Bills Committee on

Matrimonial Proceedings and Property (Amendment) Bill 2010 ("the Bill")

Background

At the meeting of the Bills Committee held on 12 July 2010, the Administration was requested to provide the Bills Committee with information on the following –

(a) the experience of the English courts, with reference to relevant cases, in dealing with applications for financial relief under Part III of the English Matrimonial and Family Proceedings Act 1984 ("the 1984 Act");

(b) responses from the Judiciary, the Legal Aid Department, the two legal professional bodies and relevant organizations on the estimated caseload arising from the implementation of the proposed legislation;

(c) the procedures for transferring applications for financial provisions from the District Court to the Court of First Instance and vice versa; and

(d) factors that the Hong Kong court might take into account when considering the jurisdictional requirement of "substantial connection" in divorce proceedings.

Cases concerning application for financial relief under Part III of the 1984 Act

2. The more relevant cases concerning applications for financial relief under Part III of the 1984 Act are summarised below.

Holmes v Holmes ([1989] 3 All ER 786)

3. This was the first case concerning an application made under the 1984 Act which was considered by the Court of Appeal ("CA"). A divorce decree was granted to the couple by the Supreme Court of the State of New York, which had made orders in respect of the distribution of matrimonial assets both in New York and England. Provision of maintenance was also ordered for the wife and the child of the family in England.

4. The wife applied for financial relief under the 1984 Act but her application was dismissed. On appeal, the CA held that in determining, for the purposes of s. 13(1) of the 1984 Act (the equivalent of section 29AC of the Bill), whether there was substantial ground for the making of an application for financial relief, the provisions of s. 16 of that Act (the equivalent of section 29AF of the Bill) had to be taken into account. If, on the application for leave to apply, it was clear that the application for relief would fail because it would not be appropriate for an order for such relief to be made by a court in England and Wales, then it would be wrong to grant leave. Since the New York court was properly seised of the matter and was the natural forum for the resolution of the dispute between the parties and since there was no basis for saying that justice would not be done if the wife was compelled to pursue her remedies for financial provision there, it would not be appropriate for an order for financial relief to be made by a court in England.

5. Purchas LJ pointed out that the intention of Parliament in passing the 1984 Act was not in any way to vest in the English courts any powers of review or even correction of orders made in a foreign forum by a competent court in which the whole matter has been examined in a way exactly equivalent to the examination which would have taken place if the application had been made in the first instance in the courts of England. (p.794)

6. Russell LJ further stated that the test laid down in s.13(1) of the 1984 Act should not be equated with the granting of leave prevailing in applications for leave to apply for judicial review. "Prima facie the order of the foreign court should prevail save in exceptional circumstances, and a

good case for any interference with it or adjustment of it or any supplementation of it should be apparent before any leave is granted under s. 13 where the foreign court is properly seized of the dispute, as it was in this case." (p.795)

Hewitson v Hewitson ([1995] 2 W.L.R. 287)

7. In this case, the wife (an Irish) was married to an American in California. They later divorced and the Californian court granted a decree of divorce. The parties also consented to a comprehensive financial agreement which included spousal support for a limited period and capital payments. The terms of the order were fully implemented by the husband. The parties subsequently co-habited for short periods both in the U.S.A. and in England. When they finally parted, the wife applied for financial relief under Part III of the 1984 Act. Leave to apply was granted to the wife.

8. The husband was given leave to appeal against the lower court's decision to refuse setting aside the grant of leave. The CA confirmed the decision of *Holmes v Holmes* and allowed the appeal. It was held that it would be wrong in principle and contrary to public policy to extend the scope of those provisions to a case where a foreign court of competent jurisdiction had made a comprehensive and final consent order negotiated by lawyers and been complied with by the parties. It would also be inconsistent with the comity existing between courts of comparable jurisdiction for an English court to review or seek to supplement a foreign order on the basis of the subsequent relationship of the former spouses. The court further opined that it was never contemplated that the 1984 Act could or should be used to provide financial relief arising from a status of cohabitation, even if the parties had previously been married.

M v M ([1994] 1 FLR 399)

9. The English couple married in England but moved to live in France shortly after the marriage. An English petition was filed by the

wife in April 1989 but had not been pursued. The husband issued a divorce petition in France in April 1990. A divorce was granted and the French court ordered the husband to make periodical payments to the wife (for 3 years) and to the children as well as to pay for their education in England. The wife appealed against the financial order made by the French court and in parallel, made an application for financial relief under Part III of the 1984 Act.

10. The application for leave succeeded but the husband sought to set aside the order of leave. Thorpe J (as he then was) set aside the leave granted. Applying the principles established in *Holmes v Holmes*, the court concluded that the foreign court concerned was a court of competent jurisdiction in one of the neighbouring friendly States and the principles of comity required that [the English court] should recognise and respect its orders. His Lordship further stated that "it offends common sense as well as principles of comity that any litigant should be free to start again from scratch in this jurisdiction, having taken financial claims to realistic conclusion within the French system." (p.408)

Jordan v Jordan ([2000] 1 W.L.R. 210)

11. The couple married in the U.S. but later lived in England. They were subsequently divorced in the U.S. and had reached a comprehensive marital settlement agreement which later turned into an order of the San Diego court. The husband then returned to live in England. The wife, having taken no step to enforce the U.S. court order, applied for financial provision under the 1984 Act.

12. The application for leave was granted *ex parte* in October 1997 but was later discharged. The wife appealed against this decision. The CA upheld the lower court's decision to discharge the order granting leave to the wife. It is held that California was the primary jurisdiction for enforcing the order for ancillary relief of the San Diego court. Thorpe LJ opined that an application for leave mounted under the 1984 Act and declared to have the sole object of enforcing a foreign order would be

unlikely to succeed unless (a) the enforcement remedies in the foreign jurisdiction have been exhausted or the enforcement remedies are manifestly inadequate, and (b) specific enforcement remedies arising under the English Maintenance Orders (Reciprocal Enforcement) Act 1972 or the common law have been exhausted or are considered manifestly inadequate. (p.220)

Moore v Moore ([2007] 2 FLR 339)

13. The couple married in England but moved to Spain shortly before they commenced divorce proceedings. A decree for divorce was granted but the Spanish court held that it had no jurisdiction in relation to financial claims.

14. The wife's application for leave for financial relief under the 1984 Act was granted. The husband's attempt to set aside the order for leave had failed. On appeal, the CA confirmed the lower court's finding that the connection of the parties with the English jurisdiction was "overwhelming" by applying the factors specified in s.16(2) of the 1984 Act.

Lamagni v Lamagni ([1995] 2 FLR 452)

15. The couple married in 1967 and separated in Belgium in 1980. The wife (being English) returned to England and took out proceedings there. She obtained a decree absolute in April 1982 without the knowledge that the Belgian court had granted a divorce order to the husband in December 1981. As the marriage was dissolved in Belgium in 1981, consequently there was no marriage to dissolve in April 1982.

16. The wife did not apply for leave under the 1984 Act until 1994. Her application for leave was refused. On appeal, the CA held that the issue of delay was one factor which the court would have to have regarded to, but it should not preclude her from having at least an attempt to claim financial relief from the husband.

17. It appears from the above cases that the English court would be slow to interfere with an order made by a foreign court which is regarded to have been properly seised of the matter and was the natural forum for the resolution of the dispute between the parties. The application for leave pursuant to s.13 of the 1984 Act was to act as a filter and the court, when considering whether substantial ground for granting relief had been made out, had to consider all relevant matters, including the criteria set out in s.16.

Agbaje v Agbaje ([2010] UKSC 13)

18. This case has been ongoing for a considerable time. The relevant divorce proceedings were commenced in 2003 but the case was only recently concluded after the Supreme Court of the UK ("SC") handed down its judgment in March 2010. This is a significant case which is expected to have impact on the approach that may be adopted by the English court in relation to Part III of the 1984 Act.

19. Mr and Mrs Agbaje were both born in Nigeria. They met and later married in London in 1967. They have five children (the eldest not being a child of the marriage), all were born in England. The husband returned to Nigeria in 1973 and was joined by the wife and children in 1974. They separated in 1999 and the husband issued a divorce petition in June 2003 in Nigeria. The facts were that Mrs Agbaje moved back to England since 1999. In December 2003, she petitioned for divorce in London but her attempt to stay the Nigerian proceeings failed.

20. A decree absolute was made by the Nigerian court in September 2005 with financial provisions made for the wife and the children. Shortly afterwards, the wife sought leave to apply for an order under s.13(1) the 1984 Act. The Judge granted her leave and the huband was refused permission to appeal that ruling. After substantive proceedings, an order for financial relief was made.

21. On appeal, the wife's claim for financial relief under the 1984 Act was dismissed as the CA found that the parties had more significant connection with Nigeria than with England, and that no substantial injustice was done to the wife in Nigeria. The wife appealed to the SC.

22. The Court unanimously allowed the wife's appeal. In its judgment, the SC specifically addressed the following questions:

(a) on the relevance of s.16(2) factors, the SC held that they were matters to which regard must be had in considering whether "it would be appropriate for such an order to be made by a court in England and Wales". The list in s. 16(2) is not exhaustive, matters which are not expressly referred to in the section, such as hardship or injustice, may be taken into account for determining whether it is appropriate that the English court should make an order, just as they can be taken into account under s. 18 (the equivalent of section 29AH of the Bill) [paragraphs 41-44];

(b) it was held that s.16 did not impose a statutory "*forum non conveniens*" test; nor did it require the court to determine the only appropriate forum where the case might be tried more suitably for the interests of the parties and the ends of justice [paragraph 49]. On the principle of comity, the SC opined that the court in one country should not lightly characterize the law or judicial decisions of another country as unjust [paragraph 53];

(c) in considering whether the applicant must show exceptional circumstances, both hardship and injustice should not be regarded as pre-conditions of the exercise of jurisdiction but they would be relevant factors for the court to take into consideration under ss.16 and 18 of the 1984 Act [paragraphs 60-61]. The SC further stated that although there was no need for an English court to make inquiry as to the minimum required to remedy the injustice, it was equally not the intention of the legislation to allow a simple "top-up" of the foreign award so as

to equate with an English award [paragraphs 63-65];

(d) the SC also dealt with the overarching issue of what would be the proper approach for the courts to take when considering applications made under Part III of the 1984 Act. It was held that the proper approach to Part III depended on a careful application of ss.16, 17 (the equivalent of section 29AG of the Bill) and 18 in the light of the legislative purpose, which was the alleviation of the adverse consequences of no, or no adequate, financial provision being made by a foreign court in a situation where there were substantial connections with England [paragraph 71]; and

(e) it was not the purpose of Part III to allow a spouse with some English connections to make an application in England to take advantage of the potentially more generous approach to financial provision [paragraph 72].

23. The SC further set out the general principles in determining the amount of provision to be made under the 1984 Act. The amount of financial provision would depend on all the circumstances of the case and there was no rule that it should be the minimum amount required to overcome injustice. The following general principles were to be applied. First, primary consideration had to be given to the welfare of any children of the marriage. Second, it would never be appropriate to make an order which gave the claimant more than she or he would have been awarded had all proceedings taken place within England and Wales. Third, where possible the order should have the result that provision was made for the reasonable needs of each spouse [paragraph 73].

Estimated caseload arising from implementation of the proposed legislation

24. The Department of Justice has written to the Judiciary, the Hong Kong Bar Association, the Law Society of Hong Kong, the Hong Kong Family Law Association and the Director of Legal Aid on 20 July 2010 for

their views on the estimate of applications made pursuant to the Bill if it is enacted.

25. The Law Society responded on 3 August 2010 indicating that it was not possible for them to provide any estimate as they did not have the relevant data. However, the Law Society was of the view that the introduction of the legislation would not have any significant impact on current resources. The Hong Kong Bar Association replied on 23 August 2010 suggested that it has no comment to offer. The Judiciary replied on 2 September 2010 and commented that the number of cases may increase. We are still awaiting the reply from other organs.

Transfer of applications to the High Court

26. Under s. 2A of the Matrimonial Properties and Proceedings Ordinance (Cap. 192) ("MPPO"), proceedings under the Ordinance shall be commenced in the District Court but rules may be made for the transfer of any proceedings to the High Court either upon the application of any party or at the instance of the District Court. By virtue of this provision, any applications to be made under the new Part IIA of the MPPO will be similarly commenced in the District Court.

27. Rule 80 of the Matrimonial Causes Rules (Cap. 179, sub. leg. A) ("MCR") sets out the procedures for the transfer of an application for ancillary relief from the District Court to the Court of First Instance ("CFI"). Rule 80 is reproduced below save for the repealed provisions –

> "(3) The court may order the transfer to the Court of First Instance of any application for ancillary relief pending in the District Court where the transfer appears to the court to be desirable.
>
> (5) In considering whether an application should be transferred to the Court of First Instance the court shall have regard to all relevant considerations, including the nature and value of the property involved, the relief sought and the financial

limits for the time being relating to the jurisdiction of the District Court in other matters.

(7) Where pursuant to the provisions of this rule an application for ancillary relief or the cause is transferred to the Court of First Instance, the court may, on making the order for transfer, give directions as to the further conduct of the proceedings.

(10) An order under this rule may be made by the court of its own motion or on the application of a party, but before making an order of its own motion the court shall give the parties an opportunity of being heard on the question of transfer and for that purpose the registrar may give the parties notice of a date, time and place at which the question will be considered."

28. It should however be noted that rule 80 of the MCR only relates to an application for ancillary relief under Part II of the MPPO. In order that that rule may also apply to an application under the proposed Part IIA of the MPPO, the new rule 103E is proposed to be added to the MCR under clause 12 of the Bill. That new rule reads –

"103E. Transfer of application made under rule 103A, 103B, 103C or 103D

Rule 80 applies, with the necessary modifications, to an application made under rule 103A, 103B, 103C or 103D as it applies to an application for ancillary relief made by notice in Form 8 or 8B."

29. Section 42 of the District Court Ordinance (Cap. 336) also gives the District Court a general power of transferring any proceedings before it to the CFI.

"Substantial connection with Hong Kong" under s. 3(c) of the Matrimonial Causes Ordinance (Cap. 179) ("MCO")

30. Section 3 of the MCO defines the jurisdiction of the court in divorce proceedings which includes, *inter alia*, the parties to the marriage having a substantial connection with Hong Kong at the date of the petition or application for divorce. The courts of Hong Kong seem to adopt a liberal approach in the interpretation of "substantial connection with Hong Kong" under s. 3(c) as illustrated by the following cases.

31. In *Savournin v Lau Yat-fung* ([1971] HKLR 180), Briggs J considered that the jurisdictional requirement of "a substantial connection with Hong Kong" under s.3(c) of the MCO should be given a wider meaning than domicile and habitual residence for 3 years respectively provided under s.3(a) and (b). In this case, the husband was a French national who had been ordinarily resident in Hong Kong for more than five years. The wife was born in China but had lived in Hong Kong for 23 years. The parties had their matrimonial home in Hong Kong and the child of the family was born here. On these facts, the learned judge was satisfied that both parties to the marriage had a "substantial connection with Hong Kong".

32. In *Griggs v Griggs* ([1971] HKLR 299) Briggs J reaffirmed that it would be difficult to give a definition to the phrase and that every case has to be considered on its own facts. In this case, the couple were both British and the family moved to Hong Kong where the husband later took up employment. They remained ordinarily resident in Hong Kong for two years before the wife petitioned for divorce. On the balance of probabilities, the court found that there was evidence to show that the husband intended to remain in Hong Kong for a very considerable time and that he has set up the matrimonial home (a rented flat). The children of the family went to school here. On these facts, the court was satisfied that he had a substantial connection with Hong Kong in the words of the relevant section of the MCO.

33. In *Ta Tran The Thanh v Ta Van Hung* (FCMC 1412/1981 unreported), Judge Wane had referred to various English authorities on the meaning of "substantial connection" accepting that those cases were concerned with the issue of whether or not foreign divorces should be

recognised in the England courts. The learned judge said that the words "substantial connection" should be interpreted in a common sense and liberal way. The case concerned a Vietnamese refugee (the wife) who came to Hong Kong and reluctantly remained here until a third country was prepared to accept her children. The court found that her petition was to facilitate her departure from Hong Kong but accepted there was no real prospect for her to leave Hong Kong soon. In these special circumstances, although the wife had only lived in Hong Kong (in a transit camp) for 11 months, the court was satisfied that she had established a "substantial connection with Hong Kong".

34. In a more recent case *G V G* ([2005] 1 HKFLR 182) involving the dissolution of a marriage of two foreign nationals (an Italian and a German), Judge Bruno Chan agreed with Briggs J in *Griggs v Griggs* and *Savournin v Lau Yat-fung* that a meaning must be given to the phrase wider than domicile or three years ordinary residence. In this case, the couple lived in Hong Kong for 3 years but subsequently moved to reside in Macau. The husband was found to have maintained "substantial connection with Hong Kong" by virtue of his having purchased real property and operating all his personal and company bank accounts in Hong Kong as well as maintaining a Hong Kong employment visa.

35. In another case *B v A* ([2007] 4 HKC 610), Hartmann J (as he then was) agreed with Briggs J in *Savournin v Lau Yat-fung* that the phrase should be given its ordinary meaning and that it would be wrong to burden the phrase with qualifications, by specifying, *inter alia*, that a person must ordinarily reside here for at least a year. He observed that it would be easier in many cases to establish a "substantial connection" with Hong Kong than to establish domicile or 3 years of usual residence in Hong Kong.

36. In determining whether a party had a substantial connection with Hong Kong, Hartmann J suggested that the following questions should be asked. First, did the party have a connection with Hong Kong? Second, was that connection of sufficient substance, that is, of sufficient significance or worth, to justify the courts of Hong Kong to assume

jurisdiction in respect of the matter before it, i.e. the dissolution of the party's marriage?

37. In this case, the couple have only lived in Hong Kong for 6 months before the wife instituted divorce proceedings. The learned judged accepted the wife's assertion that the family's life was centred on Hong Kong with the intention to remain here for a fairly extended period of time. The court found that the parties to the marriage did have a connection with Hong Kong which was of sufficient significance and worth. The court was satisfied that it had jurisdiction pursuant to s.3(c) of the MCO to entertain the proceedings.

38. The above cases are useful references to demonstrate how the courts of Hong Kong would approach the issue of a party's connection with Hong Kong for the purposes of s.3(c) of the MCO. In deciding the issue, the court would have regard to all relevant facts instead of limiting to particular circumstances such as the time that a party has remained in Hong Kong. The presence of a matrimonial home in Hong Kong (whether in purchased or rented property), nature of their stay in Hong Kong, place of education of the children of the marriage, as well as maintaining bank accounts and acquiring family assets in Hong Kong may all be relevant. The list is not exhaustive.

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