DR GURMAIL KAUR SADHU SINGH v. DR TEH SEONG PENG & ANOR

HIGH COURT MALAYA, SHAH ALAM
YAACOB MD SAM J
[DIVORCE PETITION NO: 33-994-2007]
6 MARCH 2014

FAMILY LAW: *Divorce – Petition – Breakdown of marriage – Adultery – Whether first respondent committed adultery with second respondent – Whether petitioner could be reasonably expected to live with first respondent – Whether marriage irretrievably broken down – Whether second respondent aided and abetted breakdown of marriage – Whether second respondent to pay damages to petitioner – Whether petitioner's drug abuse and unreasonable behaviour was cause of matrimonial breakdown – Whether marriage dissolved*

FAMILY LAW: *Divorce – Petition – Maintenance – Wife and children – Financial status of first respondent – Whether first respondent gave full and frank disclosure of income – Whether first respondent's adultery led to breakdown of marriage – Whether petitioner entitled to maintenance*

FAMILY LAW: *Divorce – Petition – Matrimonial assets – Division of – Medical clinics founded by parties during subsistence of marriage – Whether matrimonial properties jointly acquired – Whether parties reached agreement in relation to ownership of medical clinics – Whether agreement should be honoured – Employees' Provident Fund ('EPF') – Whether subjected to division – Whether parties entitled to retain respective EPF savings*

The wife ('petitioner') and the husband ('first respondent') had registered their marriage in 1995 and had two children. Both parties were practising doctors jointly operating two medical clinics, one in SS2 Petaling Jaya ('the SS2 clinic') and another in Sunway ('PJU clinic'). In August 2001, the petitioner bought a house in Bandar Utama with a RM100,000 loan from her sister and a mortgage loan for the balance of the purchase price ('the BU house'), which was solely in the name of the petitioner. In June 2005, the petitioner and first respondent bought a new house in Bukit Rimau in their joint names ('BR house') and subsequently moved into the house in August 2006. However, due to the fact that the petitioner and the first respondent were constantly quarrelling, the petitioner and the children moved back to the BU house, while the first respondent remained in the BR house. On 14 October 2006, the petitioner gave evidence that she had walked in on the first respondent in close proximity with another woman ('the second respondent') in the BR house and that after she had confronted him, the first respondent had physically abused her and had stomped on her foot causing it to fracture. On 22 November 2007, the petitioner filed for divorce on the grounds that the marriage had irretrievably broken down on the ground that the first respondent had committed adultery with the second respondent. The petitioner also claimed that the first respondent had mentally abused her. The

A first respondent, on the other hand, contended that the petitioner's constant and frequent usage of controlled drugs had cumulatively led to the breakdown of their marriage. The petitioner responded by submitting that she suffered from stress and sleeplessness due to matrimonial problems and that the drugs she consumed were prescribed by the first respondent as B medication for her condition. The petitioner also prayed for right of custody and care of their children with reasonable access to the first respondent, a lump sum maintenance payment for herself and monthly maintenance for the children and an order for the fair and reasonable division of the assets acquired by the parties during the marriage. The first respondent was C currently paying the petitioner RM6,000 and to the children RM5,000 under a varied maintenance order. However, the petitioner prayed for a higher settlement due to the fact that the petitioner and the children were presently in Australia where the cost of living was higher. The issues that arose were (i) whether it was the petitioner's alleged drug problems that caused the breakdown of the marriage; (ii) whether the first respondent had committed D adultery with the second respondent and whether the second respondent had caused or contributed to the irretrievable breakdown of marriage between the petitioner and the first respondent; (iii) whether the custody of the two children should be given to the petitioner; (iv) whether the petitioner was entitled to maintenance; (v) maintenance for the children; and (vi) division E of matrimonial assets.

Held (dissolving marriage; making appropriate orders for custody of children and division of matrimonial assets with costs):

(1) Evidence showed that the respondent had prescribed the medication F or the controlled drugs for the petitioner's condition *ie*, stress and sleeplessness. The nurses who had worked in both the clinics testified that a large quantity of controlled drugs in the clinics were missing and admitted that it was the respondent who had prescribed the drugs for the petitioner. The court accepted the petitioner's testimony that she had to be on medication due to an inherent medical condition. In the G circumstances, the respondent's allegation that the breakdown of the marriage was caused by the petitioner's misuse of drugs lacked basis. (para 41)

(2) For the allegation of adultery to be established, the evidence must be H beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the court that from the nature of things adultery must have been committed. Where the case of a party is largely founded on the oral evidence of its witness, then the credibility of that witness becomes extremely crucial. Having given due I consideration to the evidence in totality, the petitioner had proved beyond reasonable doubt that the first respondent and the second respondent had an adulterous affair and relationship and their joint presence on the bed in the BR house on 14 October 2006 was to

perpetrate their adulterous act when particularly, the marriage of the petitioner and the first respondent at that material time was still in subsistence. The petitioner had been in the BR house on that date and she had to be assisted out of the house by her siblings because she had suffered from a fractured toe, as was confirmed by the orthopaedic surgeon who had carried out the corrective toe surgery to her toe. The second respondent was also identified by the petitioner as the woman who had been in the bedroom of the BR house with the respondent. On the balance of probabilities, the petitioner's evidence of her version of the incident was accepted. (paras 53, 54 & 55)

(2a) During the marriage of the petitioner and the first respondent, the second respondent had given birth to a child. The first respondent's name was entered on the register of births as the father of the said child. The entry in the register was *prima facie* evidence of an admission of adultery by the child's father. Based on the oral and documentary evidence, the petitioner had established a case in law for the second respondent to answer. The second respondent, however, had failed to adduce any evidence or call any witnesses on her behalf, and had failed to show that the petitioner's evidence was unsatisfactory or unreliable. In the circumstances, the adultery was the causation of the breakdown of the marriage between the petitioner and the first respondent. The first respondent was solely responsible for the breakdown of the marriage, which was aided and abetted by the second respondent. A sum of RM50,000 was just and reasonable to be made against the second respondent for an award of damages to be paid to the petitioner. Since it was unsustainable for the petitioner to be reasonably expected to live with the first respondent, the marriage was thus declared to be dissolved with the *decree nisi* to be made absolute within one month from the date of the order. (paras 56-58 & 61)

(3) The petitioner had custody of the two children since a court order in 2007 until now. During the divorce proceedings, the court granted leave to the petitioner to take the children to Australia. The first respondent was no longer asserting his rights to custody, care and control of the two children but only on access over the children. Thus, the custody, care and control of the two children was given to the petitioner with access to the first respondent. (paras 63-65)

(4) The first respondent's evidence that his gross monthly income was an average of RM7,000 to 8,000 per month was questionable. There were discrepancies in the explanation given by the first respondent regarding his income. Unfortunately, the amount could not be ascertained due to the lack of a full and frank disclosure of his actual income. The parties had been married for 19 years and it was the first respondent's adultery conducts that had caused the breakdown of the

A marriage. Clearly, the petitioner was entitled to maintenance. The petitioner had set out her expenses in Australia amounting to RM23,208 per month (inclusive of the children). However, her stay in Australia was temporary and she was supposed to come back after her training. Having considered the means and needs of the parties, a
B sum of RM6,000 per month was a reasonable award of maintenance for the petitioner. The first respondent's contention that no maintenance should be paid to the petitioner was unsustainable. (paras 81 & 82)

(5) According to s. 93 of the Law Reform (Marriage and Divorce) Act
C 1976, the husband has a primary duty in law to provide the children with accommodation, clothes, food and education as may be reasonable having regard to his means and station in life. Having given due consideration on issue of the expenses in Australia and the age of the children who are now 17 years old and 15 years old respectively,
D and the evidence as to the means and needs of the parties, a sum of RM6,000 would be a reasonable award of maintenance for the two children to be shared equally between them. (paras 84 & 86)

(6) Having considered the contributions made by each party and the interests of the two children, the balance proceeds of the sale of the
E BU house be shared in the proportion of 75% to the petitioner and 25% to the first respondent. The net proceeds (balance surplus sum) from the auction of the BR house be shared equally between the petitioner and the first respondent. As for the medical clinics, there was an agreement reached between the petitioner and the first respondent that
F the petitioner was to take the SS2 clinic and the PJU clinic would go to the first respondent. The parties should honour the agreement reached. There was no reservation or qualification over the agreement. The petitioner had waived her interest on the PJU clinic and was estopped now from raising the same. The first respondent was given full control and ownership of the PJU clinic. The petitioner's claims
G on the PJU clinic was thus dismissed. (paras 94, 97 & 102)

(7) It was fair and reasonable for parties to be entitled to retain their respective EPF savings and thus no order of division on EPF funds was made. No order was made on the two vehicles which the first
H respondent and the petitioner had in their respective names. Having given due consideration to the submission and circumstances, a sum of RM60,000 was fair and reasonable to be ordered as costs to be paid by the first respondent to the petitioner. (para 105)

Case(s) referred to:

I *Annie Quah Lay Nah v. Syed Jafer Properties Sdn Bhd & Ors And Another Appeal [2007] 1 CLJ 1 CA* ***(refd)***

Chaw Anui v. Tan Kim Chai [2004] 1 LNS 260 HC ***(refd)***

Ching Seng Woah v. Lim Shook Lin [1997] 1 CLJ 375 CA ***(refd)***

Choo Hui Ling v. Yeow Joen Ann [2013] 9 MLJ 788 ***(refd)***
Choong Yee Fong v. Ooi Seng Keat; Chua Chong Hong (Joint Respondent) [2006] 5 CLJ 144 HC ***(refd)***
Dato' Abdullah Hishan Hj Mohd Hashim v. Sharma Kumari Shukla (No 3) [1999] 7 CLJ 464 HC ***(refd)***
Gnasothy Nadarajah v. Dr Manahoran Muthuthamby [2007] 3 CLJ 679 CA ***(refd)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***
Jackson v. Jackson and Pavan [1960] 3 All ER 621 ***(refd)***
Hariram Jayaram v. Saraswathy Rajahram [1990] 1 CLJ 285; [1990] 2 CLJ (Rep) 103 HC ***(refd)***
Kang Ka Heng v. Ng Mooi Tee; Yeoh Ah Hoon (Named Party) [2001] 2 CLJ 578 HC ***(refd)***
Koay Cheng Eng v. Linda Herawati Santoso [2005] 1 CLJ 247 HC ***(refd)***
Koay Cheng Eng v. Linda Herawati Santoso [2008] 4 CLJ 105 CA ***(refd)***
Leow Kooi Wah v. Philip Ng Kok Seng & Anor [1997] 1 LNS 419 HC ***(refd)***
Parkunan Achulingam v. Kalaiyarasy Periasamy [2004] 7 CLJ 175 HC ***(refd)***
PP v. Abang Abdul Rahman [1981] 1 LNS 169 ***(refd)***
Shanmugam v. Pitchamany & Anor [1976] 1 LNS 141 HC ***(refd)***
Shudesh Kumar Moti Ram v. Kamlesh Mangal Sain Kapoor HC [2005] 2 CLJ 371 HC ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
Soo Lina v. Ngu Chu Chiong (Chong Oi Khium Irene, co-respondent) [1994] 2 MLJ 139 ***(refd)***
Subry Hamid v. Husaini Tan Sri Ikhwan & Anor [2006] 4 CLJ 50 CA ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***
Wee Hock Guan v. Chia Chit Neo & Anor [1964] 1 LNS 214 FC ***(refd)***
White v. White [1998] 4 All ER 659 ***(refd)***
Wong Kim Foong v. Teau Ah Kau [1998] 1 CLJ 358 HC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***
Yew Yin Lai v. Teo Meng Hai & Anor [2007] 5 CLJ 737 HC ***(refd)***
Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd [2010] 1 CLJ 484 CA ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 53, 54(1)(a), (b), 59, 76, 77(1), 78, 80, 88, 93
Rules of Court 2012, O. 22B r. 9(2)

For the petitioner - Rabinder Singh; M/s Rabin & Assocs
For the 1st & 2nd respondent - Kan Weng Hin (Aw Kam Mei with him); M/s Josephine, LK Chow & Co

Reported by Suhainah Wahiduddin

A

JUDGMENT

Yaacob Md Sam J:

Introduction

B **[1]** This is a divorce petition by the petitioner ('the wife') for the following ancillary reliefs:

(1) that the marriage be dissolved under s. 54(1)(a) and/or (b)(read together with s. 53) of Law Reform (Marriage and Divorce) Act 1976;

C (2) that custody, care and control of the two children of the marriage be granted to the petitioner with the first respondent be given a reasonable access to the children;

(3) pursuant to s. 77, the first respondent makes lump sum payment to the petitioner;

D (4) that the first respondent makes a reasonable sum of periodical monthly payments for maintenance and benefit of the children;

(5) pursuant to s. 76, the court order of the division of assets acquired by parties during the marriage in such shares as this court considers fair, just and reasonable;

E (6) alternatively, pursuant to s. 76, this court orders that any or more of the said assets as at para. (5) as aforesaid be sold, and less any redemption sum payable, if any, and the net proceeds thereafter be divided among the parties in such manner as this court considers fair, just and reasonable;

F (7) pursuant to s. 59, that Ng Siew Tee as second respondent pay damages to the petitioner;

(8) other ancillary and equitable reliefs that the court thinks fit; and

G (9) costs against the first and second respondent.

The Trial

[2] The petitioner called four witnesses namely, the petitioner ("SP1"), Dr Rakesh a/l Rethinasamy ("SP2") the medical practitioner who bought the SS2 clinic from the petitioner, Jane Maria a/p Sivananthan ("SP3") the H petitioner half sister, and Joshua Teh Lai Soon ("SP4") the representative from Zuellig Pharma Sdn Bhd.

[3] The first respondent Dr Teh Seong Peng called five witnesses namely, the first respondent ("SD1"), Lam Chung Ming ("SD2") the first respondent's patient, Nurul Nazihah binti Juhar ("SD3") the first I respondent's staff nurse, Saraswathy Kattharayan ("SD4") the first respondent's former staff nurse, and Gaitiri Baloo ("SD5") also the first respondent's former staff nurse.

Change Of Circumstances

[4] It has to be noted that since the petition was filed in the year 2007 and the cross-petition that was filed in 2009, a lot of the facts stated therein have changed and became irrelevant due to the passage of time. For instance, the two children under the marriage, Teh Chia Ray and Teh Shia Lin are residing with the petitioner in Australia since July 2012 and the petitioner's medical condition had recovered and she is currently pursuing a higher qualification for her medical practice.

Issues For Determination

[5] The issues before this court are confined to the following:

(a) when and what was the cause of breakdown of the marriage:

(i) on behalf of the petitioner, whether it was due to the alleged adultery committed by the first respondent and the second respondent and the unreasonable behaviour of the first respondent;

(ii) on behalf of the first respondent, whether it was due to the petitioner's drug abuse and unreasonable behaviour; or

(b) whether the petitioner is entitled to maintenance from the first respondent, and if yes, the quantum of it;

(c) how should the division of matrimonial assets including two medical clinics (particulars as set out below) be carried out;

(d) whether the first respondent should be given visitation rights to the two children born under this marriage and how should it be carried out; (it is to be noted that the first respondent is no longer asserting his rights to custody, care and control of the two children as they are currently residing with the petitioner in Australia);

(e) the quantum and duration of maintenance payable to the two children;

(f) whether the second respondent is liable to pay damages to the petitioner for allegedly having caused/contributed the breakdown of the marriage between the petitioner and the first respondent and if so, the quantum.

Factual Background

[6] The petitioner and the first respondent met each other in year 1989 when they were both medical students in Kasturba Medical College in Manipal, India. After a courtship for about six years and having completed their respective medical degree, they registered their marriage on 19 July 1995 in the National Registration Department in Penang ("P1"). Both are practising doctors and are 46 years of age this year.

[7] Two (2) children were born out of this union, namely, Teh Chia Ray, now 17 years old (born on 11 August 1997) and Teh Shia Lin (f), now 15 years old (born on 6 October 1999) ("P2" – birth certificates).

[8] The petitioner and the first respondent commenced their housemanship in Taiping Hospital sometime in year 1996. Both their salary were within the region of less than RM2,000 each. Thereafter, they were both posted as medical officers to a hospital in Selama, Taiping, Perak. Subsequently, parties were then posted to several other places and finally in the year of 2000, the first respondent was posted as a Registrar in Hospital Tuanku Jaafar, Seremban, Negeri Sembilan and the petitioner was posted to the Ministry of Health in Kuala Lumpur.

[9] At the time their marriage was registered, parties did not own any immoveable assets in their own name. As far as the two cars which the parties had in their respective names, that is Ford Escape under the name of the first respondent and Honda CRV under the name of the petitioner, both parties agreed to waive their claims upon each other as far as the cars are concerned. Thus, an infinitesimal calculation is not required on these.

[10] The petitioner resigned from the government service on 9 May 2000 and then set up a private practice under the name and style Klinik Prime Medic located at Ground Floor, No. 36, Jalan SS2/24, 47300, Petaling Jaya, Selangor ("SS2 clinic"). At that material time the first respondent was still working as a Registrar in Hospital Tunku Jaafar in Seremban, Negeri Sembilan and he would help out with the running of the SS2 clinic by working in the evening for several hours and during weekends (unless when he is on call in the government hospital).

[11] Sometime in August 2001 the first petitioner bought a house at Bandar Utama, the house of which both the petitioner and the first respondent rented when they first moved to Kuala Lumpur from Taiping and they continued to stay there with the children till 5 August 2006. The house was solely in the name of the petitioner with initial deposit of RM100,000 borrowed by the petitioner from her sister Tip Kaur. A mortgage loan was taken from HSBC Bank for the balance purchase price. The loan instalments were paid from the income of the SS2 clinic.

[12] The first respondent resigned from government service on 14 April 2002 with a view to pursue his studies in the field of Obstetrics and Gynaecology in the United Kingdom as he had already passed Part 1 exams in that field ("P7"). He was however unable to pursue that due to some financial issues. After several months later, the first respondent decided to sit for his Part 2 MRCOG examination (O&G Specialist Qualification) locally but he did not get through the exams, and thereafter on or about end 2003 the first respondent joined the petitioner full time at SS2 clinic. Both the petitioner and the first respondent jointly operated the SS2 clinic with joint account at RHB bank with either to sign. However, it was the first respondent who was in charge of clinic and finances.

[13] Sometime in September 2004, the petitioner and the first respondent set up of another branch of Klinik Prime Medic called as Sunway Mas Clinic ("PJU clinic"), the funds coming from the income generated by the SS2

clinic. The petitioner and the first respondent took turns to run both clinics, three days the first respondent at the PJU clinic and three days a week the petitioner at SS2 clinic, the following week they would switch, the first respondent three days the SS2 clinic and the petitioner three days at the PJU clinic. Both clinics were closed on Saturday. The arrangement took place until sometime in the middle of December 2006.

[14] On 29 June 2005 the petitioner and the first respondent bought, in joint names, a new house at Bukit Rimau, Shah Alam ("the Bukit Rimau house") for RM1.9 million. Both of them and the children had moved out of the Bandar Utama house and moved into, the Bukit Rimau house sometime in early August 2006.

[15] However less than two months later, due to constant quarrelling between them mostly on financial issues, the petitioner moved out of the Bukit Rimau house in September 2006 and thereafter the parties had lived separately since then. The petitioner and the children had moved back to Bandar Utama house. The first respondent stayed on in Bukit Rimau house.

[16] In relation to the operation of the two clinics, the petitioner had ceased to work in the SS2 clinic and PJU clinic sometime after Christmas 2006 until April 2007.

[17] On 16 April 2007, the petitioner went back to the SS2 clinic and had a discussion with the first respondent. The outcome of the discussion was that the parties agreed that there would be a separation in interest where the petitioner would take over and manage the SS2 clinic on her own and *vice versa*, the first respondent to take full control of the PJU clinic, effectively dividing the two clinics among themselves.

[18] On 23 April 2007, there was a formal handover of the SS2 clinic from the first respondent to the petitioner. After conducting a physical examination, the parties had their respective representatives to witness the handover and a record book titled "Transfer Drugs to PJU Klinik" (marked as exh. "D12": pp. 111-124 of Bundle J) was created to record the things removed from and the things remained in the SS2 clinic for the purposes of the handover. Parties and their respective representatives/witnesses had also placed their signature in p. 124 of Bundle J ("D12"), namely Jane Maria for the petitioner and Helina Edward for the first respondent. Thereafter, all the nurses from the SS2 clinic, namely, Nurul ("SD3"), Helina Edward, Saraswathy ("SD4") and Gaitiri ("SD5") followed Dr T and worked in the PJU clinic except Saraswathy who had worked in the SS2 clinic for a period of two weeks after the handover to help out with Dr G at SS2 clinic.

[19] After the separation of parties in September 2006, the children had initially resided with the petitioner in the Bandar Utama house from September 2006 to end of December 2006. Subsequently, the children were staying with the first respondent at about the end of December 2006 until sometime March 2007.

[20] On 17 May 2007, the court granted interim custody of the children to the petitioner pursuant to the order under the Originating Summons No: MT3-24-19-2007.

[21] Sometime in January 2007 the first respondent applied for counselling sessions with the Marriage Tribunal. After meeting the parties for four occasions respectively, a certificate was then issued by the Marriage Tribunal on 13 September 2007 to certify that reconciliation of the marriage was not possible ("D28").

[22] The first respondent had then filed a Divorce Petition No: 33-888-2007 ('the first petition' – "exh. D27") for dissolution of the marriage between the parties on 11 October 2007 but the first petition was struck out by court on the grounds that the petition filed by the first respondent had failed to plead the cause of breakdown of the marriage.

[23] Subsequent to the first petition, the petitioner then filed this current petition on 22 November 2007. On 15 January 2008, the petitioner obtained the *ex parte* maintenance order to compel the first respondent to pay a monthly maintenance in the sum of RM15,000 which comprise of the following;

(a) RM10,000 to the petitioner; and

(b) RM5,000 for the children.

[24] On 19 July 2012, pursuant to a Notice of Application For Ancillary Relief dated 15 March 2012 filed by the first respondent to vary the maintenance sum granted to the petitioner namely, RM10,000 (on grounds of misrepresentation and material change in circumstances), the *ex parte* maintenance order in favour of the petitioner was varied by this court and was reduced from RM10,000 to RM6,000 (Order dated 19 July 2012 (encl. 4A).

[25] The children are currently residing with the petitioner in Australia since sometime in July 2012 where the petitioner had been residing since to obtain her advanced medical qualification at The Royal Australian College of General Practitioner. The children had not been back to Malaysia since then.

The Evidence

[26] The first respondent in his reply and cross-petition filed on 28 October 2009 blamed the petitioner for the break down of the marriage. The first respondent testified that the marriage between him and the petitioner had been in trouble since 2004 and that it had irretrievably broken down sometime in September 2006 as can be seen from the events below:

(i) there were constant arguments over the petitioner constant and frequent usage of controlled drugs and alcohol and as a result of that, caused numerous quarrels between the parties over time and cold war between the parties where there would be no communication;

(ii) that the petitioner had walked out of their marriage when she moved out from the Bukit Rimau house with the children without informing the first respondent sometime around September 2006.

[27] The first respondent testified that he first found out that the petitioner was abusing drugs, through the petitioner's own confession, sometime in the year of 2002 after he left the government service, before the intended trip to UK to further his studies. According to the first respondent after the petitioner rested at home for about six months, the petitioner managed to recover but then shortly after, that is in year 2004, the petitioner went back to her old habit because she could not cope with the stress of running the SS2 clinic. As a result, the petitioner had suffered a seizure during a family trip in London in year 2004 and another during their daughter's birthday celebration at the end of year 2005. Thereafter, the first respondent persuaded the petitioner to see a psychiatrist by the name of Dr Lee Chee Min to overcome her psychological problems that lead up to the drug problem. He further testified that the petitioner would appear 'stoned' and in a daze most of the time during work and clinic staffs could not read her handwriting. He added that the petitioner had also forced the clinic staff, Gaitiri ("SD5"), who was tasked by the first respondent to monitor the controlled drugs in the clinic to allow her to take the controlled drugs which were locked. As a result, parties had constant arguments and had stopped talking to each other and ceased having any intimate relationship with each other thereafter. In August 2006 the petitioner moved to the Bukit Rimau house with the children. Upon discovering that the petitioner and the children had moved to the Bukit Rimau house, the first respondent then packed his personal belongings in Bandar Utama house and moved to the Bukit Rimau house as well. However, approximately less than two months after, the petitioner had moved back to the Bandar Utama house with the children. The first respondent had stayed on in the Bukit Rimau house. He further testified that at this juncture it was clear to him that the petitioner does not intend to continue with the marriage and he then made up his mind to give up on the marriage.

[28] The petitioner testified that she suffered from stress and sleeplessness due to matrimonial problems and that she was under medication for sleeplessness and that the epileptic fits she had were due to an inherent condition and not the alleged misuse of drugs.

[29] The petitioner further testified that when they moved into the Bukit Rimau house, there was no gate or fence nor street lights and there was no phone line as yet. She was concerned about the safety of the children as it was a new area and there was construction work in progress in the vicinity and there were foreign workers working at the construction site. Furthermore, the Bukit Rimau house was 30 km from the children's school and as the year end exams were approaching and for security reasons, after discussion and agreement between her and the first respondent, she and the children shifted back to the Bandar Utama house on 1 October 2006 until the

children's exams were over. They intended to move back to Bukit Rimau house when the security arrangements were better. According to the petitioner, the first respondent did not move back to the Bandar Utama house but insisted on staying at the Bukit Rimau house to take care of the premises during week days and the family agreed to meet on weekends at the Bandar Utama house to spend quality time together.

[30] The petitioner gave evidence that on 14 October 2006 the whole family had decided to go for a movie as the tickets are at a discount on Wednesdays. The first respondent was supposed to pick the petitioner and the children up from Bandar Utama at 7pm and it was supposed to be a family outing ie dinner and movie after that. According to the petitioner, she and the children waited for the first respondent till 8pm and when he failed to turn up, she called him on his handset and he answered stating that he was at the Bukit Rimau house and that he was not feeling well and could not make it for the planned family outing, and that he intended to take a rest to recuperate. Out of sheer concern as a wife, she went to the Bukit Rimau house on the same day at around 10pm to inquire on the first respondent's health. She had a set of keys for the Bukit Rimau house. Upon arriving at the Bukit Rimau house, she entered the house using her set of keys. As the first respondent was not downstairs, she proceeded upstairs to the master bedroom and when she opened the bedroom door, she saw the first respondent in close proximity with another woman having wine on the bed. She observed that the first respondent was dressed only in his shorts and the woman was skimpily dressed with spaghetti-string top. The petitioner also observed that the woman's hair was still wet as she had just taken her bath. The petitioner further testified that she was in a state of shock at what she saw. According to the petitioner, the first respondent then told the woman something in Chinese and the woman whizzed past the petitioner and rushed downstairs and left the house hurriedly. Thereafter, the petitioner confronted the first respondent and asked him to explain what was going on and this led to an argument between them. The petitioner admitted slapping the first respondent. According to the petitioner, the first respondent then grabbed her by her shoulders and pushed her into the adjoining study room where they continued to argue and there after he forcefully pushed her to the ground and stomped on her foot causing it to fracture. He left her and went downstairs. The petitioner followed him downstairs limping and asked him where he had met the Chinese woman she saw in bed and in response, the first respondent told her that he had met the woman at a pub two years ago after a medical conference and he had started to see the woman ("the second respondent") recently. He left her crying, got into car and sped off. The first respondent came back to the Bukit Rimau house after about 2 to 3 hours later while the petitioner was still there. He immediately called the petitioner's brother ("Alfred") and sister ("Jane") to come over. When the petitioner's brother and sister ("Jane Maria") came over, the first respondent told them what had happened. The first respondent told them that the petitioner had gone mad

and asked them to calm her down. In response the petitioner's brother then asked the first respondent how else would someone react after knowing that her husband had cheated on her. The first respondent remained silent. The petitioner then left the Bukit Rimau house with her brother and sister, at about 2am on 15 October 2006, leaving her car behind which her driver collected later the next day. She identified the said woman as being present in court on the first day of trial, ie the second respondent, Ng Siew Tee as the woman that she saw at Bukit Rimau house on the night of 14 October 2006.

[31] Evidence was also led showing that the first respondent, a few days later, took an X-ray of the petitioner's fractured toe and she was treated for the fracture with corrective surgery by Dr Eddie Soo Fook Mun at Assunta Hospital on 9 November 2006. The reporting of the X-ray confirming the said fracture was done on 18 July 2007 ("P14").

[32] Thereafter, there was an impasse between the petitioner and the first respondent and the petitioner and the children continued to stay at the Bandar Utama house, whereas the first respondent continued to reside at the Bukit Rimau house. According to the petitioner, there were times when she and her sister would drive past the Bukit Rimau house and on many occasions, the second respondent's car, was seen parked outside the house. She testified that she had strong grounds to believe that the first and second respondent were cohabiting.

[33] The petitioner testified that Ng Siew Tee, the second respondent is also included in these proceedings as a co-respondent as the main cause of the break down of the marriage between her and the first respondent. She was a medical sales rep who supplied pharmaceutical products at the SS2 clinic and also a patient whom the first respondent treated for "Clamydia and Herpes Simplex" on 5 October 2006 ("P105"). The petitioner, as medical practitioner, testified that this condition is a venereal disease contracted from having multiple sexual partners. The petitioner also produced the birth certificate of a child between the first respondent and the second respondent Ng Siew Tee that was born on 12 September 2008 ("P58"). She further testified as a doctor, that Ng Siew Tee would have conceived during the currency of these divorce proceedings, confirming the intimate relationship between the first respondent and the second respondent. The court is also referred to photographs of the child born out of wedlock, the child of the first respondent and Ng Siew Tee ("photos P59A to 59L").

[34] The first respondent testified that the alleged incident on 14 October 2006 never took place at all and it was a concocted story by the petitioner. The relevant passage of the first respondent's statement on the incident is as follows (the first respondent's witness statement T(1)(SD1):

19Q: I refer you to paragraph 16, page 4 to 6 of the Bundle of Pleadings (Bundle A). The petitioner said she saw you and the 2nd respondent sipping wine on your matrimonial bed on 14.10.2006. Was there such an occurrence?

A: The whole event is a mere fabrication by the petitioner with an intention to injure me and the 2nd respondent. It was convenient for the petitioner to pick up such a date as it was a Saturday, the only day our clinics are closed.

20Q: What happened on 14.10.2006 then?

A: The petitioner and I were already having cold war at that time. As the petitioner and the children had already moved back to the Bandar Utama house on the petitioner's own accord, I practically was left alone in the Bukit Rimau house every weekend. As such the petitioner also brought the maid along with her, I would spend my weekends cleaning and maintaining the Bukit Rimau house on Saturdays.

21Q: In that case, have you ever physically abused the petitioner or stomped on the petitioner's toe as alleged in paragraph 16.10 at page 5 of Bundle A?

A: I had never laid a finger on the petitioner. The accusation about me stomping on her toe was also a mere concoction! I however do recall that the petitioner came to see me in the SS2 Clinic sometime around end of year 2006 for her fractured toe as she claimed she injured herself at home. We were already having cold war during that time, she was staying in the Bandar Utama house herself with the children.

22Q: How do you know the 2nd respondent then?

A: I know the 2nd respondent as a medical sales representative from one of the company that I used to take supplies of pharmaceutical products from. We only got to know each other well during a charity project in mid 2007, after the petitioner moved out from the Bukit Rimau house, when we live separately. We started seeing each other after that.

[35] The first respondent also testified that the reasons given by the petitioner for moving out of Bukit Rimau house cannot be accepted because if that was her real concerns, the petitioner should not have moved into the Bukit Rimau House at the first instance as those alleged facts were easily available and known to her before she moved in with the children. Besides, there was also no 'fence and gate' because the house was a gated and guarded community. The petitioner had not requested to install any fencing or additional security apparatus.

Findings And The Decision Of The Court

Whether Dr G's Drugs Problem Caused The Breakdown Of The Marriage

[36] Learned counsel for the first respondent contends that the petitioner's constant and frequent usage of controlled drugs had cumulatively led to the breakdown of the marriage between the petitioner and the first respondent and the first respondent cannot be reasonably be expected to live with her and the marriage between parties should be dissolved by virtue of ss. 53 and 54(1)(b) of the Law Reform Act.

[37] Learned counsel for the first respondent also submitted that the breakdown of the marriage was caused by the petitioner's behaviour in her over usage of controlled drugs and her conduct in moving out of the Bukit Rimau House sometime end of September 2006 and not because of the alleged incident on 14 October 2006.

[38] The petitioner on the other hand alleged that the marriage between her and the first respondent had irretrievably broke down because:

(a) of the incident on 14 October 2006 where the first respondent had committed adultery with the second respondent; and

(b) that the first respondent had abused the petitioner physically and mentally as stated in para. 17 of the petition and it is unreasonable for one to expect the petitioner to stay married with the first respondent.

[39] Learned counsel for the petitioner submitted that the preponderance of evidence goes to show that the petitioner suffered stress and sleeplessness due to matrimonial problems and that she was under medication for sleeplessness and that the epileptic fits she had were due to an inherent condition and not the alleged misuse of drugs. Learned counsel for the petitioner further submitted that the cross-examination of the nurses Nurul, Saraswathi and Gayathri elicits evidence that they themselves knew that the first respondent prescribed the drugs as is seem from cross-examination of the first respondent and of the three nurses SD3, SD4 and SD5.

[40] The evidence of the first respondent during cross-examination on the drugs issue is as follows:

Q: I take you back to the drug issue. Dr I put it to you, since 2004, you knew Dr Gurmail had anxiety and sleeplessness and sometimes you gave her controlled drugs, do you agree or disagree?

A: I give her occasionally once or twice and is documented down in the controlled drugs book.

Q: if she is taking drugs for sleeplessness and anxiety, you took the drugs for her and gave her?

A: I give in a few occasions in the beginning of 2004, yes.

Q: As a doctor, for drugs in your clinic, you have domicom, zophidon. Doctor, is insopine the manufacturer name for zophicon?

A: Yes

Q: And another Drug, lorazpin, is it the short name for lora?

A: Yes.

Q: And there's one more, forknow?

A: That is not a control drug that is the drug we use to prevent people having migraine.

Q: For the Drugs I mentioned just now, are all these sedatives?

A: Yes

Q: As you rightfully say, these were controlled drugs and whoever took them should record their name, correct?

A: Previously we didn't do that, we trust the thing in order but later we discover large amount missing then we start doing the book.

Q: Anyone who took the drug have to record the name?

A: Prior to April 2005, is not recorded.

Q: Can I take you to bundle J, page 8, can we see "27/4/2005, Dr Teh for GK, lorans 10", you agree?

A: I agree.

Q: And GK is Gurmail Kaur, you agree?

A: I agree.

Q: And page 9, 3rd June, Dr Teh for GK, forknow, lorans, insopin, 5, 10, 10.

A: That's correct.

Q: You gave forknow for migraine, you agree?

A: Yes, as she requested.

Q: So you have knowledge of this.

A: As I said, only for first few, yes.

Q: I take you to August 2005, page 12. Can you see "15.08.2005, Dr Teh for GK, lorans 10".

A: Yes.

Q: If you look at page 24, now we are looking at 2006, 18th September, its written, "Dr Teh G, insopin 10, lorans 10". Doctor, I put it to you that this was taken for Dr Gurmail, the drugs were the same, 10 :10, you agree?

A: I can't recall, because I may take for patients, G means Gaya, my nurse.

Q: But insopine and lorans are the same drugs and the number of tablets are also 10 : 10, correct. Same as earlier, agree?

A: Agree.

Q: I put it to you from June 2005 right up to September 2006, you knew and agree to Dr Gurmail taking Insopin, taking Lorans and sometimes Forknow.

A: I agree.

Q: Doctor, I put it to you that all these drugs (except for forknow) lorans, insopin from 2005 till 2006 was to cure her insomnia, her, Dr Gurmail, insomnia, anxiety, do you agree?

A: I have to answer yes or no.

Q: Yes or no?

A: Because there was no treatment.

Q: My question is she took all these drugs, of course you have knowledge up to 2006 to cure her sleeplessness and anxiety as the doctor's report shows, you agree?

Q: I have to disagree Mr Rabinder.

A: Remember page 3, the doctor who gave the report

A: Dr Lim.

Q: He said she has anxiety and depression and sleeplessness, do you agree?

Q: Yes.

R: You agree with me, so I put it to you, in light of the doctor's report in your knowledge she is taking this, it was or treating anxiety, sleeplessness, insomnia, do you agree or disagree?

Q: Treatment I agree, for cure.

[41] Having given due consideration to the evidence in totality on the allegation by the first respondent that the breakdown of marriage was caused by the petitioner's misuse of drugs, I found that that the allegation was lack of basis. The evidence clearly shows that it was the first respondent himself that prescribed the medication/the controlled drugs for the petitioner's stress and sleeplessness. SD4 and SD5 were both nurses who had worked in the SS2 clinic and PJU clinic at the material time testified that were the ones who had discovered that a large quantity of controlled drugs in the clinics were missing. SD5 was further tasked by the first respondent to keep a record of the drugs storage as can be seen in exh. "D1 & D2". Apart from the first respondent, SD5 was also the only other person who had the key to where the controlled drugs were kept. Under cross-examination, both SD4 and SD5 admitted that it was the first respondent that prescribed the drugs for the petitioner. The petitioner had given her explanation on why she took those drugs. I accept the evidence of the petitioner as credible on why she had to be on medication, ie, the stress in her matrimonial life, and how she was prone to epileptic fits as early as 2004 due to an inherent condition in the

brain for which she has been on medication and has improved now. Thus, I found the breakdown of the marriage was not caused by the petitioner as a result of the misuse of drugs.

Whether The First Respondent Committed Adultery With The Second Respondent, And The Petitioner Finds It Intolerable To Live With The First Respondent, And Whether The Second Respondent Has Caused And/Or Contributed The Irretrievably Breakdown Of Marriage Between The Petitioner And The First Respondent And If So Whether She Is Liable In Damages To The Petitioner

[42] The petitioner gave evidence that she saw the second respondent with the first respondent on the bed at the Bukit Rimau house night of 14 October 2006 and the second respondent was skimpily dressed and her hair was wet as if she just had a shower. The first respondent was in his shorts. The petitioner also identified, by pointing to the second respondent in court during the trial on 16 November 2011 as the woman she saw with the first respondent that night.

[43] The petitioner also gave evidence that on the night of 14 October 2006, the petitioner asked the first respondent where he had met the Chinese woman she saw in bed and in response, the first respondent confessed that he had met her at a pub two years ago after a medical conference and also confessed that he had started to see the second respondent, recently.

[44] At the hearing of the petition the petitioner produced a birth certificate relating to a child namely Teh Chia Kang ("P58"). Learned counsel for the petitioner invites this court to consider the birth certificate ("P58") which shows that on 12 September 2008 the second respondent gave birth to the first respondent's child namely Teh Chia Kang. In birth certificate the first respondent with NRIC No: 680814-07-5215 registered as the father and the second respondent with NRIC No: 770730-09-5074 registered as the mother. Photographs "P59(A to L)" showed the first respondent and second respondent with the said child.

[45] The petitioner also stated that the second respondent was a medical sales representative who supplied pharmaceutical products at the SS2 clinic and was also a patient who the first respondent treated for "Clamydia and Herpes Simplex" on 5 October 2006, about nine days prior to the incident of 14 October 2006. The petitioner, as doctor, testified that this condition is a veneral disease contracted from having multiple sexual partners.

[46] It was also contended by the counsel for the petitioner that during cross-examination, the first respondent agreed that sometime in mid-2008 there was traditional ceremony in Penang during which he 'married' the second respondent who was dressed in a bridal costume and relatives were present.

[47] It was also submitted that the second respondent knew that the petitioner was married to the first respondent as both doctor's names would be displayed at the SS2 clinic. The petitioner led evidence that when both children were with the first respondent from mid-December 2006 till March 2007, they met the second respondent. Counsel for the petitioner contended that the petitioner was not cross-examined on this issue. Neither was the petitioner cross-examined on her identification of the second respondent in court on 16 November 2011 as the woman she saw in the bed with the first respondent on 14 October 2006. As stated earlier, the second respondent was a medical sales representative who supplied pharmaceutical products at the SS2 clinic, the clinic belongs to both the petitioner and the first respondent and was also a patient who the first respondent treated for "Clamydia and Herpes Simplex" on 5 October 2006 (cases on effect of failure to cross-examine a witness, see: *Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLH 212 FC; *PP v. Abang Abdul Rahman* [1981] 1 LNS 169; *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545).

[48] The petitioner also testified that when she and her sister used to drive past the Bukit Rimau house she would see the second respondent's car parked there indicating that the second respondent and the first respondent were cohabiting. The petitioner also testified that on one occasion just after the incident of 14 October 2006, she and her sister Jane Maria followed the first respondent's car in her sister's car and saw him pick the second respondent up and proceed to an apartment complex Pangsapuri Akasia where they drove in the Ford Escape. The petitioner also stated that she and her sister observed from their car that the first and second respondent alighted from the car holding hands and they had then proceeded to the guardhouse to register and then went together into one of the apartments in the apartment complex. The petitioner stated that she and her sister waited for a while in the car but the first respondent and second respondent did not emerge from the apartment so the petitioner and her sister left later. The petitioner's evidence on this issue was corroborated by PW3 Jane Maria.

[49] It was submitted for the petitioner that in spite of the allegation against the second respondent, she chose not to testify but elected to make submission of no case to answer. It was submitted that the court may make an adverse inference against the second respondent for electing not to go into the witness box to face the 'fire baptism of cross-examination' (See: *Jaafar bin Shaari & Anor (suing as administrator of the estate of Shofiah bte Ahmad, deceased) v. Tan Lip Eng & Anor* [1997] 4 CLJ 509; [1997] 3 MLJ 693; *Subry Hamid v. Husaini Tan Sri Ikhwan & Anor* [2006] 4 CLJ 50; [2006] 6 MLJ 229; *Takako Sakao (f) v. Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 FC; *Dato' Abdullah Hishan bin Haji Mohd Hashim v. Sharma Kumari Shukla (No 3)* [1999] 7 CLJ 464; [1999] 6 MLJ 589).

[50] The first respondent denied having an adulterous affair and said that the claim by the petitioner was baseless and a mere fabrication to injure his reputation. The first respondent also denied that he had stomped and caused crack to the petitioner's toe. Instead the first respondent said the petitioner's injury caused by her own falling sometime around end of year 2006.

[51] Learned counsel for the first respondent submitted that the alleged incident of 14 October 2006 never took place at all and it was a concocted incident by the petitioner. He further submitted that there are contradiction of testimony of the petitioner and her witness SP3. Learned counsel listed out the contradictions as per para. 46 of his written submission. It was also submitted that the allegation of adultery conveniently surfaced when the petitioner filed this petition on 22 November 2007.

[52] It is trite law that in relation to an allegation of adultery, the standard of proof for adultery is beyond reasonable doubt and the adultery had caused the breakdown of the marriage as enunciated in the following cases:

See:

i) *Wee Hock Guan v. Chia Chit Neo & Anor* [1964] 1 LNS 214; [1964] 1 MLJ 217, OCJ Singapore, Winslow J at p. 217 (right) to para. A-C, p. 218 (left):

> It is well established that an allegation of this nature must be proved to the satisfaction of the Court beyond reasonable doubt and that the onus of so satisfying the Court in this case rests upon the petitioner. "The evidence must go beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the Court that from the nature of things adultery must have been committed; where the evidence is entirely circumstantial the Court will not draw the inference of guilt unless the facts relied on are not reasonably capable of any other explanation." (See *Tolstoy on the Law and Practice of Divorce*, 4th Ed. at page 29). As Lord Merrivale P. said in *Farnham v. Farnham* (1925) 133 LT 320 "The inference of adultery arises when there is proof of the disposition of parties to commit adultery, together with the opportunity to commit it".

ii) *Choong Yee Fong v. Ooi Seng Keat; Chua Chong Hong (Joint Respondent)* [2006] 5 CLJ 144, HC, Faiza Tamby Chik J at para. 4, p. 149:

> [4] The petitioner must prove to the satisfaction of the court beyond reasonable doubt that the respondent had committed adultery and it is due to the alleged adulterous relationship which led to the breakdown of the marriage. This principle is upheld in the case of *Shanmugam v. Pitchamany & Anor*. [1976] 1 LNS 141; [1976] 2 MLJ 222 where Hashim Yeop A Sani J (as he then was) stated:

> It is well established in law that an allegation of this nature must be proved to the satisfaction of the Court beyond reasonable doubt. In *Rayden on Divorce*, 12th Edition page 193, it is said: the burden of proof is throughout on the person alleging adultery, there being a presumption of innocence.

iii) See also: *Yew Yin Lai v. Teo Meng Hai & Anor* [2007] 5 CLJ 737; [2007] 4 MLJ 703; *Choo Hui Ling v. Yeow Joen Ann & Anor* [2013] 9 MLJ 788; *Shanmugam v. Pitchamany & Anor* [1976] 1 LNS 141; [1976] 2 MLJ 222; *Kang Ka Heng v. Ng Mooi Tee; Yeoh Ah Hoon (Named Party)* [2001] 2 CLJ 578; *Shudesh Kumar Moti Ram v. Kamlesh Mangal Sain Kapoor* [2005] 2 CLJ 371; [2005] 5 MLJ 82; *Wee Hock Guan v. Chia Chit Neo & Anor* [1964] 1 LNS 214; [1964] MLJ 217.

[53] Based on the cases cited above, for allegation of adultery to be established, the evidence must be beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the court that from the nature of things adultery must have been committed; where the evidence is entirely circumstantial, the court will not draw the inference of guilt unless the facts relied on are not reasonably capable of any other explanation. In dealing with circumstantial evidence the court has to consider the weight which is to be given to the united force of all the circumstances put together.

[54] It is trite law also that where the case of a party is largely founded on the oral evidence of its witness, then the credibility of that witness becomes extremely crucial. This was so held in the Federal Court decision of *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 FC, YAA Raus Sharif at paras. 27 to 28, p. 800 as follows:

> [27] In the instant case, as found by the trial judge, that the case of UEM and GIE was not one that was premised only on documentary evidence. The positions of the respective parties depended largely on oral evidence as to the circumstances of the dispute between the parties as well as the circumstances underlying material documentary evidence. In respect of documentary evidence, it was not entirely such that it could be understood without the benefit of explanation by material witnesses.
>
> [28] It is for this reason that the trial judge's conclusion that Seow, the only witness put forth by GIE, being not a witness of truth, was of great significance. This is because GIE's case was mounted on the strength of Seow's evidence. Reliance was placed on Seow as to how documents were to be understood. Several affidavits were filed by Seow in the proceedings which were then relied upon on Seow's evidence in chief for the trial of both the petitions. Thus, what the trial judge had to say of Seow as a witness is crucial.

(Further down at paragraphs 29 to 30, page 803):

> [29] It can be seen from the above that the trial judge's conclusion as to Seow's credibility was based on his observation not only on material attributes of Seow's demeanour but also on evident contradictions and inconsistencies on the relevant and material matters. The trial judge referred to specific examples of Seow's contradictions and inconsistencies. These examples were drawn from the different aspect of the case before him and threaded through the various heads of oppression identified by UEM in its case. To that end, the trial judge noted that Seow had lied on affidavit as well as during his oral evidence and was untruthful.
>
> [30] In the light of the above, it is apparent that this is a case where the findings of credibility could not be severed from documentary evidence. The finding by the trial judge that Seow was being untruthful was an integral part of the whole case on the basis of a reasonable and proper judicial appreciation of the evidence. This is evident from a reading of the trial judge's judgment as a whole as well as his summary and conclusions. The trial judge had come to findings of specific facts, pertaining to the heads of oppression in the UEM's petition in rejecting the version put forth by Seow.

[55] Having given due consideration to the evidence in totality, I found that the petitioner had proved beyond reasonable doubt that the first respondent and the second respondent had an adulterous affair and relationship and their joint presence on the bed in the Bukit Rimau house on 14 October 2006 was to perpetrate their adulterous act when particularly, the marriage of the petitioner and the first respondent at that material time was still in subsistence. I find it hard to believe that the petitioner had concocted the incident of 14 October 2006. I find it is not a bold statement or she had allowed her imagination run wild. It is a fact that the petitioner was at Bukit Rimau house on the night of 14 October 2006. It is also a fact that the first respondent had called the petitioner's brother and sister ("SP3") to come over to Bukit Rimau house on that late night. It is also a fact that the petitioner left Bukit Rimau house with her brother and sister and left her car at Bukit Rimau house. It is also a fact that the petitioner suffered from fractured toe and corrective surgery on the toe was carried out by orthopaedic surgeon Dr Eddie Soo Fook Mun on 9 November 2006. She has explained that she was so emotionally disturbed by the events of 14 October 2006 and delayed her treatment until she could not bear the pain. The petitioner also identified the second respondent in court during the trial on 16 November 2011 as the woman she saw with the first respondent that night and her evidence was not challenged (*Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212 FC). On the submission by the learned counsel for the first respondent that there are contradictions testimony between the petitioner and SP3 in relation to the incident of 14 October 2006, I found the inconsistency are inconsequential inconsistencies which do not affect the evidence of the petitioner on what she saw and observed upon her entry into

the Bukit Rimau house. It can be fairly stated that the petitioner's mind was still dominated by the event. On the balance of probabilities, I accept the petitioner's evidence of her version on the incident on the night of 14 October 2006. In accepting her evidence, I was guided by the principle stated in the case *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119. The first respondent in his evidence under cross-examination admitted that he did have extra marital affair with the second respondent. The first respondent excerpt of the cross-examination in this issue is as follows:

Q: I refer you to bundle D page 1, same bundle. You agree that this is the birth certificate of Teh Chia Kang

A: I agree.

Q: Is he your son?

A: Yes.

Q: In fact do you see, bapa Teh Seong Peng, ibu Ng Siew Tee, you agree?

A: Yes

Q: And the date of birth is 12.9.2008, you agree?

A: Yes;

Q: You agree that this child is conceived sometime, you say 10 months, ok. So if the child is born on 12.9.2008, the child would have been conceived in December 2007 according to your calculation.

A: Yes correct around there.

Q: Do you agree when this child was conceived, you were lawfully and are still lawfully married to the petitioner?

A: Yes.

Q: Do you agree that in December when you had sexual intercourse with the 2nd respondent, you were still lawfully married to the petitioner?

Q: Yes

R: Would you agree that December was not the 1st time you had sex with the 2nd respondent. I am asking you, the date she conceived was not the first time you had sex with her?

A: Yes

Q: I put it to you that you had sex with her in November, October, September 2007.

A: I am sorry can you repeat the month?

R: Under oath you have said to the court that in December when she conceived, it was not the first time you had intercourse with her

A: Yes.

Q: I put it to you that you had intercourse with her November 2007, October 2007 and even September 2007

A: I can't recall the exact month Mr Rabin.

Q: But you had sexual intercourse before that, before conception, you agree

A: Yes.

[56] The name of the first respondent and the second respondent entered on the register ("P58") as being the father and the mother of Teh Chia Kang is not accidental. In the case of *Jackson v. Jackson and Pavan* [1960] 3 All ER 621 it was held *inter alia* that the entry in the register was *prima facie* evidence of an admission of adultery by the child's father. It is also a fact that sometime in mid-2008 there was traditional ceremony in Penang during which the first respondent 'married' the second respondent. On the evidence, I also found that the second respondent knew that the first respondent was married. It is not the requirement of law that the petitioner must have seen the first respondent and second respondent in the act of intercourse.

[57] Based on the oral and documentary evidence adduced by the petitioner, I find that the petitioner had established a case in law for the second respondent to answer. The second respondent failed to adduce any evidence or to call any witness on her behalf. It is trite law that once a defendant in civil proceedings makes a submission of no case to answer and elects not to call evidence, then all evidence led by the petitioner must be assumed to be correct (*Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751 FC; *Dato' Abdullah Hishan Haji Mohd Hashim v. Sharma Kumari Shukla (No. 3)* [1999] 7 CLJ 464; [1999] 6 MLJ 589; *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484; [2010] 1 MLJ 85, [2010] 1 AMR 448). That being the case, the second respondent had failed to show that the evidence of the petitioner is so unsatisfactory or unreliable that the burden of proof on the petitioner of the relevant issues has not been discharged.

[58] On the above reasons, I found the marriage has irretrievably broken down due to adultery between the first respondent and the second respondent. In the circumstances, I hold that the first respondent was solely responsible for the breakdown of the marriage aided and abetted by the second respondent. The adultery is the causation for the breakdown of the marriage. In the circumstances, I also found that it is unsustainable for the petitioner to be reasonably expected to live with the first respondent. I shall order that the marriage be dissolved and grant the petitioner's prayer that *decree nisi* be made absolute in one month from the date of the order.

[59] In the case of *Soo Lina v. Ngu Chu Chiong (Chong Oi Khium Irene, co-respondent)* [1994] 2 MLJ 139, Abdul Kadir Sulaiman J (as he then was) held as follows:

> Under the Act, the power of the court to grant the dissolution of the marriage is covered in ss. 53 and 54. There is only one ground for divorce under the Act. It is on the ground that the marriage had irretrievably broken down. At the hearing of a petition for divorce, the court is required to inquire into the facts alleged as causing or leading to the breakdown of the marriage and if satisfied that the circumstances make it just and reasonable to do so, it shall make a decree for the dissolution of the marriage.... In such an inquiry the court is required to have regard to any one or more of the four facts listed in items (a)-(d) of s. 54(1) … .

[60] In the case of *Hariram Jayaram v. Saraswathy Rajahram* [1990] 1 CLJ 285; [1990] 2 CLJ (Rep) 103; [1990] 1 MLJ 114, Lim Beng Choon J (as he then was) held:

> … In passing, I should perhaps say that I tend to agree with learned counsel for the respondent that, in considering a petition for divorce, the court is required pursuant to s. 53(1) of the Law Reform Act to inquire into the facts alleged as causing or leading to the breakdown of the marriage …
>
> …
>
> The standard is that he must behave 'in such a way that the petitioner cannot reasonably be expected to live with [him]'. That is the test. It is for the judge not the petitioner alone to decide whether the behaviour is sufficiently grave to fulfil that test, that is, to make it unreasonable to expect the petitioner to endure it, to live with the respondent. Also it is for the judge to say whether the marriage has irretrievably broken down. To that extent I agree with what Bagnall J said in *Ash v. Ash* [1972] Fam 135. The court must consider the effect of the behaviour on the particular petitioner and ask the question is it established, not that she is tired of the respondent, or, colloquially, fed up with him, but that she cannot reasonably be expected to live with him. In a sense it seems to me wrong to call it, as we are apt to do, unreasonable behaviour. It is behaviour that causes the court to come to the conclusion that it is of such gravity that the wife cannot reasonably be expected to live with him.

[61] As stated earlier that the marriage has irretrievably broken down due to adultery between the first respondent and the second respondent, and that the first respondent was solely responsible for the breakdown of the marriage aided and abetted by the second respondent. In other words the second respondent had contributed to the breakdown of the marriage. Learned counsel for the petitioner submitted that the second respondent be condemned to pay damages of RM200,000 to the petitioner due to the special circumstances of this case wherein the second respondent has caused the petitioner to lose her husband and partner in medical practice. Section 58 of the Law Reform Act provides that the court may award damages against the adulterer, in this case the second respondent. Having considered the submissions by parties, it is my considered opinion that a sum of RM50,000 is just and reasonable to be made against the second respondent for an award

of damages to be paid to the petitioner. Therefore, I shall order the second respondent to pay the petitioner a sum of RM50,000 as damages with 4% interest from the date of judgment until full realisation.

Custody Of The Two Children

[62] Section 88 of the Law Reform (Marriage and Divorce) Act 1976 provides that:

(a) the court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person;

(b) in deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard:

(i) to the wishes of the parents of the child; and

(ii) to the wishes of the child, where he or she is of an age to express an independent opinion.

[63] As alluded earlier, the children Teh Chia Ray (born on 11 August 1997) and Teh Shia Lin (born on 6 October 1999) now 17 years old and 15 years old respectively, are currently residing with the petitioner in Australia since sometime in July 2012. Both the children are now schooling at Glen Waverly School in Melbourne, Australia. The petitioner has had custody of the two children since the court order in the OS 24-19-2007 ie mid-2007 up to and until now. During the divorce proceedings, this court granted leave to the petitioner to take the children to Melbourne, Australia where the petitioner is currently pursuing a higher qualification for her medical practice. Learned counsel for the petitioner also invited this court to consider the wishes of the children as they are of an age to express an independent opinion. The court is referred letters written by the children at pp. 225-226 of Bundle L(1) which have put in evidence ("P95" and "P96").

[64] Learned counsel for the first respondent in his written submission informed the court that the first respondent is no longer asserting his rights to custody, care and control of the two children but only on access over the children.

[65] Having given due consideration to the circumstances, I order that the custody, care and control of the two children Teh Chia Ray and Teh Shia Lin be given to the petitioner with access to the first respondent over the children.

Whether The Petitioner Is Entitled To Maintenance

[66] The power to award maintenance to a wife is clearly provided by s. 77(1) of the Law Reform Act which reads as follows:

> 77. Power for court to order maintenance of spouse
>
> (1) The court may order a man to pay maintenance to his wife or former wife:
>
> (a) during the course of any matrimonial proceedings;
>
> (b) when granting or subsequent to the grant of a decree or divorce or judicial separation;
>
> (c) if, after a decree declaring he presumed to be dead, she is found to be alive.

[67] Further s. 78 of the Act provides that in assessing the amount of maintenance to be paid by a man to his wife or former wife, "the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage".

[68] In the case of *Parkunan Achulingam v. Kalaiyarasy Periasamy* [2004] 7 CLJ 175 His Lordship Faiza Tamby Chik J held at pp. 179-180:

> The term 'maintenance' used in ss. 77 and 92 of the LRA aforesaid, should be construed widely as it signifies any form of material provision that will enable the wife and children to be placed in a position to enjoy the same standard of living as they did during the existence of the marriage. In the case of *Re Borthwick (Deceased), Borthwick v. Beauvais* [1949] Ch 395 at p. 401, Harman J held:
>
> > ... Maintenance does not only mean the food she puts in her mouth it means the clothes on her back, the house in which she live, and the money which she has in her pocket, all of which vary according to the means of the man who leaves a wife behind him. I think that must be so. Maintenance cannot mean only a mere subsistence.
>
> In the *Supreme Court of Victoria's case of Lumsden v. Lumsden* [1963] 5 FLR 388 at 394 Herring CJ, Dean and Gowans JJ held:
>
> > In the second place in awarding maintenance the court endeavours, subject to the Husband's financial position, to place the wife in a position to enjoy the same standard of living as she did during the marriage.
>
> I am of the opinion that in considering what amount of maintenance the petitioner husband should pay to the respondent wife as maintenance for herself and the children, we must consider the means and needs of the parties, taking into account the standard of living of the parties. In the case of *Ching Seng Woah v. Lim Shook Lin* [1997] 1 MLJ 109, Mahadev Shankar JCA at p. 120 had stated that:

> The parental duties in this context are spelt out by s. 92 and it extends to accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

In the case of *Sivajothi a/p K. Suppiah v. Kunathasan a/l Chelliah* [2000] 3 CLJ 175, I held as follows:

> Maintenance signify any form of material provision that will enable an adult to live a normal life and a child to be brought up properly. Thus maintenance cannot mean only mere subsistence, ie, the food she puts in her mouth but also means the clothes on her back, the house in which she lives and the money which she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind. Moreover, it is settled law that it is the duty of the father to maintain the standard of living the children had enjoyed in the past, ie, during the existence of the marriage.

[69] Learned counsel for the petitioner invites this court to consider the evidence given by the petitioner after she settled down in Melbourne, Australia with her children which shows that:

(a) she is having custody of the two children and is undergoing training in Australia and she has not qualified as yet;

(b) pursuant to the first respondent's application (encl. 4A) on 19 July 2012 the court order dated 15 January 2008 for interim maintenance (encl. 10) was varied wherein the interim maintenance for the petitioner was varied from RM10,000 to RM6,000 but for the children the RM5,000 remains the same. This was before the court gave the order allowing the petitioner to take the children out of jurisdiction on 23 July 2012 and the issue of the expenses in Australia and cost of living there was not before the court;

(c) at the time the petitioner gave evidence (reference is made to her answers to questions 5 to 26 of M(2)) she stated that she had only about AUD 40,000 left in her account in Australia;

(d) in her response to Question 27 of M(2) she set out her monthly expenses in Australia were as follows:

(i) the rental of the current premises AUD 2,824;

(ii) the utilities expenses about AUD 1,000;

(iii) children's school pocket money for both children about AUD 400;

(iv) children's school fees about AUD 1,340 per year which translates to about AUD 112 per month;

(v) provisions come up to about AUD 1,500 per month;

(vi) health insurance for the children AUD 250 per month (since they are not covered by Australian medicare as they on temporary resident visa);

(vii) other miscellaneous expenses about AUD 500.

[70] Hence, it it was submitted that based on the average exchange rate RM3 per 1AUD, the total amounts of the petitioner's monthly expenses come to RM23,208. The current maintenance being paid by the first respondent amounts to RM11,000 (which translates to AUD 3,667 per month) ie, a shortfall of RM12,208 (ie, about AUD 4,070 per month).

[71] During cross-examination the petitioner disclosed that she makes on the average of AUD 1,280 per week and monthly, this amounts to about AUD 5,120 per month.

[72] Learned counsel for the petitioner submitted that taking into account the shortfall above (with inclusion of AUD 5,120), would translate to only a positive balance of AUD 1,000 per month for the petitioner's future savings for the children's education as well as other contingencies like the cost of a flight back to Malaysia per year (RM15,000-20,000 which translates to about AUD 6,000 per year). It was also submitted that taking into account the standard of living the family enjoyed, there is no real prospect of the petitioner being able to finance the children's education further nor buy a house as the savings for the petitioner's and children's future needs are minimal, not taking into account unforeseen contingencies.

[73] Learned counsel further contended that the first respondent has not led any evidence to his expenses. It was contended also that the first respondent has been less than honest about his means and has not given a full and frank disclosure of all his assets, in particular his bank accounts.

[74] On the other hand, it is the contention of the first respondent that the petitioner is not entitled to any maintenance. This is because, as contended that by the learned counsel for the first respondent, that the petitioner is a qualified doctor with her advanced medical qualification from the Royal Australian College of General Practitioner is capable and in the better position to earn higher income as compared to the first respondent who is currently running a general practice in the PJU clinic. It was also submitted that the first respondent does not have the financial means and capability to make a lump sum payment *in lieu* of maintenance. Learned counsel further submitted that the income which the first respondent derives from his PJU clinic is hardly sufficient to pay maintenance as ordered by this court and to sustain the first respondent's daily needs and expenses.

[75] In short, it was contended by the first respondent that the petitioner is not entitled to any maintenance whether in lump sum or periodically because:

A (a) of her earning/potential earning capacity;

(b) of her conduct that had caused the breakdown of the marriage;

(c) she has not satisfied the criteria in s. 80 Law Reform Act in seeking for a lump sum maintenance.

B **[76]** Learned counsel for the first respondent further submitted that in the event this court finds that the petitioner is entitled to maintenance, it should be adjusted to reflect the portion of blame she has to take for causing the breakdown of the marriage.

C **[77]** The first respondent is currently paying a sum of RM6,000 to the petitioner and RM5,000 to the children, totalling RM11,000 per month under the *ex parte* maintenance order that was varied by this court on 17 September 2012. During cross-examination it was put to him by the petitioner's counsel that his income is within a region of RM3 million to RM5 million a year. In response to the question raised, the first respondent D stated that his income from PJU clinic was bringing him an average of RM7,000 to RM8,000 per month. According to the first respondent's income tax filing for the year of 2006 to 2011 (pp. 57-126 of Bundle S – exh. 'D36(A)-(F)') his gross profit for the relevant years as follows:

E

Year	Gross Profit (per year)	Average Gross Profit (per month)
2006	RM99,630	RM8,302.50
2007	(RM263,696.50)	nil
2008	RM96,373	RM8,301.08
2009	RM87,704	RM7,308.67
2010	RM88,622	RM7,385.17
2011	RM93,455	RM7,787.92

F

G

[78] It was submitted by the first respondent's counsel that even at the best time when both the petitioner and the first respondent were operating both the SS2 and PJU clinics, they never had an income of RM3 million to RM5 million collectively. It was also submitted that there is no evidence led by H the petitioner that their lifestyle and earning was anywhere near the figures suggested when they were jointly operating the SS2 and PJU clinics. Therefore it is unfounded to assert now that the first respondent is earning this kind of income when he is only operating from one clinic.

I **[79]** Learned counsel for the petitioner also submitted for combined lump sum a total of RM5 million for the petitioner and children under ss. 77 and 93 of the Law Reform Act. The apportionment being RM3 million for the petitioner, and RM2 million to the children equally to be held on trust by

the petitioner until the age of 18; and for order that the second respondent secure the payment of RM5 million with a bank bond. The case of *Chaw Anui v. Tan Kim Chai* [2004] 4 MLJ 272 was cited in support of the proposition.

[80] Learned counsel for the first respondent on the other hand submitted that lump sum payment cannot be made save and except when it was agreed by parties and approved by the court. The case of *Gnasothy Nadarajah v. Dr Manahoran Muthuthamby* [2007] 3 CLJ 679 decision of the Court of Appeal was referred in support of the contention. The Court of Appeal was of the view that one lump sum payment award is only made in exceptional cases. I agree with the submission of the first respondent's counsel on this issue. It is my considered opinion that there is no exceptional circumstances in this case to order for lump sum payment of maintenance.

[81] Pursuant to s. 78 of the Law Reform (Marriage & Divorce) Act 1976 which states that the court "shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage" when assessing maintenance, learned counsel for the petitioner urged this court to consider the gross and inequitable conduct of the first respondent after the incident of 14 October 2006 and where pertinent, his conduct throughout these proceedings. It was submitted for the petitioner that the first respondent has dragged his feet in every aspect in relation to discovery of his income and had not been truthful about his income. I am in agreement with the petitioner's counsel with regard to this issue of a full and frank disclosure. As such, the first respondent's evidence that his gross monthly income an average of RM7,000 to RM8,000 per month is questionable and as shown during cross-examination and documents. For 2009 the cash sales in the profit and loss statement of Klinik Prime Care (pp. 120-130 – Bundle L(l): "P126") amount to RM799,562.13 but the total deposits for all bank accounts operating in 2009 is RM983,893.40. For 2010 the cash sales in the profit and loss statement are RM905,769.22 but the total deposits for all bank accounts in operating in 2010 is RM381,731.98. There is a discrepancy that the first respondent has not explained satisfactorily. The total deposits for all bank accounts for the years 2007 and 2008 were RM731,763.50 and RM1,081,998.67, respectively. Having given due consideration on the evidence, this court is of the view that the first respondent's income is more than RM8,000 a month. But it is unfortunate that the amount could not be ascertained due to the lack of a full and frank disclosure of his income. Thus, I am inclined to draw adverse inference against the first respondent for his failing to make full and frank disclosure of his actual income (*Koay Cheng Eng v. Linda Herawati Santoso* [2004] 6 MLJ 395; *Koay Cheng Eng v. Linda Herawati Santoso* [2008] 4 MLJ 863; *Leow Kooi Wah v. Philip Ng Kok Seng & Anor* [1997] 3 MLJ 133).

[82] I am also in agreement with learned counsel for the petitioner with regard to the issue of maintenance for the petitioner the wife. The parties had been married for 19 years. This court had made the findings earlier that it was the first respondent's adultery conducts that had caused the breakdown of the marriage. He has no empathy nor regret for the misdeed. The petitioner stated that she never imagined for once, that the first respondent could do this to her. She thought she would live the rest of her life, in matrimony with the first respondent as partner in life and medical practice. Clearly to my mind, the petitioner is entitled to maintenance. The petitioner has set out her expenses in Australia amounting to RM23,208 per month (inclusive the children). However, her stay in Australia was supposed to be temporary and she is supposed to come back after her training. She has now been in Australia for one and half year. Having considered the means and needs of the parties, it is my considered opinion that a sum of RM6,000 per month would be a reasonable award of maintenance for the petitioner. The first respondent's contention that no maintenance should be paid to the petitioner is unsustainable. In awarding the sum of RM6,000 as maintenance for the petitioner, I am mindful that the petitioner is capable of securing better income from her higher qualification. She is currently 46 years old and certainly has earning potential with relevant past working experiences which help enhance her earning power in the field of medical practice.

[83] Therefore, I order that the first respondent pay monthly maintenance of RM6,000 to the petitioner commencing from the date of judgment and thereafter the said maintenance sum to be paid on the 7th day of each month.

Maintenance For The Children

[84] The power to award maintenance for children is provided by s. 93 of the Law Reform Act. According to s. 93, the husband has a primary duty in law to provide the children with accommodation, clothes, food and education as may be reasonable having regard to his means and station in life.

[85] With regard to the provision of maintenance for the two children, the first respondent testified that he is willing to provide a monthly maintenance of RM5,000 to be shared equally between the children as per interim court order dated 15 January 2008 (encl. 10). On 17 May 2007, the interim custody of the children, namely Teh Chia Ray (now 17 years old) and Teh Shia Lin (f) (now 15 years old) were given to the petitioner. The children are currently residing with the petitioner in Australia since July 2012 and expected to be back in Malaysia together with the petitioner after one year. However, the children had not been back to Malaysia till to date. Both the children are schooling at Glen Waverly School at Melbourne, Australia.

[86] The petitioner has explained her monthly expenses in Australia (see: para. [69]). Having given due consideration on issue of the expenses in Australia and the age of the children who are now 17 years old and 15 years old respectively, and the evidence as to the means and needs of the parties,

I am of the considered opinion that a sum of RM6,000 would be a reasonable award of maintenance for the two children to be shared equally between them.

[87] Thus, I order that the first respondent to pay monthly maintenance of RM6,000 to the children commencing from the date of judgment and thereafter the said maintenance sum to be paid on the 7th day of each month.

Division Of Matrimonial Assets

[88] Section 76 of the Law Reform Act provides that:

> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (2) In exercising the power conferred by subsection (1) the court shall have regard to:
>
> (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
>
> (b) the needs of the minor children, if any, of the marriage, and subject to those considerations, the court shall incline towards equality of division
>
> (3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (4) In exercising the power conferred by subsection (3) the court shall have regard to:
>
> (a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;
>
> (b) the needs of the minor children, if any, of the marriage; and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were required shall receive a greater proportion.

[89] In the case of *Wong Kim Foong v. Teau Ah Kau* [1998] 1 CLJ 358 his Lordship Abdul Malik Ishak J (as he then was) at p. 374:

> ... The expression "matrimonial assets" is not a term of art. Lord Denning in *Wachtel v. Wachtel* [1973] 1 All ER 829 CA explained the phrase "family assets" in this way:
>
> The phrase 'family assets' is a convenient short way of expressing an important concept. It refers to those things which are acquired by one or other or both of the parties, with the intention that there should be

A continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. It is a phrase, for want of a better, used by the Law Commission, and is well understood. The family assets can be divided into two parts: (i) those which are of a capital nature, such as the matrimonial home and the furniture in it; (ii) those which are of a revenue - producing nature, such as the earning power of
B husband and wife. When the marriage comes to an end, the capital assets have to be divided: the earning power of each has to be allocated.

In defining the term "family assets", Lord Denning in *Wachtel v. Wachtel (supra)* was not referring to s. 76 of the 1976 Act but nevertheless one can easily appreciate the broadness that can be attached to the expression
C 'matrimonial assets'.

[90] The parties had purchased two properties in the course of their marriage. The properties are as follows:

(a) Bandar Utama house;

D (b) Bukit Rimau house;

[91] Further, there are two medical clinics set up in the course of the marriage, namely:

(a) Klinik Prime Medic (SS2 clinic); and

E (b) Klinik Prime Medic Sunway Mas (PJU clinic).

The Bandar Utama House

[92] Initially the petitioner and the first respondent rented the Bandar Utama house when they first moved to KL from Taiping. Thereafter the
F petitioner bought the Bandar Utama house in August 2001 where they continued to stay there with the children till 5 August 2006. The Bandar Utama house was solely in the name of the petitioner and according to the petitioner's evidence, her sister lent her RM100,000 for the initial deposit. A mortgage loan was taken by her from HSBC bank for the balance of the
G purchase price of RM350,000. The loan instalment was initially paid from the income of the SS2 clinic which was initially operated by the petitioner.

[93] The petitioner testified that she was forced to sell the Bandar Utama house, when she was hard pressed for funds and at the material time the first respondent was not complying with the court order of 15 January 2008 and
H after her sister told her she could not help her anymore as she had her own family commitments. The petitioner sold the Bandar Utama house on 29 April 2009 for RM575,000 and after paying the redemption sum to the bank the balance was RM433,881.06. According to the petitioner, on 19 August 2009 she paid her sister back RM250,000 leaving the petitioner
I a surplus of only RM183,881.06. The first respondent however contended that the loan from Tip Kaur was paid back to her over a period of two years from the earnings gained from the SS2 clinic.

[94] Having considered the evidence, I am of the view that the Bandar Utama house should be treated as a matrimonial asset acquired through the income of SS2 clinic and the proceeds of the sale forms part of the matrimonial assets. As such, the proceeds of the sale after deducting the outstanding loan should be apportioned between the parties. It must be noted that at the time of the purchase, the first respondent was still with the government service and only resigned from the government service on 14 April 2002. It is not disputed that the petitioner had borrowed from her sister for the initial deposit of RM100,000 for the purchase of the house. It is not disputed also that the monthly instalments for the housing loan from HSBC Bank were paid from the collection of SS2 clinic. Having considered the contributions made by each party and the interest of the two children, I hold that balance proceeds of the sale of Bandar Utama house, for a sum of RM245,690.53 be shared in proportion of 75% to the petitioner and 25% to the first respondent.

The Bukit Rimau House

[95] This house was bought on 29 June 2005, in joint names of the petitioner and the first respondent for RM 1.9 million. The evidence at trial shows that the down payment of RM95,000 for the house came from the income generated from both clinics (SS2 and PJU). The loan agreement for the remainder of the purchase price for the Bukit Rimau house was with Southern Bank. The petitioner gave evidence that the loan instalments were paid from the joint income of the SS2 and PJU clinics up to and until the time the petitioner and the first respondent started operating the clinics separately from end-April 2007 and the first respondent stopped issuing cheques for the monthly instalments. This caused the interest to accumulate and a large portion of the losses was the interest payable to the bank.

[96] The Bukit Rimau house was auctioned off by the bank for RM2.4 million ("P56"). The petitioner testified that she called the bank and was told that since divorce proceedings are on, the bank would only release money/ balance proceeds from the sale upon a court order ("P57"). The surplus funds with the bank's solicitors Messrs Seow and Megat is about RM574,000 (excluding interest) and this was admitted by the first respondent in his answer to question No. 24 of his witness statement.

[97] Having considered that the Bukit Rimau house was acquired under the joint name of the petitioner and the first respondent and from the income generated by both clinics, and loans instalments were also paid from the daily collection of the SS2 and PJU clinics, I agree with the submission of the learned counsel for the first respondent that it is just and fair that the net proceeds (balance surplus sum) from the auction of the Bukit Rimau house, that is RM573,366.57 together with interest therein be shared equally by the petitioner and the first respondent.

A **The Medical Practice**

[98] Learned counsel for the petitioner contended that the partnership asset of PJU clinic ought to be broken up according to the principles of partnership law. The case of *White v. White* [1998] 4 All ER 659 was cited in support of the proposition.

B

[99] Learned counsel for the first respondent on the other hand submitted that since parties had agreed to divide the two clinic where the petitioner would take the SS2 clinic whilst the first respondent takes the PJU clinic pursuant to an oral agreement between the parties during the discussion on 17 April 2007, parties should honour the agreement reached. The relevant testimony in relation to the petitioner taking over the SS2 clinic and the respondent taking over the PJU clinic can be found in Q. No. 72 of the petitioner's witness statement in Bundle M(1) and Q & A No. 39 and 40 of the first respondent's witness statement at p. 28 of Bundle T(1).

C

D **[100]** Learned counsel for the first respondent submitted that to allow the petitioner to make any claim now on the PJU clinic would be unjust and unfair since the first respondent had relied and acted on the agreement by giving up his place of practice in the SS2 clinic on 23 April 2007. Subsequently the SS2 clinic was sold for RM100,000 by the petitioner without any involvement and accounting back to the first respondent.

E

[101] Learned counsel for the petitioner on the other hand submitted that the court ought to also consider that the PJU clinic was set up in 2005 from the earnings of the SS2 clinic which the the petitioner set up in 2000. Furthermore, the first respondent took away the patients records and equipment and drugs from the SS2 clinic and thus the goodwill. The court is also referred to the income of the SS2 clinic when the petitioner was kept out of the SS2 clinic when she was recuperating and from January 2007 to 23 April 2007 by the first respondent (Bundle L(3) exh. "P74" at pp. 674-796). Hence, it was submitted that the account for this and half of these profits are to be reimbursed to the petitioner.

F

G

[102] Having given due consideration to the evidence, I found that there is an agreement reached between the petitioner and the first respondent on 17 April 2007 that the petitioner to take SS2 clinic and the first respondent to take PJU clinic respectively. This is evident from the petitioner's witness statement in Q No. 72 Q & A in Bundle (M)(1) and para. 17.3(r) of her petition (Bundle A). In fact it was the petitioner's suggestion that the first respondent to take over PJU clinic while the petitioner will take control of SS2 clinic commencing on 17 April 2007. Thus, it my considered opinion that parties should honour the agreement reached. There is no reservation or qualification over the agreement. The petitioner has waived her interest on PJU clinic and is estopped now from raising the same (*Annie Quah Lay Nah v. Syed Jafer Properties Sdn Bhd & Ors* [2007] 1 MLJ 225 CA). Therefore, I order that the first respondent be given full control and ownership of the PJU clinic. The petitioner's claims on the PJU clinic is dismissed.

H

I

Employees' Provident Fund (EPF)

[103] It is trite law that EPF contributions are matrimonial assets liable for division (*Ching Seng Wah @ Cheng Song Huat (p) v. Lim Shook Lin & Anor* [1997] 1 AMR 214; [1997] 1 MLJ 109, *Koay Cheng Eng v. Linda Herawati Santoso* [2008] 4 MLJ 863). The account shows that as at 25 May 2012 the first respondent has a total of RM79,842.31 in his EPF account. Learned counsel for the petitioner proposed that the petitioner be given half sum of the amount. Learned counsel for the first respondent on the other hand submitted that the petitioner's EPF funds also be subjected to division, or in alternative, parties should be entitled to the funds in their EPF account respectively. No disclosure by the petitioner on how much is in her EPF savings. Having considered the facts and the submission, this court is in the agreement with learned counsel for the first respondent that it is fair and reasonable for parties be entitled to retain their respective EPF savings and thus no order of division on EPF funds.

Conclusion

[104] On the foregoing grounds, the order of this court are as follows:

(a) the marriage be dissolved with *decree nisi* be made absolute in one month;

(b) the petitioner is granted with the custody, control and care of the two children of the marriage namely, Teh Chia Ray and Teh Shia Lin;

(c) the first respondent be given access to the two children for half of the children's school term holidays where the first respondent is at liberty to exercise the same in Australia, or alternatively, the children to be flown back to Malaysia at which instance the expenses shall be born equally between the first respondent and the petitioner;

(d) the first respondent to pay a sum of RM6,000 per month as maintenance and benefit of the two children, commencing from the date of judgment and thereafter the said maintenance sum to be paid before or on the 7th day of each month;

(e) the first respondent to pay a sum of RM6,000 per month as maintenance of the petitioner, commencing from the date of judgment and thereafter the said maintenance sum to be paid before or on the 7th day of each month;

(f) the balance proceeds from the auction of the Bukit Rimau house, that is RM573,366.57 and the interest therein be shared equally by the first respondent and the petitioner;

(g) the balance proceeds of the sale of Bandar Utama house, that is for the sum of RM245,690.53 be shared in proportion of 75% to the petitioner and 25% to the first respondent;

(h) the first respondent be given full control and ownership of the PJU clinic;

(i) the petitioner to keep all the proceeds of the sale of the SS2 clinic;

(j) there will be no distribution of cash held in HSBC/HLC Dividend Fund ("P21") and two AmBank fixed deposits ("P22") that was taken out/withdrawn on 25 May 2006 and 22 January 2007 respectively;

(k) the petitioner and the first respondent be entitled to the funds in their own EPF account respectively;

(l) no order is made on the two vehicles, that is Ford Escape WJW 6435 and Honda CRV WKN 1385 which the first respondent and the petitioner had in their respective names;

(m) the second respondent, Ng Siew Tee to pay the petitioner damages of RM50,000 with 4% interest from the date of judgment until full realisation;

(n) costs of the proceedings in this petition be borne by the first respondent; and

(o) parties is given liberty to apply back to court for enforcement.

Costs

[105] Learned counsel for the first respondent submitted that since the hearing of the proceeding had been completed and the court had decided over the reliefs, the court should take into consideration the provision of O. 22B r. 9(2) of the Rules of Court 2012 in deciding costs to be awarded. He further submitted that the first respondent *via* letters dated 23 April 2012 and 17 July 2012 had made an offer to settle with terms not less favourable than the judgment obtained by the petitioner herein but was rejected by the petitioner. Thus, it was submitted that the first respondent is entitled to costs from that date. Learned counsel for the petitioner on the other hand submitted that since the terms of the offer was incomplete it was disagreed by the petitioner. He further submitted that there are enclosures/applications that have been decided against the first respondent in which the court ordered for costs in the cause. Hence, it was submitted that the court should also take into consideration on those orders in determining the sum to be awarded as costs. Learned counsel for the petitioner prayed for RM150,000 as costs due to the complexity of this case and the fact that the trial has spanned from mid-2011 to date, and taking into account the number of days the trial proceeded before this court (16 days). Having given due consideration to the submission and circumstances, I am of the considered opinion that a sum of RM60,000 is fair and reasonable to be ordered as costs be paid by the first respondent to the petitioner. I so order.