow problem for Baldwin. LWD would appear not to have been involved in this "understanding" between CSC and Mr Chan Wai Lim. Even if there H I J

- A were an “understanding” between CSC and Mr Chan Wai Lim, it is not entirely clear on CSC’s case as formulated how this could be regarded as constituting the consent of all the shareholders, namely, Junestar and Rocky, so as to invoke the principle in *Re Duomatic Ltd* [1969] 2 Ch 365 and the Australian decision of *Swiss Screens (Australia) Pty Ltd v Burgess* (1987) 11 ACLR 81 that the informal assent of all shareholders who have a right to attend and vote at a general meeting of the company would be as binding as a resolution in a general meeting. I should point out that it is LWD’s case that the dividends declared were on-lent to Baldwin by Junestar and Rocky as the shareholders were informed by CSC that Baldwin would need to borrow money from them as additional working capital and that the shareholder’s loan from Junestar had been repaid to the extent of HK\$30,004,983.95 in April 1998, leaving outstanding an amount of HK\$80 million odd.
- D 51. Particulars of LWD’s knowledge of CSC’s drawings and of Ann’s knowledge as imputed to LWD (on the basis that she is the “confidante” of LWD) are pleaded in paras.27 and 29 of the defence. I do not propose to set out these particulars except to observe that the particulars of knowledge do not strike me as very cogent on the face of it, nor do they support an allegation that all previous drawings made by CSC from Baldwin against Junestar’s account for his personal investments in securities as set out in Annexure 1 of the defence were with LWD’s knowledge and consent. I also note that the previous drawings made from Baldwin against Junestar’s account as set out in Annexure 1, even if made with the knowledge and consent of LWD, were a long way from the magnitude of HK\$40 million. Besides, even if LWD had consented to CSC withdrawing money from Baldwin for his personal investments, two of the directors cannot help themselves to the funds of the company in this manner, as this would be contrary to the principle that the assets of a company do not belong to its shareholders.
- G 52. Further in answer to this, CSC has alleged that in the latter part of May 1999, he wanted to use Andreas to make a substantial purchase of shares as his personal investment in the value of HK\$70 million to HK\$100 million and that he had, on or about 24 May 1999, when the marital relationship was apparently falling apart, made known to LWD this proposed investment. As LWD stated she would prefer CSC to cause the investment to be carried out through a new foreign corporation and not Andreas, she instructed GE Secretaries Ltd to acquire a company for CSC and this was Silver Cumulus. CSC then purchased HK\$70 million worth of shares in the name of Silver Cumulus and HK\$39,354,023.05 was required to settle the margin amount in the securities trading account of Silver Cumulus with Worldsec by 26 May 1999.
- I 53. As a bank account could not be opened in the name of Silver Cumulus with the Kincheng Banking Corp (Kincheng) at the time, CSC deposited the money he had borrowed to settle in part the margin
- H
- J

amount into the bank account of Baldwin with Kincheng. Banknotes of HK\$6 million were thus deposited on 25 May 1999 and banknotes in two portions of HK\$10 million and HK\$9 million were deposited on 26 May 1999. As the borrowed funds were insufficient to settle the margin amount, in accordance with the “accepted practice”, CSC instructed the staff of Baldwin to give instructions to Hang Seng to transfer to Andreas’ account with Hang Seng the proceeds of two other fixed deposits held by Baldwin in the total sum of HK\$40,099,311.87. Unknown to him, LWD had given instructions to Hang Seng on 26 May 2002, the day before she left the matrimonial home with Ann, to withdraw these two fixed deposits totalling HK\$40,099,311.87 and to transfer the funds to Junestar’s account with Hang Seng (it is LWD’s case that this withdrawal was a further repayment by Baldwin of part of the outstanding sum in respect of the shareholder’s loan from Junestar). When CSC discovered, on 27 May 1999, the proceeds of the other two fixed deposits had been transferred to Junestar instead of Andreas, and that Hang Seng would decline to honour the cheque he drew on Andreas’ account in the sum of HK\$39,354,023.05 in favour of Worldsec if Andreas was not put in funds within a short time, CSC instructed the staff of Baldwin to uplift the two fixed deposits in question in the total sum of HK\$40,091,233.37 by premature withdrawal and to transfer the proceeds to Andreas. Again, this was done in accordance with the “accepted practice”. Further, CSC had, on or about 17 June 1999, deposited into Baldwin for the credit of Junestar’s account the sum of HK\$28 million from the moneys he had borrowed to fund his investment in shares.

54. Whether CSC’s case of an accepted practice is made out is a matter to be resolved at the trial. If his allegation were accepted that there was a settled and accepted course of conduct agreed between Junestar and Rocky for each shareholder to draw money from Baldwin freely against the dividends each has kept deposited in its respective accounts of Baldwin, and that there was also a settled and accepted practice between CSC and LWD for CSC to draw money from Baldwin freely under Junestar’s account for his personal benefit, it may be that LWD and Junestar cannot rely on CSC’s withdrawals as grounds for complaint (*Re Fildes Bros* [1970] 1 WLR 592 at pp.596H–597D; *Ho Tung v Man On Insurance Co Ltd* [1902] AC 232 at p.236). At this stage, I do not regard the evidence of the settled and accepted practice as sufficiently cogent. Mr Poon has drawn my attention to the discrepancies regarding the alleged accepted practice between Junestar and Rocky as presently formulated and what CSC has deposed to in para.33 of his first affirmation filed in HCMP No 703 of 2001. It is not apparent why two fixed deposits of about HK\$20 million each had to be uplifted on 27 May 1999 when CSC had at his disposal HK\$25 million in banknotes being borrowed funds by 26 May 1999 and the amount of margin payment required was only HK\$39 million. I also note that of the HK\$40 million odd withdrawn on CSC’s instructions for his personal benefit, only HK\$28 million

- A was repaid to Baldwin. My provisional view is that a *prima facie* case of misappropriation of assets has been made out.

B *Alleged wrongful payment of bonus salary to CSC and interest to Rocky*

55. The basic facts, which are not in dispute, may be set out as follows.

- C 56. In a document purporting to be the minutes of a meeting of the board of directors of Baldwin held at its registered office on 30 July 1999 (the first minutes), it was stated that LWD was present at the meeting, that the board of directors had resolved a bonus salary was to be awarded to CSC as the managing director of Baldwin since its founding in 1977, and that such bonus was to be calculated at the rate of 12.5% of the accumulated net audited profit of Baldwin as from the first fiscal year of Baldwin. The first minutes were signed by CSC, purportedly as chairman of the meeting, and were shown to LWD by Mr Chan Wai Lim. No such meeting was in fact held, nor was LWD present at any such meeting. LWD objected to the first minutes in her letter to Mr Chan Wai Lim on 6 August 1999.

- E 57. In another document purporting to be the minutes of a meeting of the board of directors of Baldwin held at its registered office on 14 August 1999 (the second minutes), it was stated that CSC, LWD, Mr Chan Wai Lim and Madam Lo Hung Suen were present at the meeting, with CSC elected as the chairman, and that the board of directors had resolved: (1) that a bonus salary of HK\$23,503,273.30 was to be awarded to CSC for his service as the managing director since the founding of Baldwin up to 1998, calculated at the rate of 12.5% of the net annual audited profit of Baldwin; and (2) that as from 15 June 1999, interest would be paid to all directors' accounts and shareholders' accounts with Baldwin at the rate of 8% per annum on the credit balance of such accounts. The second minutes were signed by CSC purportedly as the chairman of the meeting. No meeting was in fact held on 14 August 1999, nor was LWD present at any such meeting. LWD objected to the second minutes by her letters to CSC and the board of directors of Baldwin dated 16 and 19 August 1999, respectively.

- H 58. In a third document purporting to be the minutes of a meeting of the board of directors of Baldwin held at its registered office on 14 August 1999 (the third minutes), it was stated that LWD, CSC and I Mr Chan Wai Lim were present at the meeting, with CSC elected as the chairman, and that the board had passed resolutions identical to those set out in the second minutes. The third minutes were signed by CSC, purportedly as the chairman, and by both CSC and Mr Chan Wai Lim, purportedly as attendants of the meeting. No such meeting J was in fact held.

59. As at 15 June 1999, being the date referred to in the resolution set out in the second and third minutes as from which interest was

payable on the credit balance of directors' and shareholders' accounts, A
Baldwin owed Rocky HK\$78,056,082.88 as shareholder's loan. I
should mention that on 14 June 1999, LWD had caused a fixed deposit
of Baldwin of about HK\$49 million to be uplifted, and HK\$40 million
of the proceeds to be transferred to Junestar's Hang Seng bank
account, in further repayment of the shareholder's loan from Junestar B
to Baldwin, thereby reducing the outstanding balance on the loan
to HK\$1,495,704.18. By her letter of 23 June 1999, LWD informed
the other directors of Baldwin of the repayments of the shareholder's
loan of Junestar in the total sum of HK\$80,099,311.87 and, at the same
time, urged the board to forthwith repay the shareholder's loan of C
Rocky out of Baldwin's surplus funds not immediately required for
the company's business. Between 10 August 1999 and 5 September
2000, a total of HK\$49 million was repaid by Baldwin to Rocky.

60. By a cheque dated 19 August 1999, drawn on the account
of Baldwin in Kincheng and signed by CSC, Baldwin paid to CSC D
HK\$23,503,273.30 as bonus salary for managing director from 1976
to April 1998. Interest on Baldwin's indebtedness to Rocky calculated
at 8% per annum in the sum of HK\$6,962,145.83 was credited to an
interest payable account in the books and records of Baldwin from
15 June 1999 to 31 March 2001, although no actual payment has been E
made.

61. Quite apart from the fact that no such meetings of the
directors were held as stated in the first, second and third minutes,
it is LWD's case that the resolution purportedly passed to pay bonus
salary to CSC was unlawful as it was in breach of art.49 of the Articles F
of Association of Baldwin which prescribes that bonus must be paid
out of net profits and there was no net profit available for this purpose
when the resolution was purportedly passed. It is stated in the first
report of PwC that Baldwin had suffered heavy losses from 1998 to
2000, resulting in a fundamental uncertainty to prepare its accounts G
on a going concern basis, as it had recorded net accumulated losses
of approximately HK\$270 million by the end of 31 March 2000. The
resolution to award bonus salary was in breach of art.49 in another
respect, as this article requires the approval of Baldwin in general
meeting for the payment of any bonus, and no such general meeting H
was held. Both the resolutions to pay bonus salary and interest on
the credit balance of directors' and shareholders' accounts were in
contravention of art.43 and s.162(1) of Cap.32 in that neither CSC,
nor Mr Chan Wai Lim, who was interested in one or the other of
the resolutions, had disclosed to the board their respective interests I
at, or before, the passing of such resolutions. Further, even if a meeting
of the board of directors were held between CSC and Mr Chan Wai
Lim as stated in the third minutes, such meeting was inquorate and
in breach of art.37, in that art.43 declares that any director who is
interested in any contract, arrangement or dealing shall not vote J
and shall not be counted as part of a quorum when any such contract,
arrangement or dealing is under consideration.

A 62. It is alleged by CSC that the payment of HK\$23.5 million
as bonus salary to himself was discussed between CSC, LWD and
Mr Chan Wai Lim on no less than two occasions after LWD had
left the matrimonial home when they still attended regular family
gatherings at the residence of LWD's parents, and that all three had
B agreed, in principle, for CSC to be paid HK\$1 million a year for each
of the 23 years when he served as managing director. The first minutes
were prepared by Miss Choi on the instructions of CSC in accordance
with this agreement in principle. Subsequent to the first minutes,
Mr Chan Wai Lim raised with CSC that interest should be credited
C to the dividends which Rocky had kept deposited in its account
with Baldwin. CSC, therefore, instructed Miss Choi to prepare the
second minutes, which recited that CSC, LWD, Mr Chan Wai Lim
and Madam Lo Hung Suen were present at the directors' meeting.
The second minutes were discussed and agreed to, by CSC, LWD
D and Mr Chan Wai Lim when they met at another family gathering.
They also agreed to sign a revised version of the minutes which would
recite that only CSC, LWD and Mr Chan Wai Lim were present.
Hence, the third minutes were prepared by Miss Choi. However,
LWD refused to sign the third minutes in breach of her agreement
E to do so.

63. It was submitted by Mr Poon that the alleged agreement
of LWD to award bonus salary to CSC is plainly inconsistent with
contemporaneous documents, namely, the letters written by LWD to
Mr Chan Wai Lim and CSC objecting to the first and second minutes,
F and these letters were not refuted by CSC at the time. Further, it has
not been denied that the resolutions purportedly passed were in breach
of various provisions in the Articles of Association. I note also that the
allegation that LWD had agreed various things with CSC and Mr Chan
Wai Lim on several occasions at the family gatherings is at odds with
G paras.62 and 63 of the first affirmation of CSC in HCMP No 703 of
2001 in which he stated there was a "communication blockade", and
that he was unable to talk to LWD on any of these occasions due to
the intervention of Ms Ann Chan.

64. On this allegation, my provisional view is that a *prima facie*
H case of misappropriation of assets of Baldwin has been made out by
LWD and Junestar.

I *Alleged unlawful payments to CSC's brothers, securities trading
companies and for the purchase and maintenance of a horse*

65. It is not in dispute that between 1 April 1996 and 16 August
1999, CSC had used the funds of Baldwin to make various payments
for his personal purpose unrelated to the interest of Baldwin. The
total amounts involved were HK\$14,842,576.16, and the facts are as
J follows.

66. Between 1 April 1996 and 16 August 1999, CSC had caused
to be withdrawn from Baldwin a total amount of HK\$501,500 in cash,

of which HK\$241,500 were paid to his two brothers and the balance of HK\$260,000 were withdrawn by him for unknown purpose. A

67. Between 13 July 1996 and 16 April 1999, CSC had caused the funds of Baldwin in the aggregate amount of HK\$13,681,578.07 to be paid to various securities trading companies in settlement of sums owed to them by CSC, or by companies solely under his control, for his personal investments in securities. B

68. Between 11 December 1998 and 13 January 1999, CSC caused Baldwin to pay a total sum of HK\$659,498.09 for his purchase of a horse and its maintenance.

69. All the above payments were entered and recorded in the books of account of Baldwin as payments made to Junestar in the form of debits to its current account with Baldwin. C

70. LWD claims that she only became aware of these payments as a result of the PwC report, and that they were made without authority and that CSC was simply treating the assets of Baldwin as his own. D

71. CSC's answer is that there was an accepted and settled practice between Junestar and Rocky for Junestar to withdraw money from Baldwin against the shareholder's account of Junestar, that there was also an accepted and settled practice between CSC and LWD for CSC to draw against Junestar's account with Baldwin for his personal use, and that all the above drawings were made in accordance with accepted practice. CSC further stated that the drawings were subsequently set off by re-deposits made by him to Baldwin for the credit of Junestar's account, the particulars of which are set out in Annexure 2 to his defence in HCA No 1036 of 2002. According to Annexure 2, of the total amount he had withdrawn to pay for his investments in securities being HK\$13,681,578.07, CSC had re-deposited a total of HK\$10,263,989.99 to set off such drawings. It is alleged that *some* of the drawings were clearly known to LWD, "on the face of the books and records of Baldwin", and also because LWD claims to be the sole proprietor of Bold Win Securities Co, being one of the securities trading companies through which CSC carried out his investments in securities (it is CSC's case that Bold Win Securities Co was jointly owned by CSC and LWD beneficially). It is further alleged that LWD had assented to and authorised *all* the drawings (there were quite a number of them) in that a cheque dated 30 October 1997 drawn on Baldwin for HK\$600,000 in favour of a securities trading company was signed by LWD jointly with CSC, that the vouchers of three other payments to securities trading companies were checked and approved by Ms Ann Chan, who was CSC's personal assistant in Baldwin at the time, and she had signed a cheque for one of these transactions jointly with Miss Choi, and that the vouchers of the payments made for the purchase and maintenance of a horse were checked and approved by Ms Ann Chan. E F G H I J

72. I have dealt with CSC's case on accepted practice in the earlier parts of this decision and his allegations of knowledge on the

A part of LWD and Ann's knowledge to be imputed to LWD. Suffice it to say at this stage I am of the provisional view that a *prima facie* case of misappropriation of Baldwin's assets by CSC has been made out.

B *Alleged unlawful payments in respect of a property*

73. The basic facts relating to this complaint, which are not disputed, are as follows.

74. Between 27 June 1998 and 10 September 1998, CSC caused Baldwin to pay a total sum of HK\$309,623.16 to various suppliers and contractors in respect of renovation work carried out to a property in Hong Lok Yuen, Tai Po, New Territories, which was owned by Krypton Ltd, and the shares of which are held by the senior project manager of Damen Ltd and his wife. Damen Ltd is a member of the Cheung Kong Group and was the employer of Baldwin in the construction project at Tin Shui Wai. A substantial part of the payments made was for building a tennis court in the property.

75. It is alleged by LWD that CSC made the payments for the above renovation work with a view to offering an advantage to the project manager as an inducement or reward for favouring or facilitating Baldwin in doing business with the Cheung Kong Group.

76. It is denied by CSC that the payments were made for the alleged improper purpose. He claims that the project manager had requested Baldwin to convert the yard in his property into a golf practice area and to carry out some renovation works inside the house. CSC delegated the job to an employee of Baldwin who mistakenly arranged for the yard to be converted into a tennis court instead of a golf practice area and the cost of the works had far exceeded the amount the customer had intended to spend. As a result, Baldwin did not seek payment from the project manager of any of the costs it had paid to its subcontractors.

77. It is not alleged by CSC that the project manager had rejected the finished work, assuming that the work was done by mistake. On a provisional basis, I am not prepared to say that a *prima facie* case of misconduct on the part of CSC has not been made out.

H *Interest-free loans to a subcontractor*

78. It is not in dispute that between 8 December 1993 and 6 July 2000, CSC caused Baldwin to lend to Mr Chan Chi Kuen, a subcontractor of Baldwin, interest-free loans without any security or agreed terms of repayment. Only one repayment of HK\$212,800 was made during 1993/94. The balance outstanding from April 1997 to July 2000 was HK\$797,000. The entire outstanding sum was repaid on 6 July 2000.

79. It is alleged by LWD that the loans were made without the knowledge or consent of the board of directors and that CSC had failed to act *bona fide* in the interest of Baldwin in granting the interest-free loans to this subcontractor.

80. CSC claims that this subcontractor was extremely valuable to Baldwin and they had a very successful business relationship since 1979. The loans were made to ease “minor cash flow problems” of the subcontractor from time to time, and they were made in the best interest of Baldwin in view of its business relationship with the subcontractor. A

81. This seems to me to be a relatively minor complaint, if established. I do not propose to take this into account for the purpose of the present applications. B

Alleged misuse of Baldwin’s bank account C

82. It is not in dispute that over a period of eleven days between 25 May 1999 and 4 June 1999, CSC caused to be deposited into Baldwin’s account at Kincheng a substantial number of banknotes not belonging to Baldwin in the total sum of HK\$35,800,000. Each of the cash deposits was recorded in the books of account of Baldwin as a credit entry in the current account of CSC as a director. On 2 June and 14 June 1999, two cheques signed by CSC were drawn on Baldwin’s account made payable to CSC, in the respective sums of HK\$7,800,000 and HK\$28 million, causing the entire amount deposited to be withdrawn. On 17 June 1999, CSC drew a cheque on his personal account at Kincheng in favour of Baldwin in the amount of HK\$28 million. This was recorded in the books of account of Baldwin as a credit entry in the current account of Junestar. D

83. On 8 June 1999, LWD issued a notice convening a meeting of the board of directors on 22 June 1999 for the purpose of considering CSC’s use of Baldwin’s bank account in the manner aforesaid. The meeting was aborted, as all the other directors did not attend. LWD also sought an explanation of the above transactions from CSC in her letters dated 23 June 1999, 5 July 1999 and 5 August 1999. No explanation was given by CSC. E

84. CSC stated that the amount of HK\$35,800,000 in banknotes were borrowed by him to make a substantial purchase of shares as his personal investment in late May 1999 in the value of HK\$70 million to HK\$100 million as mentioned earlier. The funds were deposited into Baldwin’s bank account because a bank account could not be opened for Silver Cumulus. Further, as Silver Cumulus did not have an account in the ledgers of Baldwin, the amount deposited was credited to the director’s account of CSC with Baldwin. It would appear that he first provided an explanation that the aforesaid deposits and withdrawals were for his investments in stocks only in para.31 of his first affirmation in HCMP No 703 of 2001 filed on 22 February 2001, in which he also alleged that LWD had been fully informed by him of the use of Baldwin’s bank account in that manner. F

85. It is highly unusual for such a large amount of money to be deposited in banknotes within such a short period of time. So far, CSC has made no mention of the ultimate source of these funds. It is not apparent why, instead of his personal bank account, Baldwin’s bank G

- A account was used for the alleged purpose. He gave no explanation at the time despite LWD's repeated requests. His allegation that LWD was fully informed of his use of Baldwin's bank account does not tally with contemporaneous documents being the notice to convene a directors' meeting and the letters of LWD. I am inclined to think that
- B a *prima facie* case of misconduct has been made out for this complaint.

Other misfeasant acts as alleged

86. These other misfeasant acts as alleged relate to CSC's management of the construction projects of Baldwin. In summary, it is alleged that in breach of his fiduciary duty, CSC had caused Baldwin to give substantial discounts to the employers in the net tender sum of the projects; that Baldwin was subject to substantial claims by the employers of liquidated and ascertained damages (LADs), substantial variations claims have
- D remained uncertified, and final accounts in respect of projects have not been settled due to the mismanagement of the projects.

87. Regarding the giving of substantial discounts, it is accepted by Mr Poon that there is an error in para.61 of the petition and in para.40 of the amended statement of claim in HCA No 1036 of 2002,
- E in that it is alleged that Baldwin gave to the employers substantial discounts to "the net contract sum". This should have been "the net tender sum", being the gross tender sum less the provisional sums for the works undertaken by the subcontractors and suppliers of Baldwin. Further, the total amount of discounts given for eight projects, in the
- F sum of approximately HK\$136,150,000, would have been equivalent to an effective percentage of 4.72% of the original tender sums, not 6.29% as pleaded.

88. It is not in dispute that CSC was the only person in Baldwin to deal with all commercial negotiations on financial matters throughout the tender stage, construction stage, and up to the final account stage, with both the employers and subcontractors. Discounts were offered either at the time when a tender was submitted, or after tender negotiations with the employers. It is recognised in the PwC report that due to the highly competitive nature of the construction
- G industry, the giving of discounts to procure construction projects is "not unusual". What gave rise to concern, according to the PwC report, is the magnitude of the discounts offered, considering that the profit margins for main contractors are typically low.
- H

89. CSC engaged his own experts in the construction industry to give a report dated 4 July 2002 (the Molloy report) providing their comments to the relevant sections in the PwC report. PwC made a second supplemental report dated 15 July 2002 in response to such comments (PwC's second supplemental report). The findings in the Molloy report as to the total amount of discounts offered by Baldwin
- I are in line with those stated in the PwC report. I should also point out that in PwC's second supplemental report, it is accepted that the giving of discounts by Baldwin does not "necessarily" reduce the profit
- J

margin of Baldwin as it had obtained cheap prices from its domestic subcontractors to help it to procure the projects. A

90. Has a *prima facie* case been made out that CSC was in breach of fiduciary duty in offering discounts in the total sum of about HK\$136 million? There is insufficient evidence at this stage to support CSC's contention that without such substantial discounts, members of the Cheung Kong Group would not have awarded the contracts to Baldwin. On the basis of the magnitude of the discounts given, I am persuaded that a *prima facie* case has been made out for this complaint. B

91. I turn to the substantial claims for LADs by the employers. This would need to be considered in conjunction with Baldwin's claims for extension of time (EOT). The case as pleaded in the petition and the amended statement of claim is based on the findings in the PwC report. This report was prepared on the basis of the documents inspected by PwC between 13 and 25 September 2001. After September 2001, there had been EOT approvals and additional payment certifications, causing the potential liability of Baldwin to the employers for LADs to be reduced by some HK\$277 million to about HK\$169 million. C D

92. I will take the figures from the Molloy report as this was prepared with the benefit of subsequent information. E

Project	Total delay (days)	EOT granted (days)	Delays subject to LADs (days)	Total LADs per section (HK\$)	Total LADs per project (HK\$)
<i>Tsing Yi Phase 1</i>					
Section A	91	91	0	0	
Section B	189	138	51	14,280,000	14,280,000
<i>Tsing Yi Phase 2</i>					
Section A	123	123	0	0	
Section B	91	91	0	0	
Section C	352	50	302	114,760,000	114,760,000
<i>Tin Shui Wai Lot 4 Phase 2</i>					
Carpark & Arcade	443	351	92	19,320,000	
Remaining works	631	351	188 (= 631 – 351 – 92)	18,929,178.56	38,249,178.56
<i>Tin Shui Wai Lot 6</i>					
	15	0	15	2,700,000	2,700,000
Total LADs					<u>169,989,178.56</u>

- A 93. It is alleged by LWD and Junestar that the substantial potential liability of Baldwin to the employers for LADs was due to mismanagement of the projects in several respects being the failure to deliver most of the construction projects on time and by the date for practical completion, the failure to comply with time bar provisions
- B in the main contract agreements in submitting claims for EOT, the failure to submit proper claims for EOT in that the claims submitted do not address the issues of entitlement and programme criticality adequately, the failure to identify causes of delay to allow LADs to be passed through to domestic or nominated subcontractors. Further,
- C it is alleged that Baldwin had failed to monitor properly the quality of the works of the subcontractors in various projects in that a total sum of about HK\$52,448,000 had been deducted by the employers, and that Baldwin had failed to finalise the accounts for a number of projects which have long been completed with the result that
- D substantial payments for the works done remain outstanding. One of the criticisms in the PwC report is that basic project control tools in the form of computer software have not been used to update and monitor construction programmes in view of the size and complexity of the projects.
- E 94. The author of the Molloy report has reached a different conclusion in that he does not consider that the procedures adopted by Baldwin had resulted in significant financial risk to its financial position. According to his findings, in order to maintain good business relationship with the Cheung Kong Group, CSC and his staff have not
- F adopted a “claim conscious and contentious approach” in running the projects with the employers. That is why only a small team of quantity surveyors were employed in dealing with contractual and EOT matters. In some instances, EOT claims were submitted only after the employer’s representative had confirmed the date of practical completion (not
- G forthwith upon it becoming reasonably apparent that the progress of the works is delayed, as provided in some of the contracts) for two reasons. First, CSC and the Cheung Kong Group had been adopting a “partnering approach” in carrying out the projects, so the employers had seldom imposed LADs against Baldwin notwithstanding there
- H was delay, and the EOT claims submitted were not used to assert the contractual rights and entitlement of Baldwin but merely as a tool for commercial negotiation in reaching a fair settlement of the final accounts with the employers. Second, it is claimed that as EOT claims were used as a tool for negotiation, it was difficult to know how much EOT
- I Baldwin would need to apply for until the employer’s representative had confirmed the date of practical completion. The author of the Molloy report claims that this is the “normal approach” adopted by most developers and contractors in Hong Kong as major developers dislike claim conscious contractors. Further, events subsequent to the
- J inspection of documents by PwC have shown that the employers have approved claims for EOT for most of the projects, notwithstanding they were not submitted within the contractual time limit.

95. As for the amount deducted by the employers for defective work of the subcontractors in the sum of HK\$52 million odd, this represented only 2% of the combined value of the projects involved. The author of the Molloy report does not consider the percentage deducted to be excessive or unusual. Besides, corresponding amounts have been withheld by Baldwin from payments due to the subcontractors, so the effect on Baldwin's financial position would be minimal. A B

96. Regarding the delay in finalising accounts, the author of the Molloy report is of the view that there is very little the main contractor can do, as it is for the employer's quantity surveyors to deal with variation valuations and to finalise accounts. Further, it is common for final accounts to remain outstanding two or three years after completion of the work. C

97. I note that according to the Molloy report, since the commencement of the present proceedings, the attitude of the representatives of the Cheung Kong Group has become "more contractual" in that the claims for EOT have been scrutinised and some of the claims have been rejected. The author of the report recognises there is a need for "detailed and substantiated claims" to be produced if Baldwin's claims are to be preserved, and for that reason, he recommends that key staff, including CSC, should be retained. D E

98. There is no dispute that the projects have not been administered by Baldwin strictly in accordance with the contractual provisions, as it is the gravamen of the Molloy report that things were done in an "informal and non-contractual manner" and it was sought to justify the "non-adversarial attitudes" adopted. F

99. It seems to me that the practice of Baldwin to submit claims for EOT well after the contractual time bar and after the dates for practical completion is a risky practice. Further, the claims submitted do not appear to have contained adequate particulars, as recognised in the Molloy report. The claims for EOT have not been settled as yet. It is not known how the employers would resolve this, now that they appear to have become "more contractual". I am not expressing any views on the merits of the employers' claims against Baldwin for LADs. I am of the provisional view that there is a *prima facie* case CSC was in breach of his fiduciary duties in that the construction projects had not been administered in accordance with the contractual provisions. G H

I

The audited accounts

100. The complaint is that as the director responsible for the day-to-day affairs of Baldwin, CSC was in breach of ss.122(1), (1A) and (2) of Cap.32 in that none of the audited financial statements of Baldwin comprising both profit and loss accounts and the balance J

A sheets for the years ended 31 March 1997, 1998, 1999 and 2000 were laid at its annual general meetings during the statutory period as none of such annual general meetings were ever convened. The last annual general meeting of Baldwin was held on 30 December 1996.

101. After LWD was alerted to CSC's mismanagement of Baldwin in late May 1999 as alleged, she had requested for information on the audited accounts on several occasions when she was provided with the audited financial statements for the years ended 31 March 1999 and 2000. In the auditors' report to the annual accounts for these financial years, the auditors made a disclaimer of opinion as to whether the financial statements gave a true and fair view of the company's affairs due to the limited evidence made available to them concerning in particular the validity and correctness of the amount of LADs payable to the employers for the delay in completion of the construction projects undertaken. LWD requested for information and explanation in view of the auditors' qualifications. CSC did not answer or did not answer adequately the queries she raised on the audited accounts. Her attempts to seek such information at meetings of the board of directors were likewise unsuccessful, as the meetings were either aborted or adjourned by CSC.

102. In the draft audited accounts dated 5 March 2002 for the financial year ended March 2001, the auditors stated that they were unable to obtain information and explanation from the directors as to how they have satisfied themselves that Baldwin will be able to meet in full its financial obligations as they fall due in the foreseeable future and how they have satisfied themselves that it is appropriate to prepare the financial statements on a going concern basis. The auditors made a disclaimer of opinion as they had done for the previous years.

103. The above matters would appear not to have been disputed by CSC.

Denial of access to documents

104. This relates to the attempts of LWD to inspect the books and accounts of Baldwin and BF in 2000 and 2001, which were blocked by CSC and which led to the proceedings brought by LWD in HCMP No 702 and 703 of 2001 February 2001. Eventually, it was ordered by the Court of Appeal, on 7 September 2001, that CSC should forthwith provide to LWD and her agents all books and accounts of Baldwin and BF for inspection and for copies to be taken.

No annual general meetings or properly constituted board of directors

105. By s.111 of Cap.32 and art.22 of the Articles of Association of Baldwin, a general meeting is required to be held once every year

as its annual general meeting and not more than 15 months shall elapse after the holding of the last annual general meeting. As mentioned earlier, no annual general meeting of Baldwin has been held since 30 December 1996. A

106. It is provided in art.38 of the Articles of Association that the directors shall hold office for a term of one year and shall retire at the expiration of their terms of office. It is alleged in the petition that as no annual general meeting of Baldwin has been held since 30 December 1996, there is no properly constituted or elected board of directors of Baldwin since 31 December 1997, being the last day on which the 1997 annual general meeting should have been held. B
C
I was referred by Mr Poon to *Re Bodega Co Ltd* [1904] 1 Ch 276 and *Re Consolidated Nickel Mines Ltd* [1914] 1 Ch 883. It is further alleged that the appointments of Mr Tang Chun Sing and Mr Yu Ho Yuen as additional directors are unlawful and invalid in that they were allegedly appointed at two meetings of the board of directors purportedly held on 26 March 1999 and 7 July 1999 as set out in two minutes signed by CSC as the chairman of the meetings when no such meetings were held. Further, it was stated in the minutes that Mr Tang and Mr Yu were elected by the “subscribers” of Baldwin. By 1999, the subscribers of Baldwin, being LWD and CSC, had long ceased to hold any subscriber share or to be the registered holder of any share in Baldwin. D
E

107. The complaint here is that there is no properly constituted board of directors for Baldwin, although there are *de facto* directors who have been discharging the functions of directors. The petitioner’s position is that it would not be right to allow the *de facto* directors to continue, in view of conflicting decisions on the effect of an irregularity upon acts affecting shareholders, such as allotting shares, making valid calls, forfeiting shares or appointing directors (see *Gore-Browne on Companies* (44th ed., 1986) Vol.2, para.26.5). F
G

108. On behalf of CSC, Mr Chang submitted that the contention that there has been no properly constituted board is misconceived on a number of grounds.

109. Firstly, it was submitted that the provisions relating to rotation of directors, being regs.73–76 of Table A in the First Schedule of Cap.32, 1975 edition, were incorporated in the Articles of Association. Regulation 76 provides that: H

... the company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto and in default the retiring director shall be deemed to have been re-elected unless at such meeting it is resolved not to fill up such vacated office. I

It was submitted that even if some of the directors of Baldwin should retire by 31 December 1997, the retiring directors were deemed to have been re-elected pursuant to reg.76. J

- A 110. I have reservations if the provisions on rotation of directors, including reg.76, were adopted in the Articles of Association of Baldwin, in view of art.38. Even if reg.76 had been incorporated in the Articles, this provision would not apply if no general meeting of the company were held at all, in breach of art.22 and s.111 of Cap.32 (see *Buckley on the Companies Acts* (11th ed.) p.745).

111. Secondly, it was submitted that art.38 would not apply to CSC as he is the managing director. Regulation 68 in Table A provides, *inter alia*, that:

- C ... the directors may from time to time appoint one or more of their body to the office of managing director or manager for such term and at such remuneration ... as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation of retirement of directors
- D

Assuming that reg.68 was incorporated in the Articles, the difficulty here is that there is no evidence of CSC having been appointed as the managing director of Baldwin. The available evidence merely showed that he was the *de facto* managing director.

- E 112. Thirdly, as regards the alleged irregularity in the appointment of Mr Tang and Mr Yu as additional directors or the irregularity in not holding annual general meetings, reliance was sought to be placed on reg.88 in Table A which provides that:

- F ... all acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.
- G

Further, Mr Chang submitted that the *Duomatic* principle referred to earlier (ie the informal consent of all the shareholders) could also be invoked.

- H 113. In answer to this, Mr Poon referred to the decision of *Morris v Kanssen* [1946] AC 459 which held that the provisions equivalent to reg.88 and s.157 of Cap.32 were only designed to deal with the situation where there were slips or irregularities in appointment, not with a case with a total absence of appointment, as in the present case.
- I In the latter situation, there was not a defect in the appointment, there was no act at all.

114. It may be that some of the acts done by the *de facto* directors would be regarded as valid if the *Duomatic* principle could be invoked. It is not necessary to decide this for present purpose. The point here is whether on the face of it, there is no properly constituted board of directors for Baldwin. I am satisfied that a *prima facie* case has been made out in this respect.
- J

Allegations of misconduct as regards BF

A

Exclusion from management of BF and secret bank accounts

115. All the bank accounts in Boldwin and BF used to be operated by CSC and LWD signing singly. After the incidents in May 1999, and in August 1999, LWD requested CSC to convene meetings of the board of directors of Boldwin and BF to change the bank mandates to joint signatories. A meeting of the board of directors of BF was held on 2 September 1999 attended by LWD, CSC and Ms Ann Chan in which it was resolved that all accounts of BF with the Hongkong & Shanghai Banking Corp (HSBC) and Hang Seng be operated with LWD and CSC signing jointly in addition to the company chop of BF.

B

C

116. Between October 2000 and February 2001, LWD was pressed by the employees of BF acting on CSC's instructions to co-sign a great number of cheques in excess of HK\$80 million. LWD did so with reluctance as she regarded the documents or particulars provided to her in support of the payments were inadequate. She was however given to understand that the bank accounts of BF operated by her and CSC jointly were the only sources for BF to discharge its daily expenses and the amounts due to its subcontractors. In November 2000, CSC refused to supply the monthly bank statements of BF to LWD.

D

E

117. A meeting of the directors of BF was purportedly held on 27 November 2000 and attended by CSC and Mr Henry Yip. LWD has challenged the validity of the resolutions passed at this meeting on the ground that LWD and Ms Ann Chan had objected to the short notice of the meeting. According to the minutes of this meeting, it was resolved by CSC and Mr Yip that with effect from 29 November 2000, the mandates for the operation of the accounts of BF with HSBC and Hang Seng be changed to CSC and Mr Yip as joint signatories in addition to the company chop of BF, and a new account was to be opened with these joint signatories. LWD and Ms Ann Chan received a copy of the minutes on 30 November 2000.

F

G

118. Attempts at resolving the dispute on the aforesaid amendment of the mandates were not successful, as a meeting of the board of directors could not be held due to the deadlock among LWD, Ms Ann Chan, CSC and Yip on the election of the chairman of the meeting. Thus, the meetings on 30 November 2000, 4 December 2000, 29 January 2001 and 7 February 2001 were all aborted.

H

119. It was only after the Court of Appeal had granted the orders for LWD and Ms Ann Chan to inspect the documents of BF and when PwC carried out an inspection as their agent in September 2001 that it was discovered that according to the minutes of a meeting of the board of directors of BF purportedly held at its registered office on 1 September 1999, CSC and Mr Yip had resolved that two bank accounts in the name of BF be opened with Kincheng, Shamshuipo

I

J

- A sub-branch and that such accounts be operated by CSC solely with the company chop of BF (the Kincheng accounts). It was in the course of inspection of documents by PwC that CSC produced to them three documents addressed to LWD, Ms Ann Chan and himself purporting to be notices dated 17 August 1999 issued by him for convening the meeting of directors allegedly held on 1 September 1999.

120. From 1 September 1999 to July 2001, CSC had caused a total of HK\$1,126,559,000, received by BF from the employers as interim progress payments, to be paid into the Kincheng accounts operated solely by him, instead of paying the amounts into the accounts of BF at HSBC or Hang Seng which were operated with joint signatures. Substantial amounts have been withdrawn from the Kincheng accounts as in the account ledger of BF for January 2002, it was recorded that the monies standing to the credit of the Kincheng accounts stood at HK\$156,183,740, a mere 13.86% of the total amounts deposited.

- D 121. It is alleged by LWD that the opening and operation of the Kincheng accounts by CSC were acts done without the authority of the board of directors of BF, as neither LWD nor Ms Ann Chan had received the notices for the meeting of 1 September 1999, nor were they aware of the resolutions purportedly passed at that meeting.
- E It is further alleged that CSC is liable to account to BF for all sums deposited into and withdrawn from the Kincheng accounts of over HK\$1 billion. LWD's solicitors had written to the Bank of China (Hong Kong) Ltd (BOC) as the successor-in-title of Kincheng on 20 December 2001 requesting BOC to refrain from acting in any way to facilitate CSC in operating the Kincheng accounts. The request was turned down by BOC on 28 December 2001 on the ground that the Kincheng accounts had been operating for some time and the bank had no notice of any illegality or irregularity concerning the opening or operating of the accounts until receipt of the letter of LWD's solicitors. BOC requested BF to give them proper authority or instruction or the necessary court order if LWD should require them not to act on the mandate that was given.

- H 122. A meeting of directors convened by LWD on 4 January 2002 for this purpose was aborted because the four directors could not agree on the chairman for the meeting. CSC has continued to operate the Kincheng accounts.

- I 123. CSC's answer to the above allegations is that he had given proper notice of the meeting on 1 September 1999 by faxing the notices dated 17 August 1999 to LWD and Ms Ann Chan and that all the withdrawals from the Kincheng accounts had been recorded and documented.

- J 124. On a provisional basis, I do not think CSC has adduced cogent evidence in answer to LWD's allegations here. I take into account the conduct of LWD from August 1999 when she repeatedly sought information on the financial affairs of Baldwin and BF. It does not seem likely she, or Ms Ann Chan, would not attend the meeting

of directors on 1 September 1999 if they had indeed received notice of the meeting by fax. Further, prior to September 2001, CSC had made no mention of the Kincheng accounts in any of the letters of his solicitors or in his affirmations filed in court. In para.30 of his first affirmation filed in HCMP No 703 of 2002, he complained of LWD's delay in co-signing cheques for BF and alleged that the company was in "great jeopardy" and the consequence of not making punctual payments to its subcontractors because of LWD's delay would be "very disastrous". I am satisfied a *prima facie* case of misconduct of CSC has been made out.

Deadlock at board meetings

125. As mentioned above, between 30 November 2000 and 4 January 2002, five meetings of the directors were aborted because the four directors could not agree on the chairman of these meetings. The powers of management of BF cannot be vested in its shareholders exercisable in general meetings as Maintain Profits and Myriad Gold are owned and controlled equally by LWD and CSC.

126. CSC's answer to the deadlock is that this has not affected the ability of BF to deal effectively with its business operations as since the incorporation of BF, he has been vested with full power to manage the business of BF as its managing director "without reference to its Board of Directors, whether in form or in substance". Hence, until his position has been altered by a valid and effective resolution of the board of directors or of the shareholders in general meeting, he is entitled to continue to manage BF as its managing director.

127. I am of the provisional view that if there is complete deadlock and mutual trust and confidence is gone, a good *prima facie* case to wind up Maintain Profits and Myriad Gold on just and equitable grounds is made out.

No annual general meetings or properly constituted board of directors

128. Since its incorporation, no annual general meeting of BF has been held, in breach of s.111 of Cap.32 and art.23 of the Articles of Association. Further, it is alleged by LWD that in view of art.8, there is no properly constituted board of directors of BF since 23 March 1999, being the last day on which the first ordinary or annual general meeting of BF should have been held.

129. The validity of the appointment of Mr Yip on 1 April 1999 as an additional director is challenged by LWD on grounds similar to those advanced to attack the appointment of Mr Tang and Mr Yu as additional directors of Boldwin.

130. For the reasons I have given in the earlier parts of this decision, I am of the provisional view that LWD has made out a *prima facie* case that BF does not have a properly constituted board of directors.

A *Payment of legal fees unrelated to BF*

131. Between 16 February 2001 and 31 January 2002, CSC caused to be withdrawn from the Kincheng accounts a total of HK\$7,152,811 to pay for legal fees incurred on his behalf or on behalf of Yip in legal proceedings to which CSC or Yip or both were parties, including HCMP Nos 702 and 703 of 2001 and the appellate proceedings, HCA No 2623 of 2001, and the matrimonial proceedings against LWD being FCMC No 4917 of 2001. In respect of the legal fees incurred for FCMC No 4717 of 2001 in the sum of HK\$862,866, CSC has repaid this amount to BF by a cheque dated 2 February 2002 drawn on his personal account.

132. It is the case of LWD that the payments of such legal fees with the funds of BF were improper as BF has not been a party to any of these proceedings, with the exception of HCMP No 703 of 2001. As for HCMP No 703 of 2001, BF was merely named as a nominal defendant; those proceedings were brought by LWD and Ms Ann Chan against CSC and Mr Henry Yip to compel them to permit inspection of the books and accounts of BF. BF was not represented in the proceedings.

133. CSC's answer is that as he and Mr Yip were sued in HCMP No 703 of 2001 as directors of BF, it is arguable that payment of their legal fees in the proceedings and the related appeal out of the funds of BF at about HK\$6.1 million was justified.

134. My provisional view is that there is a *prima facie* case of misappropriation of assets in this respect.

The Dongguan property

135. According to the minutes of a meeting of directors allegedly held at the registered office of BF on 24 July 2000 and attended by CSC and Ms Yip, it was resolved that BF was to purchase a property at Laguna Verona, Hwang Gang Lake, Dongguan, China (the Dongguan property) at HK\$926,800. The Dongguan property is a golf resort bungalow. The provisional agreement for sale and purchase was signed on 27 July 2000. Payment of the purchase price was made from the Kincheng accounts.

136. It is alleged by LWD that the resolution to purchase the Dongguan property was invalid, as neither she, nor Ms Ann Chan, had received notice of the meeting of directors. Further, the Dongguan property was purchased for an improper purpose in that it was to benefit CSC personally.

137. I am of the provisional view that there is a *prima facie* case of misappropriation of assets on the part of CSC.

J *Other misfeasant acts as alleged*

138. As in the case of Baldwin, it is alleged these other misfeasant acts as alleged relate to CSC's management of the construction projects

undertaken by BF. The complaints are similar. It is alleged that CSC A
 had given substantial discounts to the net tender sum of four projects
 in the total sum of HK\$133,836,000. Further, BF is subject to
 substantial claims of LADs by the employers. The figure as pleaded
 in the petition is HK\$420,398,000. The potential liability would appear
 to have been reduced to HK\$317,060,731 as a result of EOT claims B
 granted and additional certifications for variations made after
 September 2001. The relevant figures, taken from the Molloy report,
 are as follows:

Project	Total delay (days)	EOT granted (days)	Delays subject to LADs (days)	Total LADs per section (HK\$)	Total LADs per project (HK\$)	C
<i>King's Road</i>						D
Office	148	178	0	0		
Hotel	295	178	117	27,160,731	27,160,731	
<i>Ma On Shan</i>	174	0	174	113,100,000	113,100,000	
<i>Hok Un</i>						E
Phase IVA	260	0	260	124,800,000		
Phase IVB- Section 1	0	0	0	0		
Phase IVB- Section 2	260	0	260	52,000,000	176,800,000	F
Total LADs					<u>317,060,731</u>	

139. For the reasons similar to those given in the earlier parts of
 this decision, I have reached the provisional view there is a *prima facie* G
 case of breach of fiduciary duties on the part of CSC in the manner
 the construction projects of BF were administered.

The audited accounts

140. None of the audited financial statements of BF comprising both
 profit and loss accounts and balance sheets for the period between its
 date of incorporation and 31 March 2000 was laid at its annual general
 meetings during the statutory period required under s.122(1), (1A)
 and (2) of Cap.32 as no annual general meeting was convened since I
 incorporation. Neither the audited accounts for the period ended
 31 March 1999 nor those for the following financial year have been
 approved by the board of directors due to the deadlock. The draft
 audited accounts for the financial year ended 31 March 2001 have not
 yet been supplied to LWD. LWD's many attempts to seek explanation J
 and information from CSC on the financial statements were not
 successful.

A ***Denial of access to documents***

141. CSC refused to allow LWD and Ms Ann Chan to inspect the books and accounts of BF and this has led to HCMP No 703 of 2001, which I have dealt with.

B

Balancing competing interests — Baldwin

142. I turn to consider if it would be appropriate in all the circumstances to appoint provisional liquidators for Baldwin. This involves balancing
C competing interests, as the appointment of provisional liquidators is a serious intrusion on the company and should not be taken lightly without adequate reasons.

143. The case for the appointment of provisional liquidators for Baldwin has been put as follows. First, reliance was placed on the
D serious misconduct, lack of probity and lack of competence of CSC as alleged. It was submitted that he should be removed from his control of Baldwin to prevent further abuses of power. Second, there would appear to be deep mistrust between LWD and those in control of Baldwin. The company has apparently been functioning without
E a properly constituted board of directors for some time, although there are *de facto* directors. The audited accounts of the company have been heavily qualified by the auditors for several years. It is doubtful if the company has been managed in a proper manner. In these circumstances, it would be desirable for a third party independent from
F the controversy of the parties to take charge of the company to keep a fair balance between them pending the resolution of the dispute. Third, it was submitted that in view of the foregoing matters, it is necessary to appoint provisional liquidators to preserve the status quo so as to ensure that the assets of the company should remain undiluted, undiverted and properly administered pending the determination of
G the petition, which is envisaged would take some time to be resolved, in view of the voluminous evidence filed to date and the acrimonious dispute between LWD and CSC in these proceedings and a number of other proceedings. Reliance is placed on the *dicta* of Harman J in *Re Company (No 000596 of 1986)* [1987] BCLC 133, which was
H concerned with the appointment of a receiver for the purpose of preserving the company's assets pending the hearing of a petition to wind-up on the just and equitable ground or for the purchase of shares, and in which the judge approached the matter in the same manner as in a partnership dispute. The relevant *dicta* at pp.135G–136I read
I as follows:

J In a partnership dispute, it is almost as of course for the court, where the partners have fallen out and there has to be a dissolution, to order the appointment of a receiver, on motion, at an early stage of the partnership action. That is done to hold the ring, to ensure that the partner or partners who happen to be in possession of the partnership

trading assets do not obtain advantage, nor damage the partnership assets to the harm of the dissenting partner, nor siphon them away or otherwise maltreat the partnership affairs. It is done without any judgment of the rights or wrongs in the partnership action or any attempt to take a view as to why the partnership has broken up. It is simply designed to hold the ring and ensure that the status quo of the assets is preserved, that the value of the business is there, so that the whole thing may best be realised for the advantage of all partners in due course. That is particularly the case where there is a business with a going concern and a good-will.

144. The above submissions made on behalf of the petitioner would, on the face of it, appear to justify the appointment of provisional liquidators for Baldwin. I turn to consider whether there are any factors which would militate against this course.

145. First, it was submitted on behalf of CSC that it would be in the interest of Baldwin that the existing directors, in particular CSC, should retain day-to-day management of Baldwin to handle the claims for LADs vis-à-vis the employers and the claims of the subcontractors. I do not regard this as a matter of weight. Although the appointment of a provisional liquidator operates to transfer to him the powers of the directors who thereby cease to be the company's authorised agents, it does not mean that a provisional liquidator may not retain the services of any director or key staff to carry on the business of the company insofar as that may be necessary for the beneficial winding-up of the company.

146. Second, it was contended that the assets of Baldwin are not in jeopardy and sufficient interim measures have been implemented to preserve the assets. As at 25 June 2002, Baldwin had a total bank balance of about HK\$7 million and since 3 April 2002, the mandates of its accounts have required the joint signatures of CSC and LWD or the joint signatures of one from group A (ie CSC, LWD) and one from group B (ie Mr Tang, Mr Yu). The petitioner also has the protection of s.182 of Cap.32 in that any dispositions since the commencement of the winding-up would require a validation order. Given the amount of cash balance in the accounts of Baldwin, that Baldwin is not actively trading and the only outstanding matters are the ongoing disputes with the employers and the subcontractors, it was submitted that to appoint provisional liquidators would be a disproportionate remedy in view of the expenses involved.

147. I agree with Mr Poon here that one should not only be looking at the bank balances in considering the assets to preserve and whether the appointment of provisional liquidators would be a disproportionate remedy. According to the latest available financial statements of Baldwin, which are the draft audited accounts for the year ended March 2001, the current assets stood at HK\$133 million, made up of bank balances and cash of HK\$11.6 million, properties for sale of HK\$1.6 million, trade debtors of HK\$12.1 million, retention

- A receivables of HK\$78.9 million, other debtors of HK\$2.6 million, temporary payments of HK\$24.2 million and tax prepaid of HK\$2.3 million. There were current liabilities to be discharged in the sum of HK\$354.7 million. There would appear to be cash flow problems. The provisional liquidators would need to take possession of not just
- B the bank balances but of other assets and to discharge such liabilities in the ordinary course of business of the company. I accept the petitioner's submission that there are doubts if the company has been managed in a proper manner in the interest of all concerned.

148. Third, it was submitted that there has been undue and
- C substantial delay of the petitioner in seeking the relief and that LWD has an ulterior purpose in bringing the petition. The claims relating to misappropriation of assets, wrongful payment of bonus salary, and misuse of Baldwin's bank account were known to LWD from May to August 1999. It was pointed out that an order for disclosure was
- D made against LWD in the matrimonial proceedings on 25 March 2002 and the three winding-up petitions were presented on 2 April 2002. Further, CSC obtained a *Mareva* injunction against LWD on 15 May 2002 restraining her from disposing of assets to the extent of HK\$110 million. The applications to appoint provisional liquidators
- E were issued on 16 May 2002. It was alleged that the present applications were made to deflect CSC's pursuit of discovery in the matrimonial proceedings and to bring pressure on him so as to achieve a more favourable resolution of the dispute concerning ancillary relief in the matrimonial proceedings.

- F 149. It is true that LWD was alerted to some of the misconduct complained of in the petition in 1999. However, one cannot ignore the attempts she made by herself and through her solicitors in obtaining information and explanation from CSC in 1999 to early 2001, which were largely unsuccessful. She then brought proceedings in HCMP
- G Nos 702 and 703 of 2001 in February 2001 to assert her right of access to the books and records. The petition for divorce was only filed by CSC in May 2001. The orders for inspection were made by the Court of Appeal in September 2001 and PwC inspected and reviewed the documents and reported their findings to LWD in their report in
- H February 2002. The derivative action was brought by Junestar on 15 March 2002 and the three winding-up petitions were filed on 2 April 2002 with the summonses for the appointment of provisional liquidators issued on 16 May 2002. I do not think there was undue delay on the part of the petitioner. I decline to attach significance to
- I the close sequence of the steps taken in the matrimonial proceedings and in the winding-up proceedings. The important thing to consider is not so much whether LWD has any ulterior motive in presenting the winding-up petitions but whether she has good *prima facie* grounds in doing so.

- J 150. For the above reasons, I have come to the view that it would be appropriate in all the circumstances to appoint provisional liquidators for Baldwin.

Balancing competing interests — Maintain Profits and Myriad Gold A

151. I turn to consider the position of these companies and BF. Similar submissions were made to justify the appointment of provisional liquidators for Maintain Profits and Myriad Gold. In addition, it was submitted that there is a complete deadlock at the meetings of the board of directors with the result that no business can be transacted at any board meetings. This is clearly an undesirable state of affairs. Unlike Boldwin, BF still remains active in the tender market and is seeking new construction projects, according to the PwC report. B C

152. The latest audited accounts of BF were for the year ended 31 March 2000. The draft audited accounts for the year ended 2001 are not available. In addition, CSC has produced the management account of BF being the balance sheet as at 31 July 2002 and the cash flow forecast from August 2002 to March 2003. According to the last audited accounts for 2000, current assets were HK\$532 million and current liabilities were HK\$534 million. According to the management account as at July 2002, current assets were HK\$351 million including cash and bank balances of HK\$188 million and current liabilities were HK\$452 million. The net current liabilities were HK\$101 million. Of the bank balances, as at 14 June 2002 HK\$106 million were in the Kincheng accounts operated solely by CSC. D E

153. Mr Chang raised similar objections to the appointment of provisional liquidators for Maintain Profits and Myriad Gold as in the case of Boldwin. In addition, he submitted that it would not be right to appoint provisional liquidators for these companies as there is a real risk that such an appointment would trigger off a takeover of BF by the Cheung Kong Group under an option agreement and a loan agreement both dated 3 March 1999. F

154. The loan agreement was made between Presidential Profits Ltd (Presidential Profits, a company incorporated in the British Virgin Islands, the sole shareholder of which is Purple Heart Enterprises Ltd (Purple Heart); LWD and CSC each held one of the two issued shares in Purple Heart) and Bomina Ltd (Bomina, a member of the Cheung Kong Group) as the lenders and BF as the borrower. By that agreement, the lenders agreed to grant to BF a revolving loan facility of up to HK\$350 million. The facility to be granted by the lenders was at the percentage of 70% from Presidential Profits and 30% from Bomina. Under cl.5.05, a profit sharing arrangement is provided in that BF is required to deliver to the lenders its audited financial statements of each year and pay a premium to the lenders calculated with reference to its retained profits (70% of which would go to Presidential Profits and 30% to Bomina). By clause 12.03, any of the lenders may at any time after the happening of an event of default declare the loan and interest and other sums payable under the loan agreement have become immediately due and payable. The events of default include the presentation of a petition to wind up BF, Maintain Profits or G H I J

- A Myriad Gold or the appointment of a liquidator, receiver or similar officer (cl.12.01(g)) and when CSC ceases to own directly or indirectly the entire issued share capital of Maintain Profits and Myriad Gold (cl.12.01(m)).

- B 155. Mr Chang submitted that an event of default has clearly arisen under the loan agreement since 2 April 2002 when the petitions to wind-up Maintain Profits and Myriad Gold were presented.

- C 156. The option agreement was made between Maintain Profits, Myriad Gold, BF and Bomina and reference was made to the loan agreement. By cl.2 of that agreement, Maintain Profits and Myriad Gold granted to Bomina a call option entitling the latter to call upon and require Maintain Profits and Myriad Gold to sell the Option Shares, being the shares of BF representing 30% and under the circumstances specified in cl.5.3(a) thereof, 51% or such higher percentage of the issued share capital of BF as Bomina may elect. Where the call option
D is exercised in respect of 30% of the issued share capital of BF, the consideration shall be an amount equivalent to the par value of the shares; where the call option is exercised in the circumstances specified in cl.5.3(a), the consideration shall be calculated by a formula with reference to the net worth of BF (cl.4). The call option may be exercised
E at any time as long as the facility under the loan agreement is owing by BF (cls.1 and 5.1). The event referred to in cl.5.3(a) giving Bomina the right to elect for a higher percentage of shares to acquire is where CSC, for any reason, shall be unable to act as or otherwise cease to be a director of BF or is otherwise disqualified to act as a director of BF.

- F 157. It was submitted by Mr Chang that in the event provisional liquidators are appointed, cl.5.3(a) could be invoked by Bomina to purchase all the shares in BF. This is a risk I should take into account as one of the competing balancing factors. The risk would need to be assessed.

- G 158. As regards the risk of Bomina enforcing the loan agreement because an event of default has risen, I ask what would be the damaging effect on BF. Bomina has not taken any action against BF for four months since the petitions to wind-up Maintain Profits and Myriad Gold were presented in April 2002. The event of default has occurred,
H regardless of whether provisional liquidators are to be appointed. The loan payable under the facility granted, as appeared from the management account as at July 2002, is only HK\$100,000. As for the premium payable to Bomina (being 30% of the retained profits), the figure is not given in the management account. I note from the audited
I accounts for the year ended March 2000 that the premium payable for the financial years ended 1999 and 2000 was in the aggregate sum of HK\$14,189,919.00, of which 30% would be payable to Bomina. Even if Bomina should decide to demand immediate payment of 30% of the loan and the premium, I do not think this would have a serious
J damaging effect on BF.

159. What of the risk of Bomina exercising its right under the option agreement to acquire all the shares of BF? For one thing, the

appointment of provisional liquidators for Maintain Profits and Myriad Gold does not necessarily give rise to the event provided for in cl.5.3(a). The directors of Maintain Profits and Myriad Gold will cease to act as such with the appointment of provisional liquidators, not so with the directors of BF, although LWD has sought in the draft order that the provisional liquidators should be given the power to appoint or remove directors of BF as may be necessary to obtain control or management of it for the protection of the interests of Maintain Profits and Myriad Gold in BF. That would be a matter to be considered by the provisional liquidators, if appointed, and no doubt the provisional liquidators would take the risk of acquisition by Bomina into account.

160. In all the circumstances, I am not persuaded that the risks of enforcement of the loan agreement and the option agreement should tip the balance. I am of the view that it would be appropriate in all the circumstances to appoint provisional liquidators for Maintain Profits and Myriad Gold.

If a Mareva injunction should be granted

161. Much of what I have said above would apply to the consideration of whether it is appropriate to grant a *Mareva* injunction in having regard to a good arguable case, the risk of dissipation of assets, the balance of convenience, and whether there is undue delay for the application. I am of the view that a *Mareva* injunction should be granted.

162. I need to consider the limit of the assets that CSC should be restrained from disposing of. Mr Poon has submitted a figure of HK\$232,965,676.00 and this is made up as follows:

(1) Proprietary claims

The total amount as pleaded in the amended statement of claim for the proprietary claims is HK\$78,746,705, being paras.14, 27, 29(1) to (3), and 36. LWD is prepared to give credit for the repayments by CSC and the re-deposits made to Baldwin to set off the drawings against the account of Junestar with Baldwin, with the exception of one re-deposit of HK\$5 million on 30 March 1998, which is disputed, as there is evidence in the PwC report that subsequent to the re-deposit of HK\$5,806,534.48 on 30 March 1998, HK\$5,245,728.82 was drawn on Baldwin's account by a cheque signed by CSC payable to Andreas. The total sum for which credit is given is HK\$33,263,989 and the net figure thus arrived at is HK\$45,482,716.

(2) Special damages on other misfeasant acts

These relate to the substantial discounts to the net tender sum given by Baldwin to the employers in the total amount of HK\$136,150,000 and the deductions made by the employers for the defective work of subcontractors in the amount of HK\$52,448,000, being paras.41 and

- A 50 respectively of the amended statement of claim. The total amount under these heads of claim is HK\$187,482,960.

163. I have no difficulty with imposing a limit of disposal of assets as per the amount of the net claim of the proprietary claims. However,
B I have difficulty at this stage as to the amount that Junestar would probably be entitled to recover from CSC as special damages on other misfeasant acts. As I have mentioned earlier, it is recognised in PwC's second supplemental report that it is "not unusual" for discounts to be given in order to procure contracts from the employers, what gave
C rise to concern here is the substantial amount of discounts given, considering the typically low margin of profits for main contractors. Assuming that Junestar should succeed in its allegation that the discounts given are improper and in breach of CSC's fiduciary duty to Baldwin, it does not seem to me that the entire amount of discounts
D given should be awarded to Baldwin as damages, as allowance should be given to what may have been a proper level of discounts that could legitimately be given. There is no evidence on this at this stage. I do not think it right for an arbitrary figure or percentage to be taken in the absence of evidence.

E 164. As for the claim for defective work, I also have difficulty as to the amount that Junestar would probably be entitled to recover from Baldwin. At the moment, negotiations are ongoing between Baldwin, the employers and the subcontractors. Assuming that Junestar should succeed in its allegation that CSC was in breach of
F fiduciary duty in failing to cause Baldwin to monitor properly the quality of the works of the subcontractors, it is far from clear at this stage what would be the amount of deduction that Baldwin would need to bear eventually so that it should look to CSC for damages to cover its loss.

G 165. For the above reasons, I do not propose to take into account the claims for special damages on other misfeasant acts in fixing a limit of the assets that CSC should be restrained from disposing of pending the determination of the derivative action. Accordingly, the limit I would impose for this purpose is HK\$45,482,716.

H 166. The other matter I need to consider is the question of an undertaking in damages to be given for the injunction to be granted. What is offered in the draft order is that this undertaking is to be given by Junestar. In her second affirmation filed in HCA No 1036 of 2002 on 15 July 2002, LWD has deposed that if required by the
I court, she is prepared to offer a personal undertaking in damages and she has also given an estimate of her personal assets on the basis of her equity interest in a number of companies and her interest as one of the joint tenants of the former matrimonial home. I think it would be appropriate in this instance to require a personal undertaking
J in damages from LWD as I have been given to understand that the amounts withdrawn from Baldwin in the total sum of about HK\$110 million being dividends payable to Junestar have been transferred

out from Junestar and this was why a *Mareva* injunction was made against LWD in the matrimonial proceedings. I am also satisfied that LWD's personal assets should be sufficient to cover reasonable damages she would have to pay in the event that the injunction to restrain disposition of assets of the limit of HK\$45 million odd were wrongly made. I do not think it necessary to require LWD to fortify her undertaking in damages.

Orders

167. On the application to appoint provisional liquidators for Boldwin, I make an order that Mr Charles Chan Wai Dune and Mr James Wardell, both of CCIF Corporate Advisory Services Ltd, certified public accountants, be appointed joint and several provisional liquidators of Boldwin until the hearing of the petition in HCCW No 340 of 2002 or further order with their powers limited and restricted as provided in para.2 of the summons with the deletion of sub-para.(8), which relates to the sale of assets. The power of the provisional liquidators may be extended to realise assets, if necessary. I decline to provide for this power in the first instance. I make an order in terms of paras.3 and 4 of the summons.

168. On the application to appoint provisional liquidators for Maintain Profits and Myriad Gold, I make an order that the above named individuals be appointed joint and several provisional liquidators of these companies until the hearing of the petition in HCCW Nos 345 and 346 of 2002, respectively, or further order with their powers limited and restricted as provided in para.2 of each of the summonses with the following amendments:

- (1) Paragraph 2(4) is to read "To bring or defend any action or other proceedings in the name and on behalf of the Company or BF Construction Co Ltd (BF) as may be considered by the provisional liquidators to be necessary for the protection of the Assets". The reference to the presentation of a petition for the winding-up of BF is to be deleted.
- (2) Paragraph 2(8), which relates to the sale of assets, is to be deleted.

169. I also make an order in terms of paras.3 and 4 of each of the summonses in HCCW Nos 345 and 346 of 2002.

170. On the application for a *Mareva* injunction in HCA No 1036 of 2002, I make an order in terms of the draft submitted with the following amendments:

- (1) The limit of the assets up to which CSC is restrained from disposing of is altered to HK\$45,482,716. All the references to the previous monetary limit are to be amended accordingly.
- (2) Paragraph 1(2)(iv)(a) of the draft order should read "BF Construction Co Ltd".

- A (3) Paragraph (2) under “Exceptions to this Order” is to read, “This Order does not prohibit the second defendant from dealing with or disposing of any of his assets in the ordinary and proper course of any business in which he has an interest”.
- (4) The undertaking in damages in para.(1) of Sched.2 is to be given
- B by Law Wai Duen, Nina instead of Junestar Investment Corp.

171. As for the costs of the applications for the appointment of provisional liquidators, I make an order *nisi* as per each of the summonses that the costs of each application be in the cause of the
- C respective petition with a certificate for two counsel. Regarding the costs of the application for a *Mareva* injunction, I also make an order *nisi* that the costs of the application be in the cause of the action in HCA No 1036 of 2002 with a certificate for two counsel.

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HCA 2379/2009

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 2379 OF 2009**

BETWEEN

HORST JOACHIM FRANZ GEICKE

Plaintiff

and

1-ONASIA LIMITED

1st Defendant

DEREK RICHARD JOSEPH ELMER
alias DEREK ANDREWS

2nd Defendant

JOSEPH MA

3rd Defendant

Coram: Deputy High Court Judge Lok

Dates of hearing: 6 October 2011

Date of handing down of Decision: 17 October 2011

DECISION

1. There are two summonses before the court: (i) the Plaintiff's summons dated 11 August 2011 for leave to adduce 6 invoices issued by the 1st Defendant ("the Invoices") and 2 receipts ("the Receipts") issued by Messrs. Haldanes to the Plaintiff's wife ("the Wife") in relation a surveillance operation known as "Project October" ("the 1st Summons");

and (ii) the Plaintiff's summons dated 19 September 2011 for specific discovery of the Invoices from the Defendants ("the 2nd Summons"). The relief sought in the two summonses are in the alternative.

Background

2. The Plaintiff is a businessman resident in Hong Kong with business interests in Hong Kong, Vietnam and elsewhere. The Plaintiff and the Wife were married in Hong Kong in 1987 and they separated in 2009. There are two children of the family: a daughter aged 19 and a son aged 15 ("the Children"). Since September 2009, the Plaintiff and the Wife have been engaged in divorce proceedings in Hong Kong ("the Matrimonial Proceedings") which are still pending and are bitterly fought.

3. The 1st Defendant is a Hong Kong company engaged in the provision of surveillance, security and investigation services and the 2nd Defendant is the chief executive officer of the 1st Defendant. According to the Defendants' case, the 3rd Defendant was an independent contractor of the 1st Defendant at the material time.

4. It is not disputed that since October 2009, the Wife had engaged the 1st Defendant to provide, *inter alia*, a campaign of general surveillance and investigation services relating to the Plaintiff. The campaign was named "Project October".

5. It is the Plaintiff's case that at the time of the issue of the Writ, surveillance had been carried on by the Defendants in Hong Kong on at least 10 occasions and in Vietnam on at least 4 occasions. The Plaintiff and the Children were followed by the 1st Defendant's agents and their

whereabouts were closely monitored to the extent that they felt harassed and intimidated, and the matter was reported to the police on 17 October 2009.

6. It is also the Plaintiff's case that bugging devices were installed by the Defendants in the Plaintiff's car and in one of the Children's bedroom in the Wife's home. The Plaintiff claims that such measures were taken by the Defendants to obtain personal and confidential information of the Plaintiff and the Children.

7. As a result of the aforesaid alleged unlawful acts, the Plaintiff issued the Writ on 27 November 2009 and obtained an *ex parte* interlocutory injunction restraining the 1st and the 2nd Defendants from assaulting, harassing, molesting, threatening, communicating or otherwise interfering with the Plaintiff or the Children within the Plaintiff's home or in any other place in any manner whatsoever. Prior to the return date of the said *ex parte* application, it was agreed that the Defendants would provide an undertaking in terms of the injunction and the summons for the continuation of the injunction was adjourned *sine die* with liberty to restore.

8. In this action, on the basis of the said alleged unlawful acts which are all part of a campaign on the part of the 1st Defendant, who was then acting on the Wife's instructions, to carry out covert and secret investigations over the personal and business affairs of the Plaintiff and the Children, the Plaintiff claims against the Defendants for, *inter alia*:

- (i) conspiracy to injure the Plaintiff by using unlawful means;

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(ii) contravention of the Personal Data (Privacy) Ordinance, Cap. 486 and breach of the duty of confidence; and

(iii) harassment and/or intimidation and/or trespass to the person.

9. Although the Defendants admit that they have been engaged by the Wife to obtain evidence to be used in the Matrimonial Proceedings and were engaged by her to carry out “a programme of general surveillance” on the Plaintiff from early October 2009, they deny that they have committed any unlawful acts. In particular:

(i) it is the Defendants’ case that their engagement and work were limited to “observing the Plaintiff’s meetings in public places” and to “conduct record and asset checks on the Plaintiff”;

(ii) the Defendants allege that the Plaintiff should have no expectation that his “movements and meetings in public places” would be private and confidential;

(iii) the Defendants deny that they have taken steps to obtain and collect private and confidential information from the Plaintiff and the Children or are otherwise in possession of any confidential or private information; and

(iv) the Defendants deny that they have carried out any surveillance on the Children.

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10. Although the Wife is not a party to this action, the Defendants have never denied that their legal fees in this action are being paid for entirely by the Wife.

11. The Plaintiff had pressed for discovery but very limited documents were disclosed by the Defendants in the present case, certainly not including the Invoices and the Receipts. These documents were subsequently disclosed by the Wife in her application for maintenance pending suit in the Matrimonial Proceedings as evidence of her engagement of the 1st Defendant's services and the payments that she had made to the 1st Defendant for the services rendered.

12. The Plaintiff takes the view that the Invoices and the Receipts are relevant in the instant proceedings and so the Plaintiff issued the 1st Summons on 11 August 2011 seeking leave to adduce such documents as evidence in this action. The Defendants object the application on the ground that the Matrimonial Proceedings in which the Invoices and the Receipts were disclosed are private proceedings and that the Plaintiff is subject to an implied undertaking in respect of which this court has no jurisdiction to release. Given the Defendants' stance, the Plaintiff issued the 2nd Summons on 19 September 2011. In this particular summons, the Plaintiff only asks for specific discovery of the Invoices and not the Receipts. The Plaintiff accepts that the Defendants may not be in possession of the Receipts which were issued by Messrs. Haldanes to the Wife.

13. In the hearing, Ms. Tong, counsel for the Plaintiff, indicates that if the court is minded to grant an order for discovery under the 2nd Summons, the Plaintiff will not press for any order under the 1st Summons.

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In view of such stance and the simple nature of the 2nd Summons, I will deal with that particular summons first.

The 2nd Summons

14. The Defendants object the 2nd Summons on the following grounds:

- (i) by issuing the 2nd Summons, the Plaintiff is seeking to circumvent the prohibition against the use of the documents disclosed in the Matrimonial Proceedings without leave, which amounts to an abuse of process;
- (ii) as the Plaintiff has possession of the Invoices, it is not necessary for specific discovery to be ordered; and
- (iii) in any event, the Invoices are irrelevant and immaterial to the Plaintiff's claim, given the admissions made by the Defendants to many of the Plaintiff's allegations in respect of the particulars of the surveillance operation as pleaded in the Re-Amended Statement of Claim.

(a) *Question of relevance*

15. I propose to deal with the question of relevance first. If the documents in question are not relevant to the issues involved in the dispute, there is simply no basis for the court to make an order for specific discovery.

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16. It is quite unnecessary for me to recite the well-accepted legal principles for discovery as laid down in the case of *Compagnie Financiere du Pacifique v Peruvian Guano* (1882) 11 QBD 55.

17. Undoubtedly, the Invoices are all in relation to the surveillance campaign conducted by the Defendants on the Plaintiff and allegedly on the Children which is the subject matter of this action. I agree with Ms. Tong that the Invoices are directly relevant in providing information as to the scope, nature, duration and extent of the Defendants' surveillance activities on the Plaintiff and the Children, and the steps taken by them to obtain alleged private and confidential information by using alleged unlawful means, or are capable of leading to a train of inquiry which may lead the Plaintiff to information to support his own case or to discredit the Defendants' case. The Invoices may contain descriptions of the services rendered and the work done as well as the items of equipment purchased for the purpose of carrying out such services. All such information is directly relevant to the issues in this action.

18. It seems that the only reason put forward by Mr. Lo, counsel for the Defendants, to say that the Invoices are irrelevant is that the Defendants have made a number of admissions in the pleading about the details of the surveillance activities. According to Mr. Lo, the Defendants admit that they have carried out the surveillance activities as pleaded in the Re-Amended Statement of Claim, and so the dispute between the parties is narrowed down to the lawfulness of such activities. Hence, the Invoices are not relevant to the determination of the issues of the case.

19. I am a bit puzzled by such argument. If the Invoices contain nothing more than the particulars already pleaded in the Re-Amended

Statement of Claim, why do the Defendants object the discovery of such documents? Although I do not have the opportunity of examining the contents of the Invoices myself, I would imagine that the Invoices do contain some relevant information or materials that the Plaintiff is seeking to rely on at the trial of this action, otherwise there is no point for the parties to appear in court to argue on such matter. That is already sufficient for the court to order discovery of such documents.

20. There is a dispute between the parties as to whether the Defendants have admitted all the relevant details of the surveillance activities pleaded in the Re-Amended Statement of Claim. However, it is not appropriate for the court to conduct a forensic exercise at this stage to examine whether the admissions cover all the particulars in the pleadings. It should be a matter for the trial judge.

21. Further, the relevance of a document should not be tested solely against the detailed particulars pleaded by the parties. In this regard, Deputy High Court Judge H. Wong, SC said the following in *Chan Hung v Yung Kwong Chung*, HCA 216 & 217 of 2004, unreported (decision on 15 January 2009):

“27. ... For the purpose of discovery, the relevance of a document should not be solely tested against the detailed particulars pleaded by the parties. It is the pleaded case of the parties in the broad sense that one should be concerned with. A document may be generally relevant to a party’s case as pleaded (many so-called ‘background documents’ are of this nature) although its relevance cannot be specifically pinned to some pleaded particulars. For discovery purposes, the pleadings have to be looked at broadly.”

22. One must bear in mind that the Invoices are by themselves very important documentary evidence. Apart from the details of the surveillance activities referred to in the Invoices, they may or may not

contain other information which can assist the Plaintiff's case. As I see it, so long as the Invoices are directly relevant documents, the Plaintiff should be allowed to make use of the documents in whatever manner that is best in the interest of the Plaintiff's claim, and it is not appropriate for the court to limit the scope as to how the Plaintiff should present his claim or evidence at the trial of this action. Further, there is certainly a dispute between the parties as to whether the Defendants have conducted surveillance on the Children, and the Invoices may help the court to determine this particular issue.

23. I would add one more observation. Since it was supposed to be a covert surveillance operation, the Plaintiff would not be able to know the full extent of the alleged unlawful activities relating to the surveillance on the Plaintiff and the Children until the Defendants make full discovery of the relevant documents including the Invoices. This is also an additional reason why discovery should be ordered in the instant case.

(b) Abuse of process

24. It is also the Defendants' submission that a discovery order would have the effect of releasing the Plaintiff from the implied undertaking given in the Matrimonial Proceedings which are private in nature. The implied undertaking was made for the protection of the Wife so that the Plaintiff would not be able to use the documents in other proceedings. Instead of asking the court for an order for discovery, the Defendants say that the Plaintiff should have applied in the Matrimonial Proceedings for leave to use the Invoices in the instant case. In so doing, the Wife would have the opportunity to address the court on such

application. Hence, it is an abuse of process to by-pass such procedure and to make the application for discovery in the instant proceedings.

25. I also reject such argument. No matter what happens in the Matrimonial Proceedings, there is an independent obligation on the part of the Defendants to disclose documents which are relevant to the issues in the instant case. Assuming that the Invoices have not been disclosed in the Matrimonial Proceedings, it seems that the Defendants accept that they are obliged to disclose the Invoices here. In such circumstances, why should it make a difference when the Wife happened to make use of such documents in support of her application for maintenance pending suit in the Matrimonial Proceedings? Hence, unless the Defendants can establish any valid reason as to why the Invoices should not be disclosed such as legal privilege, there is nothing to deny the Plaintiff of his right to insist the Defendants to disclose documents which are relevant in the present case. There is no abuse of process.

26. It is certainly open to the Plaintiff to adopt such course of action. In fact, that was actually what happened in the Australian case of *Patrick v Capital Finance Pty Ltd (No. 3)* [2003] FCA 385. In that case, there were related proceedings both in the Federal Court and the County Court. In the Federal Court, the Court was asked to determine the question of discovery relating to a document disclosed in the County Court proceedings. The party applying for discovery initially made an application in the County Court for leave to use the document in the Federal Court proceedings. After reflection, that party withdrew the application in the County Court and made an application for discovery in the Federal Court on the ground that the opposite party had an independent obligation to disclose relevant documents in the Federal Court proceedings.

The Federal Court saw nothing wrong with such approach and entertained the application for specific discovery.

27. As there is an independent obligation on the part of the Defendants for discovery, the court should not refuse to entertain the discovery application simply because the Wife is not a party to the proceedings. In fact, this action can be considered as a satellite litigation of the Matrimonial Proceedings, but it does not mean that the Wife should be heard in all interlocutory applications in the instant case. In any event, it is open to the Wife to make an application to intervene in the present proceedings if necessary. I also cannot think of any possible prejudice that can be caused to the Wife by the discovery of the Invoices which are crucial documents in this case. In particular, the Wife voluntarily made use of the Invoices in the Matrimonial Proceedings and such documents were not disclosed under the compulsion of law. Hence, I reject the Defendants' abuse of process argument.

(c) Necessity of the discovery order

28. I also do not accept the Defendants' contention that since the Plaintiff is in possession of the Invoices, it is unnecessary for the court to order specific discovery in the present case. Although it is the Plaintiff's argument that the Invoices are not subject to the implied undertaking because they are not documents disclosed under compulsion, the Plaintiff is not certain about his legal position. If the Plaintiff simply produces the Invoices in the instant proceedings, there is a danger that he would be liable for contempt for breach of the implied undertaking. It would therefore be necessary for the Plaintiff to make the present application. As I see it, the Plaintiff just insists on his right to require the Defendants to

disclose documents which are relevant to the issues of the case. If the Defendants refuse to do so, an order for specific discovery is necessary.

The 1st Summons

29. In view of my aforesaid ruling, it is quite unnecessary for me to deal with the 1st Summons. However, since I still have to decide on the issue of costs of the 1st Summons, I feel obliged to deal briefly with the arguments advanced by the parties on this summons, in particular on the issue as to whether this court has the jurisdiction to entertain the application in the instant action as opposed to the Matrimonial Proceedings.

30. By issuing the 1st Summons, the Plaintiff is asking the court to grant leave to adduce the Invoices and the Receipts disclosed by the Wife in the Matrimonial Proceedings which are private in nature. The Defendants have all along objected the 1st Summons on the ground that the court has no jurisdiction to deal with the application in the instant proceedings. The argument is two-fold. Firstly, the Invoices and the Receipts were disclosed in the Matrimonial Proceedings subject to the implied undertaking made by the Plaintiff not to use the documents in other proceedings. The implied undertaking was made for the protection of the Wife. Since the Wife is not a party in the instant proceedings, the proper procedure should be the Plaintiff making an application in the Matrimonial Proceedings for leave to use the Invoices in the instant case. Hence, this court has no jurisdiction to entertain such application. Secondly, r. 121 of the Matrimonial Causes Rules, Cap. 179A (“the MCR”) provides that no document filed in the matrimonial proceedings, other than a decree or order made in open court, shall be open to inspection by the public without the leave of the court. By reason of such rule, the court in

this particular action should not allow the Plaintiff to adduce the Invoices and the Receipts in evidence which would have the effect of making such documents available for inspection by other parties, unless leave of the court seized with the matrimonial proceedings has been obtained. Mr. Lo also cites the case of *Re Baldwin Construction Co. Ltd. & Ors.* [2003] 4 HKC 156 in support of such proposition.

31. The court in the *Baldwin* case had to deal with 3 petitions to wind up 3 different companies. These petitions were related to a married couple who were then involved in divorce proceedings. There were various summonses before the court to appoint provisional liquidators for the companies. Before dealing with these summonses, the court had to consider whether certain parts of the evidence adduced by the husband should be struck out as they were in contravention of r. 121 of the MCR. The husband sought to produce in evidence materials disclosed in the matrimonial proceedings between the wife and himself in order to show that the wife had an ulterior motive to serve in these applications. Kwan J, as she then was, held that the evidence adduced by the husband in contravention of r. 121 of the MCR should be struck out as the provision prohibited the inspection of documents in matrimonial proceedings by third parties without leave and that the court should not allow such documents to be exhibited in other proceedings where they would be available for inspection by other parties, unless leave of the court seized with the matrimonial proceedings had been obtained (at 164E-166D).

32. I agree with such *dicta* of Kwan J. The rationale and wording of r. 121 are clear. Matrimonial proceedings are private in nature. For the protection of the parties involved in the proceedings, the documents filed in such proceedings should not be disclosed in public unless leave of the

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court seized with the matrimonial proceedings has been obtained. Hence if the Plaintiff just proceeds with the application under the 1st Summons, the proper procedure is that such application should be made in the Matrimonial Proceedings. The Defendants are, therefore, quite justified to oppose the Plaintiff's application under the 1st Summons.

33. However, I notice one oddity in the MCR. According to r. 121, leave should be obtained from the "court" for the inspection of the documents. "Court" is defined in s. 2(2) of the MCR to mean the District Court. This definition is different from the one in the main Ordinance which also includes the High Court. Hence, even if the matrimonial proceedings have been transferred to the High Court and documents are filed in the High Court proceedings, as in what happened in the present case, any application for inspection of such documents would have to be made in the District Court. This would be quite undesirable as the High Court in the matrimonial proceedings would be in the best position to adjudicate on such matter. In any event, the effect of r. 121 is that leave for inspection should be obtained from the court seized with the matrimonial proceedings.

34. Despite my *dicta* on the effect of r. 121, I must emphasis once again that there is nothing wrong for the Plaintiff to proceed with the application for specific discovery under the 2nd Summons. The Plaintiff has an option in this regard, either to apply in the Matrimonial Proceedings for leave to use the Invoices in the instant proceedings, or to insist on his right to request the Defendants to disclose the Invoices by way of discovery. I just repeat the observations that I have made in paragraphs 25 to 27 above, and the court should not therefore be deterred to make an order for discovery simply because of r. 121 of the MCR.

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35. By reason of the aforesaid, I make an order for discovery in terms of paragraphs 1 and 2 of the 2nd Summons and dismiss the application under the 1st Summons. I also make an order *nisi* that:

- (i) the costs of the 2nd Summons be to the Plaintiff;
- (ii) the costs of the 1st Summons be to the Defendants; and
- (iii) there be certificate for counsel for the said two summonses.

The order *nisi* shall be made absolute 14 days after the date of the handing down of this decision. The parties agree that any application to vary the costs order shall be dealt with by the court on papers, and I therefore direct that such application shall be made in writing with full reasons given and the opposite party shall submit the written reply, if any, within 7 days thereafter.

(David Lok)
Deputy High Court Judge

Ms. Sara Tong, instructed by Messrs. Robertsons, for the Plaintiff

Mr. Benny Lo, instructed by Messrs. Oldham, Li & Nie, for the Defendants

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BETWEEN

DJ

Petitioner

(also known as DJJ)

and

LRM
(also known as LRMJ)

LRM

Respondent

(also known as LRMJ)

Date of Hearing : 23 June 2015

Date of Handling down of Reasons for Decision: 7 July 2015

Reasons for Decision
(Rule 121(2) MCR Application)

Reasons for Decision

(Rule 121(2) MCR Application)

Background

1. This is the hearing of the Petitioner wife (hereinafter called “W”)’s summons filed on 4 June 2015 seeking leave to use documents filed in these proceedings for purposes relating to the criminal charge against her under ESCC No 1397 of 2015.

2. The background of the parties and the history of the present proceedings are set out in *D v L* (Non-Molestation order), FCMC 8507/2013 (13 March 2014) and *D v L* (Maintenance Pending Suit), FCMC 8507/2013 (10 July 2014).

3. W and the respondent husband (hereinafter called “H”) were married in 1991. Three children were born out of the marriage, namely T (a daughter born in 1995), C (a daughter born in 1996) and M (a son born in 2000) (hereinafter called “the Children”).

4. W and H separated in May 2011 when he and the Children moved away from the former matrimonial home.

5. W commenced the present divorce proceedings in June 2013.

6. Care and control of C and M was granted to H by consent on 4 December 2013. An order for joint custody with reasonable access to W was made on 17 March 2014.

7. W took out a summons on 3 December 2014 applying for a variation of the previous order by seeking the care and control of M.

8. W was contacted by the police on 29 January 2015 in relation to a case of child sexual assault. It later transpired that on 9 January 2015, T, C and the Children's carer, a Ms Poon, had accompanied M to report to the police that M was suspected to have been sexually assaulted by W some 7 years ago.

9. W was charged on 30 April 2015, and appeared before Eastern Magistracy on 5 May 2015. The criminal case was adjourned to 30 June 2015 for mention.

10. By the present application W is seeking the following:

(a) Leave to use, produce and refer to documents filed or disclosed under FCMC No 8507 of 2013, the particulars of which are set out in the schedule annexed to the minutes of order lodged, for the purposes of:

i. making written representation to, and/or discussing with the Department of Justice to invite the Director of Public Prosecutions ("DPP") to reconsider the decision to prosecute W under ESCC No 1397 of 2015; and/or

ii defending the criminal charge against W under ESCC No 1397 of 2015; and

(b) W be released from any implied undertaking in relation to the above-mentioned documents for the purposes stated in the above.

11. H is absent from today's hearing. As evidenced by the 8th affirmation of Ng King Fung filled on 22 June 2015, W's legal

representative has given H notice of today's hearing by a letter dated 16 June 2015 sent by ordinary post to H's usual and last known address. Having carefully considered, I am satisfied that I should proceed with the hearing of W's present application in the absence of H.

12. At the end of the hearing today, I made an order in terms of W's application, with reasons for decision to be handed down. I now give the reasons for my decision.

Applicable legal principles

MCR rule 121(2)

13. Rule 121(2) of the Matrimonial Causes Rules, Cap. 179A (hereinafter called "MCR") provides that no document filed in the matrimonial proceedings, other than a decree or order made in open court, shall be open to inspection by the public without the leave of the court.

14. The rationale of such rule is that matrimonial proceedings are private in nature. For the protection of the parties involved in the proceedings, the documents filed in such proceedings shall not be disclosed in public unless leave of the court seized with the matrimonial proceedings has been obtained: see *Horst Joachim Franz Geicke v I-Onasia Ltd*, HCA 2379/2009, 17 October 2011 §32, *per* DHCJ Lok (now Lok J).

15. On top of MCR rule 121, the Family Court has the general power of control over access to documents within its custody in common law, and the exercise of the inherent jurisdiction is subject to a balancing test in terms of weighing the relevant conflicting interests and rights: see

Secretary for Justice v FTCW & Ors [2014] 1 HKLRD 849, at §§16, 27-28, *per* Hon Lam VP.

16. At §114 of the abovementioned judgment, Lam VP at 85 referred to *R (Guardian News and Media Ltd) v Westminster Magistrates' Court* [2013] QB 618 and adopted Toulson LJ's approach as follows:

“In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons. ... I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to outweigh the merits of the application. The court has to carry out a proportionality exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others.”

17. In the context of an application for disclosure of wardship documents for the purpose of criminal investigation, it was held in *In re D. (Minors) (Wardship: Disclosure)* [1994] 1 FLR 346 *per* Sir Stephen Brown P at 350-351:

“...the judge hearing an application for leave to disclose such documents must in the exercise of his discretion conduct a balancing exercise—that is to say, he has to balance the importance of confidentiality in wardship proceedings and the frankness which it engenders in those who give evidence to the wardship court against the public interest in seeing that the ends of justice are properly served. In relation to criminal proceedings it is clear that the wardship court should not, as it were, seek to erect a barrier which would prejudice the operation of another branch of the judiciary. There have been a number of cases where the discretion of the judge has been exercised to give leave to disclose to the Crown

Prosecution Service matters which are part of the wardship file. Similar considerations will apply to defendants because it is in the interests of justice that a defendant in a criminal trial should have available all relevant and necessary material for the proper conduct of his or her defence.”

Implied Undertaking

18. The general principles as to when an implied undertaking arises in relation to documents disclosed in civil proceedings can be found in *Shun Kai Finance Co Ltd & Others v Japan Leasing (HK) Ltd (No 2)* [2000] 3 HKLRD 539 where the Le Pichon JA stated the majority judgment at 542C-546B that:

“Compulsion was the bedrock of the undertaking. In determining whether the undertaking applied or not, a distinction was drawn between documents produced voluntarily and those produced under compulsion. Where documents were produced under compulsion, there was an invasion of privacy and it was this invasion that gave rise to the undertaking. The normal discovery process was not voluntary inasmuch as parties were compelled to disclose their private documents. Where a party voluntarily chose to refer to a document in his pleading or an affidavit, it was he who destroyed the privacy of the document. Further, even though a party in breach of any order made pursuant to O.24 r.11 might face committal under r.16(2), that did not mean that production under r.11 was within the compulsion principle: there was no compulsion even though the consequence of the choice to refer to the document was that it had to be disclosed.”

19. However, in the same judgment, Keith JA at 557E-558D gave the following dissenting judgment:

“It was a fiction to describe a litigant’s decision to waive the privacy in a particular document by referring to it in a pleading, as voluntary. Rules of court required all material averments to be pleaded. Litigants had no choice in the matter. Thus, references to a document in a pleading which triggered the obligation to produce the document for inspection was as involuntary a waiver of privacy, as the waiver of privacy under the normal processes of discovery.”

20. It is also stated in *Matthews & Malek, Discovery (2012)* at 19.11:

“At common law the undertaking covers not only documents disclosed on discovery, but also any other documents disclosed by a party under compulsion of court process. Thus the undertaking has been held to apply to documents produced under a subpoena duces tecum, or under the Norwich Pharmacal procedure, or under an order made pursuant to s.7 of the Bankers’ Books Evidence Act 1879, or for the purposes of detailed assessment of costs, or under the procedure for giving effect to letters of request, as well as affidavits and exhibits produced only because the court has ordered them to be provided by way of discovery of assets pursuant to the asset-freezing (Mareva) jurisdiction or a search (formerly Anton Piller) order, or in matrimonial proceedings. The undertaking also extends to information in Lists of Documents given on discovery as well as to the documents themselves. It has even been held to apply beyond documents, but where an equivalent process of compulsory disclosure has been used by the court to order inspection of a machine or tests on samples, and, in Canada, to transcripts of oral discovery examination....”

My ruling

MCR rule 121(2)

21. Applying the above legal principles to the present case, I am persuaded that this is an appropriate case for leave to be granted whether under rule 121(2) of the MCR or the inherent jurisdiction of the court for the following reasons.

22. As can be seen from the above authorities, the default position is that access to documents filed in court proceedings should be permitted on the open justice principle, subject to the proportionality exercise. The fact that these are matrimonial proceedings does not

detract from such a position but represents only one factor to be taken into account in the balancing exercise.

23. In the present case, obviously it is in public interest to enable W to properly conduct her defence against a criminal charge laid against her. No doubt it is in the interest of justice that W should have access to relevant and necessary materials for the purpose of conducting her defence in the criminal proceedings.

24. W's legal representatives are in the course of preparing written representations to the Department of Justice to invite DPP to reconsider the decision to prosecute. Given the procedural history of these proceedings and the proximity in time between W's application for care and control of M and the complaint made to the police, it is probable that an overview of the background of the parties and the history of the ongoing matrimonial disputes between H and W would shed light on the complaint of sexual assault made by the Children to the police abovementioned. I accept W's submission that the documents that she seeks to be open to inspection by DPP are capable of enabling DPP to have an objective evaluation of the alleged incident of sexual assault.

25. On the evidence before me, I cannot see that H would be prejudiced in any way by permitting W to use the documents in the manners abovementioned.

26. In *Secretary for Justice v FTCW & Ors, supra*, the husband and the intervener in the action objected to the production of some of the documents on the ground of privilege against self-incrimination. As far

as I can see, no issue relating to privilege against self-incrimination arises in the present application.

27. Last but not least, I am given to understand that the handling magistrate has already made an anonymity order under ESCC No 1397 of 2015 prohibiting publication of the name of the victim or any information that will enable the public to identify the victim.

Implied Undertaking

28. The present application does not concern any documents that were disclosed by any party on discovery. In breach of several orders made by the Family Court in these proceedings, H has not made any discovery. Even the filing of his Form E is still outstanding. Other than those documents filed by or on behalf of W and orders/judgments made by the Family Court, the documents that W seeks to be open to DPP are mostly related to (a) children's matters, or (b) W's non-molestation injunction application. The filing and service of lists of documents were ordered under W's two section 17 applications that were dealt with by the Family Court as preliminary issues but the present application does not concern any documents relating to the said s.17 applications.

29. It therefore seems that the documents that W seeks to be open to DPP do not attract any implied undertaking.

30. Nevertheless, as there is no exhaustive list of what categories of documents are covered by implied undertaking, and in view of Keith JA's dissenting judgment in *Shun Kai Finance Co Ltd & Others v Japan Leasing (HK) Ltd (No 2)*, supra, and the discussion on the subject in

Matthews & Malek, Discovery abovementioned, I accept W's submission that it may be open to H to argue, for example, that he was under compulsion to file his affirmations (or the exhibits thereto) in opposition to W's applications for the non-molestation injunction or joint custody.

31. The court certainly has power to release an implied undertaking given to the court in appropriate cases. In the exercise of the discretion, the court may take into account a number of factors including the nature of the document, the nature of the information in the document, any prejudice the author of the document may sustain and the likely contribution of the document to achieving justice in the second proceedings: see *Secretary for Justice v FTCW & Ors, supra*, §§122-146, *per* Lam VP.

32. Insofar as it may be necessary, the paragraphs 21 to 27 in the above are repeated.

33. Having carefully considered, I regard that W should be released from any implied undertaking such that she may conduct her defence fully in ESCC No 1397 of 2015.

34. For reasons stated in the above, I make an order in terms of W's application with no order as to costs.

(K K PANG)
Deputy District Judge

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Mr Eugene Yim instructed by Lam & Lai for the Petitioner
The 1st Respondent has not represented and did not appear

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FORM E FINANCIAL STATEMENT

In the District Court / High Court*

Case No
Always quote this

Petitioner / 1st Applicant / Respondent / 2nd Applicant*

Between

Petitioner / 1st Applicant

Solicitor's ref.

and

Respondent / 2nd Applicant

Solicitor's ref.

Please fill in this form fully and accurately. Where any box is not applicable write "N/A". You have a duty to the court to give a full, frank and clear disclosure of all your financial and other relevant circumstances.

A failure to give full and accurate disclosure may result in any order the court makes being set aside and an order for costs being made against you.

If you are found to have been deliberately untruthful, criminal proceedings for perjury may be taken against you.

If there is not enough room on the form for any particular piece of information, you may continue on an attached sheet or paper.

Attach documents to the form where they are specifically sought and you may attach other documents where it is necessary to explain or clarify any of the information that you give.

This statement must be sworn or affirmed before a solicitor or a Commissioner for Oaths before it is filed with the Court or sent to the other party.

Important: You are recommended to obtain independent legal advice before completing this form.

*delete as appropriate

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Part 1 General Information

1.1 Full name

1.2 Date of birth

Day	Month	Year
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 1.3. Date of Marriage

Day	Month	Year
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1.4 Occupation

1.4.1 I am employed * ☐

Self-employed * ☐

Unemployed * ☐ and have been since

Day	Month	Year
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Retired * ☐ and have been since

Day	Month	Year
-----	-------	------

1.4.2. If employed give the following details:-

I am employed on a casual basis * ☐ I have been so employed for

Years	Months
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on a fixed salary basis * ☐

on a piece-rated basis * ☐

otherwise * (specify)

My employer's name and address is:-

Name	
Address	

If your present job has lasted less than 2 years

My previous occupation was:-

From : D/M/Y	To : D/M/Y
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My former employer's name and address was:-

Name	
Address	

My previous monthly income was

HK\$

*Tick in the box that applies.

1.4.3 If self-employed give the following details:-

I am a sole proprietor * ☐

Partner * ☐

Shareholder * ☐

in the following business

Name of Company	Nature and Address of business

1.5 Date of separation

Day	Month	Year	Tick here <input type="checkbox"/> if not applicable
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1.6 Date of the

Petition			Decree Nisi/ Decree of Judicial Separation			Decree Absolute		
Day	Month	Year	Day	Month	Year	Day	Month	Year

1.7 If you have remarried, state the date

Day	Month	Year
-----	-------	------

1.8 If you intend to remarry, state the date, if known

Day	Month	Year
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1.9 Do you co-habit with another person? Yes / No

1.10 Do you intend to co-habit with someone within the next six months? Yes / No

1.11 Details of all children of the family

Full Names	Date of birth			With whom does the child live?
	Day	Month	Year	

1.12 Give details of physical or mental disability of yourself and the children

Yourself	Children

*** Tick in the box that applies.**

1.13 Give details of the present and proposed future educational arrangements for the children.

Present arrangements	Proposed future arrangements

1.14 Give details of any maintenance arrangement or maintenance orders made between the parties.

1.15 Give details of any other court cases between you and your spouse, whether in relation to money, property, children, or anything else and attach copy orders.

Case No.	Court

1.16 Specify your present residence and its occupants and on what basis you occupy the residence.

I live at:- (address)

This is a self or jointly owned unit * ☐

This is a rented unit *

☐

Name of tenant

This is a Public Housing Unit (PHU) *

☐

Name of registered tenant

This is a Home Ownership Scheme (HOS) Unit *

☐

Name of registered owner

Otherwise * e.g. quarters, rent free (specify)

I live alone * ☐

with others * ☐

I live (where applicable) with the following persons:

Name	Relationship

*** Tick in the box that applies.**

Part 2 Assets

2.1 Give details of your interest in the matrimonial home

Address	
---------	--

The property is registered solely * ☐ jointly ☐

In the name of a company in which you have shareholding or beneficial interest ☐

If joint, the names of registered co-owners are:-

--

My share of ownership or beneficial interest is:

--

Particulars of purchase

Date of purchase	D/M/Y		
Downpayment	HK\$	Paid by	
Mortgage/legal charge	HK\$	Name of lender	
Other loans	HK\$	Name of lender	
Other expenses	HK\$	Paid by	
Total	HK\$		

My estimate of its present market value is:-	HK\$
My estimate is / is not based on a valuation report.	
The amount presently outstanding on mortgage or charge is:-	HK\$
The amount presently outstanding on other loans is:-	HK\$
Estimated net value	

Attach a copy of documentary evidence of mortgage / other loans

NET value of your capital interest in the matrimonial home (A)

HK\$

* Tick in the box that applies.

2.2 Give details of all other landed properties in Hong Kong or elsewhere which you own or in which you have beneficial interest.

Address	
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The property is registered solely * ☐ jointly ☐

In the name of a company in which you have shareholding or beneficial interest ☐

If joint, the names of registered co-owners are:-

--

My share of ownership or beneficial interest is:

--

Particulars of purchase

Date of purchase	D/M/Y		
Downpayment	HK\$	Paid by	
Mortgage/legal charge	HK\$	Name of lender	
Other loans	HK\$	Name of lender	
Other expenses	HK\$	Paid by	
Total	HK\$		

My estimate of its present market value is:-	HK\$
My estimate is / is not based on a valuation report.	
The amount presently outstanding on mortgage or charge is:-	HK\$
The amount presently outstanding on other loans is:-	HK\$

Attach a copy of documentary evidence of mortgage / other loans

**TOTAL net value of the above (B)
(excluding the matrimonial home)**

HK\$

* Tick in the box that applies.

- 2.3 Give details of all bank accounts in Hong Kong or elsewhere, which you hold or in which you have an interest including those closed within the last 12 months. For joint accounts, state your interest and the names of the account holders. Attach copies of your bank statements covering the last 12 months for each account. For fixed or term deposits, attach copies of latest statements.**

Name of bank	Type of account (e.g. current)	Account number	Name of other account holder (if applicable)	Balance at the date of this form	Total current value of your interest
TOTAL value of your interest in all accounts (C)					HK\$

- 2.4 Give details of all your shareholding / beneficial interest in private companies in Hong Kong or elsewhere. Attach copies of the last 2 years' audited / unaudited financial statements and any other documents on which you base your valuation.**

Name of Company	Date & Place of Incorporation	The extent of your shareholding / beneficial interest	Your estimate of the current value of your shareholding / beneficial interest
TOTAL current value of all your shareholding / beneficial interest (D)			HK\$

- 2.5 List any directorships you hold or held in the last 24 months**

--

2.6 Give details of all other business in Hong Kong or elsewhere. Attach copies of the last 2 years' audited / unaudited financial statements and any other documents on which you base your valuation.

Name and nature of your business	The extent of your beneficial interest	Your estimate of the current value of your interest
TOTAL current value of other business interests (E)		HK\$

2.7. Give details of all stocks, bonds and other quoted securities and other investments in Hong Kong or elsewhere which you hold or in which you have a beneficial interest. (Do not include dividend income in this paragraph). Attach a copy of your latest statement for each account.

Name of Stocks / Bonds etc	Securities account(s)	The extent of your beneficial interest	Type	Current value	Total current value of your interest
TOTAL value of your interest in all holdings (F)					HK\$

2.8. Give details of all life insurance and endowment policies in Hong Kong or elsewhere which you hold or in which you have an interest, including those that do not have a surrender value. If the policy is jointly owned, or has a number of beneficiaries, identify the owners and beneficiaries.

Policy details including name of company, policy type and number	If policy is charged, state in whose favour and amount of charge	Maturity date			Surrender Value	Total current value of your interest
		Day	Month	Year		
TOTAL value of your interest in all policies (G)						HK\$

2.9 Give details of all monies which are owed to you.

Brief description of debt	Name of Debtor	Balance outstanding	Interest Owed	Total current value of the debt including interest
TOTAL value of your interest in all debts owed to you (H)				HK\$

2.10 Give details of valuable personal items including but not limited to cars, boats and jewellery.

Item	Purchase value	Estimated current value
TOTAL value of your valuable personal items (I)		HK\$

2.11 Give details of any other assets not listed above in Hong Kong or elsewhere (excluding pensions / mandatory provident fund / gratuity) including but not limited to :

- Share option scheme, stating the estimated net sale proceeds of the shares if the options were capable of exercise now, and whether any taxes would be payable.
- Trust interests (including interests under a discretionary trust), stating your estimate of the value of the interest and when it is likely to become realizable. If you say it will never be realizable, or has no value, give your reasons.
- Specify also any asset that is likely to be received in the foreseeable future including any inheritance, any assets held on your benefit by a third party and any assets not mentioned elsewhere in this form.

Type of asset	Value	Total net value of your interest
TOTAL value of your other assets (J)		HK\$

2.12 Give details of your pension / Mandatory Provident Fund / gratuity interests.

Attach a copy of the valuation of your pension / Mandatory Provident Fund rights by the trustees or managers of the scheme. Where the information is not available, give the estimated date when it will be available and attach the letter to pension company or administrators from whom the information was sought. If you have more than one pension plan or scheme, provide the information in respect of each one, continuing, if necessary, on a separate piece of paper. If you have made Additional Voluntary Contributions or any Free Standing Additional Voluntary Contributions to any plan or scheme, give the information separately if the benefits referable to such contributions are separately recorded or paid.

I have* ☐ do not have* ☐ the benefit of a pension scheme*☐, mandatory provident fund*☐, superannuation* ☐ or contract gratuity* ☐ from my employer.

Description of benefit	Current Value	Date Realizable	Value of maturity
TOTAL value of your pensions (K)			

*** Tick in the box that applies**

Part 2 Liabilities

2.13 Give details of all other liabilities which you have not disclosed above. If you have credit cards, attach copies of the latest 3 months credit card statements.

Liability	Amount
TOTAL value of your liabilities (L)	HK\$

Part 2 Summaries of Assets and Liabilities

	Reference on the section on this statement	Value
Net value of your interest in the matrimonial home	A	HK\$
Total net value of all other landed properties (excluding the matrimonial home)	B	HK\$
Total value of your interest in all bank accounts	C	HK\$
Total value of your shareholding / beneficial interest in all private companies	D	HK\$
Total value of your other business interests	E	HK\$
Total value of your interest in all holdings (e.g. stocks)	F	HK\$
Total value of your interest in all insurance policies	G	HK\$
Total value of your interest in all debts owed to you	H	HK\$
Total value of your valuable personal items	I	HK\$
Total value of your other assets	J	HK\$
	Sub-total	HK\$
Total value of your pensions, if any	K	HK\$
	TOTAL	HK\$
LESS: TOTAL value of your liabilities	L	HK\$
	NET VALUE	HK\$

Part 3 Income

3.1 **Earned Income: Give details of your income. Attach copies of proof of income for the last 3 months or contract of employment, if any, and tax returns for the last 2 years.**

My present basic / average* income per month is :-	
--	--

In addition I receive :-

Overtime (average per month-based on the last 12 months)	
Double pay (average per month)	
Bonus (average per month)	
Commission (average per month-based on the last 12 months)	
Tips (average per month-based on the last 12 months)	
Housing allowance (average per month)	
Travel /Transport * allowance (average per month)	
Education allowance (average per month)	
Entertainment allowance (average per month)	
Other allowances (specify) (average per month)	
The total average per month	HK\$

3.2 **Additional Income: benefits, etc. Give details and the amount of all benefits in kind, perks, or other remuneration not disclosed elsewhere, received in the last 12 months. Attach copies of proof of income for the last 3 months or contract of employment, if any.**

Nature of Income	Current amount per month	Average amount per month for last 12 months

* Delete as appropriate.

3.3 Income from any part-time employment, including all benefits, if any. Attach copies of proof of income for the last 3 months or contract of employment, if any.

Nature of Income	Current amount per month	Average amount per month for last 12 months

3.4 Self-employed or partnership income: Give details of annual net profit or loss for the last 12 months. Attach copies of the tax returns for the last 2 years.

Nature of Income	Details of the last 12 months	
	Net profit/loss	Amount of your share of net profit/loss

3.5 Government allowances (including Comprehensive Social Security Assistance payments). Attach copies of latest statements.

Nature of Income	Current Amount

3.6 Other income. Give details of other income (e.g. rent, dividends, interest).

Nature of Income	Current Amount

Apart from the above I do not have any other income.

Part 4 Current Monthly Expenses

4.1 General

Item	Amount
Rent	
Mortgage instalments	
Utilities (electricity, gas, rates, telephone & water)	
Management fees	
Food	
Household expenses	
Car expenses	
Insurance premia	
Domestic helper(s)	
Other (specify)	
Total monthly household expenses	HK\$

Attach copies of the latest rental receipt.

4.2 Personal

Item	Amount
Meals out of home	
Transport	
Clothing / Shoes	
Personal grooming (including haircut and cosmetics)	
Entertainment / presents	
Holiday	
Medical / Dental	
Tax	
Insurance premia	
Interim maintenance	
Contribution to parents	
Dependent family members	
Others (specify)	
Total monthly personal expenses	HK\$

4.3 Children

Item	Amount
School fees	
Extra tuition fees	
School books and stationery	
Transport to school (including school bus)	
Medical / Dental	
Extra Curricular Activities	
Entertainment / presents	
Holidays	
Clothing / Shoes	
Insurance premia	
Lunches and pocket money	
Other Transport	
Child-minding fees	
Uniform	
Others (specify)	
Total monthly expenses for children	HK\$

Total Monthly Expenses
(4.1+ 4.2 + 4.3)

HK\$

4.4 Anticipated Future Expenses

Give details of any anticipated substantial changes in the above expenses in the foreseeable future.

Item	General / Yourself / Children	Anticipated Date of change	Amount after the change	Amount of Increase / Decrease


Part 5 Other information

5.1 State whether there has been significant change in your assets during the last 36 months, including any assets held outside Hong Kong.

5.2 Conduct of either party will only be taken into account in exceptional circumstances. If you feel it should be taken into account in your case, identify the nature of such conduct.

5.3 Give brief details of the standard of living enjoyed by you and your spouse during the marriage (e.g. size of home, clubs, holidays per year, domestic helper(s)).

5.4 Give brief details of the standard of living enjoyed by the children and the manner in which they were being and in which you and your spouse expected them to be educated.



Monthly Income		Assets	
Nature of Income	Monthly Income	Item	Value (if known)
Total income	HK\$	Total assets	HK\$

Part 6 Orders Sought

6.1 If you are able to at this stage, specify what kind of orders you are asking the court to make.

6.2 If you are seeking a transfer, settlement or sale of any property, identify the property in question.

6.3 If you are seeking an avoidance of disposition order, identify the property to which the disposition relates and the person or body in whose favour the disposition is alleged to have been made.

Part 7 Schedule of Attachments

Please indicate with a tick in ☐ the attachments to your Financial Statement and number them with the corresponding numbers.

Part 2

- | | | |
|-------------|---|--------------------------|
| 2.1 | Matrimonial Home:
Copy of latest statement of mortgage / other loans | <input type="checkbox"/> |
| 2.2 | Other landed properties:
Copy of latest statement of mortgage / other loans | <input type="checkbox"/> |
| 2.3 | Copies of bank statement of the last 12 months for each account and copies of latest statements for fixed or term deposits | <input type="checkbox"/> |
| 2.4 | Copies of the last 2 years' audited / unaudited financial statements of your private companies or any other documents on which valuations is based | <input type="checkbox"/> |
| 2.6 | Copies of the last 2 years' audited / unaudited financial statements in respect of all other business interest and any other documents on which valuation is based | <input type="checkbox"/> |
| 2.7 | Copies of latest statements for each securities account | <input type="checkbox"/> |
| 2.12 | Copy of the valuation of pension / Mandatory Provident Fund rights by the trustees or managers of the scheme | <input type="checkbox"/> |
| 2.13 | Copies of the latest 3 months credit card statement for each credit card | <input type="checkbox"/> |

Part 3

- | | | |
|------------|--|--------------------------|
| 3.1 | Copies of proof of earned income for the last 3 months or contract of employment if any, & tax returns for last 2 years | <input type="checkbox"/> |
| 3.2 | Copies of proof of additional income for the last 3 months or contract of employment if any. | <input type="checkbox"/> |
| 3.3 | Copies of proof of income from part-time employment for the last 3 months or contract of employment if any. | <input type="checkbox"/> |
| 3.4 | Copies of tax returns for the last 2 years in case of self-employment / partnership | <input type="checkbox"/> |
| 3.5 | Copies of latest statements of government allowances | <input type="checkbox"/> |

Part 4

- | | | |
|------------|--------------------------------------|--------------------------|
| 4.1 | Copy of latest rental receipt | <input type="checkbox"/> |
|------------|--------------------------------------|--------------------------|

Sworn / Affirmed * confirmation of the information

I

(the above named Petitioner / 1st Applicant / Respondent / 2nd Applicant)*

of
(Residential address)

Swear by Almighty God / solemnly, sincerely and truly declare and affirm that the contents of this my affidavit / affirmation* are true and confirm that the information given above is a full, frank, clear and accurate disclosure of my financial and other relevant circumstances.

Signed

Dated

Sworn / Affirmed * by the above named [Petitioner] [1st Applicant] Respondent] [2nd Applicant]* at

on

before me

Signed

Name

A Solicitor / Commissioner* for Oaths duly appointed to take Affidavits

*delete as appropriate

Address all communications to the Chief Judicial Clerk or if the matter is in the High Court, The Clerk of Court and quote the case number from page 1. If you do not quote this number, your correspondence may be returned.

**Chief Judicial Clerk
M2 Floor Family Court Registry
Wanchai Law Courts
Wanchai Tower
12 Harbour Road, Hong Kong**

or

**If the matter is in the High Court
The Clerk of Court
High Court of Hong Kong
Ground Floor, High Court Building
38 Queensway, Hong Kong**

Explanatory Note to Financial Statement

1. The court has been asked to consider the parties' financial position and to make appropriate orders for financial provision for the parties and for any relevant children of your family.
2. It cannot perform this task unless both parties fully co-operate with each other and with the court by making full and frank disclosure of their income and financial resources.
3. The Financial Statement is a comprehensive document which both parties are required to complete to provide relevant information to the court.
4. As you will have noticed it is quite lengthy, and a substantial amount of information needs to be provided. The document has been designed to be as clear and straightforward as possible. If you have a lawyer he or she will assist you in its preparation.
5. If you are unrepresented the Financial Statement has been set out so that it can be filled in by a lay person.
6. Although it requires careful and patient reading it is an uncomplicated Financial Statement despite the number of questions that it contains. Answer all questions as truthfully and as fully as you can.
7. Some questions may not relate to your situation in which case you will not need to answer them. For those questions that do not relate to you state "Not applicable" to show that you have read the question, or put a line through the box provided for the answer.
8. This is an important matter and it is in your best interests to complete the Financial Statement as fully as possible. Allow yourself sufficient time to fill it in properly and within the time limit set by the court

《婚姻訴訟規則》

(第 179 章第 54 條)

[1972 年 4 月 1 日]

導言

1. 引稱

本規則可引稱為《婚姻訴訟規則》。

2. 釋義

(1) 《釋義及通則條例》(第 1 章)須適用於闡釋本規則，一如其適用於闡釋條例。

(2) 在本規則中，除文意另有所指外——

“子女”(child)及“家庭子女”(child of the family)的涵義與《婚姻法律程序與財產條例》(第 192 章)第 2 條中該兩詞的涵義相同；

“司法常務官”(registrar)——

(a) 就在區域法院待決的法律程序而言(評定法律程序訟費的法律程序除外)，指憑藉《區域法院條例》(第 336 章)第 14(4)條行使區域法院司法常務官的司法管轄權的高等法院司法常務官；(2000 年第 28 號第 47 條；2002 年第 26 號法律公告)

(aa) 就區域法院的法律程序的訟費評定而言，指《區域法院條例》(第 336 章)第 2 條所界定的司法常務官；(2002 年第 26 號法律公告)

(b) 就在原訟法庭待決的法律程序而言，指高等法院司法常務官；(1998 年第 25 號第 2 條)

“本條例”(the Ordinance)指《婚姻訴訟條例》(第 179 章)；

“共同申請”、“共同申請書”(joint application)指婚姻雙方根據本條例第 11B 條提出的申請或關於該申請的申請書；(1996 年第 172 號法律公告)

MATRIMONIAL CAUSES RULES

(Cap. 179, section 54)

[1 April 1972]

PRELIMINARY

1. Citation

These rules may be cited as the Matrimonial Causes Rules.

2. Interpretation

(1) The Interpretation and General Clauses Ordinance (Cap. 1) shall apply for the interpretation of these rules as it applies for the interpretation of an Ordinance.

(2) In these rules, unless the context otherwise requires—

“the Ordinance”(本條例)means the Matrimonial Causes Ordinance (Cap. 179);
“adopted”(領養)means adopted in pursuance of an adoption order made under the Adoption Ordinance (Cap. 290);

“ancillary relief”(附屬濟助)means—

- (a) an avoidance of disposition order,
- (b) a lump sum order,
- (c) an order for maintenance pending suit,
- (d) a periodical payments order,
- (e) a secured periodical payments order,
- (f) a settlement of property order,
- (g) a transfer of property order,
- (h) a variation of settlement order, or
- (i) a variation order;

“avoidance of disposition order”(廢止產權處置令)means an order under section 17 of the Matrimonial Proceedings and Property Ordinance (Cap. 192) setting aside a disposition;

- “有抗辯訴訟”(defended cause) 指並非無抗辯訴訟的訴訟；
- “有保證定期付款令”(secured periodical payments order) 指根據《婚姻法律程序與財產條例》(第 192 章) 第 4(1)(b) 條就婚姻的一方或根據該條例第 5(2)(b) 條就家庭子女作出的命令；
- “在訟案待決期間提供贍養費令”(order for maintenance pending suit) 指根據《婚姻法律程序與財產條例》(第 192 章) 第 3 條作出的命令；
- “更改令”(variation order) 指根據《婚姻法律程序與財產條例》(第 192 章) 第 11 條作出的命令；
- “更改授產安排令”(variation of settlement order) 指根據《婚姻法律程序與財產條例》(第 192 章) 第 6(c) 或 (d) 條作出的命令；
- “法官”(judge)——
- 就在區域法院待決的法律程序而言，指區域法院的其中一位法官；
 - 就在原訟法庭待決的法律程序而言，包括高等法院首席法官、任何在婚姻法律程序中行使司法管轄權的原訟法庭大法官，以及根據或憑藉《高等法院條例》(第 4 章) 第 10 條和按該條所作的任何命令而在此等法律程序中行使司法管轄權的任何暫委大法官；(1975 年第 92 號第 58 條；1983 年第 49 號第 7 條；1995 年第 79 號第 50 條；1998 年第 25 號第 2 條)
- “法院”(court) 指區域法院；(1982 年第 325 號法律公告；1998 年第 25 號第 2 條)
- “定期付款令”(periodical payments order) 指根據《婚姻法律程序與財產條例》(第 192 章) 第 4(1)(a) 條就婚姻的一方或根據該條例第 5(2)(a) 條就家庭子女作出的命令；
- “附屬濟助”(ancillary relief) 指——
- 廢止產權處置令，
 - 整筆付款令，
 - 在訟案待決期間提供贍養費令，
 - 定期付款令，
 - 有保證定期付款令，
 - 授產安排令，
 - 財產轉讓令，
 - 更改授產安排令，或
 - 更改令；

- “cause”(訴訟) means a matrimonial cause as defined by section 2 of the Ordinance;
- “child”(子女) and “child of the family”(家庭子女) have the same meaning as in section 2 of the Matrimonial Proceedings and Property Ordinance (Cap. 192);
- “court”(法院) means the District Court; (*L.N. 325 of 1982; L.N. 26 of 2002*);
- “defended cause”(有抗辯訴訟) means a cause not being an undefended cause;
- “directions for trial”(審訊指示) means directions for trial given under rule 33;
- “financial provision”(經濟給養) has the same meaning as in section 17 of the Matrimonial Proceedings and Property Ordinance (Cap. 192);
- “joint application”(共同申請、共同申請書) means an application made by both parties to the marriage under section 11B of the Ordinance; (*L.N. 172 of 1996*);
- “judge”(法官)——
- in relation to proceedings pending in the District Court means one of the judges of the District Court;
 - in relation to proceedings pending in the Court of First Instance includes the Chief Judge of the High Court, any judge of the Court of First Instance exercising jurisdiction in matrimonial proceedings and any deputy judge exercising jurisdiction in such proceedings under or by virtue of section 10 of the High Court Ordinance (Cap. 4) and any order made thereunder; (*92 of 1975 s. 58; 49 of 1983 s. 7; 79 of 1995 s. 50; 25 of 1998 s. 2; L.N. 26 of 2002*)
- “lump sum order”(整筆付款令) means an order under section 4(1)(c) or section 5(2)(c) of the Matrimonial Proceedings and Property Ordinance (Cap. 192) in respect of a party or a child of the family respectively;
- “matrimonial proceedings”(婚姻法律程序) means any proceedings with respect to which rules may be made under section 54(1) of the Ordinance or section 32 of the Matrimonial Proceedings and Property Ordinance (Cap. 192); (*20 of 2010 s. 10*);
- “notice of intention to defend”(擬抗辯通知) has the meaning assigned to it by rule 15;
- “order for maintenance pending suit”(在訟案待決期間提供贍養費令) means an order under section 3 of the Matrimonial Proceedings and Property Ordinance (Cap. 192);
- “periodical payments order”(定期付款令) means an order under section 4(1)(a) or under section 5(2)(a) of the Matrimonial Proceedings and Property Ordinance (Cap. 192) in respect of a party or a child of the family respectively;
- “person named”(被指名者) includes a person described as “passing under the name of A.B.”;

[附屬法例]

- “被指名者”(person named) 包括被描述為“以 A. B. 作稱呼”的人；
- “財產轉讓令”(transfer of property order) 指根據《婚姻法律程序與財產條例》(第 192 章) 第 6(a) 條作出的命令；
- “婚姻法律程序”(matrimonial proceedings) 指任何法律程序，而該等法律程序為根據本條例第 54(1) 條或《婚姻法律程序與財產條例》(第 192 章) 第 32 條可就該等程序訂立規則者；(2010 年第 20 號第 10 條)
- “授產安排令”(settlement of property order) 指根據《婚姻法律程序與財產條例》(第 192 章) 第 6(b) 條作出的命令；
- “無抗辯訴訟”(undefended cause)——
- (a) 就根據本條例第 12 條提出的申請而言，指答辯人在限期內並無發出擬抗辯通知的訴訟；
 - (b) 就任何其他情況而言，指——
 - (i) 答辯人並無提交答辯書或所提交的答辯書已被剔除的訴訟；或
 - (ii) 單就答辯人的答辯書而進行的訴訟，而在該訴訟中並無就答辯人的答辯書提交答覆書或答辯書，或所提交的答覆書或答辯書已被剔除；或
 - (iii) 第 18(4) 條適用的訴訟，而在該訴訟中並無根據該條規則發出通知，或如此發出的通知已被撤回；
- “訴訟”(cause) 指本條例第 2 條所界定的婚姻訴訟；
- “經濟給養”(financial provision) 的涵義與《婚姻法律程序與財產條例》(第 192 章) 第 17 條中該詞的涵義相同；
- “福利”(welfare) 的涵義與《婚姻法律程序與財產條例》(第 192 章) 第 18 條中該詞的涵義相同；
- “領養”(adopted) 指依據一項根據《領養條例》(第 290 章) 作出的領養令而領養；
- “廢止產權處置令”(avoidance of disposition order) 指根據《婚姻法律程序與財產條例》(第 192 章) 第 17 條將產權處置撤銷的命令；
- “審訊指示”(directions for trial) 指根據第 33 條發出的審訊指示；
- “整筆付款令”(lump sum order) 指根據《婚姻法律程序與財產條例》(第 192 章) 第 4(1)(c) 條就婚姻的一方或根據該條例第 5(2)(c) 條就家庭子女作出的命令；
- “擬抗辯通知”(notice of intention to defend) 具有第 15 條給予該詞的涵義。

(1972 年第 135 號法律公告)

[Subsidiary]

“registrar” (司法常務官) means—

- (a) in relation to proceedings (being proceedings other than taxation of costs of proceedings) pending in the District Court, the registrar of the High Court exercising his jurisdiction as the registrar of the District Court by virtue of section 14(4) of the District Court Ordinance (Cap. 336); (*L.N. 26 of 2002*)
 - (aa) in relation to taxation of costs of proceedings in the District Court, the Registrar as defined in section 2 of the District Court Ordinance (Cap. 336); (*L.N. 26 of 2002*)
 - (b) in relation to proceedings pending in the Court of First Instance, the registrar of the High Court; (*25 of 1998 s. 2*)
- “secured periodical payments order” (有保證定期付款令) means an order under section 4(1)(b) or section 5(2)(b) of the Matrimonial Proceedings and Property Ordinance (Cap. 192) in respect of a party or a child of the family respectively;
- “settlement of property order” (授產安排令) means an order under section 6(b) of the Matrimonial Proceedings and Property Ordinance (Cap. 192);
- “transfer of property order” (財產轉讓令) means an order under section 6(a) of the Matrimonial Proceedings and Property Ordinance (Cap. 192);
- “undefended cause” (無抗辯訴訟) means—
- (a) in the case of an application under section 12 of the Ordinance, a cause in which the respondent has not given notice of intention to defend within the time limited;
 - (b) in any other case—
 - (i) a cause in which no answer has been filed or any answer filed has been struck out; or
 - (ii) a cause which is proceeding only on the respondent's answer and in which no reply or answer to the respondent's answer has been filed or any such reply or answer has been struck out; or
 - (iii) a cause to which rule 18(4) applies and in which no notice has been given under that rule or any notice so given has been withdrawn;
- “variation of settlement order” (更改授產安排令) means an order under section 6(c) or (d) of the Matrimonial Proceedings and Property Ordinance (Cap. 192);
- “variation order” (更改令) means an order under section 11 of the Matrimonial Proceedings and Property Ordinance (Cap. 192);
- “welfare” (福利) has the same meaning as in section 18 of the Matrimonial Proceedings and Property Ordinance (Cap. 192).

(L.N. 135 of 1972)

[附屬法例]

(3) 除文意另有所指外，凡以呈請方式開始訴訟，就本規則而言，即使已就該呈請作出最後判令或命令，該項訴訟仍須視為待決的訴訟。

(4) 除文意另有所指外，本規則中凡提述某號數的規則，即提述本規則中該號數的規則。

(5) 在本規則中，凡以號數提述某表格，即指附錄中該號數的表格，或指實質上效力相同的表格，但須按個別案件的情況所需而更改表格。

(6) 在本規則中，凡提述的命令及規則，其前綴詞為“高等法院規則”者，即為提述《高等法院規則》(第 4 章，附屬法例) 中的該命令及規則。(1998 年第 25 號第 2 條；2002 年第 26 號法律公告)

(6A) 在本規則中，凡提述的命令及規則，其前綴詞為“區域法院規則”者，即為提述《區域法院規則》(第 336 章，附屬法例) 中的該命令及規則。(2002 年第 26 號法律公告)

(7) 除文意另有所指外，本規則中凡提述任何規則或成文法則，須解釋為提述經任何其他規則或成文法則修訂、引伸或適用的該規則或成文法則。

3. 《高等法院規則》的適用

在符合本規則及任何成文法則的規定下，《高等法院規則》(第 4 章，附屬法例) 經作出必需的變通後，須適用於在原訟法庭或區域法院開始的婚姻法律程序，和適用於在原訟法庭或區域法院待決的婚姻法律程序的慣例及程序。

(1998 年第 25 號第 2 條)

4. 在法律程序中採用的語文

(1) 法官可為在其席前進行的任何法律程序獲公正而迅速地處理，而在該法律程序或其任何部分中，按他認為適當兼用兩種法定語文或採用其中一種。

(2) 法官根據第 (1) 款作出的決定是最終決定。

(3) 在法院進行的法律程序中或法律程序的一部分中的一方，或在法院進行的法律程序中或法律程序的一部分中的證人——

(a) 可兼用兩種法定語文或採用其中一種；及

(b) 可用任何語文向法院陳詞或作供。

(4) 在法院進行的法律程序中或法律程序的一部分中的法律代表，可兼用兩種法定語文或採用其中一種。

(5) 供法院在任何法律程序中使用的文件，可用其中一種法定語文製備。

[Subsidiary]

(3) Unless the context otherwise requires, a cause begun by petition shall be treated as pending for the purposes of these rules notwithstanding that a final decree or order has been made on the petition.

(4) Unless the context otherwise requires, any reference in these rules to a numbered rule is a reference to the rule so numbered in these rules.

(5) In these rules a form referred to by number means the form so numbered in the Appendix, or a form substantially to the like effect, with such variations as the circumstances of the particular case may require.

(6) In these rules any reference to an Order and rule if prefixed by the letters “R.H.C.” is a reference to that Order and rule in the Rules of the High Court (Cap. 4 sub. leg.). (25 of 1998 s. 2; L.N. 26 of 2002)

(6A) In these rules any reference to an Order and rule if prefixed by the letters “R.D.C.” is a reference to that Order and rule in the Rules of the District Court (Cap. 336 sub. leg.). (L.N. 26 of 2002)

(7) Unless the context otherwise requires, any reference in these rules to any rule or enactment shall be construed as a reference to that rule or enactment as amended, extended or applied by any other rule or enactment.

3. Application of the Rules of the High Court

Subject to the provisions of these rules and of any enactment, the Rules of the High Court (Cap. 4 sub. leg.) shall apply with the necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceedings pending in the Court of First Instance or in the District Court.

(25 of 1998 s. 2; L.N. 26 of 2002)

4. Use of language in proceedings

(1) A judge may use either or both of the official languages in any proceedings or a part of any proceedings before him as he considers appropriate for the just and expeditious disposal of the proceedings before him.

(2) The decision of the judge under paragraph (1) is final.

(3) A party to or a witness in any proceedings or a part of any proceedings before the court may—

(a) use either or both of the official languages; and

(b) address the court or testify in any language.

(4) A legal representative in any proceedings or a part of any proceedings before the court may use either or both of the official languages.

(5) Documents prepared for use by the court in any proceedings may be in either official language.

雜項

121. 對扣留在法院的文件進行查閱等

(1) 任何婚姻法律程序的一方或其律師或律政司司長，均可翻查和查閱就該等法律程序而在登記處存檔或遞交的任何文件，並可索取該等文件的副本。(1972 年第 135 號法律公告；1998 年第 25 號第 2 條)

(2) 除第 47A(3) 及 95(3) 條及本條第 (1) 款另有規定外，任何在登記處存檔或遞交的文件，如非公開法庭所作的判令或命令，在未經法院許可下，不得公開讓人查閱；任何人未得法院許可，亦不得取走或獲發給任何此等文件或其摘錄的副本。(1974 年第 123 號法律公告；1982 年第 325 號法律公告)

122. 在區域法院須遵守的慣例

高等法院首席法官及司法常務官可發出指示，以確保在區域法院進行婚姻法律程序時，妥為遵守法定規定和維持慣例的一致性。

(1998 年第 25 號第 2 條；2005 年第 10 號第 15 條)

123. (已失效)

124. 婚生地位法律程序

(1) 根據本條例第 49 條提出的呈請，除須述明呈請人所依賴的理由外，並須列述呈請人的出生日期與地點和呈請人母親未婚時的姓名；如呈請人為人所知的姓名並非其出生證明書上所登載的姓名，則須在呈請書及在任何就該呈請書而作出的判令內述明此項事實。

(2) 呈請書須以呈請人的誓章作為支持，該誓章須核實呈請人個人所知的各項事實，呈請人亦須在誓章內宣誓證實他相信其他事實為真實。該誓章須與呈請書列載在同一份文件內，且須載於呈請書的末端或結尾。

(3) 在呈請書提交後，呈請人須向民事法律專員發出提交通知書，民事法律專員可在 8 天內就該呈請書呈交應訴書。

MISCELLANEOUS

121. Inspection etc. of documents retained in court

(1) A party to any matrimonial proceedings or his solicitor or the Secretary for Justice may have a search made for, and may inspect and bespeak a copy of, any document filed or lodged in the registry in those proceedings. (*L.N. 135 of 1972; 25 of 1998 s. 2*).

(2) Except as provided by rules 47A(3) and 95(3) and paragraph (1) of this rule, no document filed or lodged in the registry, other than a decree or order made in open court, shall be open to inspection by any person without leave of the court, and no copy of any such document, or of an extract from any such document, shall be taken by, or issued to, any person without such leave. (*L.N. 123 of 1974; L.N. 325 of 1982*)

122. Practice to be observed in District Court

The Chief Judge and the registrar may issue directions for the purpose of securing in the District Court due observance of statutory requirements and uniformity of practice in matrimonial proceedings.

(*L.N. 26 of 2002; 10 of 2005 s. 15*)

123. (*Had its effect*)

124. Legitimacy Proceedings

(1) A petition under section 49 of the Ordinance shall, in addition to stating the grounds on which the petitioner relies, set out the date and place of birth of the petitioner and the maiden name of his mother, and, if the petitioner is known by a name other than that which appears in the certificate of his birth, that fact shall be stated in the petition and in any decree made thereon.

(2) The petition shall be supported by an affidavit by the petitioner verifying the facts of which he has personal knowledge and deposing as to his belief in the truth of the other facts. The affidavit shall be contained in the same document as the petition and shall follow at the foot or end thereof.

(3) When the petition has been filed, notice of filing shall be given by the petitioner to the Law Officer (Civil Law), who may within 8 days enter an appearance to the petition.

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Mini-Trial

These instructions ask you to make certain assumptions about the witnesses who will appear at trial. Please note that, for the mini trial conducted at the assessment, only 1 witness for each party will actually be physically present for examination purposes.

NOTE: Please ignore ALL of the facts and information contained in the Instructions for the Interim Application for the purposes of the Mini-Trial.

The following background facts are undisputed:

1. The Plaintiff Mr Andrew Fong (“**Mr Fong**”) was driving a Ferrari motorcar (the “**Ferrari**”) along Acacia Avenue at 2:00 am on 1 January 2016. Mr Fong’s wife, Mrs Martha Fong (“**Mrs Fong**”), was in the passenger seat.
2. The Ferrari was involved in a minor collision with a lorry (the “**Lorry**”) driven by the 1st Defendant Mr John Smith (“**Mr Smith**”) – the Ferrari stopped and Lorry impacted the rear-end of the Ferrari. The Lorry was registered in the name of the 2nd Defendant Industrial Goods Limited (“**IGL**”), which was also Mr Smith’s employer.
3. After a discussion (the “**Discussion**”), the contents of which are in dispute, Mr Fong and Mr Smith and drove off. They did not call the police to report the accident.
4. The cost of repairing the Ferrari was HK\$400,000 (the “**Repair Costs**”). Mr Smith and IGL refused to reimburse Mr Fong for the Repair Costs. Mr Fong has brought this claim in the District Court to recover the Repair Costs.

In his Amended Statement of Claim, Mr Fong claims that:

1. During the Discussion, Mr Fong and Mr Smith on behalf of IGL entered into an oral contract pursuant to which IGL agreed to reimburse Mr Fong for the reasonable costs of repair of the Ferrari, in full and final settlement of Mr Fong's claim against Mr Smith and IGL (the "**Compensation Agreement**").
2. Given Mr Smith's and IGL's denials of the Compensation Agreement, Mr Fong claims, in the alternative, that the accident was caused by Mr Smith's negligence. Mr Smith was driving the Lorry negligently quickly. He was also sleep deprived. This prevented Mr Smith from braking in time to avoid hitting the Ferrari. Mr Fong further claims that IGL was vicariously liable for Mr Smith's negligence because IGL was Mr Smith's employer.

In Mr Smith's and IGL's Defences, which are materially identical to each other, they say that:

1. There was never any Compensation Agreement. Instead, Mr Fong and Mr Smith, on behalf of IGL, agreed not to sue each other for compensation (the "**Non-Suit Agreement**").
2. Further, Mr Smith was driving the Lorry at a reasonable speed, and he was not sleep deprived. The accident was caused by Mr Fong. Mr Fong was driving whilst intoxicated and also distracted by a heated argument with Mrs Fong. This led him to brake abruptly when he saw that the traffic ahead had slowed down, and Mr Smith had no opportunity to stop in time.

For the purpose of the exercise, please assume that:

1. The only documents disclosed by the Plaintiff was an invoice for the repair costs of the Ferrari and a receipt proving payment.
2. Amongst the documents disclosed by the Defendants was a work schedule, showing that Mr Smith had been driving one day shift (from 9 am to 6 pm) every day in the week leading up to the accident.
3. The parties have agreed that HK\$400,000 is a reasonable cost of repairing the Ferrari.
4. The Oral Agreement and Non-Suit Agreement, if found to exist, were legally effective and binding.
5. If Mr Smith was driving the Lorry at an excessive speed and he was sleep deprived, as claimed by Mr Fong, Mr Smith would have been driving the Lorry negligently.

-
6. IGL does not dispute that it is vicariously liable for Mr Smith if Mr Smith is found to have been negligent.
 7. The agreed factual issues are:
 - (1) Whether, during the Discussion, Mr Fong and Mr Smith made the Oral Agreement or the Non-Suit Agreement.
 - (2) Whether the accident occurred because Mr Smith was driving the Lorry at an excessive speed and was sleep deprived, or whether the accident occurred because Mr Fong braked too suddenly and early.

Witnesses

The witnesses for the Plaintiff and the Defendants are described below. The Defendants are conducting their case together.

You will be informed which two witnesses (one witness for the plaintiff and one witness for the defendants) will appear at the mini trial on the day of assessment itself when you arrive and register.

Plaintiff's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the Plaintiff:

1. Mr Andrew Fong.
2. Mrs Martha Fong.

You can assume:

- i. the witnesses will give evidence at trial in the order listed above
- ii. the witnesses who will not appear 'live' at the mini trial have given/will give evidence in the terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

Defendants' witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the Defendants:

-
1. Mr John Smith.
 2. Ms Jane Chan.

You can assume:

- i. the witnesses will give evidence at trial in the order listed above
- ii. the witnesses who will not appear 'live' at the mini trial have given/will give evidence in the terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

DURING the Mini-Trial

You will be required to:

- Make an opening speech (max 5 minutes).
- Examine in chief (max 10 minutes) the witness who will give 'live' oral evidence at trial on behalf of your client. You should conduct a full examination-in-chief of the witness on the basis that their statement does not stand as evidence in chief.
- Cross-examine (max 15 minutes) the opponent's witness who is attending at trial to give 'live' oral evidence. Please note that the opponent's witness may be un-cooperative at times. The witness' statement does not stand as evidence in chief.
- Deal with any interventions made by the advocate representing the opposing party.
- Make any interventions, as you think appropriate, to the questioning of witnesses by the advocate representing the opposing party.
- Deal with any Judicial interventions/questions as and when they arise.