



THE
LAW SOCIETY
OF HONG KONG
香 港 律 師 會

Consultation on Proposed Amendments to MPPO Law Society's comments

The Law Society's Family Law Committee is pleased to note the Department of Justice has acted on representations made by Ms. Audrey Eu SC on 28 March 2008 and supported by the Law Society in April 2008.

The Committee has reviewed Consultation Paper on the Proposed Amendments to the Matrimonial Proceedings and Property Ordinance and generally supports the draft Amendment Bill subject however to the following comments on Section 15 (1) (c) of the Matrimonial and Family Proceedings Act 1984 (the Act):

Under Section 15 (1) (c) of the Act the court has jurisdiction to entertain an application for financial relief if any of the following jurisdictional requirement is satisfied:

"either spouse had at the date of the application for leave a beneficial interest in possession in a house in England and Wales which was at some time during the marriage a matrimonial home"

The DOJ proposes to introduce amendments similar to those provisions in the Act save for the jurisdictional requirement of Section 15 (1) (c) above. The Law Society's Family Law Committee wrote to the DOJ and queried the rationale to exclude this provision given the aim of the amendment bill is to address the loopholes in the MPPO as highlighted in the judgment of *ML v YJ*. (HCMC 13/2006).

The DOJ stated in its letter dated 9 March 2010 that section 15(1)(c) of the Act had not been included in the draft bill because *"we have also been influenced in our decision by the complexity of the provisions in the 1984 Act relating to the former matrimonial home and the factual difficulties that could arise in establishing jurisdiction solely on that ground."*

The Family Law Committee does not agree with the commentary that a provision will not be included simply because it is "too complicated". Section 15(1)(c) and its related provisions had been carefully drafted and the English legislation must have contemplated the provisions would cover people who meet the jurisdictional criteria laid out in that section.

It is particularly because of the situation provided in section 15(1)(c), the legislation in England considered that it needs to be more stringent and restrictive on the power

of the court to deal with such application which is why section 20 of the Act has been drafted to limit the power of the court when granting relief under this provision. The restrictions in Section 20 provides clear guidance on the action the court can make in relation to such applications:

S.20 Restriction of powers of court where jurisdiction depends on matrimonial home in England or Wales

(1) *Where the court has jurisdiction to entertain an application for an order for financial relief by reason only of the situation in England or Wales of a dwelling-house which was a matrimonial home of the parties, the court may make under section 17 above any one or more of the following orders (but no other)—*

(a) *an order that either party to the marriage shall pay to the other such lump sum as may be specified in the order;*

(b) *an order that a party to the marriage shall pay to such person as may be so specified for the benefit of a child of the family, or to such a child, such lump sum as may be so specified;*

(c) *an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be so specified for the benefit of such a child, the interest of the first-mentioned party in the dwelling-house, or such part of that interest as may be so specified;*

(d) *an order that a settlement of the interest of a party to the marriage in the dwelling-house, or such part of that interest as may be so specified, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;*

(e) *an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage so far as that settlement relates to an interest in the dwelling-house;*

(f) *an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement so far as that interest is an interest in the dwelling-house;*

(g) *an order for the sale of the interest of a party to the marriage in the dwelling-house.*

(2) *Where, in the circumstances mentioned in subsection (1) above, the court makes an order for the payment of a lump sum by a party to the marriage, the amount of the lump sum shall not exceed, or where more than one such order is made the total amount of the lump sums shall not exceed in aggregate, the following amount, that is to say—*

(a) *if the interest of that party in the dwelling-house is sold in pursuance of an order made under subsection (1)(g) above, the amount of the proceeds of the sale of that interest after deducting therefrom any costs incurred in the sale thereof;*

- (b) if the interest of that party is not so sold, the amount which in the opinion of the court represents the value of that interest.*
- (3) Where the interest of a party to the marriage in the dwelling-house is held jointly or in common with any other person or persons—*
- (a) the reference in subsection (1)(g) above to the interest of a party to the marriage shall be construed as including a reference to the interest of that other person, or the interest of those other persons, in the dwelling-house, and*
- (b) the reference in subsection (2)(a) above to the amount of the proceeds of a sale ordered under subsection (1)(g) above shall be construed as a reference to that part of those proceeds which is attributable to the interest of that party to the marriage in the dwelling-house.*

We note the DOJ's proposed section 29AE which sets out the court's jurisdiction could, in practice be quite restrictive, namely the requirements based on (1) habitual residence or (2) permanent residence in Hong Kong.

These 2 requirements ignore the rights of people who fail to meet the 2 criteria, had a substantial connection with Hong Kong where there remains a matrimonial home. These people include parties who lived in Hong Kong for less than 7 years and left the jurisdiction a few months after which a foreign decree is obtained by a spouse.

Hong Kong is an international city with a significant number of expatriates and mixed marriages. The Family Law Committee are of the view that there could be cases where the "matrimonial home ground" under Section 15 (1) (c) could be the only avenue open to an applicant to seek redress in Hong Kong in circumstances where the foreign decree fails to give sufficient or appropriate financial relief, as in the case of *ML v YJ*.

The following is not an impossible example:

A Pakistan national married a Filipino woman in Hong Kong and they live here for just under 7 years. The husband then moved the whole family to Pakistan and four months later he obtained a decree for divorce. There could be substantial assets in Hong Kong including a former matrimonial home, and yet the Filipino woman would not have any right to seek financial relief under the proposed S29AE as she would not meet the requirements of habitual residence in Hong Kong nor will she have permanent residency and so will be barred from seeking any redress in Hong Kong for herself or for any child of the family.

Section 20 of the Act does limit the power of the court in the scope of orders it can grant but it does provides an avenue for redress to those people who fall within this situation.

The DOJ confirmed in its said letter that

The Family Law Committee submits that if Section 15 (1) (c) of the Act is not adopted the amendment bill fails to address the loopholes in the existing ordinance and that it may well require additional future amendment. The DOJ should take this opportunity to introduce comprehensive amendments in order to plug

loopholes and as it stated in its letter achieve: *“The main purpose of introducing the amendments to the Ordinance is to assist an applicant whose spouse has obtained a divorce decree in a jurisdiction outside Hong Kong, but where the financial provision made in those proceedings is insufficient or inappropriate.”*

The Law Society of Hong Kong
The Family Law Committee
22 March 2010
133369