Certified Trust Practitioner™ Accreditation Programme

Trust Training Certificate

Unit 10 – Testamentary Issues & Avoiding Testamentary Disputes

Module 16 – Testamentary Issues - Wills

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Study Guide & Legal Cases

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Unit 10

Testamentary Issues & Avoiding testamentary disputes

Module 16

Other Testamentary Issues

The Hong Kong Trustees' Association

UNIT 10 – TESTAMENTARY ISSUES & AVOIDING TESTAMENTARY DISPUTES

MODULE 16 OTHER TESTAMENTARY ISSUES

EXECUTIVE SUMMARY

PART 1 – MARRIAGE AND COMMON LAW SPOUSE/PARTNERSHIP RELATIONSHIPS

1. In Hong Kong, a marriage entered into on or after 7 October 1971 is only lawful if it is the voluntary union for life of one man and one woman to the exclusion of all others and contracted in accordance with the Marriage Ordinance (Cap. 181).
    a. A celebration of marriage in Hong Kong can be done (a) at a marriage registry by a Registrar; (b) at a licensed place of worship by a competent minister; or (c) by a civil celebrant of marriages in Hong Kong.
    b. Rights of a concubine or that of a party to a kim tiu marriage are not affected by the prohibition against concubinage and kim tiu marriage if the union of concubinage or kim tiu marriage was lawfully contracted before 7 October 1971.

2. Customary marriages and modern marriages celebrated in Hong Kong prior 7 October 1971 may also be recognized as valid marriages provided that requirements in the Marriage Reform Ordinance (Cap. 178) are satisfied.
    a. A customary marriage is a marriage celebrated in Hong Kong in accordance with Chinese law and custom (i.e. applicable to Chinese inhabitants of Hong Kong immediately prior to 5 April 1843).
    b. A modern marriage is a marriage between a man and a woman (not less than 16 years of age and not married to any other person) celebrated in Hong Kong by open ceremony in the presence of 2 or more witnesses.

3. A foreign marriage celebrated outside Hong Kong is recognized as a valid marriage if the marriage is celebrated or contracted in accordance with the law in force at the time and in the place where the marriage was performed.

4. Same sex marriage is not recognized in Hong Kong.

5. The concept of common law marriage is not recognized by Hong Kong law.

PART 2 – COMMUNITY OF PROPERTY

1. The concept of community of property is not recognized by Hong Kong law.

2. A property may be co-owned at law or in equity by way of "joint tenancy" or "tenancy in common".
    a. Joint tenancy: the co-owners together owned the entire estate but none of them individually owns a specific share in the estate. 4 unities are required: unity of possession, unity of interest, unity of title, and unity of time.
    b. Tenants in common: each co-owner owns a distinct but undivided share. Only unity of possession is required.
    c. A joint tenancy may be converted to a tenancy in common by severance.
    d. If a property is co-owned by joint tenants, on the death of one of the joint tenants, the co-owned property will be vested automatically in the surviving joint tenants. Unlike tenants in common, a joint tenant cannot dispose of his interest by will or under the intestacy rules in Hong Kong.

3. While registration of a land transaction itself does not confer validity on the owner's title, it is relevant to issues relating to priority between competing interests in land.

4. A person is generally free to dispose of his property in whatever manner he may decide, no matter during his lifetime or leaving such property to whomever he wishes by will. Estate duty was abolished on 11 February 2006.

5. Provided that the deceased died domiciled in Hong Kong or having been ordinarily resident in Hong Kong at any time in the 3 years immediately preceding his death, his dependants may apply to the Court under the Inheritance (Provision for Family and Dependants) Ordinance (Cap. 481)

for financial provision out of the deceased's estate on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant.

PART 3 – NUPTIAL AGREEMENTS

1. The landmark case in Hong Kong is SPH v. SA (FORMERLY KNOWN AS SA) [2014] HKCFA 56: an agreement for the division of matrimonial assets should be upheld by the court if it was freely and independently entered into by the parties and in the absence of unfair or unconscionable circumstances as well as material and drastic unforeseen circumstances such as to manifest prejudice to one of the parties.

2. Main principles of the English case of Radmacher v Granatino [2010] UKSC 42 are adopted:
    a. Nuptial agreements cannot oust the jurisdiction of the court.
    b. Court must give appropriate weight to nuptial agreements.
    c. Nuptial agreements would carry full weight only if each party had entered into the agreement of his or her own free will, without undue influence or pressure, having all the information material to his or her decision to enter into the agreement and intending that it should be effective to govern the financial consequences of the marriage coming to an end.

PART 4 – MATRIMONIAL PROPERTY AND EXPRESS, RESULTING, CONSTRUCTIVE AND FAMILY TRUSTS AND DISPUTES

1. A declaration of trust in respect of any land or any interest in land must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will. However, the declaration itself need not be in writing.

2. A resulting trust may arise is where a person has provided money for the purchase of a property but the property is then purchased in the name of another person, or in favour of a settlor who fails to dispose of his beneficial interest in a property or in the case where an express trust fails.

The presumption of resulting trust may be rebutted by the presumption of advancement.

3. A property may be subject to a constructive trust in favour of a party claiming to have a beneficial interest in the property (who is not a legal owner) if:
    a. It is the common intention that the claiming party is to have a beneficial interest in the property
    b. The claiming party has detrimentally relied on such common intention
    c. It is inequitable for the legal owner to deny the claiming party's interest

4. In divorce proceedings, the court shall have regard to, among other things, financial resources each party to the marriage has or is likely to have in the foreseeable future.
    a. The legal test for whether a trust and trust assets should be regarded as a financial resource of a party: if that party were to request the trustee to advance the whole or part of the capital or income of the trust to him/her, the trustee would, on the balance of probabilities, be likely to do so.
    b. The court will look at past conduct and consider: (a) the creation and terms of the trust; (b) the party's power to replace the trustee; (c) the letter of wishes; (d) the nature of the trust assets and distributions made by the trustee.

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Module Overview

This module looks at other testamentary issues which affect estates and impact trusts, including:

1. Marriage and common law spouses/partnership relationships
2. Community of property
3. Post-nuptial agreements and pre-nuptial agreements
4. Matrimonial property and express, resulting, constructive and family trusts

The above issues are set in context of HK law and recent relevant legal cases.

Learning Outcomes

This module reviews the issues surrounding legal marriage, common law spouses, community of property, pre-nuptial and post nuptial agreements, express and implied trusts, and disputes which can arise in the case of divorce.

At the end of the Unit students will:

1. understand what constitutes a legal marriage and be able to elaborate the requirements
2. be able to list the key issues concerning the concept of ownership of property
3. understand the differences in pre-nuptial and post-nuptial agreements and be able to explain the legal protection provided under each instrument
4. understand how marital property is treated under trust and list the key points
5. be aware of important cases which influence marital dispute decisions of the Courts in Hong Kong and the concepts of express, resulting and constructive trusts.

1. Marriage and Common Law Spouse/ Partnership Relationships

When dealing with estate matters and trusts, much of the determination of beneficiaries and entitlements centres around issues of "marriage", including validity of the marriage under Hong Kong law and its subsequent breakdown.

1.1 Marriage in Hong Kong on or after 7 October 1971

In Hong Kong, marriages entered into on or after 7 October 1971 ("**the Appointed Day**") shall imply the voluntary union for life of one man with one woman to the exclusion of all others and may be contracted only in accordance with the Marriage Ordinance (Cap 181). A man is expressly forbidden to take any concubine after the Appointed Day. Another type of Chinese customary marriage that has been outlawed is "kim tiu" marriage.

See *Sections 4-6, Marriage Reform Ordinance (Cap 178) ("**MRO**")*
Leung Sai Lun Robert and Others v Leung May Ling and Others [1999] 1 HKLRD 649

1.1.1 Celebration of marriage

As for celebration of marriage in Hong Kong, it can now be done:

(a) at a marriage registry by a Registrar;
(b) at a licensed place of worship by a competent minister; or
(c) by a civil celebrant of marriages at any hour and any place in Hong Kong (other than the office of the Registrar of Marriage and a licensed place of worship).

1.1.2 Status of concubinage and kim tiu marriages

For a concubine lawfully taken before the Appointed Day (and her child) and a party to a kim tiu marriage lawfully contracted before the Appointed Day, their status and rights shall not be affected by the prohibition against concubinage and kim tiu marriage.

See sections 5 & 6, MRO

1.2 Marriage in Hong Kong before 7 October 1971

Customary marriages and modern marriages that were celebrated in Hong Kong prior to the Appointed Day may also be recognized as valid marriages under Hong Kong law provided that the requirements set out in the MRO are satisfied. The MRO also contains provisions dealing with post-registration and dissolution of such marriages.

1.2.1 Customary marriage

For the purpose of the MRO, a marriage shall constitute a customary marriage if it was celebrated in Hong Kong before the Appointed Day in accordance with Chinese law and custom. "*Chinese law and custom*" is defined as *"such of the laws and customs of China as would immediately prior to 5 April 1843 have been applicable to Chinese inhabitants of Hong Kong"*.

There is a presumption that a marriage is "deemed to accord with Chinese law and custom if it was celebrated before the Appointed Day in Hong Kong in accordance with the traditional Chinese customs accepted at the time of the marriage as appropriate for the celebration of marriage either—

(a) in the part of Hong Kong where the marriage took place; or
(b) in the place recognized by the family of either party to the marriage as their family place of origin."

See Sections 2 & 7, MRO

1.2.2 Modern marriage

"*Modern marriage*" is defined as "*a marriage celebrated in Hong Kong before the Appointed Day by open ceremony as a modern marriage and in the presence of 2 or more witnesses*" under the MRO. Every marriage celebrated in Hong Kong before the Appointed Day as a modern marriage by a man and a woman each of whom, at the time of marriage, was not less than 16 years of age and was not married to any person shall also be recognized as a valid marriage, unless it was validly dissolved before the Appointed Day.

See sections 2, 8 & 14, MRO

1.3 Foreign marriage

Generally speaking, a marriage celebrated outside Hong Kong is recognized as a valid marriage if the marriage "*is celebrated or contracted in accordance with the law in force at the time and in the place where the marriage was performed*".

See Section 2(2)(d), Married Persons Status Ordinance (Cap 182)

1.4 Same sex marriage

Same sex marriage is not recognized in Hong Kong. However, in the landmark case heard in the Court of Final Appeal ("**CFA**"): *W v The Registrar of Marriages* [2013] 3 HKLRD 90, it was held that *"a post-operative male-to-female transsexual person whose gender has been certified by an appropriate medical authority to have changed as a result of sex reassignment surgery"* is eligible to marry a man.

1.5 Common law marriage

The concept of "*common law marriage*" is not recognized by Hong Kong law, regardless of whether the couple in question is opposite sex or same sex couple. In case that such "*common law couple*" breaks up, they would not be treated as married couple and hence they do not enjoy the same protection and entitlement like any married couples under the law of intestacy in Hong Kong.

However, the party to a common law marriage may make claim against the estate of his/her partner for financial provisions under the Inheritance (Provisions for Family and Dependents) Ordinance (Cap 481).

2. Community of Property

The concept of "*community of property*" is again not recognized by Hong Kong law. A person may continue to own a property in his or her sole name (or jointly with a third party) after entering into marriage with someone in Hong Kong.

2.1 Separation of legal and equitable title

In Hong Kong, a separation of legal and equitable ownership of a property is not unusual. In such a case, the legal estate in question is held on trust. The trust may be expressly created by a trust instrument or may be implied, and arises by operation of law.

2.2 Co-ownership: Joint tenancy and tenancy in common

A property may be co-owned at law or in equity by way of "*joint tenancy*" or "*tenancy in common*".

In the case of a joint tenancy, the co-owners together owned the entire estate but none of them individually owns a specific share in the estate. Joint tenancy also requires "four unities", namely, unity of possession, unity of interest, unity of title, and unity of time.

Whereas for a tenancy in common, each co-owner owns a distinct but undivided share. Meanwhile, only "unity of possession" is required.

2.2.1 Distinguishing between joint tenancy and tenancy in common

When the "four unities" do not exist, it can only be a tenancy in common but not a joint tenancy.

If the "four unities" do exist, then an express intention to create a joint tenancy is conclusive. However, in the absence of such express intention, you must pay attention to the date of creation of the co-ownership in question.

Prior to 1 November 1984, the presumption at law favoured a joint tenancy. However, such presumption was later reversed by section 9 of the Conveyancing and Property Ordinance (Cap 219) ("**CPO**").

Regarding beneficial co-ownership, in which case section 9 does not apply, "*equity normally follows the law*" meaning that the beneficial interest will be held in joint tenancy if the legal estate is held in joint tenancy and vice versa. Of course, such presumption is rebuttable.

It is worth noting that a joint tenancy may be converted to a tenancy in common by severance in accordance with the provisions of section 8 of CPO.

2.2.2 Right of survivorship

If a property is co-owned by joint tenants, on the death of one of the joint tenants, the co-owned property will be vested automatically in the surviving joint tenants. A joint tenant cannot dispose of his interest by will or under the intestacy rules in Hong Kong.

Unlike joint tenants, tenants in common do not enjoy the right of survivorship. The distinction between a joint tenancy and a tenancy in common is therefore very important.

2.3 Registration and priority

While registration of a land transaction itself does not confer validity on the owner's title, it is relevant to issues relating to priority between competing interests in land. The legislation governing land registration and relevant priority issues in Hong Kong is the Land Registration Ordinance (Cap 128) ("**LRO**"). Common law rules may also be applicable in case where there is a lacuna (a gap or missing part) in LRO or when LRO is otherwise irrelevant.

2.4 Disposal of property

A person is generally free to dispose of his property in whatever manner he may decide, no matter during his lifetime or leaving such property to whomever he wishes by will. There is no inheritance tax in Hong Kong following the abolishment of estate duty on 11 February 2006.

2.5 Provision for family and dependants

In Hong Kong, certain family members or dependants of a deceased may apply to the Court for an order that provisions be made out of the deceased's estate by way of periodical payments, lump sum payment, transfer of property comprised in the estate etc.

Such application may be made by any person specified in section 3 of the Inheritance (Provision for Family and Dependants) Ordinance (Cap 481) ("**IPFDO**"), who survives the deceased, on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant, provided that the deceased dies:

(a) domiciled in Hong Kong; or
(b) having been ordinarily resident in Hong Kong at any time in the 3 years immediately preceding his death.

Reasonable financial provision is defined in section 3(2) of IPFDO.

3. Nuptial Agreements

This section provides you with an overview of the legal status of post-nuptial agreements and pre-nuptial agreements in Hong Kong.

3.1 Post-nuptial agreements

Post-nuptial agreements may also be referred to as separation agreements and that they usually deal with issues of divorce.

The leading English case is *Edgar v Edgar* [1980] 1 WLR 1410. It was held that although the Court's powers to grant ancillary relief could not be overridden by separation agreements, the Court in exercising its discretion when granting such relief should uphold such agreements "*unless there were vitiating factors or a compelling case of unforeseeable circumstances*".

The landmark case in Hong Kong concerning post nuptial/separation agreements is the case of Court of Final Appeal case of **SPH v. SA (FORMERLY KNOWN AS SA) [2014] HKCFA 56.**

See Legal Cases appendix page 1 for a summary of the case.

See para 29, *SPH v SA* [2014] 4 HKC 271

In Hong Kong, the Court of Appeal has to a large extent adopted the English position in the case of *L v C* [2007] HKFLR 334. It confirmed that *"when parties who are sui juris freely enter upon a bargain for the division of matrimonial assets then, in the absence of unfair or unconscionable circumstances surrounding the conclusion of the agreement and material and drastic unforeseen circumstances arising thereafter such as to cause manifest prejudice to one of the parties, the courts will hold the parties to their bargain"*.

See para 30, *SPH v SA*

3.2 Pre-nuptial agreements

Pre-nuptial agreements are agreements entered into between a couple prior to and in contemplation of their marriage and that such agreements usually regulate the financial affairs of the couple, especially in the event of legal separation or divorce.

Historically, at common law, pre-nuptial agreements were considered as contrary to public policy and were therefore not binding on the parties entering into such agreements. However, in the leading English case *of Radmacher v Granatino* [2010] UKSC 42, the UK Supreme Court held that such long standing rule was obsolete and no longer applied.

See paras 31 & 32, *SPH v SA*

The main principles of the *Radmacher* case were as follows:

(a) The court when considering the grant of ancillary relief was not obliged to give effect to nuptial agreements and that the parties could not oust the jurisdiction of the court.
(b) However, the court must give appropriate weight to such agreements though ultimately it was the court that would determine the appropriate ancillary relief.
(c) In particular, an agreement would carry full weight only if each party had entered into the agreement of his or her own free will, without undue influence or pressure, having all the information material to his or her decision to enter into the agreement and intending that it should be effective to govern the financial consequences of the marriage coming to an end.

See paras 33 & 34, *SPH v SA*

In the Hong Kong case of *SPH v SA*, the Court of Final Appeal (CFA) held that the principles enunciated in the *Radmacher* case should be regarded as the law in Hong Kong and that there was no reason for distinguishing between pre-nuptial agreements and separation agreements.

See para 39, *SPH v SA*

4. Matrimonial property and express, resulting, constructive and family trusts and disputes

Please refer legal cases appendix Page 17-27

4.1 Express Trust

A declaration of trust in respect of any land or any interest in land must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will. However, the declaration itself need not be in writing.

All interests in land created by parol (oral) and not put in writing and signed by the persons so creating the same have the force and effect of interests at will only.

See Sections 5(1)(b) & 6, CPO

Where the subject matter of a trust is any property other than land or interest in land, the declaration of trust can generally be made orally.

4.2 Resulting Trust

One of the typical situations in which a resulting trust may arise is where a person has provided money for the purchase of a property but the property is then purchased in the name of another person.

However, if there is evidence to the contrary, for example, if it is the intention that the property is to be a gift to that another person, no resulting trust would arise. The presumption of resulting trust may be rebutted by the presumption of advancement.

See *Dyer v Dyer* (1788) 2 Cox Eq Cas 92

A resulting trust may also arise in favour of a settlor who fails to dispose of his beneficial interest in a property or in the case where an express trust fails.

4.3 Constructive Trust

A property may be subject to a constructive trust in favour of a party claiming to have a beneficial interest in the property (who is not a legal owner) ("**the Claiming Party**") if the following conditions are satisfied:

(a) It is the common intention that the Claiming Party is to have a beneficial interest in the property, and such common intention must be proved either by way of express agreement or be inferred from words or conduct of the parties involved.
(b) There must be detrimental reliance on such common intention by the Claiming Party.
(c) It must be inequitable for the legal owner of the property to deny the Claiming Party a beneficial interest in the property.

See *Lloyds Bank v Rosset* [1991] 1 AC 107
Ip Man Shan Henry & Another v Ching Hing Construction Co Ltd. & Others [2003] 1 HKC 256
Stack v Dowden [2007] 2 AC 432
Chan Chui Mee v Mak Chi Choi [2009] 1 HKLRD 343

4.4 Family trusts and matrimonial property disputes: Whether a trust and its assets will be treated as a "financial resource" of a party to a marriage

See legal cases appendix page 28: "Poon" case and others

4.4.1 Facts and major issues

The couple was married in 1968. The husband was a renowned engineer and was very successful with his business. He set up a discretionary trust in July 1995 and settled 84.63% of the shares in the holding company of his business in the trust.

The husband later petitioned for divorce in early 2009 and the wife did not defend the proceedings. The decree nisi and the decree absolute were pronounced by the Court on the basis of the husband's petition in May 2009 and September 2010 respectively.

However, in the wife's application for ancillary relief, a major issue of the case was how the trust ought to be approached and that to what extent the value of the shares settled in the trust should be treated as matrimonial assets.

4.4.2 The law and application

The Matrimonial Proceedings and Property Ordinance (Cap 192) ("**MPPO**") empowers the Court to make financial provision orders in divorce proceedings.

Section 7(1)(a) of MPPO provides that in deciding whether and in what manner to exercise its powers under the relevant provisions of MPPO, the Court shall have regard to, among other things, the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future.

In order to determine whether the trust and the trust assets should be regarded as a "financial resource" available to the husband, falling within the meaning of section 7(1)(a), the CFA has adopted the *Charman* test: "*whether, if the husband were to request the trustee to advance the whole or part of the capital or income of the trust to him, the trustee would, on the balance of probabilities, be likely to do so*" (see para 29).

In making its assessment, the CFA has looked at "the reality of the situation" and regarded "past conduct as a useful guide" (see para 60). In particular, the CFA has considered the following:

(a) The creation and terms of the trust
(b) The husband's power to replace the trustee
(c) The husband's letters of wishes
(d) The nature of the trust assets and distributions made by the trustee

The CFA has also briefly referred to cases where a trust is a sham or where a settlor being found not to have effectively divested himself of the trust property. (see paras 36-37).

Review Questions

1. After 7 October 1971, what type of marriages were forbidden in Hong Kong?

2. Since common law marriage is not recognized in Hong Kong, under what provisions can a party to a common law marriage may make claim against the estate of his/her partner for financial provisions?

3. What does the Hong Kong, Court of Appeal case of *L v C* [2007] HKFLR 334 provide for in regard to post nuptial settlements?

4. Historically at common law, pre-nuptial agreements in Hong Kong were considered as contrary to public policy and were therefore not binding on the parties entering into such agreements. What is the situation now?

5. What does Section 7(1)(a) of MPPO provide for in terms of matrimonial disputes?

6. What is an Express Trust?

7. What conditions would need to be satisfied for property to be subject to a constructive trust?

8. What is the leading court case upon which rests the principles of determining validity of pre nuptial agreements in Hong Kong and what are those principles?

Unit 10

Testamentary Issues & Avoiding Testamentary Disputes

Module 16

Other Testamentary Issues

Appendix Legal cases

Pre Nuptial Agreements and Treatment (refer section 3 of the Study Guide)

SPH v. SA (FORMERLY KNOWN AS SA) [2014] HKCFA 56;

Summary: On 9 June, 2014 the Court of Final Appeal unanimously decided to uphold the Court of Appeal's decision in the case of SPH v SA. The case was primarily concerned with forum (Germany versus Hong Kong) but also looked specifically at what weight should be given to the parties' election in their pre-nuptial or post-nuptial agreements to have their marriage governed by the laws of a particular country, in this case, Germany.

The case was a landmark decision in terms of how Family Courts in Hong Kong are likely to consider pre-nuptial agreements in other cases.

The case

1. This case was an appeal from a judgment of the Court of Appeal refusing a stay of matrimonial proceedings in Hong Kong. The appellant husband (H) and the respondent wife (W) were German nationals. W has lived in Hong Kong since 1997 and is a permanent resident. They were married in Hong Kong and during their short marriage they lived there. W commenced divorce proceedings in Hong Kong. H commenced divorce proceedings in Germany and sought a stay of the Hong Kong proceedings. Prior to the marriage they executed an ante-nuptial agreement under German law, and they also executed a post-nuptial, or separation agreement before the divorce proceeding.

2. Differing from Poon J, the Court of Appeal (Cheung, Fok and Lam JJA) decided that a stay should not be granted. The reasoning of the Court of Appeal will be outlined below. At this stage it is sufficient to mention that the principal reason why it decided to interfere with the judge's decision, in a case which essentially involved the exercise of a discretion in accordance with well-settled principles of forum non conveniens, was that it considered that Poon J's exercise of the discretion was

plainly wrong because, in finding at the first stage of the enquiry that Germany was clearly and distinctly the more natural and appropriate forum, the judge had failed to give sufficient weight to the facts that W had commenced divorce proceedings in Hong Kong as of right and that the connection of the parties with Hong Kong was overwhelming.

3. The Court of Appeal exercised the discretion afresh, and in the normal course, where it had done so properly, such a case would not have been a suitable one for this court. But what takes it out of the ordinary is that, as mentioned above, the parties entered into an agreement prior to their marriage varying their matrimonial property rights under German law, and when they were about to divorce the parties entered into a separation agreement restricting W's rights to claim maintenance.

4. Consequently the appeal has a much wider significance, since it involves the potential impact of these agreements in Hong Kong should the proceedings continue here. Such agreements were once considered at common law to be contrary to public policy because, not only were they seen somehow to affect the institution of marriage itself, they ousted the jurisdiction of the court to grant ancillary relief, but they have been the subject of a slow evolution in English law, and also reflected in Hong Kong law, to the point where, although not regarded as definitively binding, they have substantial legal effects. The two crucial decisions were, first, *Edgar v Edgar* [1980] EWCA Civ 2; [1980] 1 WLR 1410 (CA), on the effect of post-nuptial agreements or separation agreements (to which we will generally refer as "separation agreements"), which was applied in Hong Kong by the Court of Appeal in *L v C* [2007] HKCA 210; [2007] 3 HKLRD 819, and, second, *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 A.C. 534 in which the UK Supreme Court gave qualified effect to ante- or pre-nuptial agreements (to which we will refer as "ante-nuptial agreements"). This is an opportune occasion to consider whether *Radmacher v Granatino* represents the law in Hong Kong. If it does not, this would obviously be an extremely important factor in considering whether or not the present proceedings ought to be stayed.

II The marriage and its breakdown

5. As is so often the case in bitter matrimonial disputes, there are almost no uncontested facts, and there are angry disputes in the affidavits on questions (concerning such matters as the size of W's engagement ring, and the use by the couple of first class air travel) which are peripheral to the issues which arise on the present appeal. There have, of course, been no findings of fact, and the following account must be read in that light.

6. H is German. He is now 50. He is a successful specialist in luxury hotel interior design. His business is based in Cologne, Germany, and has grown internationally over the years. He now has a business presence in several parts of the world including Hong Kong, which he regards as a gateway to enter into the mainland and the Asia Pacific region. In about 2006, he set up Company A, a hotel interior design company, in Hong Kong. Company A's business is funded by loans from HSBC, and he has paid income tax in Hong Kong.

7. W is also German. She is 46. She has been living in Hong Kong since 1997 and is a permanent resident. Prior to the events giving rise to the present proceedings, she worked in Hong Kong as a general manager for a German-based Hong Kong company.

8. H and W first met in Hong Kong in 2005 when H was on a business trip here. He was then married to his first wife, whom he married in 1997 and from whom he separated in 2006. Later that year H and W began an intimate relationship. In early 2007 H proposed marriage, and they were married at the Peninsula Hotel, Hong Kong, on February 15, 2008. The Hong Kong marriage certificate was used also to obtain registration of the marriage in Germany by April 3, 2008 at the Family Court of Berlin.

9. During their married life, the parties lived together in Hong Kong, although H (often accompanied by W) spent much of the time outside Hong Kong in the pursuit of business and leisure interests, and they frequently visited Germany.

10. H owns, or owned, a castle in Germany ("the castle") initially through a company, Company C. He had acquired it for €2 million from his former wife as part of their ante-nuptial agreement or their separation agreement – it is not clear from the evidence which is the relevant agreement. H allowed W's elderly retired parents to live in the guest house in the castle. H claims that as a result of the financial crisis in 2008 he was forced to sell the castle to discharge the loan used to purchase the castle from his former wife. H says that the purchaser was an independent wealth management company, which, on H's request, granted a lease of the guest house to W's parents (from which they have moved).W says that H is still the owner.

11. The marriage was a short one, and by 2010 it had broken down. W presented a divorce petition in Hong Kong in October 2010. In the following month H applied for a stay of the Hong Kong proceedings on the basis that the German courts were the forum conveniens. H also commenced divorce proceedings in December 2010 in the Family Court of Berlin. Poon J granted the stay by a decision of November 10, 2011,

and an appeal was allowed by the Court of Appeal on February 8, 2013. H now appeals.

III The Agreements

12. H and W entered into two agreements. The first was an ante-nuptial agreement executed on December 17, 2007 ("the Ante-nuptial Agreement"). The second was a separation agreement executed on September 9, 2010 ("the Separation Agreement").

The Ante-nuptial Agreement

13. H's evidence of the genesis of the Ante-nuptial Agreement is as follows. W knew that he had entered into an ante-nuptial agreement with his first wife. H told W that as they had already accumulated wealth before meeting each other, their finances should remain independent and separate from each other. W agreed, and suggested that they should sign an ante-nuptial agreement. W knew that H had to carry a lot of business loans after his divorce with his ex-wife, including the €2 million he took out to purchase the castle from his former wife. If there were an ante-nuptial agreement he would be free from any claim against her business and assets, and she would be free from any potential claims from his creditors. So he agreed with her suggestion, even though he was concerned that the process would damage their relationship.

14. H then instructed his lawyers to draft an ante-nuptial agreement. On December 17, 2007, H and W flew back to Germany to execute the Ante-nuptial Agreement before a notary, who explained the contents and legal effect to them beforehand. H says that both parties intended their marriage to be governed by German law, and to have all matrimonial matters dealt with by the German courts.

15. W's evidence is substantially different. She accepts that H told her about the €2 million he had agreed to pay to his ex-wife for the castle, but not that he raised a bank loan to fund it. She denies that it was she who suggested that they should have an Ante-nuptial Agreement. The idea came from H who said that it was for her protection and for the purpose of keeping them safe, just in case if he had to go bankrupt, or had to let his companies go bankrupt. She received no independent legal advice before signing the Agreement before the notary, who was a long standing personal friend of H's. She says that they did not discuss what law should govern their marriage, or what courts should deal with matrimonial proceedings.

16. The Ante-nuptial Agreement executed on December 17, 2007 stated that the parties (whose residential addresses were stated to be Hong Kong ones) declared: (1) they intended to be married in Hong Kong on February 15, 2008; (2) the notary had pointed out to them that in his opinion the proprietary effects of the marriage were governed by German law since they were both German citizens; (3) purely as a matter of precaution, they selected German law, in accordance with Article 15 of the Introductory Act to the German Civil Code, to govern the proprietary effects of the marriage; and (4) they had been informed by the notary of the consequences of the agreement, in particular about the meaning of the modification of the statutory matrimonial property regime.

17. The Agreement provided that they agreed to retain the German matrimonial property regime for the common ownership of gains accrued in marriage, subject to modification. They had both acquired substantial assets, in particular shares in companies (namely W's Hong Kong company, and several companies owned by H, including Company A and Company C), and they assumed they would receive substantial assets from parents or third parties by way of gift, inheritance or succession. Accordingly, the companies which they owned (and debts associated therewith) and any such gifts etc would be excluded from computation of the parties' assets in the event of the termination of the marriage (except on death). The present value of the assets was declared to be only €1 million, perhaps for the purpose of the calculation of ad valorem fees.

18. The Agreement was therefore essentially concerned with the exclusion from the matrimonial property regime of business assets and assets to be derived from gifts and inheritance, and not with the position on divorce.

The Separation Agreement

19. H's evidence is that the relationship deteriorated from February 2010, and that after a public incident in London in August 2010, he decided to divorce her, and told her of his decision on September 4, 2010. W had no objection and they had detailed discussions about the terms of the divorce on the following day. H then asked his lawyer to draft a separation agreement based on their agreement. On September 7, 2010, the notary emailed a copy of a draft Separation Agreement to H's office in Hong Kong. H's secretary printed it out and gave it to H and W, who then discussed it. W agreed to various handwritten amendments. In the same evening, H and W left for Germany separately. H denies that W signed the Agreement under duress.

20. W's evidence is that there was no sign or indication from H that he had any problem with their marriage. Then on September 4, 2010, while she and H were discussing some business at the office, H suddenly told her that they were to separate and that she had to sign a separation agreement. He told her later that day that he had instructed his lawyers in Germany that she had to sign a separation agreement when she was there. He asked her to fly back to Germany immediately to inform her parents of their separation and if she were not to sign the agreement, she would be left with nothing. H then presented to her orally a list of terms to be included in the agreement. W denied that she saw the draft.

21. On September 9, 2010, she was collected from the castle by a tax adviser, a friend of H's, who drove her to the notary's office. It was during the journey that the tax adviser showed her, for the first time, a copy of the Separation Agreement. W declined to look at it, as she was already very upset and could not read while riding in a car. When they arrived at the notary's office, she was presented with the original document and was told to sign. She had not received any financial disclosure or any legal advice nor was there any time to consider the contents away from H's representatives. She felt pressured to sign, and her signature was procured by H through his representatives while she was under duress.

22. The Separation Agreement is dated September 9, 2010. The residential addresses of both parties were again Hong Kong ones. The Agreement provided that the Ante-Nuptial Agreement was rescinded, and that the assets in their respective possession should be retained in sole ownership. The Agreement made provision (inter alia) for W to stay in the matrimonial home until September 30, 2012, and for W to continue to receive her existing salary until September 30, 2012; for W to be able to use the castle as a guest until the end of 2011; for H to pay €500 per month for 2 years for the accommodation of a horse which was to be transferred to W, and for H to pay W's private health insurance in Germany of €1200 per month for 2 years; H agreed to pay W's parents an allowance of €20,000 should Company C terminate the tenancy which enabled them to stay at the castle.

23. For present purposes the most important provisions are those by which claims for maintenance were renounced. There are competing translations of the Agreement, but the following translation seems to represent its sense:

"11. The parties concerned are in agreement that mutual support will not be due upon implementation of the present Agreement, since both will be in the position of supporting themselves. In the event of a legally effective divorce from the

marriage, the husband and wife will waive mutual support, even in the case of emergency need, and adopt this waiver mutually.

12. The parties concerned are in agreement that a maintenance settlement should not be implemented. Claims for a maintenance settlement are mutually waived.

With this provision it has been taken into account that both parties, even if indeed they have only earned negligible accrued pension rights, are each capable in the future of themselves looking after their own security in old age.

…

15. All claims for equitable division of community property as well as possible effects of divorce shall be governed by the foregoing provisions. No mutual claims shall exist after implementation of the foregoing agreement.

16. Since all agreements to be made between us shall be governed by this contract, in the event of the initiation of a divorce proceeding only one of us will be represented by counsel. The costs arising thereupon shall be borne by the husband alone …"

German law

24. There is substantial written evidence from four experts (two instructed by each party) on German law. Some of the opinions go far beyond the proper scope of an opinion on foreign law, and express views on the merits of the case. Nothing in this judgment is to be taken as a finding on German law in relation to any contentious or unclear matter.

25. This point will be expanded below, but at this point it is only necessary to say that the effect of the Ante-nuptial Agreement was to modify the German matrimonial property regime, which is not one of community of property, but community of accrued gains, i.e. separation of property with a claim for participation in the gains which accrued during the marriage. The parties can opt out of the matrimonial regime: BGB (German Civil Code), section 1408(1). According to the husband's expert and one of the wife's experts (but not the other) there is no need for independent legal advice in relation to marital agreements. There is evidence that conclusion of the agreement requires a notarial deed, and the notary is an independent holder of public office, who is supposed to be a neutral adviser owing a duty to both parties to explain the consequences of the agreement.

26. Three of the experts have given evidence on questions relating to the validity of the Agreements. Dr Palm and Dr Scherpe, instructed on behalf of H and W respectively, are of the view that there was no duty of disclosure prior to the Ante-nuptial Agreement, although Dr Pilati, also instructed on behalf of W, takes a contrary view. Dr Scherpe considers that there is no requirement for W to have separate advice where there is a notary, whose position is independent. He also expresses the view that an Ante-nuptial Agreement may be challenged on the ground that it is so one-sided as to be contrary to public policy, or on the basis that there was undue influence, fraud etc. Dr Pilati considers that an Ante-nuptial Agreement may be challenged on the basis of mistake if W was labouring under the mistake that (as she was told by H) the Agreement was necessary for her own protection.

27. On the validity of the Separation Agreement, Dr Scherpe considers that if W entered into the Ante-nuptial Agreement without disclosure or knowledge of the assets, then the Separation Agreement might be open to challenge. It might also be set aside on the ground H is found to have been abusing his dominant position. Dr Pilati also expresses the view that the Separation Agreement can be challenged if W did not receive independent advice, she was in a state of shock and subject to unequal bargaining power, and proper disclosure was not made.

IV Radmacher v Granatino

28. There was extensive discussion in the courts below and in the arguments of the parties of the application of the decision of the UK Supreme Court in *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 A.C. 534 concerning the effect of ante-nuptial agreements and, as indicated above, this is an opportune time for this court to state the law in Hong Kong. But a word of qualification is necessary in this respect, to which it will be necessary to return. Some ante-nuptial agreements, as frequently happens in the United States, are designed primarily for the consequences of divorce. This was partly so in *Radmacher v Granatino*, where the wife was a German heiress whose father had threatened that she would not receive a further inheritance unless she entered into an agreement with the French husband, providing for a mutual waiver of claims for maintenance on divorce, as well as for separation of property on marriage. But, as will appear below, that is not the typical ante-nuptial agreement in civil law countries.

Separation or post-nuptial agreements

29. Separation or post-nuptial agreements were the subject of the leading English decision in *Edgar v Edgar* [1980] EWCA Civ 2; [1980] 1 WLR 1410 which decided that,

although separation agreements did not override the powers of the court to grant ancillary relief, they carried considerable weight in relation to the exercise of the court's discretion when granting such relief. Such an agreement should be upheld unless there were vitiating factors or a compelling case of unforeseeable circumstances.

30. In Hong Kong the Court of Appeal conducted an extensive review of the English cases in *L v C* [2007] HKCA 210; [2007] 3 HKLRD 819 and confirmed that when parties who are sui juris freely enter upon a bargain for the division of matrimonial assets then, in the absence of unfair or unconscionable circumstances surrounding the conclusion of the agreement and material and drastic unforeseen circumstances arising thereafter such as to cause manifest prejudice to one of the parties, the courts will hold the parties to their bargain. Determining whether injustice would be done under the agreements involved more than simply ascertaining whether there was any disparity in the value of the assets. The court would only allow one of the parties to depart from an agreement if that party demonstrated good and substantial grounds for doing so.

Ante-nuptial agreements

31. The evolution in relation to ante-nuptial agreements was considerably later. In *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 the Privy Council (on appeal from the Isle of Man) held that it was not open to the Privy Council to reverse the long standing rule that ante-nuptial agreements were contrary to public policy and thus not valid and binding in the contractual sense, since it was more appropriate that any such policy change should be made by legislation rather than by judicial development: [31], [35].

32. In *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 A.C. 534 a wealthy German heiress entered into an ante-nuptial agreement with her prospective husband, who was French. The agreement was subject to German law and provided (inter alia) for separation of property and also for a waiver of claims of maintenance on termination of the marriage. When the marriage broke down, the husband, despite the terms of the agreement, brought a claim for ancillary relief, seeking an order for a lump sum and periodical payments. The UK Supreme Court decided that, although it was the court and not any prior agreement between the parties which would determine the appropriate ancillary relief when a marriage came to an end, the rule that agreements providing for the future separation of the parties to a marriage were contrary to public policy was obsolete and no longer applied; the court should give weight to an agreement, made between a couple prior to and in contemplation of their marriage, as to the manner in which their financial affairs should be

regulated in the event of their separation in circumstances where it was fair to do so; in appropriate circumstances, the court could hold the parties to the agreement even when the result would be different from that which the court would otherwise have ordered; on an application for ancillary relief the court should apply the same principles when considering ante-nuptial agreements as it applied to post-nuptial agreements.

33. In particular, an agreement would carry full weight only if each party had entered into it of his or her own free will, without undue influence or pressure, having all the information material to his or her decision to enter into the agreement and intending that it should be effective to govern the financial consequences of the marriage coming to an end; and the court should give effect to an agreement which was freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to the agreement. Enforcement of the agreement could be rendered unfair by the occurrence of contingencies unforeseen at the time of the agreement or where, in the circumstances prevailing at the time of separation, one partner would be left in a predicament of real need while the other enjoyed a sufficiency.

34. The particular matters which were stressed by the Supreme Court were these. The court when considering the grant of ancillary relief was not obliged to give effect to nuptial agreements—whether they were ante-nuptial or post-nuptial. The parties could not, by agreement, oust the jurisdiction of the court. The court must, however, give appropriate weight to such an agreement. But it was the court, and not any prior agreement between the parties, that would determine the appropriate ancillary relief when a marriage came to an end, for that principle was embodied in the legislation. [2], [7].

35. The Supreme Court said:

"68 If an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, both the husband and wife must enter into it of their own free will, without undue influence or pressure, and informed of its implications. …

69 … the Court of Appeal was correct in principle to ask whether there was any *material* lack of disclosure, information or advice. Sound legal advice is obviously desirable, for this will ensure that a party understands the implications of the agreement, and full disclosure of any assets owned by the other party may be necessary to ensure this. But if it is clear that a party is fully aware of the implications of an ante-nuptial agreement and indifferent to detailed particulars of the other party's assets, there is no need to accord the agreement reduced weight because he

or she is unaware of those particulars. What is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end.

…

71 … The first question will be whether any of the standard vitiating factors: duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it.

72 The court may take into account a party's emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures. The circumstances of the parties at the time of the agreement will be relevant. Those will include such matters as their age and maturity, whether either or both had been married or been in long-term relationships before. For such couples their experience of previous relationships may explain the terms of the agreement, and may also show what they foresaw when they entered into the agreement. What may not be easily foreseeable for less mature couples may well be in contemplation of more mature couples. Another important factor may be whether the marriage would have gone ahead without an agreement, or without the terms which had been agreed. This may cut either way.

73 If the terms of the agreement are unfair from the start, this will reduce its weight, although this question will be subsumed in practice in the question of whether the agreement operates unfairly having regard to the circumstances prevailing at the time of the breakdown of the marriage."

The foreign element

36. There are several distinct aspects to the foreign element. One is what law governs the matrimonial property rights of the parties. The relevant conflict of laws rules in Hong Kong (which are the same as those in England) are that the rights of married persons in each other's movable property are governed by the law of the matrimonial domicile (which for this purpose is almost certainly Germany), and the law governing the effect of the Ante-nuptial Agreement is German law, which was expressly chosen to govern it: see Dicey, Morris and Collins, *Conflict of Laws*(15th ed.

2012), Rules 165 and 166; Johnston, *Conflict of Laws in Hong Kong* (2nd ed 2012), para 7.099.

37. *Radmacher v Granatino* was a case (as is the present case) in which the ante-nuptial agreement was expressed to be governed by German law. The Supreme Court said (at [74]) that foreign elements may bear on the important question of whether or not the parties intended their agreement to be effective:

"In the case of agreements made in recent times and, a fortiori, any agreement made after this judgment, the question of whether the parties intended their agreement to take effect is unlikely to be in issue, so foreign law will not need to be considered in relation to that question."

38. The second, and distinct, question is what law governs the availability of financial relief. In Hong Kong, as in England, when the court exercises its jurisdiction to make an order for ancillary relief under the Matrimonial Proceedings and Property Ordinance ("MPPO"), or the Matrimonial Causes Act 1973, it will normally apply Hong Kong law, or English law, as the case may be, irrespective of the domicile of the parties, or any foreign connection: Dicey, Morris & Collins, *Conflict of Laws* (15th ed 2012), vol 2, rule 99(9) and e.g. *C v C (Ancillary Relief: Nuptial Settlement)* [2004] EWCA Civ 1030; [2005] Fam 250, [31]. Consequently, the issues in *Radmacher v Granatino* were governed exclusively by English law, and the relevance of German law and the German choice of law clause was that they clearly demonstrated the intention of the parties that the ante-nuptial agreement should, if possible, be binding on them: [108].

The application of Radmacher v Granatino in Hong Kong

39. There have been signs of approval of *Radmacher v Granatino* in this court in *LKW v DD* [2010] HKEC 1727[2010] HKCFA 70; , (2010) 13 HKCFAR 537 (per Ribeiro PJ at [53], [105], obiter since the appeal did not concern an ante-nuptial agreement). In the view of this court, the principles enunciated in *Radmacher v Granatino* should also be regarded as the law in Hong Kong. In common with the UK Supreme Court, we see no reason for distinguishing between ante-nuptial agreements and separation agreements.

40. As we have said, the Hong Kong Court of Appeal has already accepted in *L v C* [2007] HKCA 210; [2007] 3 HKLRD 819 that the old rule that agreements providing for future separation are contrary to public policy is obsolete, and we endorse its judgment. We agree with the UK Supreme Court that this should not be restricted to separation agreements. None of the supposed distinctions between them can any longer be supported, although we accept that there may be circumstances where it

is appropriate to distinguish between an ante-nuptial and a separation agreement. As the UK Supreme Court said (at [61]) the circumstances surrounding the agreement may be very different dependent on the stage of the couple's life together at which it is concluded, but it is not right to proceed on the premise that there will always be a significant difference between an ante-nuptial agreement and a separation agreement.

V Matrimonial property regimes

41. It is now necessary to revert to the word of qualification referred to above, when it was pointed out that the agreement in *Radmacher v Granatino* went beyond the normal matrimonial property agreement by providing that the parties were to have no claims against each other on divorce. In the present case the Ante-nuptial Agreement, like many such agreements entered into in civil law countries in Europe, was concerned only with the effect of the marriage on property rights. European countries in the civil law tradition operate matrimonial property regimes, which take a number of different forms. Some involve immediate community of property, others involve deferred community of property where the property is pooled on death, bankruptcy or divorce. Some involve total community, where all property is jointly owned. Others involve a community of acquests, where property acquired before marriage, and property gained gratuitously (e.g. by inheritance or gift) is excluded. But a common feature of these systems is that the parties may contract out of them: see Law Commission of England and Wales, *Marital Property Agreements: A Consultation Paper* (Consultation Paper No 198, 2011), paras 4.6 *et seq*. Contractual matrimonial property regimes are often entered into, not in contemplation of divorce, but to regulate the financial position of the parties during and after the marriage, sometimes to protect one of the spouses from the insolvency of the other.

42. Under German law the default matrimonial property regime is an accruals system, that of the *Zugewinngemeinschaft*, a community of acquired gains or a system of separation of property with a claim for participation in the gains of the spouses accrued during the marriage (*Zugewinnausgleich*): BGB, sections 1363 *et seq*. In the present case the Ante-nuptial Agreement excluded participation in the gains of the major assets of the parties at the time of the marriage and in assets to be acquired by gift or inheritance after marriage. It did not purport to restrict claims for financial relief on divorce.

43. Under German law, the matrimonial property regime and financial provision on divorce are entirely separate matters. The German rules on divorce provide for maintenance provision: (a) for the care of joint children; (b) if sufficient income

cannot be expected due to age, or due to illness, or unemployment, or education or re-education requirements. The yardstick is standard of living during marriage (with a statutory discretion to limit it to reasonable requirements). The parties may, by an agreement made before the marriage or in contemplation of divorce, modify the default rules on maintenance (as in *Radmacher v Granatino* itself, above), but the Ante-nuptial Agreement in the present case dealt only with the matrimonial property regime.

44. It is not yet settled what effect matrimonial property regime agreements in the strict sense have in the case of matrimonial proceedings in Hong Kong (or England).

45. Comparable agreements in France providing for *séparation de biens* were involved in the stay cases, *de Dampierre v de Dampierre* [1988] AC 92 (which appears only from the transcript of the decision in the Court of Appeal) and *Louvet v Louvet* [1990] 1 HKLR 670 (see at 672), and several other stay cases discussed below have involved similar agreements under other laws.

46. Since *Radmacher v Granatino* matrimonial property agreements have been considered in several cases at first instance, but the position cannot be regarded as settled.

47. In *Z v Z* [2011] EWHC 2878 (Fam) such an agreement was treated by Moor J as an exclusion of the sharing principle in *White v White* [2000] UKHL 54; [2001] AC 596 (adopted in Hong Kong in *LKW v DD* (2010) 13 HKCFAR 582). Moor J gave effect to what he regarded as the agreement to exclude sharing and granted ancillary relief on a reasonable needs only basis in a case which would otherwise "undoubtedly be a case for equal division of the assets" (at [31]). The decision is questioned by Cretney and Probert, *Family Law* (8th ed Probert, 2012), para 8-005, who say:

"This inevitably raises questions about the very basis of the 'sharing' principle, and why any requirement to share, as opposed to meeting the other's needs, should be capable of being displaced by agreement. In other words, is sharing a fundamental element of marriage, to be required whatever the individual wishes of the spouses, or does it rest on the inferred intentions of the spouses? If the former, one might ask why we have a system of separate property within marriage; if the latter, we perhaps need more empirical data about the actual intentions of married couples. And if, as the Law Commission have claimed, the prospect of sharing assets on divorce 'may indeed be a serious disincentive to marriage for some' [citing Law Commission of England and Wales, *Marital Property Agreements* (Consultation Paper No 198, 2011), para 5.23], then is the solution to move away from sharing, to allow those who do not want to share their wealth to marry but opt out of sharing,

or simply to leave this group to live together outside marriage? Any of these approaches could, of course, be described as promoting marriage – and any of them could equally be viewed as devaluing marriage, depending on whether it is the obligations of marriage or the numbers marrying that is regarded as more important."

48. In *B v S* [2012] EWHC 265 (Fam) [2012] 2 FLR 502 Mostyn J said (at [5]), in a case involving an agreement varying the Spanish matrimonial property regime, that there is a marked difference between a negotiated ante-nuptial agreement which specifically contemplates divorce and which seeks to restrict or influence the exercise of discretion to which the law gives access, and an agreement made in a civil law jurisdiction which adopts a particular marital property regime. On the facts Mostyn J found that the marital property agreement was only to be effective in England if the parties intended the agreement to have effect wherever they might be divorced and particularly were they to be divorced in a jurisdiction that operated a system of discretionary equitable distribution. See also *GS v L* [2011] EWHC 1759 (Fam) (Spanish law agreement between Spanish wife and German-Polish husband); [2013] 1 FLR 300; *V v V* [2011] EWHC 3230 (Fam) (Swedish law agreement between Italian husband and Swedish wife); *AH v PH* [2013] EWHC 3873 (Fam) (Scandinavian couple); Law Commission of England and Wales, *Marital Property Agreements* (Consultation Paper No 198, 2011); *Matrimonial Property, Needs and Agreements: A Supplementary Consultation Paper* (Consultation Paper No 208, 2012), Part 6; *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014), Chap 8.

49. The application of *Radmacher v Granatino*to matrimonial property agreements of the type involved in this case (which the Separation Agreement purported to supersede) was not argued on this appeal. The material referred to above shows that this is a controversial area which is not free from difficulty, and nothing in this judgment is intended to pre-judge any question which may arise on this aspect in the substantive divorce proceedings, and in particular whether the application of *Radmacher v Granatino*requires any adjustment or qualification in such cases.

VI Forum non conveniens**: principles**

50. It is now well established in Hong Kong that the general principles of *forum non conveniens* apply to the stay of matrimonial proceedings: Johnston, *Conflict of Laws in Hong Kong* (2nd ed 2012), para 7.104.

51. We adopt the re-statement of the principles in matrimonial proceedings by the Court of Appeal (Cheung JA and Tang JA (as he then was)) in *DGC v SLC (née C)* [2005] HKCA 308; [2005] 3 HKC 293, 297-298, applying *Spiliada Maritime Corporation v.*

Cansulex Limited [1987] 1 AC 460, 477 and *Louvet v. Louvet* [1990] 1 HKLR 670, 674-675:

"1. The single question to be decided is whether there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of an action i.e. in which the action may be tried more suitably for the interests of all the parties and the ends of justice?

2. In order to answer this question, the applicant for the stay has to establish that first, Hong Kong is not the natural or appropriate forum ('appropriate' in this context means the forum has the most real and substantial connection with the action) and second, there is another available forum which is clearly or distinctly more appropriate than Hong Kong. Failure by the applicant to establish these two matters at this stage is fatal.

3. If the applicant is able to establish both of these two matters, then the plaintiff in the Hong Kong proceedings has to show that he will be deprived of a legitimate personal or juridical advantage if the action is tried in a forum other than Hong Kong.

4. If the plaintiff is able to establish this, the court will have to balance the advantages of the alternative forum with the disadvantages that the plaintiff may suffer. Deprivation of one or more personal advantages will not necessarily be fatal to the applicant for the stay if he is able to establish to the court's satisfaction that substantial justice will be done in the available appropriate forum."

52. The Court of Appeal in that case (as in the present case) emphasised that the husband was entitled to sue in Hong Kong as of right. Where jurisdiction is founded in the Hong Kong court as of right (as in divorce proceedings like the present case), the party seeking the stay has to establish that there is another available forum which is clearly or distinctly more appropriate than the Hong Kong forum. This derives from what Lord Goff said in *Spiliada* (at 477), which has been regularly applied in Hong Kong: e.g. *The Kapitan Shvetsov* [1997] HKCA 656; [1997] HKLRD 374 at 377; *The Peng Yan* [2008] HKCA 505; [2009] 1 HKLRD 144, at [22].

53. The existence of an ante-nuptial or post-nuptial agreement (particularly one governed by foreign law) is plainly a factor in the exercise of the discretion to stay on the ground of *forum non conveniens*, and there have been several decisions in this area involving such agreements. The facts in one case are not, of course, a guide to the exercise of discretion in another case, and they are presented here as merely illustrative. In England the decisions arise in the context of a statutory discretion to stay on "the balance of fairness (including convenience)" (Domicile and Matrimonial Proceedings Act 1973, Sched 1, para 9), which was held in *de Dampierre v de*

Dampierre [1988] AC 92 to engage the same principles as those in the *Spiliada* case. In *de Dampierre v de Dampierre* itself the agreement for *séparation de biens* played no express part in the House of Lords' reasoning that France was the appropriate forum for the divorce proceedings. In the Court of Appeal (whose decision was reversed) Dillon LJ thought it had no bearing on the appropriate forum. That approach was followed at first instance and on appeal in *Louvet v. Louvet* [1990] 1 HKLR 670 (see at 681).

54. In *R v R (*Divorce: Stay of Proceedings) [1994] 2 FLR 1036, where there was a Swedish separation of property contract, Ewbank J held that justice demanded that a stay of English proceedings be refused because the Swedish court could do no more than apply Swedish law and enforce the marriage contract, whereas the English court could grant a property adjustment, a lump sum and periodical payments. In *S v S (Divorce: Staying Proceedings)* [1997] 2 FLR 100 Wilson J granted a stay of English proceedings in a case where the parties had entered into an ante-nuptial agreement (in the negotiation of which each of the parties was represented by a distinguished New York lawyer) which provided for the financial aspects of divorce, and which was governed by New York law, and provided that it could only be enforced in New York. In *C v C (Divorce: Stay of English Proceedings)* [2001] 1 FLR 624 Johnson J placed decisive importance on the French ante-nuptial agreement (apparently for *séparation de biens*) in granting a stay of English proceedings. In *Ella v Ella* [2007] 2 FLR 35 the parties had entered into an ante-nuptial agreement, governed by Israeli law, providing for separation of property and for Israeli jurisdiction (see at [38]), and it was treated as a major factor in granting a stay, even though the wife contested its validity: but the wife's lawyers had taken steps in the Israeli proceedings which were virtually a submission. In Hong Kong, in *L* v H, unreported, November 27, 2007 Rogers VP, refusing the husband's leave to appeal from Judge Chan's refusal to stay proceedings in favour of Germany, said, at [10], that the terms of an ante-nuptial agreement, if adhered to, would involve a grave injustice to the wife.

VII Financial relief in Hong Kong after divorce outside Hong Kong

55. The possibility of financial relief in Hong Kong after a divorce in Germany is relevant because Poon J took the view that the balance of fairness between the parties would be achieved by staying the Hong Kong proceedings without prejudice to W's right to make an application under the provisions in Part IIA of the MPPO, which came into effect on March 1, 2011.

56. Part IIA is based on, and is in material respects identical to, Part III of the English Matrimonial and Family Proceedings Act 1984 (the relevant Scottish provisions

being different), which was introduced as a result of concern at the hardship to wives and children caused by the effect of the combination of the liberality of the rules for recognition of foreign divorces and the restrictive approach of some foreign jurisdictions to financial provision: *Agbaje v Agbaje* [2010] UKSC 13, [2010] 1 AC 628, at [4].

57. The conditions for the application of Part IIA are stringent. The applicant must obtain leave to bring an application. The court has to consider whether Hong Kong is an appropriate venue, and then the applicant must persuade the court to make an order. Part IIA contains a filter mechanism in section 29AC, which provides that no application for an order may be made unless the court considers that there is substantial ground for the making of an order for financial relief. Section 29AE sets out the jurisdictional criteria for entertaining an application for an order for financial relief under Part IIA, which (a) the domicile of either of the parties in Hong Kong on the date of the application for leave, or the date on which the foreign divorce took effect; (b) the habitual residence of either of the parties for 3 years before such dates; and (c) a substantial connection of either of the parties with Hong Kong on such dates.

58. Before making the order, the court must consider whether it would be appropriate for the court to make the order, and must have regard to a number of factors, including the connection of the parties with Hong Kong and any place outside Hong Kong: section 29AF, which is headed "Duty of court to consider whether Hong Kong is appropriate venue for application."

59. So far as material, the factors are these:

"(a) the connection that the parties to the marriage have with Hong Kong;

(b) the connection that those parties have with the place where the marriage was dissolved …;

(c) the connection that those parties have with any other place outside Hong Kong;

(d) any financial benefit that the applicant … has received, or is likely to receive, in consequence of the divorce … by virtue of any agreement or the operation of the law of a place outside Hong Kong;

(e) if an order has been made by a competent authority outside Hong Kong requiring the other party to the marriage to make any payment or transfer any property to, or for the benefit of the applicant ….- (i) the financial relief given by the order; and

(ii) the extent to which the order has been complied with or is likely to be complied with;

(f) any right that the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any place outside Hong Kong and, if the applicant has not exercised that right, the reason for that;

(g) the availability in Hong Kong of any property in respect of which an order for financial relief in favour of the applicant may be made;

(h) the extent to which any order for financial relief is likely to be enforceable;

(i) the length of time that has elapsed since the date of the divorce ….”

60. The English equivalent of Part IIA was considered in detail by the UK Supreme Court in *Agbaje v Agbaje*, ante. In particular the UK Supreme Court, in a judgment of the court delivered by Lord Collins, said (at [50]) (adapted for the MPPO):

“Many of the factors in section [29AF] have much in common with those which would be relevant in a forum non conveniens enquiry, but they are not directed to the question of which of two jurisdictions is appropriate. They are directed to the question whether it would be appropriate (which is the meaning of the word conveniens in forum conveniens) for an order to be made by a court in [Hong Kong] when ex hypothesi there have already been proceedings in a foreign country (including proceedings in which financial provision has been made). Little assistance can therefore be obtained from the stay cases (and still less from the anti-suit injunction cases) in the Part [IIA] exercise. The task for the judge under Part [IIA] is to determine whether it would be appropriate for an order to be made in [Hong Kong], taking account in particular of the factors in section [29AF], notwithstanding that the divorce proceedings were in a foreign country which may well have been the more appropriate forum for the divorce.”

61. As regards the basis for an order, the UK Supreme Court held that hardship was not a pre-condition of the exercise of the power, and there was no rule that the court would only make an award to the minimum extent necessary to remedy injustice ([60]-[63]); but it was not the intention of the legislation to allow a simple “top-up” of the foreign award so as to equate with a forum award ([65]); nor was it the purpose of the legislation to allow a spouse to make an application in order to take advantage of the more generous approach in England (and Hong Kong) in “big-money” cases ([72]).

62. The possibility of an application for financial relief after a foreign divorce has been taken into account in two stay cases involving ante-nuptial agreements, both of which were relied upon by Poon J.

63. In *S v S (Divorce: Staying Proceedings)* [1997] 1 WLR 1200 the wife was Swedish. The husband was a citizen of Austria, Turkey and Israel, and was enormously wealthy. After their marriage the parties lived together in New York and London, but the wife was based primarily in London. Prior to the marriage, the parties had entered into an ante-nuptial agreement, in which all rights to financial provision on divorce were renounced. Each of the parties was represented by a prominent New York lawyer. The agreement was governed by New York law and in substance provided for the exclusive jurisdiction of the New York courts. The husband was granted a stay of the wife's English divorce proceedings. In the course of his judgment, Wilson J said (at 1202):

"Were the English proceedings to be stayed, she would probably be confined to such financial claims, if any, as she could mount under New York law. She would probably be so confined because, although there is power under Part III of the Matrimonial and Family Proceedings Act 1984 to entertain claims for ancillary relief following an overseas divorce, I have doubts whether, had her suit been stayed, she would be able to satisfy the threshold requirement as to appropriate venue set by section 16 of the Act of 1984."

64. In *Ella v Ella* [2007] EWCA Civ 99, [2007] 2 FLR 35 a couple of Israeli nationality entered into an ante-nuptial agreement immediately prior to their marriage in Israel. The agreement provided for separation of property with future assets belonging exclusively to the spouse creating them – the wife was not independently advised and the agreement was drawn up by a notary who had acted for the husband for some time: at [4]. The family home was in London. The wife petitioned for divorce in London, and the husband commenced proceedings in the rabbinical court in Israel (where divorce is administered by the religious courts). The wife's lawyer took steps in the Israeli proceedings which amounted virtually to a submission. She then appointed new lawyers to contest the jurisdiction of the rabbinical court, and the husband sought a stay of the English divorce proceedings. Macur J granted a stay, and said that she was reassured by the fact that if the wife did not receive substantial justice in Israel she could make an application under Part III of the 1984 Act. The Court of Appeal upheld the decision. Thorpe LJ said (at [28]) that if the rabbinical court in Tel Aviv were to impose on the wife the terms of the pre-nuptial agreement with fullest vigour then the likelihood was that she would bring an application for ancillary relief in London under Part III of the 1984 Act. He did not express a view on the prospects of success on an application, but Charles J

(at [56]) considered that, if the husband succeeded in Israel, the wife's prospects of getting permission under Part III of the 1984 Act in England were good.

VIII Conclusions

65. The application for a stay, of course, involves the exercise of a discretion and the Court of Appeal may only interfere with exercise of the judge's discretion in accordance with well-settled principles which it is unnecessary to repeat: *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191, which has been applied frequently in Hong Kong (e.g. *Tsit Wing (Hong Kong) Co Ltd v TWG Tea Co Pte Ltd* [2013] HKCA 134; [2013] 2 HKLRD 505 (CA)). Also, if the Court of Appeal has good grounds for interfering with the exercise of the judge's discretion, and exercises the discretion afresh, this court will only interfere with the exercise of that discretion in accordance with the same principles.

The decision of Poon J

66. In granting the stay, Poon J decided that Germany was clearly and distinctly the more natural and appropriate forum, in the light of the following matters in particular: both parties were German nationals with family ties in Germany; H's business was essentially based in Cologne, Germany, although he had an international business presence at different places including Hong Kong; H had already commenced divorce proceedings in Germany; the Ante-nuptial Agreement and the Separation Agreement were executed in Germany, and the Ante-nuptial Agreement was expressly, and the Separation Agreement was impliedly, governed by German law; it was arguable that the parties had also, by necessary implication, designated Germany as the forum for their divorce; in resolving the question of validity of the Agreements, Germany was distinctly the more natural and appropriate forum, because most of the vitiating events relied on by W took place in Germany, and the notary and the tax adviser were allegedly involved, and were material witnesses in Germany; and German law was best dealt with by a German court.

67. As regards juridical advantage, W would not be disadvantaged in having to dispute the validity of the Agreements in a German court, which she was entitled to do. But if the Agreements were held to be valid in Germany, she would suffer "serious juridical disadvantage" because the German court would simply apply them, thus severely restricting her entitlement to financial relief. We would point out here that this view was consistent with the opinion of Dr Scherpe that the courts in Germany do not adopt what he calls a "holistic approach"; in his view the German courts aim more for certainty and there is not much scope for judicial discretion.

68. If the German court were to find that the Agreements were valid and simply apply them, W could still come back to Hong Kong to make an application under Part IIA of the MPPO for additional financial relief. Accordingly, the balance of fairness was achieved by staying the proceedings in favour of Germany without prejudice to W's right to make an application under Part IIA of the MPPO after the conclusion of the German proceedings.

Court of Appeal

69. In the Court of Appeal Cheung JA emphasised that because W had brought the divorce proceedings in Hong Kong as of right, the burden was on H to show that not only Hong Kong was not the appropriate forum, but that Germany was distinctly more appropriate than Hong Kong.

70. Apart from the Agreements, the real and substantial connection of the parties with Hong Kong was overwhelming. There were three matters for determination by the Hong Kong courts: the divorce; the applicability of the Agreements (both in respect of the issue whether they had been vitiated by duress and also the weight to be given to them); and if the Agreements were not to be given effect, what should be the financial relief to be given to the parties, in the light of the circumstances of the case including the seven factors identified in section 7 of the MPPO.

71. The Agreements did not provide for exclusive jurisdiction in the German courts. Expert evidence on German law as regards the validity of the Agreements had already been filed. The German notary and tax adviser might have to testify in Hong Kong (so far there were no witness statements from them), but this was a matter affecting convenience or expense only. If the case were to be tried in Germany, then the parties and a Hong Kong witness (an employee of H) would have to travel there to attend court.

72. As regards juridical advantage, if the Agreements were found to be valid in the German court, there would be no basis for merely giving them appropriate weight in the light of fairness. Under German law, there was apparently no requirement for full financial disclosure or access to independent legal advice, which was of particular importance in the context of H’s admittedly close and life-long relationship with the notary. By staying the Hong Kong proceedings, the Hong Kong court would already have considered Germany to be the appropriate forum where substantial justice could be given to W, and W might not be able to satisfy the “substantial ground” requirement in the leave application under Part IIA of the MPPO, which could not be a proper factor to be considered in an application for stay.

Overall conclusion

73. In the view of this court, the Court of Appeal was entitled to interfere with the exercise of discretion by the judge for these reasons.

74. While the judge referred to the principle that in stay cases, where jurisdiction is founded as of right, the applicant must show that the foreign forum is distinctly more appropriate than Hong Kong, he failed to give appropriate weight to the factors connecting the parties, the marriage, and the matrimonial home with Hong Kong, and gave inappropriate weight to their nationality, and to the Ante-Nuptial Agreement and the Separation Agreement (which, as observed earlier, stated the residence of the parties to be in Hong Kong). The principal issues in the Hong Kong proceedings would relate to the matters to be considered under MPPO, section 7, in determining the financial relief to be granted to W, and the weight to be given to the Agreements.

75. It is true that the Agreements are governed by German law. However, like the agreement in *Radmacher v Granatino* (see *NG v KR (Pre-nuptial Contract)* [2008] EWHC 1532 (Fam), [2009] 1 FLR 1478, [43]), the Ante-nuptial Agreement in this case says nothing about jurisdiction. The Separation Agreement contains no exclusive submission to the German courts, although it plainly contemplates divorce proceedings in Germany by providing that one lawyer is to act for both parties. It is also true that proceedings would be much more expensive in Hong Kong, although W can afford that less than H. But W contests the validity of the Agreements, and the evidence seems to show that their validity can be challenged on a number of grounds which are available under German law, and which have already been the subject of extensive written evidence in these proceedings.

76. We also agree with the Court of Appeal that if the judge had not erred at the first stage, he was correct in concluding that W would suffer a juridical disadvantage if the stay were granted. If the German court held that the Agreements were valid, they would be applied without the discretion inherent in the *Radmacher v Granatino* approach. The judge found that W would suffer a serious juridical disadvantage but we agree with the Court of Appeal that he erred at the third stage in finding that the balance of fairness would be achieved by staying the proceedings in favour of Germany without prejudice to W's right to make an application under Part IIA of the MPPO. He placed too much reliance on statements by the English Court of Appeal in *Ella v Ella* [2007] EWCA Civ 99, [2007] 2 FLR 35 that if the Israeli court gave full effect to the ante-nuptial agreement, the wife could apply in England under Part III of the 1984 Act. That appeal was decided before *Agbaje v Agbaje* and *Radmacher v Granatino*, and it must be doubtful whether the decision could be supported on that

ground. More relevant is the statement by Wilson J in *S v S (Divorce: Staying Proceedings)* [1997] 1 WLR 1200, 1202, that, where proceedings are stayed on the ground of forum non conveniens, there is room for doubt whether the threshold requirements for appropriate venue under Part III would be met. That is so even though the UK Supreme Court recognised in *Agbaje v Agbaje* that the Part III requirements were not the same as the forum convenienstest.

77. Since in our judgment the Court of Appeal was justified in interfering with the exercise of discretion, the sole remaining question is whether the exercise of discretion by the Court of Appeal is flawed and open to challenge on familiar grounds. In our view it is not. The Court of Appeal correctly held that H had not shown that Germany was clearly or distinctly more appropriate than Hong Kong.

78. We therefore dismiss the appeal. We would only add that W should not necessarily think that the very considerable costs she is bound to incur in these proceedings will be well spent. As was indicated in the oral argument, victory on this appeal might well be pyrrhic.

79. As to costs, we make an order *nisi* that the respondent (W) should have the costs of this appeal, such costs to be taxed if not agreed. If either party wishes to have a different order for costs, written submissions should be served on the other party and lodged with the Registrar of the Court within 14 days of the handing down of this judgment, with liberty on the other party to serve and lodge written submissions within 14 days thereafter. In the absence of such written submissions, the order *nisi* will stand absolute at the expiry of the time limited for these submissions.

(Geoffrey Ma) Chief Justice

(R.A.V. Ribeiro) Permanent Judge

(Robert Tang) Permanent Judge

(Kemal Bokhary) Non-Permanent Judge

(Lord Collins of Mapesbury) Non-Permanent Judge

Cases on Martimonial Property Disputes and resulting, implied and constructive trusts

Reference Section 4.1 of study Guide

Petitt v Petitt [1970] AC 777 – Facts: "In proceedings under section 17 of the Married Women's Property Act, 1882,1 following a divorce, a husband claimed to be beneficially entitled to a share in the proceeds of sale of the former matrimonial home. The house in question had been purchased out of the proceeds of sale of a

previous house belonging to the wife, and had been conveyed into her name alone. The husband's claim was based on his having done work on the house by way of redecoration and improvement which he said had enhanced its value by £1,000. The registrar held that he was entitled to share in the proceeds to the extent of £300. The Court of Appeal affirmed that decision.

On appeal – Held (1) that section 17 of the Act of 1882 was a procedural provision only, and did not entitle the court to vary the existing proprietary rights of the parties.

(2) That upon the facts disclosed by the evidence it was not possible to infer any common intention of the parties that the husband by doing work and expending money on materials for the house should acquire any beneficial proprietary interest therein; and that, accordingly, in the circumstances the husband's claim failed and the appeal must be allowed."

The House of Lords ruled that "In the absence of agreement and any question of estoppel, one spouse who does work or expends money upon the property of the other has no claim whatever upon the property of the other."

Lord Morris of Borth-y-Gest in his judgment said, "The mere fact that parties have made arrangements or conducted their affairs without giving thought to questions as to where ownership of property lay does not mean that ownership was in suspense or did not lie anywhere. There will have been ownership somewhere and a court may have to decide where it lay. In reaching a decision the court does not find and, indeed, cannot find that there was some thought in the mind of a person which never was there at all. The court must find out exactly what was done or what said and must then reach conclusion as to what was the legal result. The court does not devise or invent a legal result. Nor is the court influenced by the circumstances that those concerned may never have had occasion to ponder or to decide as to the effect in law of whatever were their deliberate actions. Nor is it material that they might not have been able even after reflection – to state what was the legal outcome of whatever they may have done or said. The court may have to tell them. But when an application is made under section 17 there is no power in the court to make a contract for the parties which they have not themselves made. Nor is there power to decide what the court thinks that the parties would have agreed had they discussed the possible breakdown down or ending of their relationship. Nor is there power to decide on some general principle of what seems fair and reasonable how property rights are to be re-allocated."

Gissing v Gissing (1971) AC 886 – Facts: "The parties were married in 1935 when both were in their early twenties. The wife worked substantially throughout the marriage, until 1957 as a secretary at a firm of printers. In May, 1946, when the husband was out of work after demobilisation from the army, the wife obtained employment for him at the printers where he did well. In 1951 a house was bought in the name of the husband as the matrimonial home in which the parties lived until November, 1961, when the husband left to live with another woman. The price paid for the house was £2,695 of which £2,150 was raised by the husband on mortgage and £500 was loaned by the printers to the husband who paid the balance and costs. The wife paid £220 out of her savings for furnishings and the laying of a lawn. The husband paid the installments on the mortgage, gave the wife £8 to £10 a week for housekeeping and paid for holidays and general family expenses. The wife paid for her own clothes and those of their son and for some extras. Both saved. According to the wife, when the husband left in November, 1961, he told her that the house was hers and that he would pay the mortgage installments and out goings, which he did. The wife remained in the house and in January, 1966, she was granted a decree absolute of divorce on the ground of the husband's adultery and an order for maintenance which was subsequently reduced to 1s. a year.

On the wife's application by originating summons in the Chancery Division for an order regarding her beneficial interest in the house, Buckley J. held that the husband was sole beneficial owner of the house and was entitled to possession. The Court of Appeal, by a majority, reversed that decision.

On appeal by the husband – Held, allowing the appeal, that the wife had made no contribution to the acquisition of title to the matrimonial home from which it could be inferred that the parties intended her to have any beneficial interest in it."

Lord Diplock said in his judgment: "Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based upon the proposition that the person in whom the legal estate is vested holds it as trustee upon trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of "resulting, implied or constructive trusts."

Where the trust is expressly declared in the instrument by which the legal estate is transferred to the trustee or by a written declaration of trust by the trustee, the court must give effect to it. But to constitute a valid declaration of trust by way of

gift of a beneficial interest in land to a cestui que trust the declaration is required by section 53 (1) of the Law of Property Act, 1925, to be in writing. If it is not in writing it can only take effect as a resulting, implied or constructive trust to which that section has no application. A resulting, implied or constructive trust – and it is unnecessary for present purposes to distinguish between these three classes of trust – is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land. This is why it has been repeatedly said in the context of disputes between spouses as to their respective beneficial interests in the matrimonial home, that if at the time of its acquisition and transfer of the legal estate into the name of one or other of them an express agreement has been made between them as to the way in which the beneficial interest shall be held, the court will give effect to it – notwithstanding the absence of any written declaration of trust. Strictly speaking this states the principle too widely, for if the agreement did not provide for anything to be done by the spouse in whom the legal estate was not to be vested, it would be a merely voluntary declaration of trust and unenforceable for want of writing. But in the express oral agreements contemplated by these dicta it has been assumed sub silentio that they provide for the spouse in whom the legal estate in the matrimonial home is not vested to do something to facilitate its acquisition, by contributing to the purchase price or to the deposit or the mortgage instalments when it is purchased upon mortgage or to make some other material sacrifice by way of contribution to or economy in the general family expenditure. What the court gives effect to is the trust resulting or implied from the common intention expressed in the oral agreement between the spouses that if each acts in the manner provided for in the agreement the beneficial interests in the matrimonial home shall be held as they have agreed."

Stack v Dowden [2007] 2 AC 432 – Facts: "The parties began a relationship in **1975** and in 1983 the defendant bought a house in her sole name in which the parties lived together as man and wife and had four children. The defendant, who throughout their time together earned more money than the claimant, and sometimes almost twice as much, made all the payments due under the mortgage and paid the household bills. The parties did a great deal of work in improving the house and in 1993 it was sold for three times the figure the defendant had originally paid for it. The parties then bought another property, which was conveyed into their joint names, as their family home. Over 65% of the purchase price was paid out of funds from a building society account held in the defendant's sole name, funds

which included the equity liquidated from the sale of the previous house. The balance of the purchase price was provided by a loan secured by a mortgage in the parties' joint names and two endowment policies, one in their joint names and one in the defendant's sole name. The claimant paid the mortgage interest and the premiums due under the endowment policy in their joint names and the defendant paid the premiums due under the endowment policy in her sole name. The parties kept separate bank accounts and made separate savings and investment. Over the course of their years in the house together the mortgage loan was paid off by a series of lump sum payments of which the defendant provided just under 60% of the capital. The parties separated in 2002 and the claimant left the property while the defendant remained there with the children. The claimant successfully applied to the judge for, inter alia, an order for sale of the property and an equal division of the proceeds. The Court of Appeal allowed the defendant's appeal and ordered that the net proceeds of sale be divided 65% to 35% in the defendant's favour."

The House of Lords dismissed the appeal "(Lord Neuberger of Abbotsbury concurring in the result), that the defendant had contributed far more to the acquisition of the house than had the claimant; that the parties had never pooled their separate financial resources for the common good and everything, apart from the house and associated endowment policy, had been kept strictly separate; that the case was, therefore, highly unusual as there could not be many unmarried couples in the parties' situation who had kept their affairs so rigidly separate; that those factors were strongly indicative that the parties had not intended their shares in the property to be equal; and that, accordingly, the defendant had made good her case for a 65% share of the beneficial interest."

It was held in the House of Lords as follows – "that where a domestic property was conveyed into the joint names of cohabitants without any declaration of trust there was a prime facie case that both the legal and beneficial interests in the property were joint and equal; that the onus of proof lay upon any party seeking to establish that equity should not follow the law; that such a party had to prove that the parties had held a common intention that their beneficial interests be different from their legal interests, and in what way; that in order to discern the parties' common intention the court should look at the parties' whole course of conduct in relation to the property; that the law had moved on from the presumption of a resulting trust and many more factors other than the parties respective financial contributions might be relevant to divining their true intentions; and that when all relevant factors had been taken into account, cases in which the joint legal owners were to be taken to have intended that their beneficial interests should be different from their legal interests would be very unusual."

Stack v Dowden is considered as the primary authority on resulting, implied constructive trust now. In Jackson's Matrimonial Finance and Taxation para 15.30 it summarizes the main points arising from this case as follows – "(1) the first port of call must always be the documents of title. If these declare the legal and beneficial ownership of the property, that will preclude further enquiry in the absence of subsequent agreement, proprietary estoppel or rescission/rectification of the conveyance. …

(2) a distinction must be made between:

(i) step one—establishing that a property is in shared ownership (ie that the claimant has a beneficial interest); and

(ii) step two—quantifying the parties' shares. Those two steps should not be elided;

(3) there is an assumption, from which departure will not lightly be permitted, that the beneficial interests in property follow the legal title. Where property is in the sole name of one person, the onus will be on the non-owner to show that he/she has a beneficial interest in it;

(4) in order for a claimant to prove that the beneficial interests should not follow the legal title, the majority view in *Stack v Dowden* was that the claimant has to show an intention to share the beneficial ownership in the property other than in a way that mirrors the legal title (ie the answer to this question lies in constructive trusts). Lord Neuberger, in his speech, which dissented on reasoning but not primary outcome, thought that this question should be investigated, firstly, under resulting trust principles (who paid what towards the property) and only where necessary should the court then move on to consider issues of constructive trust.

(5) the parties' intentions in relation to the beneficial ownership may be express, inferred or imputed: This search cannot be conducted under the umbrella of what the court thinks is fair. Lord Neuberger did not agree that a common intention might be imputed;

(6) there are distinctions to be made between cases where the legal title is in joint names and those where the legal title is in the sole name of one party. Where the legal title is in joint names there will be the assumption (referred to above) that the beneficial ownership is held as beneficial joint tenants, unless the contrary is proved; in cases where the property is the sole name of one party, the assumption will be that the beneficial interest follows the legal title, unless the contrary is proved.

(7) in determining the parties' intentions a broad view should be taken. Baroness Hale gave a long list of factors that might be relevant and which are expressly not confined to the parties' financial contributions;

(8) once shared ownership has been established, the second step arises, ie what shares do the parties have? This step should be considered by the court undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws a light on the question what shares were intended'."

The list of factors given by Baroness Hale as referred to in (7) above, are set out in para 69 of her judgment where she said –

"**69** In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include:

"**69** In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include:

1. any advice or discussions at the time of the transfer which cast light upon their intentions then;
2. the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys;
3. the purpose for which the home was acquired; the nature of the parties' relationship;

4. whether they had children for whom they both had responsibility to provide a home;
5. how the purchase was financed, both initially and subsequently;
6. how the parties arranged their finances, whether separately or together or a bit of both;
7. how they discharged the outgoings on the property and their other household expenses.

When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will

be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual."

Chan Chui Mee（陳翠美）v Mak Chi Choi Nelson（麥智才（又名麥子才） & Ors – [2008] HKCU 1449 Facts: The Plaintiff in these proceedings is the ex-wife of the 1st Defendant. Though no document has been produced before me, I was told that the Plaintiff and the 1st Defendant were divorced in proceedings in the Family Court commenced in April 2005. The 3rd Defendant is their son. The subject matter of the proceedings is a property known as Flat No.1, 1st Floor, Block A, Pang Ching Court, No.6 Chui Chuk Street, Kowloon ["The Property"]. The Property is held in the name of the 1st efendant. Both the Plaintiff and the 3rd Defendant claim to have beneficial interest in the Property based on their contributions to the mortgage payments. The Plaintiff also said she paid for the deposit for the acquisition of the Property. It is their case that the 1st Defendant has no beneficial interest at all.

[2] The 2nd Defendant is not a family member. She is a creditor of the 1st Defendant. She obtained a default judgment against the 1st Defendant in her favour in HCA 19521 of 1998 on 10 December 1998 in the sum of $481,500 plus interest and costs. The total amount of the judgment debt, according to her calculation, runs up to $800,000 odd by now.

[3] The 2nd Defendant obtained charging orders in respect of the Property by way of enforcement of the default judgment: charging order nisi was obtained on 8 July 1999 and charging order absolute was obtained on 19 August 1999. These orders were registered at the Land Registry.

[4] By way of enforcement of the charging order, the 2nd Defendant commenced Order 88 proceedings against the 1st Defendant in DCMP 4229 of 2002 which was subsequently transferred to the High Court as HCMP 2100 of 2003. The 2nd Defendant sought order for possession and order for sale in respect of the Property. The 1st Defendant resisted the application. In the course of those proceedings, the 1st Defendant suggested he had decided to transfer his interest in the Property to his son, the 3rd Defendant and a Deed of Trust was executed on 1

January 1995. That document was not registered at the Land Registry. Nor was it stamped. …"

Lam J (as he then was) approved **Stack v Dowden** and said in his judgment that "[16] In the recent case of Stack v Dowden [2007] 2 AC 432, the House of Lords re-examined the law in this area. That was a case on beneficial ownership when the property was held under joint names. It was held that since Lloyds Bank v Rosset [1991] 1 AC 107, the law has moved on. The key is to identify the common intention of the parties.

Lam J continued in para 17 and said "It was also held that in the search for common intention, a holistic approach should be adopted in the quantification of the beneficial interest by undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended."

Discretionary Trusts in Matrimonial Cases – Is a Trust was a financial resource

Refer section 4.5 of study guide

The Hong Kong court of Final Appeal case:

Poon Lok To Otto formerly known as Pun Lok To Otto v. Kan Lai Kwan also known as Kan Lai Kwan Kay and Anor FACV 21/2013

The Court of Final Appeal in this case gave a test on whether a discretionary trust is to be considered as financial resources for sharing.

Summary: "1. Poon Lok To Otto (the "Husband") and Kan Lai Kwan (the "Wife") were married in 1968. The Husband became very successful with his business from the mid-1990s. Analogue Holdings Ltd ("Analogue") was incorporated to be the holding company of his business. In July 1995, a discretionary trust based in Jersey was set up (the "Trust"). The Husband was the Settlor, Protector and a potential beneficiary. HSBC International Trustee Limited was the Trustee. The Husband settled 84.63% of the shares of Analogue in the Trust.

2. In February 2009, the Husband petitioned for divorce on the basis of two years' separation. The Wife did not defend the proceedings. The decree nisi was pronounced in May 2009 and made absolute in September 2010. The Wife applied for ancillary relief. She argued that the equal sharing principle should be applied to the entire value of the Trust, not only to two-thirds of that amount (which the Husband contended for). She also claimed that they had been separated only since 2008. The Husband, on the other hand, claimed that they had been separated since 2001. This was relevant due to the substantial profits generated by Analogue after 2001.

3. To decide whether the Trust was a financial resource of the Husband, the Court of Final Appeal adopted the test of asking whether, if the Husband were to request the Trustee to advance the whole or part of the capital or income of the Trust to him, the Trustee would, on the balance of probabilities, be likely to do so. Considering the creation and terms of the Trust, the Husband's letters of wishes, the nature of the Trust assets and previous distributions made by the Trustee, the Court held that there was clear evidence of the overwhelming likelihood that the Trustee would, if requested by the Husband, advance the whole or part of the capital or income of the Trust to him. Accordingly, the Court of First Instance and the Court of Appeal were wrong to hold that the matrimonial assets included only a two-thirds interest in the value of the Trust. The entire Trust fund should be regarded as a financial resource available to the Husband.

4. Disagreeing with the finding of the Court of First Instance that the Husband and the Wife separated in 2001, the Court of Final Appeal held that as a matter of fact their marriage continued until they finally separated in 2008. The Court of Final Appeal also disagreed with the finding of the Court of Appeal, based on the doctrine of estoppel, that they separated in 2007. Whether the Husband and the Wife had separated was a question of fact. The Court was subject to a statutory duty to have regard to all the circumstances of the case. It was not estopped from finding that the Husband and the Wife in fact separated in 2008.

5. On the question of whether there should be a departure from the equality principle, the Court of Final Appeal held that the increased profits of Analogue did not provide a ground for such a departure. Those profits arose out of the business which had been built up during the Husband's and the Wife's marriage, in respect of which the Wife could legitimately assert an unascertained share.

6. Accordingly, the Court of Final Appeal unanimously allowed the Wife's appeal and dismissed the Husband's appeal."

Ribeiro PJ said in his judgment, "26. The question which arises is whether the trust and its assets should be regarded as a "financial resource" which H has or is likely to have in the foreseeable future within the meaning of section 7(1)(a). In addressing that question, the Court is engaged in taking the first step in deciding an ancillary relief claim. As pointed out in *LKW v DD*, the first step is:

"… to ascertain the financial resources of each of the parties calculated as at the date of the hearing. … At this stage, the court need not attempt to distinguish between matrimonial and non-matrimonial property, that being an exercise best undertaken (if necessary) when considering distribution of the assets."

27. Section 7(1)(a) is closely modelled on the equivalent English provision, making English decisions on section 25(2)(a) of the Matrimonial Causes Act 1973 helpful and persuasive. The approach adopted in England and Wales was laid down by the Court of Appeal in *Charman v Charman*,a case concerning a discretionary trust situated in Bermuda. Wilson LJ formulated the test as follows:

"Superficially the question is easily framed as being whether the trust is a financial 'resource' of the husband for the purpose of section 25(2)(a) of the Matrimonial Causes Act 1973, as substituted by the Matrimonial and Family Proceedings Act 1984, section 3 . But what does the word 'resource' mean in this context? In my view, when properly focused, that central question is simply whether, if the husband were to request it to advance the whole (or part) of the capital of the trust to him, the trustee would be likely to do so."

28. This was confirmed to be the test in *Charman v Charman (No 4)*, and has been treated as established in English law. A helpful elaboration can be found in the judgment of Lewison J in the English Court of Appeal in *Whaley v Whaley*:

"… a discretionary beneficiary has no proprietary interest in the fund. But under section 25 the court looks at resources; not just at ownership. Thus whether a beneficiary under a discretionary trust has a proprietary interest is not relevant. The resource must be one that is 'likely' to be available. This is the origin of the

'likelihood' test. No judge can make a positive finding about the future: the best that can be done is to assess likelihood. What is relevant is the likelihood of the trust fund or part of it being made available to him, either by income or capital distribution. If the husband were to ask the trustees to advance him capital, would the trustees be likely to do so: *Charman v Charman* [2006] 1 WLR 1053; *A v A* [2007] 2 FLR 467, 499? The question is not one of control of resources: it is one of access to them."

29. Charman v Charman was cited with approval by this Court in *KEWS v NCHC.* That was a case involving parental financial support rather than a discretionary trust in which a similar test (asking what is the likelihood of such financial assistance continuing) was adopted. It is right that the *Charman* test should be adopted in this jurisdiction since the issue arising in cases like the present and since the Hong Kong provision are materially identical. To decide whether a discretionary trust is a financial resource of one of the parties, the Court asks whether, if that party were to request the trustee to advance the whole or part of the capital or income of the trust to him or her, the trustee would, on the balance of probabilities, be likely to do so." (paras. 26 – 29)

The *Charman* test provides the approach to deciding whether a discretionary trust forms part of a party's resources.

Ribeiro PJ continues to say, "33. It should be clearly understood that the *Charman* test does not postulate any impropriety on the trustee's part. This was noted in *Charman v Charman* itself where Wilson LJ stated:

"A trustee – in proper 'control' of the trust – will usually be acting entirely properly if, after careful consideration of all relevant circumstances, he resolves in good faith to accede to a request by the settlor for the exercise of his power of advancement of capital, whether back to the settlor or to any other beneficiary."[41]

The Proper Application of the Charman Test – In the judgment, it said,

"60. As the *Charman* test has not been properly applied, it falls to this Court to decide whether it should be satisfied that if H were to request the trustee to advance the whole or part of the capital or income of the trust to him, the trustee, acting in accordance with its duties, would on the balance of probabilities be likely to accede to that request. In making its assessment the Court is able to consider the creation and terms of the trust; H's letters of wishes; the nature of the trust assets; and previous distributions made by the trustee. As was held in *KEWS v NCHC*, the Court looks at the reality of the situation and regards past conduct as a useful guide."

Court of Final Appeal – Kan Lai-kwan and Poon Lok-to Otto and HSBC International Trustees Ltd FACV 20 & 21/2013 on appeal from CACV 48/2012. (see case details below). Yet another robust, crystal-clear judgment from Ribiero PJ effectively adopting Lord Denning's view that the doctrine of estoppel is subject to the courts statutory powers – in particular where the justice of the case demands it. Of more general application is the Court of Final Appeal's clear signal that any 'departure from equality', particularly in a long marriage, will meet a very high hurdle indeed.

Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Bokhary NPJ and Mr Justice Gummow NPJ

Date of Judgment: 17 July 2014

Summary – by Caroline McNally (Registered Foreign Lawyer) Gall Solicitors

The Court of Final Appeal (FACV) heard cross appeals by the husband and wife against the Court of Appeal's judgment dated 25 March 2013 (Cheung and Fok JJA, and Macrae J CACV 48/2012). The original award was made by Deputy High Court Judge Carlson with the judgment handed down on 10 February 2012.

There were two issues before the FACV as follows:

1. The proper approach to a discretionary trust set up by the husband; and

2. Separation and estoppel in the context of ancillary relief where profits earned by the husband's business increased substantially during the final years of marriage.

Background

This was a long marriage of 40 years duration with both parties in their 80s. Sadly, they had suffered two tragedies in that two of their three children had died in 1995 and 2000 respectively.

The husband ran an engineering business which he set up in 1977. The business had mixed fortunes during the early years, and profits fell in 2003 to 2005 as a result of SARS. However, profits rose significantly from 2007 to 2010. The wife was a nurse.

When the husband's business began to prosper he decided to restructure the group and an off-shore company was established to act as the holding company. The shares of the holding company were settled in an offshore discretionary trust ("The Family Trust").

The property settled on trust consisted solely of shares in two private companies. One company, Analogue, was the husband's business. The other company, Realty Limited, owned the former matrimonial home.

At first instance DHCJ Carlson accepted that the valuation of the shares held by the trust was $1,560,686,000.

The husband was the settlor of the Family Trust. He was also the protector and a potential beneficiary. The wife and the parties' surviving child were also beneficiaries.

In 2008 the wife issued a petition on the basis of one-year separation with consent. This was, however, dismissed by consent and in February 2009 the husband issued his petition based on two years' separation.

The husband affirmed that the parties had been separated since February 2001. The wife did not defend the petition and both parties used the separation date of 2001 in their Forms E. Shortly before the trial, the wife made an affirmation stating that the 2001 date was incorrect and that the parties had separated "*some time in 2008*".

On 1 September 2010 the decree absolute was pronounced by the Court on the basis of the husband's petition.

ISSUE 1: Treatment of The Family Trust

At first instance the Judge held that the trust assets were not a resource of the husband. Despite this he decided that two-thirds of the value of the Analogue shares held on trust should be ascribed in equal shares to the parties.

The Court of Appeal upheld the Judge's decision that only two-thirds of the value of the shares held on trust should be regarded as matrimonial assets available for distribution.

The FACV up-held the wife's appeal that the entire value of the trust assets were a resource available to the husband. It said:

"It is right that the Charman test should be adopted in this jurisdiction… To decide whether a discretionary trust is a financial resource of one of the parties, the Court asks whether, if that party were to request the trustee to advance the whole or part of the capital or income of the trust to him or her, the trustee would, on the balance of probabilities, be likely to do so".

The FACV held that the Judge had fallen into error in treating the parties' surviving daughter as a beneficiary with an interest to be protected against the other beneficiaries. The daughter, like the wife, did not have fixed beneficial interest in the trust fund.

Based on all the evidence, including the fact that the trustees had advanced to the husband funds to satisfy the Orders made in the Courts below, the FACV decided that it was overwhelmingly likely that the trustee, acting in accordance with its duties, would if requested by the husband, advance the whole or part of the capital or income of the trust to him.

ISSUE 2: Should there be a departure from equality on the basis of increase in profits of the husband's business since separation

The first issue to decide was the date of separation.

The Judge at first instance held that the wife was estopped from denying that the separation had occurred in 2001. He held that the wife could not say that the parties only separated in 2008 because that was less than two years immediately preceding the presentation of the petition.

The Court of Appeal agreed with the Judge and stated:

"..the wife certainly cannot rely on separation that only began in 2008 because it will destroy the very foundation of the decree, namely, there was a two-year separation".

However, the Court of Appeal held that separation had occurred in 2007.

The FACV decided that the evidence unmistakably pointed to the marriage (unhappy though it was) having continued until the parties finally separated when the husband moved out of the matrimonial home in 2008.

The next issue was whether a departure from equality was justified.

On the basis of a separation date of 2001, the Judge at first instance concluded that there should be a departure from equality for two reasons:

(1) Some adjustment should be made in the husband's favour so that the wife could not share equally in the substantial profits of his business which had occurred after 2001.

(2) There were fears for the liquidity of the husband's business.

The liquidity point was rejected by the Court of Appeal. On the basis of a 2007 separation date the Court of Appeal held that there should be no departure from the equality principle. Post-2007 accruals were seen to be based on the business foundation that the company was built up from its earlier years to which the wife had equally contributed over the life of the lengthy marriage.

The FACV considered the UK authorities on post-separation accruals and decided that the period of separation prior to the hearing was relatively insignificant in the context of a 40 year marriage. It upheld the Court of Appeal decision that no departure from equality was justified.

The Proper Approach to Estoppel in Matrimonial Cases

The FACV was unable to accept the adoption of a 2007 separation date as a "practical solution". The real question was whether the Judge and the Court of Appeal were right to hold that they were estopped from finding that separation in fact occurred in mid-2008.

The FACV adopted the approach of Denning LJ in *Thompson v Thompson*. The parties are bound by the estoppel but, where the circumstances demand the Court's intervention, it is free to override that estoppel in exercising its statutory jurisdiction and to act upon evidence which is material to its determination.

The FACV held that the Judge and the Court of Appeal were wrong in law to hold that the Court was precluded by the doctrine of estoppel from finding that separation occurred in 2008. It stated that the present case called out for the Court to override the estoppel created between the parties.

Family Trusts and Marital disputes (refer study guide section 4.4)

Various Case Law

KAN LAI KWAN ALSO KNOWN AS KAN LAI KWAN KAY v. POON LOK TO OTTO (the Poon Case")

THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 21 OF 2013 (CIVIL)

(ON APPEAL FROM CACV NO. 48 OF 2012)

Between :

POON LOK TO OTTO formerly known as PUN LOK TO OTTO	Appellant (Petitioner)
and	
KAN LAI KWAN also known as KAN LAI KWAN KAY	1st Respondent
HSBC INTERNATIONAL TRUSTEE LIMITED	2nd Respondent

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Before:

Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Bokhary NPJ and Mr Justice Gummow NPJ

Dates of Hearing: 23-24 June 2014

Date of Judgment: 17 July 2014

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J U D G M E N T

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Chief Justice Ma:

1. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Ribeiro PJ:

2. This appeal arises out of an application for financial provision in matrimonial proceedings. It raises questions concerning the proper approach to a discretionary trust set up by the husband and issues concerning separation and estoppel in the context of ancillary relief where profits earned by the husband's business substantially increased during the final years of the marriage.

A. The course of events

3. Kay Kan Lai Kwan ("W") was born in 1939 and Otto Poon Lok To ("H") in 1940. They married on 6 January 1968 in England where they were each working and pursuing further qualifications, W as a nurse and H as an engineer. After returning to Hong Kong in 1969, they found employment and had three children, Karen,[1] Richard[2]and Heather.[3] In 1977, H started his own engineering business while W continued to work as a nurse.

4. After a slow start, H's business enjoyed some success but then had a major setback in the mid-1980s when it almost failed. It was a very difficult time for them since most of their savings were lost in a stock market crash. They decided to emigrate to Canada in 1988. W remained in Canada with the children for several years while H returned to Hong Kong and started rebuilding the business. They became Canadian citizens in 1992.

5. H's engineering business began to prosper and in 1994 it consisted of a number of operating companies based in Hong Kong. H decided to restructure the group and obtained advice from Messrs Deacons, a firm of Hong Kong solicitors. The plan adopted was to set up an off-shore corporation which would act as the holding company for the operating companies and to settle the shares of the holding company on the trustee of an off-shore discretionary trust. In a letter dated 21 March 1995 covering a draft of the trust deed, the solicitors recorded H's purpose in the following terms:

"As previously discussed, the principal purpose of establishing the trust is to provide for continuity in the ownership of the Analogue group of companies for the benefit of you and your family, to avoid a requirement for probate in respect of your interests in the Analogue group following your death and to relieve your estate of the liability to estate duty that would arise in respect of your shareholdings in the Analogue group."

6. On 18 July 1995, Analogue Holdings Ltd ("Analogue") was incorporated in Bermuda. H was its Chairman and Analogue became the holder of all the shares in the operating companies.

7. The trustee selected was HSBC International Trustee Limited ("the trustee") and by a deed dated 25 July 1995 entered into between H as settlor and the trustee, "The Otto Poon Family Trust" ("the trust") was established under the laws of Jersey. The property settled on trust consisted solely of shares in two private companies, Analogue and Realty Limited. The latter company initially owned a flat in Fulham Gardens, Pokfulam, which was later replaced by a house at Twin Bay Villas in Sai Kung, being residences where the parties lived.

8. Unfortunately, two tragedies befell the family. On 7 October 1995, the younger daughter Heather was killed in a road accident in the United States. Karen's boyfriend, who was driving, was also killed and Karen was injured. H stated in evidence that he and W were devastated by their loss. W described herself as "totally heart-broken".[4] According to H:
"… Kay and I found it impossible to talk to each other or to turn to each other in our moment of grief. We both somehow bottled it up and I again threw myself completely and with renewed energy in my work and my projects."[5]

9. Five years later, in September 2000, they suffered the second tragedy when Richard took his own life, leaping from the balcony of the family home in Fulham Gardens. H described the consequences of this event affecting the parties' relationship as follows:
"After Richard's death, the rift between the parties simply became too wide to be bridged. Still we did not talk about our pain, our anger, our grief or our overwhelming and irreplaceable loss. Still we were unable to turn to each other in our darkest moments and by then we probably both had changed into virtual strangers to each other. There was simply nothing that we could say to each other anymore."[6]

10. Reflecting this sad situation, the trial Judge, Deputy High Court Judge Carlson, stated:
"As I have already indicated, Richard died in September 2000. The husband says, and I am satisfied that he is right, that this tragic event really marked the end of the marital relationship. There was no more warmth or connection between the parties notwithstanding which they continued to live together."[7]

11. The Fulham Gardens flat, with its unhappy associations, was sold and on 22 January 2001, the parties purchased and moved into the house at Twin Bay Villas. H's case is that while he and W lived there under the same roof, their marriage was (as the Judge found[8]) "a bare shell and nothing more". As discussed below,[9] W successfully contested this finding in the Court of Appeal.

12. The Analogue Group's development is reflected in its annual net profits which were as follows:

Year	*Net profits*
2000	$12,463,425
2001	$25,865,899
2002	$27,741,544
2003	$9,330,983
2004	$8,583,115
2005	($32,066,322)
2006	$17,031,022
2007	$55,526,026
2008	$78,049,582
2009	$161,760,278
2010	$293,077,695

13. After strong initial results, profits fell during 2003 and 2004 (according to H due to the SARS epidemic) followed by 2005 when the Group made a significant loss. Thereafter, especially as from 2007, there was a steep increase in its profits.

14. In 2008, matters came to a head in the parties' relationship. W discovered and confronted H about a long-term relationship he had maintained with Queenie Law, a younger woman employed in the Group. On 3 July 2008, H moved out of the Twin Bay Villas property. On 6 November 2008, W petitioned for divorce on the basis of one-year separation and consent.[10] And on 23 December 2008, the Trustee, at H's request, transferred to W the shares which it held in Realty Limited, thereby transferring to her ownership of the Twin Bay Villas house.

B. The proceedings and awards in the Courts below

15. W did not proceed with her petition. It was dismissed by consent and, on 6 February 2009, H issued his petition based on two years' separation.[11] He affirmed that the parties had lived apart since February 2001.[12] W did not defend the proceedings and on 26 May 2009 and 1 September 2010 respectively, the decree nisi and the decree absolute were pronounced by the Court on the basis of H's petition. The February 2001 separation date was also deposed to by both parties in their Form E financial statements filed in the ancillary relief proceedings. However, shortly before the start of the hearing, W made an affirmation[13] stating that the February 2001 date was incorrect and that separation had in fact occurred "some time in 2008". The date of the parties' separation and the extent to which W should be awarded a share of the profits of the business accruing after 2001therefore became contentious issues.

16. Also controversial was the prior question of how the trust ought to be approached. H contended that the Court ought to treat Karen as if she had a "one-third interest" in the trust estate which should be protected from W's claims. His case was that only two-thirds of the value of the shares should be treated as matrimonial assets. The trustee was joined as a party to the proceedings and adopted a position which was consistent with H's contentions.

B.1 The award of Deputy High Court Judge Carlson

17. The hearing before DHCJ Carlson took place on dates in October and December 2011.[14] The Judge accepted a valuation of $1,560,686,000 for the shares held by the trust, representing 84.63% of the issued shares in Analogue.[15]His Lordship found that additionally, H had assets to the value of $46,052,707 and W, assets worth $58,259,660.[16]He also found that they jointly owned a flat in Westland Gardens (H agreeing to transfer his 50% share valued at $7,500,000 to W). Those figures are not in dispute. It was agreed that each party would retain other properties held in their respective names without bringing such properties into account.

18. The Judge held that the trust assets were not a "resource" of H[17] but nevertheless decided that $1,040,457,300 representing two-thirds of the value of the Analogue shares held on trust should be ascribed in equal shares to the parties as forming the major part of their matrimonial assets available for distribution.[18] Netting off the parties' respective assets, the Judge concluded that if the principle of equal sharing[19] were to be applied without modification, H would be required to pay $508 million to W.[20]

19. However, for a combination of reasons involving estoppel, a perceived need to preserve the Analogue Group's liquidity and a finding that the parties had lived separate lives during the last ten years of the marriage, his Lordship held that there ought to be a departure from the equal sharing principle. In the result, he ordered H to pay W a lump sum of $370 million representing 72.83% of the sum of $508 million he had prima facie arrived at by applying the equality principle.[21]

B.2 The award of the Court of Appeal[22]

20. Cheung JA, with whom the other members of the Court agreed, upheld the Judge's decision that only two-thirds of the value of the shares held on trust should be regarded as matrimonial assets available for distribution.[23] However, the Court of Appeal disagreed with the Judge's reasons relating to liquidity and separation, substituted a separation date of February 2007 and held that there was no basis for departing from the equality principle.[24]

21. Taking the parties' matrimonial assets as totalling $1,144,800,000,[25] their Lordships awarded to W 50% of that amount, resulting (after netting off adjustments) in a lump sum award of $510,400,000

in W's favour, an increase of $140,400,000 over the Judge's award of $370 million.

22. The Court of Appeal ordered the award to be paid in three tranches: $250 million within one month and two tranches of $130 millione ach to be paid on or before 1 March 2014 and 1 March 2015 respectively. The Court was told that the first two tranches have duly been paid.

B.3 This appeal

23. Pursuant to leave granted by the Appeal Committee,[26]both parties have brought appeals against the Court of Appeal's judgment. W challenges its decision upholding the Judge's conclusion that only two-thirds of the value of the shares held on trust should be regarded as a financial resource available to H. W contends that the entire value of those shares constitutes such a resource and that the "yardstick of equality" should be applied to the full value and not merely to two-thirds of that amount.

24. H, on the other hand, disputes the Court of Appeal's substitution of a February 2007 separation date for the Judge's finding that separation occurred in February 2001. He challenges the Court of Appeal's conclusion that there was no basis for departing from the equal sharing principle and argues that W should be excluded from sharing in the increased profits accruing after February2001.

C. Is the discretionary trust a financial resource available to H?

C.1 The legal test

25. The Court's jurisdiction to grant ancillary relief, including its power to make financial provision orders,[27] arises under the Matrimonial Proceedings and Property Ordinance ("MPPO").[28] Section 7(1)(a) provides that in deciding whether and in what manner to exercise those powers:
"It shall be the duty of the court … to have regard to the conduct of the parties and all the circumstances of the case including the following matters, that is to say – (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future…"

26. The terms of the trust are considered more closely below.[29] For the present, it suffices to note that apart from being the settlor, H was named as protector of the trust and also as a member of the class of potential beneficiaries.[30] The question which arises is whether the trust and its assets should be regarded as a "financial resource" which H has or is likely to have in the foreseeable future within the meaning of section 7(1)(a). In addressing that question, the Court is engaged in taking the first step in deciding an ancillary relief claim. As pointed out in *LKW v DD*,[31] the first step is:
"… to ascertain the financial resources of each of the parties calculated as at the date of the hearing. … At this stage, thecourt need not attempt to distinguish between matrimonial and non-matrimonial property, that being an exercise best undertaken (if necessary) when considering distribution of the assets."

27. Section 7(1)(a) is closely modelled on the equivalent English provision, making English decisions on section 25(2)(a) of the Matrimonial Causes Act 1973[32] helpful and persuasive. The approach adopted in England and Wales was laid down by the Court of Appeal in *Charman v Charman*,[33] a case concerning a discretionary trust situated in Bermuda. Wilson LJ formulated the test as follows:
"Superficially the question is easily framed as being whether the trust is a financial 'resource' of the husband for the purpose of section 25(2)(a) of the Matrimonial Causes Act 1973, as substituted by the Matrimonial and Family Proceedings Act 1984, section3 . But what does the word 'resource' mean in this context? In my view, when properly focused, that central question is simply whether, if the husband were to request it to advance the whole (or part) of the capital of the trust to him, the trustee would belikely to do so."[34]

28. This was confirmed to be the test in *Charman v Charman (No 4)*,[35] and has been treated as established in English law. A helpful elaboration can be found in the judgment of Lewison J in the English Court of Appeal in *Whaley v Whaley*:[36]
"… a discretionary beneficiary has no proprietary interest in the fund. But under section 25 the court looks at resources; not just at ownership. Thus whether a beneficiary under a discretionary trust has a proprietary interest is not relevant. The resource must be one that is 'likely' to be available. This is the origin of the 'likelihood' test. No judge can make a positive finding about the future: the best that can be done is to assess likelihood. What is relevant is the likelihood of the trust fund or part of it being made available to him, either by income or capital distribution. If the husband were to ask the trustees to

advance him capital, would the trustees be likely to do so: *Charman v Charman* [2006] 1 WLR 1053; *A v A*[2007] 2 FLR 467, 499? The question is not one of control of resources: it is one of access to them."

29. *Charman v Charman* was cited with approval by this Court in *KEWS v NCHC.*[37] That was a case involving parental financial support rather than a discretionary trust in which a similar test (asking what is the likelihood of such financial assistance continuing) was adopted. It is right that the *Charman* test should be adopted in this jurisdiction since the issue arising in cases like the present and since the Hong Kong provision are materially identical. To decide whether a discretionary trust is a financial resource of one of the parties, the Court asks whether, if that party were to request the trustee to advance the whole or part of the capital or income of the trust to him or her, the trustee would, on the balance of probabilities, be likely to do so.

30. The Judge was therefore wrong to hold that *Charman* was inapplicable – a conclusion which he reached apparently because:
"Mr Charman's behaviour was completely different to that of this husband who has always viewed his responsibilities to his wife(even after their divorce) and his children, now only Karen, with the utmost concern for their best interests."[38]

31. The *Charman* test provides the approach to deciding whether a discretionary trust forms part of a party's resources. A comparison of H's conduct with Mr Charman's conduct is not relevant to that question.

32. The Court of Appeal accepted the applicability of the *Charman* test.[39] However, the way in which it actually applied that test requires further discussion below.[40]

C.2 Acceding to the wishes of a beneficiary, settlor or protector

33. It should be clearly understood that the *Charman* test does not postulate any impropriety on the trustee's part. This was noted in *Charman v Charman* itself where Wilson LJ stated:
"A trustee – in proper 'control' of the trust – will usually be acting entirely properly if, after careful consideration of all relevant circumstances, he resolves in good faith to accede to a request by the settlor for the exercise of his power of advancement of capital, whether back to the settlor or to any other beneficiary."[41]

34. In like vein, Lloyd LJ stated:
"There is no doubt that trustees can properly take into account any expression of wishes, formal or otherwise, on the part of the settlor as to how they should exercise their discretionary powers, and indeed that they should have regard to any such wishes expressed to them."[42]

35. In *In Re Esteem Settlement*,[43] the Jersey Royal Court[44] provided a helpful explanation of how trusts like the present are generally administered and how trustees may properly arrive at distribution decisions on the basis of requests received:
"[165] …In our judgment there is nothing untoward in beneficiaries making requests of a trustee as to the investment of the trust fund, the acquisition of properties for them to live in or for the refurbishment of properties in which they already live. In our judgment many decisions of this nature are likely to arise because of a request by a beneficiary rather than because of an independent originating action on the part of a trustee. The approach that a trustee should adopt to a request will depend upon the nature of the request, the interests of other beneficiaries and all the surrounding circumstances. Certainly, if he is to be exercising his fiduciary powers in good faith, the trustee must be willing to reject a request if he thinks that this is the right course. But when a trustee concludes that the request is reasonable having regard to all the circumstances of the case and is in the interests of the beneficiary concerned, he should certainly not refuse the request simply in order to assert or prove his independence. His duty remains at all times to act in good faith in the interests of his beneficiaries, not to act against those interests for improper reasons.

[166] In our judgment, where the requests made of trustees are reasonable in the context of all the circumstances, it would be the exception rather than the rule for trustees to refuse such requests. Indeed, as Mr Journeaux accepted, one would expect to find that in the majority of trusts, there had not been a refusal by the trustees of a request by a settlor. This would no doubt be because, in the majority of cases, a settler would be acting reasonably in the interests of himself and his family. This would particularly be so where there was a small close-knit family and where the settlor could be expected to be fully aware of what was in the interests of his family. Indeed, in almost all discretionary trusts, the settlor provides a letter of wishes which expresses informally his desires in relation to the administration of the settlement. Furthermore he may change his wishes from time to time. In our judgment it is

perfectly clear that trustees are entitled … to take account of such wishes as the settlor may from time to time express provided, of course, that the trustees are not in any way bound by them. The trustees must reach their own independent conclusion having taken account of such wishes.

[167] … A lack of any refusal may of course be indicative of the fact that trustees have abdicated their fiduciary duties and are simply following the wishes of the settlor without further consideration. But, as mentioned above, a lack of any refusal may be equally consistent with a properly-administered trust where the trustees have in good faith considered each request of the settler, concluded that it is reasonable and concluded that it is proper to accede to such requests in the interests of one or more of the beneficiaries of the trust. But one does not start, as at times seems to have been the plaintiffs' case, with an attitude that it is very surprising and worthy of criticism that the trustee acceded to all Sheikh Fahad's requests. On the contrary, as the Privy Council said in *Letterstedt v Broers* (9 App Cas 371), trustees exist for the benefit of beneficiaries and it is in our judgment very common that trustees will have perfectly properly acceded to all the requests of a settlor without in any way abdicating their fiduciary duties and responsibilities."

36. Of course there may be cases where the trust is a sham and a settlor controls the purported trustee who does not act in good faith as a trustee when acceding to the settlor's or beneficiary's wishes. Or a trust may be constituted with provisions which result in the settlor being found not to have effectively divested himself of the trust property. That occurred for instance in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited*,[45] where the settlor retained a power to revoke the trust and was held by the Privy Council to have thereby retained rights tantamount to ownership, enabling a judgment creditor to levy execution (via a receiver by way of equitable execution to whom the power of revocation was ordered to be delegated) on the trust assets.[46]

37. In the present case, W accepts that there is no question of the trust being a sham and there is no suggestion of any impropriety on the part of the trustees. The question is whether, looking at all the evidence, the Court should be satisfied that if H were to request the trustee to advance the whole or part of the capital or income of the trust to him, the trustee, acting in accordance with its duties and after having regard to all relevant considerations, would on the balance of probabilities be likely to do so.

C.3 The judgments below on the discretionary trust

38. Unfortunately, DHCJ Carlson appears to have fallen into error in considering it somehow necessary for W to show that the trustee was prepared to act in breach of trust before the Court would treat the trust estate as a resource likely to be available to H.

39. After acknowledging that on the evidence the trustee had shown H "great deference", treating him and the Analogue Group as valued customers of HSBC;[47] that H "does have a very powerful position within the Trust by having retained the power to remove the trustee";[48] and that Mr Lynn[49] had been able "to point to various aspects of the relationship of the trustee with the husband which may be said to demonstrate his strong influence over the affairs of the trust and of the way that the trustee has in the past done what he has asked of it", his Lordship continued:
"… what Mr Lynn has signally failed to achieve is to show that the trustee has acted in breach of trust in the way that it has treated the rights of the other beneficiaries compared to its treatment of the husband."[50]

40. The Judge appears erroneously to have thought that Mr Lynn's submissions, advocating application of the *Charman* test, amounted to an argument that the trust was a sham – which had been disavowed on W's behalf. Thus, his Lordship observed:
"Mr Lynn really has had a very difficult row to hoe. He has disavowed the notion of a sham trust and yet he has had to make submissions which plainly have their place in support of an argument that the Trust is indeed a sham."[51]

41. The learned Judge evidently misunderstood the *Charman* test, leading him to conclude that "it would be wrong to hold that this shareholding (the trust assets) can be viewed by me as a resource of the husband" and to distinguish *Charman* (as I have previously indicated) on the basis of that the quality of H's conduct differed from that of Mr Charman.[52]

42. His Lordship's subsequent reasoning is not easy to follow. Notwithstanding his rejection of the *Charman* test and his decision that the trust assets were not a resource, he nevertheless took two-thirds of the value of the shares held on trust as representing the major part of the matrimonial assets of H and W. That decision appears to be explained by his Lordship'sstatement that while it was incorrect to regard the "three discretionary beneficiaries" – that is, H, W and Karen – as each having a fixed one-third share, it was nevertheless his view that:

"… the trustee in exercising its duty of safeguarding the interests of all the beneficiaries fairly as between themselves would not … countenance any disposition which results in Karen's interest being diluted to below something in the order of 1/3."[53]

43. It therefore appears that the Judge again fell into error in treating Karen as "a beneficiary" with an "interest" to be protected as against the other beneficiaries. In the joint judgment of Gummow and Hayne JJ in *Kennon v Spry*,[54]the description of the position of the wife in that case is apposite for describing Karen's position in the context of the present trust:
"The wife was an eligible object of benefaction of the Trust. She was one of the class of 'beneficiaries' identified in [the Instrument]. The use in that document of the term 'beneficiaries' was inapt insofar as it suggested the existence of any vested beneficial interest in the assets held on the trust of [the Instrument]. Dr Hardingham correctly identified the wife as one of the class of objects of the discretionary power conferred upon the trustee … Furthermore, as an object of these powers the wife hada right in equity to due administration of the Trust. The existence of such a right did not depend upon entitlement to any fixed and transmissible beneficial interest in the trust fund. The right of the wife was accompanied at least by a fiduciary duty on the part of the trustee, the husband, to consider whether and in what way he should exercise the power conferred …"

44. Karen, like the wife there mentioned, did not have any fixed beneficial interest in the trust fund, but was merely owed limited fiduciary duties of the kind described. Moreover, as we shall see,[55] the trust deed expressly authorizes the trustee in its absolute discretion to appoint capital and income to any one member of the class of eligible objects to the exclusion of the others. It was therefore erroneous to think that the trustee had a duty to safeguard the "interests" of "all the beneficiaries fairly as between themselves" so that the trustee "would not countenance" a disposition diluting Karen's "interest" to the stated extent. It was evidently on that incorrect basis that the Judge ascribed only two-thirds of the value of the trust shares to the matrimonial estate.

45. Even though the Court of Appeal acknowledged the applicability of *Charman v Charman*,[56]Cheung JA, writing for the Court, appears to have accepted the Judge's erroneous approach:
"In my view the Judge was correct when he only took into account a two-third interest in the Family Trust as the resource that would likely be available to the

husband for the purpose of assessing the matrimonial assets. In so doing the Judge had expressly recognized that the husband's view that the three of them each has a one-third share is not a correct appreciation of the position. However, the Judge considered (and I agree) that the Trustee in exercising its duty of safeguarding the interest of all the beneficiaries would not countenance any disposition which results in K's interest being diluted below one-third."[57]

His Lordship added:

"This is not a case where the husband said that the whole of the Family Trust should not be taken into account. On the contrary he accepted that it should be taken into account but only in a way that will not adversely affect K's interest."[58]

46. The Court of Appeal identified as a further ground for supporting the Judge's conclusion "the stand taken by the Trustee and also by the Jersey law experts"[59] and proceeded on the basis "that the matrimonial assets include two-thirds and not the whole of the value of the Family Trust".[60]

47. With respect, I can see nothing in the Jersey law opinions to suggest that the trustee is bound to protect a one-third "interest "in the trust attributable to Karen. I turn then to deal with "the stand taken by the trustee".

C.4 Submissions of counsel

48. The trustee has instructed solicitors and counsel to appear throughout these proceedings.[61] However, no evidence was tendered on the trustee's behalf. Instead, at the hearing before DHCJ Carlson, two notes[62] containing opening and closing submissions of counsel setting out the trustee's position were provided to the Court. Two paragraphs, repeated in each of the two notes, were relied on in particular, as is re-iterated in the trustee's printed case[63] lodged in this appeal. They were also given prominence on H's behalf.

49. The first paragraph addresses W's alternative claim for the trust to be varied pursuant to MPPO section 6(1)(c),[64]which I have not so far mentioned, but which relevantly indicates the view taken by the trustee of Karen's "interest". The submission states:
"Although the Court does have the power to vary the Trust under s 6 MPPO, in so far as the 1st Respondent [W] seeks to have 50%of the shares held under the Trust transferred to her, the Trustee has obvious concerns that this will not

be in the interests of the beneficial class as a whole, particularly Karen as an innocent third party, and also the Polytechnic and other potential beneficiaries.This should also be something that the Court is concerned about and gives careful consideration to before exercising its discretion to vary. See *C v C (Ancillary Relief : Nuptial Settlement)* [2004] EWHC 742."[65]

50. This paragraph obviously does not purport to address the *Charman* test but merely expresses reservations against any variation order that the Court might make to vest half of the trust fund in W.It also introduces the curious description of Karen as "an innocent third party". She is, of course, properly seen as a member of the class of eligible objects of the trustee's discretionary powers of appointment with no vested beneficial interest in the trust fund, as described above.

51. The second paragraph, heavily relied on by Ms Anita Yip SC[66] on H's behalf, states as follows:
"Should the Court consider that this is an appropriate case where 'judicious encouragement' should be applied the Trustee's position on this is a neutral one (the Court has seen that there have been various distributions of dividends to the Petitioner in the past) but only to the point as set out above where innocent third party beneficiaries will be adversely affected. Accordingly if an Order applying judicious encouragement is made as part of the final AR [ancillary relief] Order made for the 1st Respondent[W], the position of the Trustee is that no more than 1/3 of the value of the Trust should be realized to meet such an order. This will ensure that the interests of all beneficiaries are preserved."[67]

52. Four points may be made regarding that paragraph. The first is that the trustee has not answered the *Charman* question. It has not addressed the likelihood of its acceding to a hypothetical request by H to advance to him the whole or part of the capital or income of the trust. Instead, the trustee has taken it upon itself to engage in advocacy as to the kind of order that the Court should avoid making.

53. Secondly, Karen is once again apparently assumed to have some sort of accrued one-third interest on the basis that she is an "innocent third party beneficiary" whose interest must be preserved, a proposition which is unwarranted.

54. Thirdly, the paragraph focuses on the *award* which the Court might make on the basis of "judicious encouragement". But the question we are concerned with does not relate to the Court's award. It involves ascertaining the extent of the parties' matrimonial assets as the first step in determining ancillary relief. The Court is asking whether the trust fund should be regarded for the purposes of section 7(1)(a) as a "financial resource" of H. If the Court answers "Yes", it does not thereby decide to *award* the *whole* of the fund to W. It proceeds next to consider the subsequent steps in the ancillary relief exercise, including the question whether and to what extent it should depart from the equal sharing principle.

55. That leads to the fourth point. A decision by the Court that the trust fund is a resource available to H does not disable the trustee from appointing one-third of that fund in favour of Karen. Even if there was to be no departure from the sharing principle, satisfying the award in W's favour out of the trust assets would still leave half of the fund intact, enabling the trustee if so advised to make a one-third appointment in Karen's favour out of that balance.

56. The decision to recognize only two-thirds of the trust fund as H's financial resource therefore does not, in my view, find any support in "the stand taken by the trustee" which, with respect, is legally flawed and not to the point.

57. The foregoing reasons also undermine the central argument advanced on this issue on H's behalf. His written case recalls that:
"Husband asserted that given the presence of the Trustee, there was no need for the court to debate hypothetically what was the 'likelihood' of the Trustee advancing all trust assets to the Husband, granted that Wife accepted the Trustee was acting properly. In this case, the Trustee could and did unequivocally articulate the way they would exercise the discretion on the question of extent of availability."[68]

58. It goes on to state:
"With the participation of the Trustee in the present case, given Wife's concession that this was not a sham trust and the Trustee was acting properly in discharging its duty, the 'likelihood test' is simply not engaged. The Trustee has answered the question: if requested, would the trustee advance the whole of the trust assets to H? The answer was 'no', they were not going to countenance an advancement which would result in a termination of Karen's interests. As submitted, this was well within the terms of the trust and within the trustee's powers."[69]

59. Those propositions are incorrect. The trustee did not in fact address the *Charman* test and the premises underlying those propositions are legally and logically flawed.

C.5 The proper application of the Charman test

60. As the *Charman* test has not been properly applied, it falls to this Court to decide whether it should be satisfied that if H were to request the trustee to advance the whole or part of the capital or income of the trust to him, the trustee, acting in accordance with its duties, would on the balance of probabilities be likely to accede to that request. In making its assessment the Court is able to consider the creation and terms of the trust; H's letters of wishes; the nature of the trust assets; and previous distributions made by the trustee. As was held in *KEWS v NCHC*,[70] the Court looks at the reality of the situation and regards past conduct as a useful guide.

C.5a The creation and terms of the trust

61. As pointed out above, when H created the trust as settlor, he caused himself to be named as protector and also as a potential beneficiary.

62. The deed authorizes the trustee to act through managers and agents[71] and in practice, the trust is operated on the Jersey trustee's behalf by HSBC entities in Hong Kong.[72] The trustee is given power in its absolute discretion from time to time to appoint capital and to distribute income to any eligible object of its discretion to the exclusion of the others.[73] It also has power in its absolute discretion to appoint additional persons to become beneficiaries.[74]

63. As settlor and protector, H's wishes, conveyed from time to time in letters of wishes, are taken into account by the trustee in considering the exercise of its discretion. As protector, H has the power to remove the trustee and appoint a new trustee.[75] Furthermore, certain powers conferred on the trustee are only exercisable with H's consent as protector. These include the power to remove potential beneficiaries[76] and the power to alter, revoke or add to any provisions of the deed.[77]

64. While the settlement constitutes the trustee the 84.63% majority shareholder of Analogue, the deed authorizes the trustee to leave the administration, management and conduct of Analogue's business to its directors and managers, relieving the trustee of any responsibility in that connection.[78]

65. Relevant to the *Charman* test, the following features may therefore be noted: (i) In making himself protector, H has reserved to himself important powers, including the power to remove the trustee, obviously intending his views as to the administration of the trust to be given great weight. (ii) In making himself a potential beneficiary, he intended to benefit from the trustee's distributions of capital and income. (iii) He intended the trustees to have only the passive role of a shareholder, leaving it to him to run the Analogue Group. (iv) Karen is one of the discretionary objects and has no vested beneficial interest in the trust assets. (v) There is no impediment to the trustee appointing the whole or part of the capital or income to a single beneficiary to the exclusion of all the others.

C.5b H's power to replace the trustee

66. One controversy developed in argument concerns the significance of H's power as protector to replace the trustee. In answer toW's argument that such power indicates a high degree of control over the trustee, H replied that the power is "toothless" because(as W's own Jersey law expert states) "the office of protector [is] fiduciary" and not personal to the protector.[79]

67. It is incorrect to state categorically that a protector must be a fiduciary or that a power to replace a trustee is necessarily fiduciary. The position is explained in an article by Matthew Conaglen and Elizabeth Weaver entitled "*Protectors as fiduciaries: theory and practice*".[80] As the learned authors point out, the term "protector" is not a term of art and generally "signifies little more than that a person who is not the (or a) trustee has been granted a power affecting the operation of the trust".[81] One cannot assume that such a power is held in a fiduciary capacity requiring it to be exercised only in the interests of others to the exclusion of the donee of the power. Whether a power to replace a trustee is fiduciary depends on the construction of the trust instrument.[82]

68. In the present case, H's power as protector to replace the trustee[83] is not subject to any express limitations. Even if the deed were construed to require that power to be exercised in the interests of the potential beneficiaries, that class includes H himself. That makes it highly debatable whether its exercise is subject to fiduciary duties and, if so, what such duties are. As the learned authors of the article point out:

"Where the purpose and intention of the settlor was that the protector was also to be able to benefit under the trusts, the courts will usually respect that intention and not find fiduciary obligations which would disable the protector from acting in his own interest, although they might still hold that the protector

owes limited or qualified fiduciary duties to consider the exercise of his powers on a regular basis. On the other hand, the cases show that powers which impinge upon the trustees' position as 'ultimate guardians of the trust' are likely to be treated as fiduciary, to some degree at least, so that the court can retain a supervisory jurisdiction."[84]

69. The question whether the power of replacement is fiduciary does not directly arise in the present case. It is only likely to become relevant in a practical sense if a conflict or lack of harmony were to develop between H and the trustee, such discord often being a legitimate ground for replacing a trustee.[85] Everything indicates that there is and has always been the fullest cooperation between the trustee and H so that the power is of no immediate significance. Nonetheless, it is relevant to note for the purposes of the *Charman* test that H (as the trustee undoubtedly is aware) has the ultimate power to replace the trustee which, in the event of a serious disagreement as to the operation of the trust, might well be lawfully exercisable.

C.5c H's letters of wishes

70. As was pointed out in the *Esteem Settlement* case, it is usual for the settlor of a discretionary trust to provide letters of wishes in relation to the administration of the trust, changing his wishes from time to time. Trustees are entitled to take account of such wishes while not being bound by them. In the present case, prior to the hearings below, H had issued five letters of wishes, each superseding the previous.[86] They all followed the same pattern.

71. Thus, the letter of wishes dated 14 May 2010 has the following aspects. Having identified the Analogue shares as constituting the trust fund, it goes on express H's desire:

(a) that "following [his] death, Mr Fong Chun Yau shall be appointed as the Managing Director of [Analogue] and the Analogue Group… for a period of two years after which the position of Managing Director shall be decided by the shareholders at their discretion;"

(b) that after his death, Karen should be appointed protector;

(c) that the trustee should continue to hold its present interests in Analogue and that "following [his] death the balance of the Trust Fund … be divided into three equal parts or shares" one for the benefit of "my soon-to-be former wife, Kay", one for Karen and one for three named colleagues in the Analogue Group,

with The Hong Kong Polytechnic University as the residuary beneficiary if Kay and Karen should predecease H without issue from Karen.

72. H added a general direction that:
"In considering whether and how to exercise your powers and discretions, it is my wish that you should consult with me during my lifetime and thereafter with my daughter, Karen. I would also like you to consider any suggestions put to you by me or, after my death, by Karen and, if you consider them wise, to act upon such suggestions."

73. It is clear that the trustee has accorded H's desires great weight. When in a letter of wishes signed on 22 January 1996, H indicated a wish that The Hong Kong Polytechnic University should be a potential beneficiary, the trustee executed a deed four days later appointing the University to the class of eligible objects. Then, after H moved out of Twin Bay Villas and W issued her divorce petition on6 November 2008, the trustee, at H's request, transferred all its shares in Realty Limited (which owned Twin Bay Villas) to W byan instrument dated 23 December 2008. And when applying for directions from the Jersey Court[87] regarding its participation in these proceedings, the trustee referred to the letter of wishes of 14 May 2010.

74. The letters of wishes confirm that the trust is principally intended to function as a substitute for H's will in relation to the Analogue shares. They focus on what is to happen following his death. Just as a testator is free to change his will, it was evidently understood that any changes desired by H would be treated with respect by the trustee.

75. What also emerges from the letters is that it is plainly not H's intention that the trust assets should be divided up or that he should relinquish his position of influence during his lifetime. He only contemplates such matters occurring after his death. He makes it clear that he should be consulted by the trustee and that it should consider any suggestions which he might put to it during his lifetime. Karen is only to be consulted and her suggestions given weight after his death. There is no suggestion that Karen or anyone else should acquire any vested beneficial interest in the trust assets during H's lifetime.[88]

76. In the context of *Charman v Charman*, the terms of the trust and the letters of wishes indicate that H has always intended to occupy and in fact occupies a dominant position in relation to the administration of the trust. The trustee is plainly likely to treat any request he might make for a distribution with great deference.

C.5d The nature of the trust assets and distributions made by the trustee

77. It is important to note that the sole asset of the trust is the 84.63% parcel of shares in Analogue.[89] The underlying group of companies was described by the expert valuer as consisting of "13 electrical and mechanical engineering companies employing around 1,500 staff and achieving a turnover in excess of HKD2.5 billion a year".[90]

78. It is not surprising that the trustee is assigned an entirely passive role as shareholder and plays no part in the management of such a group. It is even relieved of any obligation to exercise the voting powers or rights conferred by its shareholding.[91] A trustee in such a situation is obviously in no position to second guess any requests made by H as to how those shares should be voted or his wishes touching on the operations or resources of the Group. The trustee would be entitled to assume that acceding to such wishes would generally be in the best interests of the underlying companies and thus of the potential beneficiaries. H is thus not only the Group's managing director, but also acts effectively as its controlling shareholder. Indeed, the letters of wishes show that he seeks to influence the management of the Group even after his death by stipulating who should then be appointed managing director.

79. This is not a trust in which the trustee manages and invests the trust fund to produce income. The only income of the trust consists of dividends declared by Analogue and the decision whether, when and how much to declare by way of dividend is taken by the Analogue board controlled by H. Unless a dividend is declared, the trust has no income. And when a dividend has been declared, the trustee has, quite understandably, invariably complied with H's wishes as to how the money which he has sent its way should be applied– namely, distributed to H himself.

80. The following distributions, all made to H personally following declarations of dividends, occurred prior to the ancillary relief proceedings:

29 March 2001	$8,463,333
14 March 2002	$846,333
16 July 2008	$8,463,333
30 July 2009	$25,390,000
21 February 2011	$25,390,000

Total	$68,552,999

81. The modus operandi is revealing. On 26 March 2001 for example, H wrote to the trustee as Analogue's managing director announcing that a dividend of $833.3333 per share had been declared and sent it a cheque for $8,463,333 being its entitlement as holder of 10,156shares. On the same day, the trustee wrote to H stating: "… we intend to exercise our trustee power to make a distribution from the trust fund to you as beneficiary thereof" and on 29 March 2001, the distribution of $8,463,333 was credited to H's account. On 9 April 2001, H paid the trustee $5,000 as its fee for "arranging the distribution".

82. The procedure was later streamlined. By letter dated 10 July 2008, Analogue again informed the trustee that a dividend of $833.3333per share had been declared, entitling the trustee to payment of $8,463,333 as shareholder. The letter went on to state:
"As Mr Otto Poon wishes to have the said dividend to be received by HSBC International Trustee Ltd distributed to him, we would therefore appreciate if you could kindly send us your letter of instructions to pay the said dividend directly into Mr Poon's bank account."

83. The trustee obliged. By letter dated 16 July 2008 it instructed Analogue to pay the dividend into H's account. H therefore caused the dividend to be declared and notionally distributed to him by the trust without the money ever passing through the hands of the trustee.

C.5e Satisfying the awards of the courts below

84. A crucial indication relevant to the *Charman* test is the glaringly important fact that H has indeed been able to draw on the trust as his resource for the purpose of satisfying the awards made in favour of W.

85. On 10 February 2012, DHCJ Carlson awarded $370 million to W and ordered H to pay a first instalment of $250 million. This led H to cause Analogue to declare a dividend on 12 April 2012 of which $262 million was received by the trust and, according to the trustee,[92] "advanced as a loan" to H to enable him to satisfy the Court's order which he did on 30 May 2012.

86. On 25 March 2013, as we have seen, the Court of Appeal increased the award in W's favour and ordered H to pay a lump sum of $510million by an initial instalment of $250 million followed by two equal instalments of $130 million on or before 1 March 2014 and2015 respectively. The Court was informed that the first two instalments have duly been paid.

87. The trustee also recently disclosed that a fresh letter of wishes dated 12 November 2013 had been received from H. It follows the pattern of identifying H's choice of managing director and protector following his own death and stating his wishes as to how the balance of the fund should then be divided. H goes on to request the trustee to advance to him from the trust assets the sums needed to satisfy the Courts' awards in the following terms:
"My former wife Kay should receive in aggregate an amount equal to the amount awarded by the Hong Kong Court under [DHCJ Carlson'sjudgment] ("the Judgment") as varied and finally determined on appeal by the Court of Appeal or the Court of Final Appeal (as the case may be) less any amounts already advanced or paid to her under or in respect of these proceedings. For the purpose of calculating amounts paid to Kay under the Judgment, amounts advanced to myself by way of distribution or loan and paid by me to Kay shall be deemed as amounts paid by the Trustee to Kay. On payment of the amount awarded to Kay under the Judgment (as varied and finally determined on appeal as aforesaid) it is my request that Kay should be excluded from further benefit under the Trust."

88. Given that the payments already made by H were funded by the trustee's distributions, there is every reason to believe that the trustee will comply with H's request to meet the Court's award as determined on final appeal out of the trust assets (no doubt in turn funded by dividends which H will cause Analogue to declare). There could, in my view, be no clearer evidence of the overwhelming likelihood that the trustee, acting in accordance with its duties, would if requested by H, advance the whole or part of the capital or income of the trust to him.

C.6 Conclusion as to the discretionary trust

89. It follows that the entire trust fund valued at $1,560,686,000 should be regarded as a financial resource available to H for the purposes of section 7(1)(a). The Judge and the Court of Appeal were wrong to confine the parties' matrimonial assets represented by the trust shares to two-thirds of their assessed value.

90. The combined matrimonial assets of the parties to be taken into account in assessing ancillary relief therefore consist of (i) the afore said sum of $1,560,686,000, plus (ii) H's assets of $46,052,707, plus (iii) W's assets of $58,259,660, plus (iv) $15 million representing the value of the flat in Westland Gardens. Those figures total $1,679,998,367. Applying the "yardstick of equality",50% of that sum comes to $839,999,183.50, which may be rounded

up to $840 million as the starting-point. If the equal sharing principle were to be applied without modification W would be entitled to payment of that sum less the value of the matrimonial assets already in her possession (her own assets and the Westland Gardens flat totalling$73,259,660). That would leave her an entitlement to $766,740,340 of which H has already paid $380 million in partial satisfaction of the awards below. If these tentative calculations are correct, that would mean that a balance of $386,740,340, in round figures$386,700,000, remains to be paid unless the sharing principle is departed from resulting in a lower award.

91. Mr Lynn devoted considerable efforts on the alternative argument that the Court should exercise its powers under MPPO section 6(1)(c)to vary the trust, settling half of its assets on W in case the Court decided that the trust fund is not a financial resource available to H. In the light of the conclusion I have reached, that question does not arise.

D. Should there be a departure from the principle of equality?

92. I turn then to consider the second main question in this appeal: Should there be a departure from the equality principle on the basis that the parties' separation ought to deprive W of an equal share in the increased Group profits which accrued after February 2001?

93. Although he was later persuaded to depart from equality, DHCJ Carlson began his judgment by describing this marriage as a paradigm case for adopting the sharing principle:

"On any view, the 'yardstick of equality' as a starting point, which Hong Kong matrimonial courts are now required to give the most serious consideration in applications such as this, must have particular resonance in this case where the wife, after a very long marriage in which she has fully played her part as wife, mother and supporter of the husband in his business successes, comes to court as worthy of the highest consideration. Prima facie, if ever the yardstick of equality is to be wielded it must be in a case such [as] this."[93]

94. His Lordship was plainly right to take that view, at least for the greatest span of the marriage. W's contribution to the family, bringing up the children, settling in Canada to acquire Canadian citizenship, making economies and taking up arduous nursing jobs(sometimes working double shifts) while offering support to H through good and bad times over decades, presents a classic example of a marital partnership that justifies equal sharing of the matrimonial assets upon the marriage coming to an end.

95. H recognizes this, at least to some extent. In his first affirmation,[94] he states:
"It was undoubted that during the first 10 years of the marriage both parties contributed equally and unstintingly towards the marriage and the family. Kay worked, looked after the children and achieved savings. I worked hard on building up the business and the first two years were really scary. There was nothing happening and no business coming in for the first two years. Then everything started coming together, the business took off and we began to enjoy some stability. …. We were even able to send Karen and Richard to boarding schools in England."

96. The reference to "the first 10 years" must surely be an understatement. As we have seen, the business only really began to take off in the 1990s, so that H appears to be referring to a period which runs into the third decade of the marriage. Later in the same affirmation,[95] he states more broadly: "… I fully recognise Kay's full contribution to the marriage and her entitlement to a fair share of all my assets including the companies" in the context of a request that the Court should not make an award which involves transferring Analogue shares to W.

97. This is therefore a case where the equality principle should be adopted not merely notionally, but as a starting-point which reflects a fair basis for sharing the matrimonial assets upon dissolution of a 40 year marriage. As was stressed in *LKW v DD*,[96] the "yardstick of equality" is applied "with a view to eliminating insidious discrimination and promoting fairness" and "should be departed from only for good, articulated reasons".

D.1 The Judge's reasons for departing from equality

98. The course of the divorce proceedings has been described in Section B above. It will be recalled that they were undefended and that the decree was granted on the basis of H's petition grounded on two years' separation. It will also be recalled that both parties affirmed that separation took place in February 2001. In considering whether there should be a departure from the equality principle, the Judge held that W was estopped from denying that separation had occurred in 2001. He held that W could not be heard to say that they had only been separated since 2008 because that was less than two years immediately preceding presentation of the petition.[97]

99. On that basis, his Lordship concluded that there ought to be a departure from equality for two main reasons. First, he held that since the parties had

lived separate lives as from February 2001, "some adjustment should be made in the husband's favour" so that W was not to share equally in the substantial profits of the Analogue Group which had accrued after that date.[98] His Lordship did not quantify that adjustment since he regarded his second reason for departing from the sharing principle, namely, "the issue of the company's liquidity" as "a very much stronger factor in potentially driving the court away from equality"; so much so that "any reduction due to post-separation accruals is likely to be theoretical rather than real and which will be subsumed by the issue of the company's liquidity".[99]

100. I shall deal with the estoppel question later.[100]However, the main reason for departure articulated by the Judge – fears for the Group's liquidity – was rejected as unfounded by the Court of Appeal.[101] Cheung JA points out that the expert valuer testified that as at 30 December 2010, the company had $446 million which was not needed for the ongoing operations of the business and that, according to the Group's financial statements for the following year, bank balances and cash increased by some $227 million to $749,593,757. The liquidity argument is in my view unsound and is in any event no longer supported by H in this Court. The principal reason articulated by the Judge for departing from equality was therefore unsound.

D.2 The evidence as to separation

101. Although DHCJ Carlson ultimately excluded such evidence on the basis of estoppel, there was a considerable body of evidence before the Court regarding the parties' relationship between 2001 and 2008. As noted above, the tragic deaths of Heather and Richard had had a devastating effect on the parties' relationship, leaving them emotionally numb and mutually unable to communicate. As the Judge put it, there was no more warmth or connection between the parties.

102. However, after leaving the Fulham Gardens flat following Richard's death, they did not go their separate ways but moved together to the Twin Bay Villas house in February 2001. As to their relationship in the period which followed, his Lordship found as follows:

"What is agreed is that they had separate bedrooms. … The wife says that whilst this may well have by then become an unhappy and unfulfilling marriage, it remained a marriage. She would polish his shoes, see to it that his laundry was done and if she did not always prepare his meals herself, they had a maid, she saw to it that his meals were prepared and kept warm for him if he returned home late. They would sometimes have meals at home together and she

continued to be a 'corporate wife', attending functions and entertaining, as his wife, clients from overseas as well as Hong Kong government officials and mainland officials. They travelled together to the mainland on company business where she was seen to be his wife. They even went on a cruise together to Greece and shared the same cabin. For the first time in court she said that on one occasion they even had sexual intercourse which he has denied.[102] On one or perhaps two occasions she performed the 'wifely' task of driving him to the airport when he had to travel on business. Usually he employed a driver to do this sort of thing, who I presume on this occasion, was not available.
They even entertained together at home. He would have barbecues for friends and for young engineers who the husband wished to encourage in their careers.

This 'modus vivendi' continued until the husband finally left the home and went to live elsewhere in 2008."[103]

103. Ms Anita Yip SC acknowledged that W's evidence to the aforesaid effect was uncontradicted. Indeed, although H suggested that theirs was "a mere shell of a marriage", he added that it had been "preserved for convenience, appearances, for friends and relatives and for the odd family [or] business occasion".[104] He elaborated on this in cross-examination, stating:
"… I think we all have face, we, you know, Chinese people are so face conscious, I think a divorced person would be looked upon by his friends, his business associates and the community as an outclassed [sic] person. And as a businessman running a business with a number of quite important public service on my shoulder, I do not wish to be seen by the community or by my business friends whatever to be divorced or to be separated physically because when I move out, everybody knows. … I could have left but I did not, I decided not to leave because of those reasons I've just mentioned."

104. The Judge evidently recognized that all this militated against there having been a separation in 2001 but apparently felt unable to act on such evidence because of the conclusion he had reached on estoppel. His Lordship observed:
"If I were to accept the wife's evidence on the way that they ordered their lives until he finally departed in 2008, it could not be said, on any view of the matter, that these parties were living separate lives. This would need to be viewed as a single household within an unhappy marriage that was, no doubt, in terminal decline.

The conclusion that I would need to come to is that after so many years together, the parties continued to live within the same single household almost as a matter of habit. Whilst there was no tenderness, or feeling they still presented the outward appearance of a married couple appearing together at functions, travelling together on business, once going on a cruise and entertaining at home together. This apart from the performance of wifely services like seeing to laundry, polishing shoes and on occasions having meals together and sometimes watching television programmes together.

The husband has even signed a statement at the wife's insistence affirming their marriage."[105]

105. The signed statement referred to was made in circumstances explained in W's 3rd affirmation.[106] She recounted how on 4 May 2008, she discovered H's personal effects in a flat occupied by Queenie Law. H had previously admitted to having had an extra-marital relationship in 1988 with Ms Law, an employee at Analogue, but he had assured W that the affair had been terminated. It therefore appeared to W that H had maintained a clandestine relationship with Ms Law for some twenty years. She states:
"I was very unhappy and cried, and he asked me what happened. I told him I knew he had a woman. I said I want to have a complete family. He said he had done so. I said he always did not keep promise. Then I asked him to write a note to me."[107]

106. The note, dated 10 May 2008 and signed by H, is exhibited. In translation, it states: "My wife Kan Lai Kwan, I want a complete family forever harmonious and happy".

107. A week later, H and W went on a trip to France together. It was intended to be a two-week trip but, when H said he would return to Hong Kong first, W insisted on returning with him since she was worried about Queenie Law.[108] After returning, W had an emotional confrontation with Ms Law. H moved out on 3 July 2008 but they later travelled to Singapore together only to have another row there.[109] W states that a final attempt was made at reconciliation when in October 2008, H asked her to book a cruise holiday but, when that did not materialise, W lodged her divorce petition on 6 November 2008.

108. The learned Judge stated his factual conclusions as follows:
"Taking all of the evidence as a whole I come to the following conclusions: Firstly, any tenderness or intimacy had ended by 2001.I reject the wife's evidence that the parties had engaged in sexual intercourse as recently 2008 as she has suggested in her oral evidence. She had in fact said in cross-examination that the last time they had sex was in 2001, contradicting her evidence in chief. Secondly, they occupied separate bedrooms. Thirdly, communication was very limited. Fourthly, they had occasional meals together at home. These features lead me to the overall conclusion that none of the indicia of a matrimonial relationship were present. This was a bare shell and nothing more. Accordingly, I find as a fact that they were separated, as the husband alleges, from February2001."[110]

109. With great respect, those conclusions are unconvincing. The four matters mentioned – lack of sexual intimacy, separate bedrooms, very limited communication and occasional meals together – appear insignificant when contrasted with the many facets of their ongoing relationship.

110. As the Judge recognized, the evidence tended to show that while the marriage was unhappy, with "no tenderness or feeling", the parties continued their habitual relationship founded on their very long marriage, with W continuing to do domestic chores for H; entertaining at home and accompanying H to business events to keep up appearances as a "corporate wife" to save H's face in front of his associates and friends; going on trips together; and having a row on W discovering H's continued relationship with his mistress – W reacting very much as a jealous wife and H acting like a husband seeking to placate her with a note which acknowledges her as his wife and records a desire for a harmonious and complete family life in May 2008. In my view, the evidence unmistakeably points to the marriage (unhappy though it was) having continued until the parties finally separated when H moved out of the house in mid-2008.

D.3 The Court of Appeal's decision

111. The Court of Appeal was also of the view that the evidence had "simply not shown that there is the necessary degree of separateness".[111] Cheung JA pointed to the matters to which attention has been drawn above and concluded that the parties did not separate in 2001.[112]But because of the doctrine of estoppel, the Court of Appeal felt unable to find that separation had only occurred in 2008 even though that was very much what the evidence indicated. Cheung JA held that:

"… the wife certainly cannot rely on separation that only began in 2008 because it will destroy the very foundation of the decree, namely, there was a two-year separation."[113]

112. His Lordship's solution was to hold that the separation had occurred in 2007. He reasoned that while W was estopped from asserting a 2008 separation, she was not precluded from denying that the separation occurred in February 2001 and could validly assert that separation had occurred in February 2007.[114] Understandably, objection was taken on H's behalf since there was no factual foundation for such a finding. Cheung JA's response was as follows:
"Certainly there is no reference in the evidence to this period of time but in my view the reliance on this time is really a practical solution in order to reconcile the requirement of honouring the integrity of the decree and at the same time allowing the wife to challenge in the ancillary relief proceedings that the separation already began in 2001."[115]

113. Having found that the separation occurred only in 2007, the Court of Appeal held that there should be no departure from the equality principle on the basis of post-separation accruals to the value of the trust estate. The period between 2001 and 2007 was irrelevant and post-2007 accruals were seen to be "based on the business foundation that the company has built up from its earlier years" to which W had equally contributed over the life of the lengthy marriage.[116]

114. With respect, I am unable to accept the adoption of a February 2007 separation date as a "practical solution". Whether parties have separated is a question of fact and the evidence simply does not support a finding that separation occurred in February 2007. The real question is whether the Judge and the Court of Appeal were right to hold that they were estopped from finding that separation in fact occurred in mid-2008.

D.4 Estoppel

D.4a The authorities

115. In approaching the question of estoppel in a case like the present, it is essential to recognize that the Court is exercising a statutory jurisdiction under MPPO section 7(1)(a) which states: "It shall be the duty of the court … to have regard to the conduct of the parties and *all the circumstances of the case* …" Estoppel is a doctrine which regulates the relations between parties. It precludes one party from unconscionably contradicting certain facts or certain

proprietary expectations bearing upon the position assumed by another party. But the Court remains subject to its statutory duty to have regard to all the circumstances of the case, regardless of the position assumed as between the parties.

116. This was acknowledged by the English Court of Appeal in *Thompson v Thompson*,[117] a divorce case which came before the court after fully contested maintenance proceedings involving cross-charges of cruelty, in which the husband's version alleging the wife's cruelty was accepted. When the husband petitioned for divorce, the wife sought to rely on the same allegations of cruelty that she had unsuccessfully made against him in the maintenance proceedings. The husband argued that she was estopped from doing so. However, the divorce proceedings were subject to section 4 of the Matrimonial Causes Act 1950 which provided that: "On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged". Denning LJ dealt with the estoppel argument, stating:
"There is no doubt, to my mind, that if the doctrine of res judicata applies in its full force to the Divorce Division of the High Court, the wife is so estopped. … The question in this case is, however, whether those ordinary principles do apply to the Divorce Division. The answer is, I think, that they do apply, but subject to the important qualification that it is the statutory duty of the divorce court to inquire into the truth of a petition – and of any counter charge – which is properly before it, and no doctrine of estoppel by res judicata can abrogate that duty of the court. The situation has been neatly summarized by saying that in the divorce court 'estoppels bind the parties but do not bind the court': but this is perhaps a little too abbreviated. The full proposition is that, once an issue of a matrimonial offence has been litigated between the parties and decided by a competent court, neither party can claim as of right to reopen the issue and litigate it all over again if the other party objects …: but the divorce court has the right, and indeed the duty in a proper case, to reopen the issue, or to allow either party to reopen it, despite the objection of the other party… If the court does decide to reopen the matter, then there is no longer any estoppel on either party. Each can go into the matter afresh."[118]

117. Unfortunately, in *Hull v Hull*,[119] the import of *Thompson v Thompson* was, in my view, unjustifiably narrowed. Mr Hull was seeking custody of the children after his wife had been granted a decree nisi of divorce in an undefended suit on the ground of his desertion. In the custody proceedings, he sought to allege that it was in fact his wife who had deserted him and also that she had committed undisclosed adultery. Sachs J held that

the husband was estopped from making those allegations, distinguishing *Thompson v Thompson* on the ground that a different statutory provision was involved. That was surprising since the relevant words of section 1 of the Guardianship of Infants Act, 1925 provided as follows:

"Where in any proceeding before any court … the custody … of an infant, … is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, … in respect of such custody, … is superior to that of the mother, or the claim of the mother is superior to that of the father."[120]

118. Sachs J construed those words as dealing "simply with the weight to be attached to facts once they are proved".[121] But, with respect, I do not think that in a custody case where the court is under a duty to "regard the welfare of the infant as the first and paramount consideration", the court should exclude itself from considering evidence which might have a material bearing on the child's welfare on the ground of an estoppel, especially where the estoppel is based on earlier undefended proceedings where the conduct of the parents had not been investigated.

119. It is noteworthy that nine years later in *Porter v Porter*,[122] a case about how discretion in awarding maintenance should be approached, Sachs LJ recognized that the courts' attitude had changed:
"The practice as to discretion has thus naturally varied on this matter as on many others — such as the discretion exercised when granting a decree, where the ambit of the discretion has fundamentally altered in the past 25 years. In the exercise of any such discretion the law is a living thing moving with the times and not a creature of dead or moribund ways of thought."[123]

120. In marked contrast with the *Hull v Hull* approach, Sachs LJ cited with approval what Denning LJ had stated back in 1950 in *Trestain v Trestain*,[124] moving away from being constrained by the implications of earlier proceedings:
"I desire to say emphatically that the fact that the husband has obtained this decree does not give a true picture of the conduct of the parties. I agree that the marriage has irretrievably broken down and that it is better dissolved. So let it be dissolved. But when it comes to maintenance, or any of the other ancillary questions which follow on divorce, then let the truth be seen."

121. In *Porter v Porter*,[125]decided two years later, Ormrod J pointed to two competing policy interests affecting the approach to estoppel in matrimonial cases:

"This then is yet another case on the much argued problem of estoppel in matrimonial causes. It is a great pity that it has not yet been finally laid to rest. It arises from a conflict between two issues of public policy; on the one hand, the desirability of finality in litigation, which means the very proper and reasonable wish to prevent the same parties litigating the same issues off act in the suit, and again in chambers on ancillary applications; and, on the other hand, the importance in the interests of justice to the individuals concerned, that the discretionary powers of the court in ancillary matters should be exercised with a full knowledge of all the relevant facts, rather than on a basis, partly of fact and partly of assumptions, arising from such rules as estoppel. It is particularly difficult to do justice in so personal a field as matrimonial cases if the realities of the situation are allowed to be obscured by the application of rules or principles which in other situations assist the cause of justice."

D.4b The proper approach to estoppel in matrimonial cases

122. In my view, the approach of Denning LJ in *Thompson v Thompson* should be adopted. It provides a measured and flexible approach which goes a long way towards reconciling those two competing policy interests, giving priority to the latter where appropriate. The parties are bound by the estoppel but, where the circumstances demand the Court's intervention, it is free to override that estoppel in exercising its statutory jurisdiction and to act upon evidence which is material to its determination.

123. Ms Yip sought to argue that since the power to grant ancillary relief arose "on granting a decree of divorce",[126]W was bound to adhere to the ground on which the decree was granted or else, as she puts it: "… the integrity of the decree of divorce would fall apart. In turn, this would mean that no ancillary relief could be obtained."[127] I do not accept that argument. In performing its statutory duty of having regard to all the circumstances of the case, including circumstances which may be inconsistent with the basis upon which the undefended decree was obtained, the Court is not involved in setting aside the decree. No one has sought to have it rescinded and jurisdiction to deal with ancillary relief on the basis of an extant decree is unaffected.

124. The *Thompson v Thompson* approach accords with the recognized quasi-inquisitorial role of the Judge in a matrimonial case. As Thorpe LJ put it in *Parra v Parra*:[128]
"The quasi-inquisitorial role of the judge in ancillary relief litigation obliges him to investigate issues which he considers relevant to outcome even if not advanced by either party. Equally he is not bound to adopt a conclusion upon which the parties have agreed."

125. As Lord Sumption JSC explained in *Prest v Prest*:[129]
"… claims for ancillary financial relief in matrimonial proceedings … have some important distinctive features. There is a public interest in the proper maintenance of the wife by her former husband, especially (but not only) where the interests of the children are engaged. Partly for that reason, the proceedings although in form adversarial have a substantial inquisitorial element."

126. Similarly, Baroness Hale of Richmond JSC stated:
"I would … emphasise the special nature of proceedings for financial relief and property adjustment under the Matrimonial Causes Act 1973 … There is a public interest in spouses making proper provision for one another, both during and after their marriage, in particular when there are children to be cared for and educated, but also for all the other reasons explored in cases such as *McFarlane v McFarlane* [2006] 2 AC 618. This means that the court's role is an inquisitorial one."[130]

D.4c Conclusion as to estoppel

127. In my view, the Judge and the Court of Appeal were wrong in law to hold that the Court was precluded by the doctrine of estoppel from finding that separation occurred only in mid-2008. The present case is one calling for the Court to override the estoppel created as between the parties. The suit was undefended and the facts relating to separation were not investigated at any stage prior to the ancillary relief proceedings. The evidence referred to in Section D.2 above compellingly points to separation occurring only as from mid-2008. Those are circumstances to which the Court ought properly to have regard if it is to make fair financial provision orders for distribution of the matrimonial assets on dissolution.

D.5 Conclusion as to departure from equality

128. When considering ancillary relief, the financial position is generally approached on the basis of the values existing at the date when the hearing takes place. [131]

129. Where, however, there has been a substantial period of separation prior to the hearing and where during that period, there has been a steep increase in the value of the matrimonial assets attributable to the independent business or professional efforts by one spouse, unmatched by any contribution from the other spouse, grounds may exist for departing from equality.[132] In some such cases, fairness may dictate that the non-contributing spouse has no claim to share equally in the post-separation accrual to the matrimonial assets.

130. There are opposing arguments as to whether a spouse should be excluded in such cases. As Nicholas Mostyn QC explained in *Rossi v Rossi*:[133]
"…it can legitimately be argued that the party in question has traded with the other party's undivided share and so should share with that party the profit that has been generated. On the other hand it can equally convincingly be said that the second party hasnot contributed to the industry or endeavour that gave rise to the profit or growth and so it is unfair that the second party should share to the same extent in that profit as the first who made all the effort…."

131. In *Cowan v Cowan*,[134] Thorpe LJ favoured the former approach and visualized only rare and exceptional departures from equality by reason of post-separation accruals:
"The assessment of assets must be at the date of trial or appeal. The language of the statute requires that. Exceptions to that rule are rare and probably confined to cases where one party has deliberately or recklessly wasted assets in anticipation of trial. In this case the reality is that the husband traded his wife's unascertained share as well as his own between separation and trial… The wife's share went on risk and she is plainly entitled to what in the event has proved to be a substantial profit. If this factor has any relevance it is within the evaluation of the husband's exceptional contribution."

132. His Lordship's reference to "exceptional contribution" was a reference to cases where it can be established that the increase is only attributable to what has been called one spouse's "stellar" contribution. As discussed in *LKW v DD* cases in that class are necessarily rare and exceptional.[135]H makes no claim to "stellar contribution" in respect of the increased profits of the business in the present case.

133. The summary of the principles provided in *Rossi v Rossi*[136] is broader than Thrope LJ's stricter approach and is, in my view, preferable. It points to various factors relevant to deciding whether a post-separation accrual justifies departure from equality, including the length of the marriage and separation, the nature of the property accruing and the means or efforts by which it was acquired, and so forth. Of particular present relevance is the following passage: "Assets acquired or created by one party after (or during a period of) separation may qualify as non-matrimonial property if it can be said that the property in question was acquired or created by a party by virtue of his personal industry and not by use (other than incidental use) of an asset which has been created during the marriage and in respect of which the other party can validly ascertain unascertained share. Obviously, passive economic growth on matrimonial property that arises after separation will not qualify as non-matrimonial property."[137]

134. In my view, the increased Analogue Group profits do not provide a ground for departure from the equal sharing principle in the present case. The parties married in January 1968 and separated in mid-2008, over 40 years later. The period of separation prior to the hearing date was relatively insignificant. The profits accruing to the Analogue Group during the post-separation period arose out of the business which had been built up in the course of the marriage, in respect of which W can legitimately assert an unascertained share on the principles accepted in *LKW v DD*.[138]

135. As no other ground for departing from equality is contended for, I conclude that the Court of Appeal was right to hold that there should be no such departure in the present case.

E. Disposal of this appeal

136. For the foregoing reasons, I would allow W's appeal and dismiss H's appeal.

E.1 Quantum

137. In Section C.6 above, I arrived at a tentatively calculated balance of $386.7 million remaining to be paid by H on the footing that there is no departure from equality. That represents an increase of $156.7 million over the Court of Appeal's award (in respect of which an instalment of $130 million payable on or before 1 March 2015 is outstanding). The calculation is necessarily tentative since the parties have not been heard as to whether that calculation correctly reflects the conclusions reached in this judgment. Miss Yip also requested an

opportunity to make submissions regarding instalments and other payment arrangements in the event that the award was increased. The parties should plainly be afforded the chance to make such submissions. I would accordingly direct that the parties be at liberty to lodge written submissions as to the quantum of the award and as to directions for its payment.

E.2 Costs

E.2a Costs at first instance

138. In W's printed case, she seeks an order for "costs here and below".[139] However, the position in relation to the proceedings at first instance is unclear. In his formal judgment in HCMC 2/2010 dated 10February 2012, DHCJ Carlson directed that there should be no order as to costs as between H and W. However, in the Court of Appeal's judgment on costs,[140] Cheung JA states that the Judge had ordered H to pay W the costs of the ancillary relief proceedings and that there was no appeal against that decision, adding that the Court had been told that the costs had been paid on 20 August 2012. It is therefore unclear whether the first instance order is in issue. I would direct that the parties be at liberty, if so advised, to address that question in written submissions.

139. As to the trustee's costs at first instance, the Court of Appeal noted that DHCJ Carlson had ordered such costs to be borne by H and W equally on an indemnity basis, but that H had taken it upon himself to pay the trustee's costs in full (save for the costs incurred on 27 February 2012 on W's unsuccessful application to vary the order nisi regarding the trustee's costs). The Court of Appeal directed that "the parties" should pay the trustee's costs of 27 February 2012. I would direct that the parties and the trustee be at liberty, if so advised, to address the question of the trustee's costs of 27 February 2012 in written submissions.

E.2b Costs in the Court of Appeal

140. The Court of Appeal ordered that as between H and W, W should be paid two-thirds of her costs of the appeal on the footing that she had been unsuccessful in claiming that the whole trust fund was H's resource. As the Court of Appeal has been reversed on that point, I would set aside the aforesaid order of the Court of Appeal and make an order nisi that W should have all her costs of the appeal in the Court of Appeal to be paid by H.

141. As to the trustee's costs in the Court of Appeal, the Court of Appeal ordered that W should be solely responsible for the trustee's costs in that Court on an indemnity basis on the basis that its presence "was solely on the issue of the treatment of the trust assets" and that W failed on that issue. Since W has now succeeded on that issue, I would set aside the aforesaid order of the Court of Appeal and make an order nisi that H should pay the trustee's costs. The parties are obviously entitled to make submissions on the order nisi. I would direct that the trustee should also be at liberty to lodge submissions on its own behalf.

E.2c Costs in this Court

142. Regarding costs as between H and W in this Court, I would make an order nisi that H should pay W the costs of both appeals.

143. As to the trustee's costs in FACV 20/2013, I note that the trustee was joined on W's application, presumably because this was thought necessary in the light of the alternative claim for a variation of the trust. However, the trustee participated by making submissions not just in relation to variation, but also regarding the discretionary trust as a possible financial resource in the ancillary relief proceedings, as it had done in the Court of Appeal. In doing so, it aligned itself with H, arguing for only two-thirds of the trust fund to be treated as an available asset on a basis which I have rejected. I would accordingly make an order nisi that H do pay the trustee's costs and direct that the trustee be at liberty to lodge submissions on its own behalf in that regard.

E.3 Directions regarding written submissions

144. I would direct that any written submissions to be lodged in relation to the abovementioned orders nisi and regarding matters on which liberty to make submissions has been granted must be lodged with the Registrar within 14 days of the date of this judgment and any written submissions in reply within 14 days thereafter. No further submissions should be accepted without the leave of a single Permanent Judge. I would furthermore direct that each set of submissions and of any submissions in reply must not exceed 10 single-sidedA4 pages of ordinarily legible 14 point print. Non-compliant submissions should not be accepted.

145. In the proceedings below the parties were anonymized, being referred to by their initials. The parties informed the Court that there was no reason for anonymity in the present case and that they had no objection to being named. They are accordingly referred to by name in this judgment. It is consistent with

open justice that anonymity should be maintained only if there is good reason to follow that course.

Mr Justice Tang PJ:

146. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Bokhary NPJ:

147. This case is very unfortunate in its immediate circumstances and, for reasons which are emphatically not the fault of either party, utterly tragic in its background. Despite the arguments so ably advanced by Ms Anita Yip SC on the husband's behalf, I would allow the wife's appeal and dismiss the husband's appeal, doing so in terms of the orders and directions proposed by Mr Justice Ribeiro PJ. There are only two matters on which I will add something of my own.

148. In connection with the question of what financial provision ought to be made for the wife, there arose an issue as to when the parties are to be treated as having started to live separately. How this issue is now to be decided goes to the proper role of each of the three court levels which make up a legal system like ours: first instance, intermediate appeal and final appeal.

149. The husband said that it was in 2001 that the parties started to live separately while the wife said that it was not until 2008 that they started to do so. After conscientious consideration, the trial judge concluded that the parties had started to live separately, albeit under the same roof, as from February 2001. There being no basis for doing so in the circumstances, the Court of Appeal rightly refrained from disturbing any of the trial judge's findings of primary fact on which he based that conclusion. What the Court of Appeal did – and was within their province to do – was to review the conclusion at which the trial judge arrived on the basis of those findings of primary fact. Upon such review and on a correct understanding of what constitutes a married couple living separately, the Court of Appeal felt unable to support the trial judge's conclusion as to when this married couple started to live separately. And they arrived at a very different conclusion in that regard. Their conclusion was, in my view, supported by the trial judge's findings of primary fact viewed in the context presented by the record realistically approached. That being so, their conclusion arrived at on intermediate appeal ought not to be disturbed by us on final appeal.

150. It was pointed out on the husband's behalf that the date upon which the Court of Appeal proceeded, namely February 2007, is not consistent with the evidence either of the husband (who said that the separation had begun as long ago as 2001) or of the wife (who said that it did not begin until 2008). That is true in the sense that the Court of Appeal adopted the date February 2007 on the footing that although the separation had begun only in 2008 as the wife said, the parties' divorce having been decreed on the ground of two-year's separation prior to the presentation of the petition on 6 February 2009, the wife is estopped from relying on any date earlier than two years prior to such presentation. That is, I think, the limited extent to which an estoppel would have operated if one had arisen. As it happens, for the reasons given by Mr Justice Ribeiro PJ, no estoppel arose.

151. I understand that anonymity in family cases is the subject-matter of on-going consultation, and I am content to say nothing on the subject at this stage.
Mr Justice Gummow NPJ:

152. I agree with the judgment of Mr Justice Ribeiro PJ.
Chief Justice Ma:

153. The Court unanimously :
(a) Allows W's appeal and dismisses H's appeal.

(b) Directs that the parties be at liberty to lodge written submissions as to the quantum of the award and as to directions for its payment.

(c) Directs that the parties be at liberty to address the question of costs at first instance in written submissions.

(d) Directs that the parties and the trustee be at liberty to address the question of the trustee's costs of 27 February 2012 inwritten submissions.

(e) Sets aside the Court of Appeal's order that W should be paid two-thirds of her costs in the Court of Appeal and makes an order nisi that all of W's costs in the Court of Appeal be paid by H.

(f) Sets aside the order of the Court of Appeal that W should be solely responsible for the trustee's costs in the Court of Appeal on an indemnity basis

and makes an order nisi that the trustee's costs be paid by H, with liberty to the trustee to lodge submissions on its own behalf in that regard.

(g) Makes an order nisi that H do pay W the costs of both appeals in this Court.

(h) Makes an order nisi that H do pay the trustee's costs and directs that the trustee be at liberty to lodge submissions on its own behalf in that regard.

(i) Directs that any written submissions to be lodged in relation to the abovementioned orders nisi and regarding matters on which liberty to make submissions has been granted must be lodged with the Registrar within 14 days of the date of this judgment and any written submissions in reply within 14 days thereafter, with no further submissions to be accepted without the leave of a single Permanent Judge.

(j) Directs that that each set of submissions and of any submissions in reply must not exceed 10 single-sided A4 pages of ordinarily legible 14 point print and that non-compliant submissions will not be accepted.

(Geoffrey Ma)	(R.A.V. Ribeiro)	(Robert Tang)
Chief Justice	Permanent Judge	Permanent Judge