IN THE FAMILY JUSTICE COURTS OF THE REPUBLIC OF SINGAPORE

[2021] SGHCF 12

Divorce (Transferred) No 4236 of 2017

Between

CLD

… *Applicant*

And

CLE

… *Respondent*

GROUNDS OF DECISION

[Family Law] — [Matrimonial assets] — [Operative date for determining the pool of matrimonial assets]

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CLD
v
CLE

[2021] SGHCF 12

General Division of the High Court (Family Division) — Divorce (Transferred) No 4236 of 2017
Kwek Mean Luck JC
22 March 2021

2 June 2021

Kwek Mean Luck JC:

Introduction

1 The sole issue in this application brought by the applicant ("the Wife") against the respondent ("the Husband") is the operative date for determining the pool of matrimonial assets as defined in s 112(10)(*b*) of the Women's Charter (Cap 353, 2009 Rev Ed) ("Women's Charter").

2 At the hearing before me, the Wife submitted three operative dates for determining the pool of matrimonial assets:

(a) 31 December 2016 – when they discussed and agreed to proceed to a divorce; or

(b) 6 March 2017 – when they took off their wedding rings; or

(c) 7 May 2017 – when the wife moved out of the matrimonial home ("Property 1") to another property purchased by the Wife and held in her sole name ("Property 2").

3 I held that the operative date for determining the pool of matrimonial assets would be the third date proposed by the Wife, that is 7 May 2017, when the Wife moved out of the matrimonial home, *ie* Property 1, to Property 2. The Wife appealed against this decision. The appeal was subsequently withdrawn after I informed the parties that my Grounds of Decision were ready. As the Grounds of Decision provide guidance on the issue of the operative date for determining the pool of matrimonial assets, I have proceeded to provide my grounds as set out below.

Background facts

4 The undisputed background facts are these. On 7 July 2012, the parties registered their marriage in Singapore.[1] They have one son ("the Child").

5 In November 2016, the Wife prepared a post-nuptial deed ("the Deed") which provided that all assets acquired in the parties' sole names, whether prior to or during the marriage, shall remain in the parties' respective absolute beneficial ownership, regardless of whether such asset is the matrimonial home, and/or has been used by the parties or substantially improved during the marriage.[2] Sometime around 11 December 2016, the Husband counter-proposed that the Deed include a stipulation that the Wife was not entitled to claim any

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1 3rd Affidavit of the Plaintiff dated 29 January 2021 ("3rd Affidavit of the Plaintiff") at para 5.

2 3rd Affidavit of the Plaintiff at para 17; Plaintiff's Affidavit of Assets and Means ("Plaintiff's AOM") at pp 66–70.

maintenance from the Husband and indicated to the Wife that he would sign the Deed on that basis.[3] However, the Deed was not signed by either party.[4]

6 On 7 May 2017, the Wife and the Child moved out of Property 1 to Property 2. On 11 September 2017, the Wife commenced divorce proceedings against the Husband. The divorce papers were served on the Husband on 17 January 2019. Interim Judgment was granted on 14 February 2020. The ancillary matters relating to custody, care and control, maintenance and division of assets remain pending before the court.

7 On 2 October 2020, the parties filed their respective Affidavit of Assets and Means ("AOM"). The Wife took the position that the operative date for the purposes of her AOM is 31 December 2016. As the Husband disputed this, the parties were directed at a Family Court Case Conference to make an application to the High Court for determination of the operative date for determining the pool of matrimonial assets.

The parties' cases

Wife's case

8 The Wife proposed three operative dates for determining the pool of matrimonial assets.

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3 3rd Affidavit of Plaintiff at para 18.

4 NE dated 22 March 2021, page 1 line 36; Defendant's AEIC ("DAEIC") at para 36(qq).

9 The first date proposed by the Wife is 31 December 2016. It was submitted that by this date, all three indicia in *ARY v ARX* [2016] 2 SLR 686 ("*ARY v ARX*") were present and the marriage had effectively come to an end:[5]

(a) There was no longer a matrimonial home in respect of the first indicium of *ARY v ARX*, as the Wife was making plans to move out of Property 1 and the Husband and Wife would live separately from each other. During oral submissions, counsel for the Wife submitted that there was a clear probability that they would have to move out as Property 1 was leased and paid for by the Husband's employer. Because of his resignation, they were likely to move out. Hence, in effect, there would be no matrimonial home at that point in time.

(b) There was no *consortium vitae*. After 31 December 2016, the Husband and the Wife had minimal contact with each other, and no longer shared any of their personal or professional lives with each other. They slept separately, and the Wife was no longer privy to the Husband's life and *vice versa*. The Husband and the Wife ceased to play any role in each other's lives. They no longer spent any time together as a family and any time spent with the Child was done separately by the Husband or the Wife.[6] By December 2016, the Husband and Wife had agreed not to make any claim on each other's assets through a verbal agreement. While the Deed was not signed, the Husband said that he would sign the deed on 11 December 2016, to which the Wife replied, "Just saw this. Thanks".[7] The Wife submitted that as was held by the

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5 Plaintiff's Written Submissions ("PWS") at para 29.

6 PWS at para 40.

7 Plaintiff's AOM at p 83.

Court of Appeal in *AUA v ATZ* [2016] 4 SLR 674, such an agreement would carry significant weight, and should generally be given effect to.[8]

(c) Third, there was no conjugal relationship between the Husband and the Wife in 2016, and after 31 December 2016.[9]

(d) There was no intention to jointly accumulate assets, since the Husband ceased to be employed from December 2016. The Husband had limited income thereafter. As such, he was only depleting the matrimonial assets. The Wife submitted that the Husband spent around $736,000 on rental from January 2017 to October 2020. The Wife submitted that this is a factor to be taken into account in determining the operative date for the pool of matrimonial assets.

10 The second date proposed by the Wife is 6 March 2017, when the parties took off their wedding rings, in addition to the presence of the three indicia of termination in *ARY v ARX*. I note that while the Wife's Written Submissions did not crystallise a date in March 2017, her counsel started her oral submissions by providing the date of 6 March 2017, when the parties took off their wedding bands, as one of the three dates proposed by the Wife.

(a) By 6 March 2017, the parties took off their wedding rings.[10]

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8 PWS at para 34.

9 PWS at para 41.

10 PWS at paras 43–45.

(b) It was also during this period in March 2017 that the Husband and the Wife agreed that the Wife would move out of Property 1 with the Child to Property 2.[11]

11 The third date proposed by the Wife is 7 May 2017, when the Wife moved out of Property 1 to Property 2 with the Child.

(a) From that date, the parties have been living separately.[12]

(b) There was no involvement and/or provision from the Husband towards the Wife and the Child. Time spent with the Child was done separately by the Husband or the Wife.[13]

12 The Wife further submitted that it would be extremely unfair for the date of Interim Judgment to be adopted as the operative date for determining the pool of matrimonial assets for the following reasons.

(a) Wife's assets: The Husband resigned from his job in December 2016 and did not work since then. He made no contribution to the Wife and Child after 31 December 2016. The Wife has continued to work. The Wife submitted that it was unfair for the Husband to claim from the matrimonial asset pool since end December 2016 when the Husband had made no contribution, except for a total of $54,152.50 towards the Child's expenses from 2016 to date.[14]

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11 PWS at para 45.

12 PWS at para 53.

13 PWS at para 53.

14 PWS at para 56.

(b) Delay by the Husband: the divorce proceedings were formally commenced by the Wife on 11 September 2017, but the Interim Judgment was granted only over two years later on 14 February 2020 due to the Husband's failures to meet court deadlines, as well as ongoing settlement discussions.[15]

(c) Property 2: The Wife submitted specifically that in respect of Property 2, this was purchased in her sole name, using the proceeds of sale from her previous property ("Property 3"), together with a loan from the Wife's eldest sister, and a mortgage from a bank. She submitted that the Husband had disowned his interest in Property 2and referred to an e-mail sent by the Wife to the Husband's mother. In the e-mail, according to the Wife, the Husband said to her that he should not be expected to be sharing equally in contributing to the purchase of Property 2, and he could not be expected to work forever.[16] The Wife submitted that the Husband did not contribute to the purchase of Property 2, whether financially or non-financially. The Husband has not made any contribution to Property 2 in terms of mortgage payments, renovations, improvements or any other expenses.[17]

Husband's case

13 The Husband submitted that the default position of the date of Interim Judgment should be applied to ascertain the pool of matrimonial assets and that

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15 PWS at para 58.

16 Plaintiff's Outline of Key Events dated 22 March 2021, item no. 3, referring to Plaintiff's AOM at pp 58–59.

17 PWS at para 50.

the Wife had provided no cogent reason why the default position should not apply.[18]

14 The Husband submitted that there was no common understanding that the marriage had effectively come to an end by late December 2016. They were still residing together as a married couple and were still communicating with each other regularly as evidenced by the text messages between them from 4 October 2016 to 21 April 2017. The sheer volume of messages exchanged during this period showed his affection and support for the Wife.[19] In particular, there were some affectionate messages exchanged between the Wife and the Husband around 10 February 2017 and 7 to 8 March 2017. While there were arguments, it did not mean that the marriage had broken down.

15 The Husband stated in his affidavit that he did not remove his wedding ring from March 2017. He removed it for one night in March 2017 but put it back the following day. He finally removed it in April 2017 following a confrontation with the Wife.[20]

16 In respect of the Wife's allegations that the Husband had not made any contributions towards the purchase of Property 2, the Husband submitted that they were not relevant to the issue of the operative date for determining matrimonial assets. It would be more relevant to the issue of division of matrimonial assets.[21] The Husband nevertheless submitted that:

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18 Defendant's Written Submissions ("DWS") at para 13.

19 DAEIC at paras 18, 26–29.

20 DAEIC at para 36(rr).

21 DWS at para 14.

(a) Property 2 was paid for using the sale of the Property 3, which was also a matrimonial asset, as the Wife was still paying for the mortgage of that property during the marriage and was also receiving rental from that property.[22]

(b) The Wife had admitted that they had discussed in February 2017, the Husband moving into Property 2. The Husband stated in his affidavit that whether he would do so was partly dependent on whether he would be able to terminate his lease of Property 1 early.[23] The Husband submits that their discussion about him moving into Property 2 belies the Wife's position that Property 2 is not a matrimonial asset.

My decision

Applicable law

17 At the hearing of this application, the relevant statutory provision and main case authorities were common ground among the parties.

18 Section 112(10)(*b*) of the Women's Charter defines matrimonial assets to include "any other asset of any nature acquired during the marriage by one party or both parties to the marriage".

19 The meaning of s 112(10)(*b*) of the Women's Charter in the context of ascertaining the operative date for determining the pool of matrimonial assets was considered by the Court of Appeal in *ARY v ARX*.[24] There, the Court of

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22 DWS at para 16.

23 DAEIC para 34.

24 PBOA at Tab 4.

Appeal held that there were four possible dates: (a) the date of separation; (b) the date the writ of divorce was filed; (c) the date of interim judgment; and (d) the date of the ancillary matters hearing. The starting point or default position should be the date of interim judgment, unless the particular circumstances of justice of the case warrant it. The justification is that the interim judgment "puts an end to the marriage contract and indicates that the parties no longer intend to participate in the joint accumulation of matrimonial assets …" (*ARY v ARX* at [32], citing *AJR v AJS* [2010] 4 SLR 617 ("*AJR*") at [4]). The grant of interim judgment is a recognition by the court that there is "no longer any matrimonial home, no *consortium vitae* and no right on either side to conjugal rights" (*Sivakolunthu Kumarasamy v Shanmugam Nagaiah* [1987] SLR(R) 702 at [25]). Applying this date also brings certainty for parties to arrange their financial affairs. Further, where such factors are present, it would be "artificial to speak of any asset acquired *after* the interim judgment has been granted as being a matrimonial asset" [emphasis in original] (*ARY v ARX* at [32]).

20 As held in *ARY v ARX* at [35]–[36], this approach preserves the court's flexibility to ensure that justice is done in every case. The court may depart from this default position where there are cogent reasons to do so. This includes situations where, for example, a party incurs a large amount of expenditure from having "indulged in certain vices" such that the matrimonial assets have been "unfairly or unjustly depleted by the unacceptable actions of that party" (*ARY v ARX* at [35], citing *AJR* at [6]).

21 Adopting a starting point in respect of the operative date ensures that the inquiry as a whole is systematic. This is because as observed by the Court of Appeal in *ARY v ARX* at [36], the court has discretion at multiple levels, not just in selecting the date of determining the pool of matrimonial assets, but also in

selecting the date of valuation of such assets and how those assets should be divided. The court also has the discretion to exclude specific property from the pool of matrimonial assets. This can be seen in *Ong Boon Huat Samuel v Chan Mei Lan Kristine* [2007] 2 SLR(R) 729 ("*Ong Boon Huat*"), which was cited by counsel for the Wife. There, the Court of Appeal excluded an apartment acquired by the husband in his sole name *during* the marriage from the pool of matrimonial assets, such that the wife would have "no share in its profits", as she had claimed that "she has nothing to do with the liabilities associated with [the property]" (at [23]). Prakash JA (as she then was), in delivering the decision of the Court of Appeal, held at [25]–[26] that while it may be that a property was acquired during the marriage, and therefore technically falls under the definition of a matrimonial asset contained in s 112(10)(*b*) of the Women's Charter, the court's power to divide any matrimonial asset is a discretionary power. This is obvious from ss 112(1) and 112(2) of the Women's Charter. It is thus not mandatory for the court to exercise its powers of division under s 112 of the Women's Charter and the court may generally decline to do so where a valid reason is given.

22 The Wife's concerns on the Husband's lack of contributions to Property 2 and the unfairness of him having a share in it, are therefore not directly relevant to the issue that was brought before me, which is the determination of the operative date for ascertaining the pool of matrimonial assets. The Wife's concerns about Property 2 are more properly dealt with at the later stage of division of matrimonial assets, where consideration can be made on whether a specific property is to be excluded from the pool of matrimonial assets, taking into account factors such as the relative contributions of parties to that specific property. *Ong Boon Huat* is illustrative of such an assessment at the later stage of division of matrimonial assets, and is hence not directly relevant to the

inquiry here on the operative date for ascertaining the pool of matrimonial assets.

23 For the determination of the operative date for ascertaining the pool of matrimonial assets, however, the crux of assessment is when the marriage can be treated as "practically at an end": *ARY v ARX* at [34], citing Debbie Ong, "Family Law" (2011) 12 SAL Ann Rev 298 at para 15.23. On this, counsel for both parties agreed that the three indicia of *ARY v ARX* – that there is no longer any matrimonial home, no *consortium vitae* and no right on either side to conjugal rights – are relevant to such an assessment.

First date – 31 December 2016

24 Taking into consideration the three indicia of *ARY v ARX*, I found no basis for holding that the operative date is the first date proposed by the Wife, that is 31 December 2016.

25 It was disputed by the Husband that there was no matrimonial home after 31 December 2016. The evidence bears him out. There was still a matrimonial home after 31 December 2016:

(a) The Husband and Wife were still staying at the matrimonial home at Property 1 after 31 December 2016, up to 7 May 2017, when the Wife moved into Property 2.

(b) The Wife admitted that she and the Husband had discussed in February 2017, about the Husband moving into Property 2. At that point of time, there was still discussion of them living together in Property 2.[25]

[25] PWS at para 50; DAEIC at para 34 and p 110.

26 The cases of *UWL v UWM* ("*UWL v UWM*") [2019] SGHCF 17 and *BRL v BRM* (Civil Appeal No 77 of 2018) ("*BRL v BRM*") (referred to in *UWL v UWM*) which the Wife cited, are therefore not relevant, as they are based on crucially different facts. In both cases, the husband and wife were clearly no longer living together in the matrimonial home, but were living separately at the relevant point of time.

(a) In *UWL v UWM,* the husband left the matrimonial home on 20 March 2013 and the parties were living separately since 21 March 2013. The court found that the operative date for determining the pool of matrimonial assets should be the date of separation (21 March 2013), as the wife moved to China shortly after the husband moved out of the matrimonial home, and spent most of her time there.

(b) In *BRL v BRM*, the wife moved to China on 1 March 2014 with their daughter, leaving the husband behind. She informed the husband in April 2014 that she and their daughter would not be returning to Singapore. The Court of Appeal excluded from the pool of assets a landed property in China acquired by the wife in December 2014, several months after she had left Singapore for China.

27 The other set of cases relied on by the Wife, *Wong Kien Keong v Khoo Hong Eng* [2014] 1 SLR 1342 ("*Wong Kien Keong*") and *AUA v ATZ* [2016] 4 SLR 674 ("*AUA v ATZ*"), also do not assist her as they are also based on crucially different set of facts. In both cases there was an actual deed of separation that was signed by both parties, which was relied on by the court to fix the operative date as the date of the deed of separation.

(a) In *Wong Kien Keong,* the court observed at [13] that where parties have agreed to comprehensively and conclusively organise their financial arrangements after or in contemplation of their separation, there would be no good reason why such an agreement should not be given full weight. The circumstances in which the deed was made was also crucial. The deed was signed after the wife had moved out of the matrimonial home to live in another apartment. The court thus cited as useful the observations made in *Wong Kam Fong Anne v Ang Ann Liang* [1992] 3 SLR(R) 902, that where the deed in question was made at a time when the parties had already been separated, and divorce was viewed as a real possibility, the onus is on the husband to justify why the court should disregard parties' express intentions.

(b) In *AUA v ATZ*, the court examined the deed in question and found at [26] that it was clear that the parties' marital relationship came to an end with the conclusion of the deed and the parties recognised it as such.

28 In contrast, there was no signed deed of separation here. There was no conclusive agreement which clearly showed that the parties' marital relationship had come to an end or that the parties had recognised any agreement as such.

29 The Wife prepared the Deed and sent it to the Husband. He counter-proposed to the Wife with an amended Deed that included a stipulation that the Wife was not entitled to claim any maintenance from the Husband, and that on that basis, he would agree to sign the Deed. It is clear, from such exchange, that both parties did not agree on the terms and did not sign the Deed.

30 The Wife sought to rely alternatively on a verbal agreement between the parties even though the Deed was not signed. But even the Wife's reply to the Husband's counterproposal, set out at [9(b)] above, is equivocal. Moreover, as pointed out by the Husband, one of the terms that the Husband wanted was that the Wife would not claim maintenance, but she was now claiming for maintenance. This showed that there was no agreement between them. In light of where this was left hanging, it could not be said that there is evidence of a verbal agreement.

31 In any case, the circumstances following the Husband and Wife's discussion about the Deed did not show that the parties' relationship had clearly come to an end. There were affectionate messages exchanged between the Husband and Wife in February and March 2017. There were exchanges of love between Husband and Wife in the messages of 10 February 2017,[26] show of affection in the messages of 1 March 2017[27] and show of affection in the messages of 7 and 8 March 2017.[28] The Wife submitted that while there were some exchange of messages which were cordial and showed some affection at times after 31 December 2016, this was against the background that parties had already agreed to divorce and that these messages had to be considered against the context of other more terse and accusatory messages. However, the fact that both Husband and Wife were still at times loving and affectionate with each other in their messages, as of February and March 2017, while they were still residing together in the matrimonial home, renders it difficult to conclude that the marital relationship had come to an end by then.

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26 DAEIC at p 113.

27 DAEIC at p 134.

28 DAEIC at pp 137–138.

32 During oral submissions, counsel for the Wife also relied on *ARY v ARX* to submit that there was unreasonable or unfair depletion of matrimonial assets, as the Husband continued staying at Property 1 from January 2017 to October 2020, paying a monthly rental of $16,000 amounting to a total sum of $736,000, when he did not have any income during this period. While the court did recognise in *ARY v ARX* at [35] that a large amount of expenditure by a party to "indulg(e) in certain vices" could provide cogent reasons to depart from the usual starting point, it cannot be said that the expenditure of moneys by the Husband on the rent of Property 1 while the whole family was living there (up to May 2017) is an indulgence in a vice, or an unfair or unjust depletion of matrimonial assets.

33 Counsel for the Wife further submitted that the Husband had disowned his interest in Property 2 and thus there was no intention to jointly accumulate assets. It may be the case that the Husband did not want to share in the purchase of Property 2. However, the crux of the inquiry before me is whether the marriage had practically come to an end, taking into consideration the three indicia in *ARY v ARX*. The Husband's lack of intention to contribute to the purchase of Property 2, on its own, bearing in mind that there were other household expenses such as the rental of Property 1, does not clearly indicate that parties lacked the intention to jointly accumulate assets. Neither does it show that parties intended to have a clean break such that the marriage had come to an end.

Second date – 6 March 2017

34 I also found no basis for holding that the operative date for ascertaining the pool of matrimonial assets to be 6 March 2017, which was the Wife's second date.

35 This was the date around which the parties were alleged to have taken off their wedding rings. Whether such actions demonstrate that the marriage has practically come to an end must necessarily be contextual, taking into account the nature of the relationship at that point of time. In any event, it is the Husband's evidence that he did not remove his wedding ring from March 2017.[29] He removed it for one night in March but put it back the following day. He finally removed it in April 2017 following a confrontation with the Wife.

36 The Wife also submitted that March 2017 should be the operative date as it was during this period that the Husband and Wife made arrangements to physically live separately from each other.[30]

37 However, it is not clear on the evidence, taken together as a whole, that the three indicia of *ARY v ARX* were satisfied and that the marriage had practically come to an end by 6 March 2017:

(a) It is undisputed that both Husband and Wife continued to live with each other during March 2017, until the Wife moved out on 7 May 2017.

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29 DAEIC at para 36(rr).

30 PWS at para 46.

(b) There were discussions of Husband and Wife living together in Property 2 after they move out of the matrimonial home, as late as February 2017: see [25] above.

(c) There were also affectionate messages that continued to be exchanged between the Husband and Wife, on 10 February 2017, 1 March 2017, and 7–8 March 2017 (which is after the second proposed date of 6 March 2017): see [31] above.

38 Thus, on the evidence, there was no *clear* indication that the marriage had practically come to an end as of 6 March 2017. Neither did the authorities relied on by the Wife support the view that their making plans to live separately (as compared to *actually* living separately) sufficed in meeting the criteria in *ARY v ARX* that there is no longer a matrimonial home.

(a) In *AUA v ATZ*, a deed of separation was entered into between the parties. The Court of Appeal found at [26] that the parties' marital relationship came to a close with the conclusion of the deed of separation and that the parties also recognised it as such. There was no longer a matrimonial home, as the wife was to move out of the matrimonial home as per the deed of separation signed by parties. Both would stay in separate apartments from then on.

(b) In *Wong Kien Keong*, the Wife moved out of the matrimonial home on 12 March 2003 and a deed of separation was signed on 28 March 2003. The court found at [101] that the date of the signing of the deed of separation was the operative date for determining what fell within the pool of matrimonial assets. There was clearly no matrimonial home at that point in time, as the wife had moved out of the matrimonial

home to live in a different apartment, before the signing of the deed of separation.

Third date – 7 May 2017

39 I found that by the third date proposed by the Wife, 7 May 2017, it was clear that there was no matrimonial home. That was the date that the Wife and Child moved out of Property 1 into Property 2. Counsel for the Husband also acknowledged that there was no matrimonial home then and that on that basis, the three indicia of *ARY v ARX* were fulfilled.

40 In addition, the evidence is that from that date, the Husband and Wife were living separately. The Husband and Wife did not spend time together as a family with the Child but did so on their own, and the Husband and Wife no longer intended to participate in the joint accumulation of matrimonial assets. I accept that them taking care of the Child thereafter was done *qua* mother or father, instead of being qua spouse: *AUA v ATZ* at [27]. I therefore departed from the default position of the date of interim judgment and held that the operative date for determining the pool of matrimonial assets would be their date of separation, that is 7 May 2017, when the Wife moved out of their matrimonial home (*ie*, Property 1).

Conclusion

41 In conclusion, it is clear on the evidence that it was only by 7 May 2017 that there was no longer a matrimonial home for the Husband and Wife, as that was when the Wife moved out of Property 1 to Property 2.

42 I awarded costs to the Wife at $4,000 inclusive of disbursements.

Kwek Mean Luck
Judicial Commissioner

Sim Bock Eng, Chan Yu Xin (WongPartnership LLP) for the applicant;
Sudhershen Hariram (Tan Rajah & Cheah) for the respondent.