

## REVIEW



**Family Law in Hong Kong** by Leonard Pegg [Butterworths Asia, third edition 1994. xxxii + 305 pp, HK\$720]

Most of us who are working with the law relating to the family in Hong Kong are likely to have read Pegg's textbook, which remains the only monograph on the subject. The second edition published in 1986 had become dated in view of the many statutory changes and developments in case-law which had taken place in Hong Kong family law. Hence, the publication of the third edition is both timely and welcome. This review considers the structure, style, and content of *Family Law in Hong Kong* and the extent to which it meets the needs of legal practitioners, students, and teachers of family law.

### *Special features of Hong Kong family law*

The author states in his preface that Hong Kong family law contains a unique mixture of Chinese customary family law and enacted laws derived mainly from Britain. This is a result of historical factors which continue to influence the development of family law in Hong Kong. Before 1971 the two systems operated largely independently even though courts were often called upon to rule on the validity of Chinese customary marriages and on other related issues. The operation, within one jurisdiction, of these two systems led to a number of problems which the enactment of the Marriage Reform Ordinance 1971 (MRO) was intended to remove. But there were other considerations underlying the 1971 reforms. They included a move away from the Chinese traditional view of marriage as a union of families to the modern notion of marriage as a union of two individuals. The new system of registration and dissolution of customary marriages enabled the courts, for the first time, to supervise and regulate the divorce process and to provide needed protection to women and children.

Having regard to this background, it would have been very helpful if the author had spelled out in the first chapter the major problems existing before the legal reforms of 1971 and further shown how these problems were tackled. Unfortunately, this picture does not emerge in the first chapter, mainly because the author adopts a rather formalistic style of considering separately the rules governing each form of marriage. This approach also creates a problem of repetition. By electing to discuss rules relating to the validity of marriage in chapter one, the author finds it difficult to avoid dealing with some aspects of nullity of marriage (pp 17–23) and yet these properly belong to chapter three. Furthermore, the material relating to the recognition of marriage in Hong Kong (pp 26–30) has been combined with aspects of private international law and this makes the argument of the chapter rather difficult to follow.

*English or Hong Kong family law?*

The book also raises an important question of emphasis. I have noted above that a particular feature of modern Hong Kong family law is that the reforms of 1971 not only aimed at introducing an integrated system of family law, in which the traditional Chinese and English systems were merged, but also the reforms had the object of changing the focus from Chinese tradition to modern notions of marriage. This is most evident in the new emphasis on monogamy, individual consent to marriage, the formalities leading to marriage, equality of rights to divorce, state-supervised dissolution of marriage, and the protection of women and children after marriage.

As one would expect, these reforms drew great insight from Western, and particularly English, family law models. Today, Hong Kong family law remains closely sensitive to the developments taking place in English family law. Yet sensitivity to English developments in family law can be pushed beyond acceptable limits. This might occur, for example, when we begin to disregard the relative autonomy of the Hong Kong legal system by arguing, as the author seems to do, that the 'reported Hong Kong decisions are few and not always particularly illuminating' and, therefore, English authorities are to be preferred (p 165).

The author's comments on *Beynon v Beynon* (DCt, Div Action No 614 of 1975, cited at p 169 n 29) are also indicative of his attitude towards local decisions. This case relates to the exercise by the court of its discretion under s 7 of the Matrimonial Proceedings and Property Ordinance (MPPPO). Commenting on the reasons for the decision, the author notes that 'the reasons for the decision are not very clear.' But having examined the case, one cannot doubt the clarity and fairness of the reasons given for the decision. The court awarded a lump sum of \$150,000 to the former wife, in lieu of a monthly sum of \$6,100. The former husband was willing to continue the periodical payments because he did not wish to commute his pension benefits in order to realise the lump sum. The wife, on the other hand, wanted a lump sum to guarantee her future financial security. The court based its decision on the wife's age (64 years), her financial contribution and long marriage (24 years), the fact that she was not employed, her loss of a widow's pension due to the divorce, and her lack of a house of her own. The court also found that the husband had been very generous to the 36 year old newly married wife. He had purchased her a home in England, taken out a life insurance in her favour, and assured her a widow's pension, and both spouses had invested HK\$50,000 in a race horse. It seems that Pegg overlooked these reasons.

This tendency to see Hong Kong law as if it were a part of the English family law system appears also in the way the author approaches some of the material. In certain parts of the book, the reader is not at all certain whether the analysis presented concerns English or Hong Kong law. For example, the discussion

regarding the circumstances under which a child is given a right to consent to medical treatment does not show what the law in Hong Kong is or might be. (See also pp 233–4, 295–6.) A number of English authorities, including *Gillick v W N & Wisbech Area Health Authority* [1986] AC 112, are cited without indicating the fact that they are largely persuasive. This tendency to underrate local decisions is not only contrary to current legal doctrine, but it also undermines the growth of a specific family law of Hong Kong. At other places this thinking appears in a subtle way as seen on p 212 n 307 where *de Lasala v de Lasala* [1980] AC 546 is cited as a ‘see also’ whereas *Minton v Minton* [1979] 1 All ER 79, is cited as the principal authority for the rule concerning the finality of consent orders under the MPPO.

*The problem of structure and coherence*

In chapter two, the author examines the protection of spouses from domestic violence and other forms of molestation. The problem with this chapter is that, instead of focusing on protection, which is indeed the title of the chapter, the author has taken the somewhat laborious task of looking at all the relevant ordinances and discussing them individually. The result is that repetition has occurred in several places (pp 37, 46–7, 50–1, 53–4). Furthermore, an analysis of the grounds which must be proved in order to obtain these remedies reveals also the same problem of repetition (pp 35, 38, and 41).

In this chapter the author has organised his subject around existing statutes which provide for alternative, if sometimes overlapping remedies. The same point can be made in this way: there are four alternative routes which a spouse, who is a victim of domestic violence, can take in order to secure future protection. The first three are stipulated under the Separation and Maintenance Orders Ordinance (SMMO), the Matrimonial Causes Ordinance (MCO), and the Domestic Violence Ordinance (DVO). The fourth is available under the inherent jurisdiction of the court in its exercise of matrimonial jurisdiction. The protective remedy that a court can order in favour of an applicant is primarily through the medium of injunctions, and this is largely so, irrespective of the statute deployed. Hence, depending on particular circumstances, an applicant can apply for a court injunction to protect oneself from domestic violence. Furthermore, with minor exceptions, such an injunction can be obtained by proving almost the same grounds. Had the author focused on protection, he could have turned around the various ordinances to show how they measure up to the task of spousal protection.

It is perhaps the author’s concern to present the law as it is that explains why he discusses in great detail the (nearly obsolete) ground of persistent cruelty (pp 42–3). Proof of persistent cruelty entitles an applicant to a separation order under s 3(1)(d) of the SMOO. In my opinion, since ‘persistent cruelty’ belongs to the pre-1972 divorce law, its removal from the SMOO is probably overdue

and this should have been pointed out. As the author has rightly noted, a comparable English statute was reformed in 1978 to remove the matrimonial offence of cruelty and replace it with the fact of behaviour. In Hong Kong, as is the case in England, the old matrimonial offence of cruelty has, since 1972, been abolished as a ground of divorce. It has been replaced with the 'behaviour' fact under s 11A(1)(b) of the MCO which may be relied upon to show that the marriage has broken down. 'Behaviour' is also a ground for judicial separation under s 24(1) MCO. This leaves s 3(1)(d) of the SMOO conspicuously out of step with the rest of the law on the subject.

Section 6 is another provision of the SMMO which requires similar treatment. It prohibits the granting of any order under the SMOO 'if it is proved that the applicant has committed an act of adultery.' Here again the author has discussed in great detail the various defences to adultery instead of recommending its abolition (pp 44-5). Although it is debatable whether or not maintenance should be denied on account of a spouse's adultery (and this originally applied only to the wife), the fact that maintenance is now available to both parties under another ordinance without this precondition suggests that this part of the law is dated (see s 8, MPPO).

#### *The past within the present*

The influence of the old law appears to affect Pegg's analysis of contemporary legal phenomena. This is particularly so in his discussion of certain aspects of divorce. For example, he argues (at p 95) that in order for a spouse to be in desertion he/she must have separated from the petitioner without just or reasonable cause. In this context, the conduct of the petitioner can constitute a just cause for the respondent to leave. But whether or not a spouse's conduct is or is not sufficient just cause is clearly a question of fact in each case. Up to that point one has no problem with Pegg's analysis. However, he goes on to argue that 'the general principle to be applied is that whatever the particular conduct in any particular case, it must be so grave and weighty as to make married life impossible.' In support of that opinion Pegg relies on the pre-1970 English cases of *Dyson v Dyson* [1953] 2 All ER 1511 and *Buchler v Buchler* [1947] 1 All ER 319; but these cases were decided before the English divorce law reforms of 1970 and do not represent current law even in England.

The law in Hong Kong has also moved forward in this respect. That is why I think that the author has pitched the level of conduct required to prove just cause too high. With effect from 1972, proof that the respondent's conduct is so 'grave and weighty as to make married life impossible' would be more than sufficient to support the 'behaviour' fact in a petition for divorce under s 11A(b) MCO. It would also be adequate to support the fact of (constructive) desertion under s 11A(c) MCO. The author recognises this point later when he notes that such conduct which would be sufficient to support an allegation of

constructive desertion 'could now be pleaded as "behaviour" and [hence] there would be no need for the petitioner to wait for two years to plead constructive desertion.' If this is so, it follows that the gravity of the conduct which would justify the respondent to leave the matrimonial home must be pitched at a lower level. This would be in accord with the post-1972 developments in our divorce law.

Pegg also falls into what Ormrod LJ described in *Bannister v Bannister* (1980) 10 Fam Law 240 as a linguistic trap. The author argues that the conduct which would support an allegation of constructive desertion (or as noted above, the behaviour fact) must be 'such that a reasonable spouse ... could not be expected to continue to endure' (p 97). And in an earlier reference to the behaviour fact Pegg also notes that the practice of coitus interruptus 'could constitute cruelty, or now *unreasonable behaviour*, under the modern law of divorce' (my emphasis). Again this is misleadingly reminiscent of the pre-1972 fault-based divorce law. The correct test is not one based on the reasonable husband but, as Bagnall J noted, the test is: 'can this petitioner, with his or her character and personality, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this respondent?' (see *Ash v Ash* [1972] Fam 135, 140).

#### *The burning issues of the day*

*Family Law in Hong Kong*, in my view, has not fully captured the prevailing mood among family lawyers in Hong Kong. This appears in the author's omission of what one might call the burning issues of the day. To put this point in its proper context, a few preliminary remarks must be made. The rise in the divorce rates world-wide, including Hong Kong, along with the liberalisation of divorce law, have resulted in the increasing importance of the law governing financial provisions and property adjustment for divorcing couples and their children. Indeed, it can be argued that, in most jurisdictions, confrontation between spouses has largely shifted away from divorce to disputes over property and, to a certain extent, over the care and upbringing of children. In recent years Hong Kong has seen a number of 'illuminating' court decisions which one would have liked to find in *Family Law in Hong Kong*. In what follows, some of the of recent disputes in this field are considered briefly in order to illustrate the local mood among family lawyers and their clients.

In this section, five important developments are examined: (1) the way s 3 of the MPPO has been applied by the courts; (2) the interpretation of r 73(3) of the Matrimonial Causes Rules which relates to the filing of an affidavit of means; (3) the meaning of 'reasonable requirements' in cases involving wealthy couples, and where one of the spouses (mainly the wife) has made a significant contribution to the acquisition of the assets; (4) the finality of consent orders; and finally, (5) the rights of spouses in the matrimonial home.

### Alimony pending litigation

Section 3 of the MPPO empowers the court to order maintenance in favour of either party to a marriage for the period beginning from the institution of the petition to its final determination. Unlike other provisions of the MPPO that deal with long term financial and property orders, this section does not contain detailed guidelines. It merely empowers the court to order what it considers to be reasonable amounts. This is because '[i]t is not appropriate for the court to make detailed investigation of the financial position of the parties [because the order is] clearly intended as an interim measure' (p 166).

In 1982 the Court of Appeal, reflecting the above approach, held in *V v V* (1982) 12 HKLJ 83 that, in cases of applications for maintenance pending the determination of a suit, it is not appropriate for the court to make a detailed investigation of the financial position of the parties. The only criterion for the award must be what the court deems to be reasonable having regard to the needs of the applicant. In such applications the court is not expected to take a long-term view and such factors as the potential earning capacity and future capital prospects of the parties should not be considered. Three years after *V v V*, the Court of Appeal expanded on its earlier opinion in *Yung v Yung CA*, Civ Action No 201 of 1985 by holding that when considering the question of maintenance pending suit the court must look at the needs of the wife and make an order which will make it possible for her to maintain a proper standard of living comparable to that which she had been enjoying up to the time of the application. In doing this it is unavoidable that a judge will not 'come to any satisfactory conclusion without making some attempt at dividing up the needs in terms of dollars for each of the factors involved.' The ground for appeal in this case was that the trial judge had erred in making an order based on the husband's income alone instead of considering also the needs of the applicant.

*Yung v Yung* thus laid down the guidelines for applications under s 3 as follows: first, where the couple used to live in a home valued, for example, at HK\$750,000, a monthly allowance of HK\$7,500 for rent is reasonable because it would enable the applicant to obtain rented accommodation of comparable standard. Second, where the spouse used to receive monthly pocket money from the respondent, that amount should continue to be paid. Third, where monthly bills are payable for utilities such as gas or electricity, this amount should be awarded to the applicant. Fourth, where the applicant used to receive regular presents as well as a travel allowance from the respondent, the court can allow the cash equivalent. After computation, the figure of HK\$22,000 was awarded, and this figure turned out to be much less than the HK\$35,000 which had been awarded by the trial court.

The question then is why has maintenance pending suit proved to be so contentious? It could be speculated that applicants view s 3 as providing an advance opportunity to test in court the amount of dollars that will be ordered.

On the other hand, respondents believe that if the court arrives at a certain figure in the interim, it would be difficult to award a lesser amount at the end of the litigation. Hence, contrary to the earlier view that s 3 is intended to provide a 'swift and speedy remedy for urgent needs' of the applicant (Power J in *Wong v Wong* (1983) HCt, DJ No 64 of 1981) the section has assumed a new function. Even in Britain, as noted by Cretney, 'such orders are intended to provide for the petitioner's immediate needs but in practice, there may often be a considerable delay in getting an order' (S M Cretney, *Elements of Family Law* (London: Sweet & Maxwell, 1992), p 144).

The above discussion, or some aspects thereof, pointing at the way s 3 has been litigated ought to have been included in *Family Law in Hong Kong*. The only indication that an order under s 3 might be contentious is found on p 166 where the author notes that the 'order may favour either party to the marriage.' But he does not pursue that line of enquiry any further primarily because he believes that the unfairness is short-lived because an order under s 3 is 'clearly intended as an interim measure' (p 166). Yet as the above discussion has shown, parties do not think so. Indeed, in England, parties have been advised to obtain alternative sources of support since such short-term orders, if opposed, can be 'disproportionately expensive.' (See Wilson, 'Conduct of the Big Money Case' [1994] Fam Law 504, 505. Phillips has also advised that 'it may be practicable for a wife in need to apply under the Separation and Maintenance Orders Ordinances' instead of s 3 MPO: see (1982) 12 HKLJ 84.)

#### Putting a cap on the affidavit of means

Another notable omission in *Family Law in Hong Kong* is the issue of determining how much information should be in the affidavit of means. Rule 73(2) of the Matrimonial Causes Rules provides that where one of the parties is served with a notice of an application for ancillary relief, the party receiving such notice must file an affidavit of means within fourteen days unless subsequently the parties agree upon the terms of a proposed order. The affidavit of means must contain full particulars as to the property and income of the deponent. Where no information is given or where the information initially given in the affidavit is not adequate, the court has jurisdiction to require the respondent to file additional particulars regarding his/her means.

The question which, until recently, had troubled the courts in Hong Kong, and also in England, is what should happen where the party filing the affidavit wishes to rely on the so-called 'millionaire's defence' by declaring that he/she has sufficient means to meet any reasonable order which the court might see fit to make. This question was raised in *H v H* [1981] HKLR 376 (noted in (1981) 11 HKLJ 239) where the respondent filed an affidavit stating that he had assets amounting to over US\$100 million and did not wish to give greater details because such assets as he had disclosed were more than sufficient to satisfy any

order which the court would make. The wife insisted on further particulars and Fuad J held that the husband's affidavit did not comply with the requirement of rule 73(2) and ordered further particulars. Thus, until the Court of Appeal decision in *Law v Law* CA, Civ App No 130 of 1993 it was not clear how much information would be necessary to meet the statutory requirements. As is common in such cases, the applicant will press for maximum disclosure while the other spouse will endeavour to give the minimum details necessary to meet the statutory requirements. In such cases, the role of the court is to draw a line beyond which the applicant must not go. As noted by Bhokary JA in *Tao v Tai* CA, Civ Apps Nos 37 & 38 of 1993, if the other spouse makes sufficient disclosure, 'the court will protect him from the harassment of any application for further disclosure which the opposite party may make.'

The battle line, so much sought after by litigants, seems to have been recently drawn by the Court of Appeal in *Law v Law*. After considering a number of authorities from Hong Kong and England, Nazareth JA noted that the criterion for determining the sufficiency of the information given in the affidavit of means must be determined 'by reference to the purpose of the particulars to be provided.' And the purpose, according to Nazareth JA, is to enable the court to exercise its discretion of determining the appropriate ancillary relief under s 7(1) of the MPPO. According to Nazareth JA, 'if the particulars already furnished are sufficient for that purpose, it cannot be right to oppress a party with the burden and intrusion of his privacy that providing further particulars will entail' (p 7). Therefore, to determine whether or not the disclosure is sufficient to enable the court to do its job, the court must be satisfied that considering the amount of liquid assets declared as available for disposal by the court, it must be unnecessary for the court to have further details as to his means and his assets (relying on Booth J in *Attar v Attar (No 1)* [1985] FLR 649, 652).

Perhaps to allay the fears expressed by the counsel for the wife regarding the wider legal implications of his decision, Nazareth JA warned that *Law v Law* must not be taken as precedent because it was an exceptional case decided on its particular facts. That is why his Lordship did not find it necessary 'to take issue with any of the authorities cited ... in which [further] particulars have been ordered.' But, with respect, this warning could apply equally to all cases decided under s 7(1) MPPO, where courts have exercised their discretion in making orders for finance and property adjustments. In my view, the wider significance of *Law v Law* lies in the fact that it is now possible for courts in Hong Kong to draw a line beyond which further demands for disclosure of assets will be considered an intrusion on the other spouse's privacy. However, it is also important to add that the drawing of this line must always depend not only on the amount of liquid assets available for distribution but also upon the particular facts of the case including the way the court intends to exercise its discretion under s 7(1) MPPO.



A reading of *Family Law in Hong Kong* shows that these new advances have not been incorporated. The consequence of this omission appears also at another level, namely the relationship between contribution and disclosure. In other words, since the question of how much has to be disclosed in the affidavit of means in the case of very wealthy spouses is necessarily related to the extent of contribution made by the spouse seeking further disclosure, one cannot avoid considering how courts have dealt with the ancillary applications of wealthy spouses.

#### The big money cases

What have come to be known in England as the 'big money cases' fall into two broad categories (see Wilson, 'Conduct of the Big Money Case' [1994] Fam Law 504 and for Hong Kong see Bebe Chu, 'Recent Developments and Cases in Family law' in *Law Lectures for Practitioners 1994* (Hong Kong: HKLJ Ltd, 1994), p 247). The first consists of cases where the former wife of a millionaire 'did not go out to work but brought up the family and did all that was required of her as a wife' (per Butler-Sloss LJ in *Gojkovick v Gojkovick* [1990] 1 FLR 140, 143). The second category is that of cases where the wife 'has made exceptional contribution to the wealth generated during their ... marriage, a contribution greater than that often made by wives after long marriages' (ibid, p 144). Relying on this classification Butler-Sloss LJ held in *Gojkovick* that, where the applicant falls in the first category, the court should endeavour to make an award which is sufficient to meet the 'reasonable requirements' of the wife and, if appropriate, the so-called *Duxbury*-calculation could be applied to determine those needs. (The *Duxbury*-calculation was described by Ward J as a new practice whereby accountants, using a computer programme, 'can calculate the lump sum which, if invested on the assumptions as to life expectancy, rates of inflation, return on investments, growth of capital, [and] incidence of income tax, will produce enough to meet the recipient's needs for her life': see *B v B (Financial Provision)* [1990] 1 FLR 20, 24.) In either case, English courts have continued to stress that they retain their wide statutory discretion to make such orders and that *Duxbury*-calculations must be viewed and 'accepted as being no more than a tool for the judge's use' (per Ward J in *B v B (Financial Provision)*, above, also approved by the CA in *Gojkovick*).

The Hong Kong Court of Appeal accepted this notion of two types of contribution in *C v C* [1990] 2 HKLR 183 and the differential weight that is to be attached to them. Relying on *Preston v Preston* (1981) 2 FLR 331, Hunter JA agreed with Ormrod J, that where a wife actively participates by either working in the business, as in *Gojkovick*, or by providing finance, her contribution to the welfare of the family under para (f) of s 7(1) MPPO is enhanced and this may lead 'to a substantial increase in the lump sum over and above her reasonable requirements.' His Lordship further observed that this classification

of contribution 'does not in any way downgrade the contribution of the lady who only fulfils the very important role of wife and mother ... [i]t simply recognises the different types of contribution which the award must reflect' (p 187).

This development in the law of ancillary relief is important for Hong Kong. First, it enables courts to do justice in those few but significant cases where the other spouse has made substantial contribution to the building up of the family wealth. Second, the recognition that a spouse who has made 'extraordinary' contributions should be entitled to an award going beyond his/her 'reasonable needs' will necessarily affect the extent to which the other spouse is required to disclose his/her assets. As noted above, because the author of *Family Law in Hong Kong* had not advanced the discussion beyond the 1980 position, it was not possible for him to discuss the important connection between contribution and disclosure.

Some of the above decisions are referred to by the author (pp 187, 191) but are cited only to illustrate other points. For example, he notes (p 187) that in cases of very wealthy couples 'it has been said that it is impossible to lay down guidelines to help to calculate appropriate lump sum payments' (citing *Gojkovick*). Yet, as noted above, it is in *Gojkovick* (among other cases) where it was decided that the spouse who makes an exceptional contribution gets an award greater than his/her 'reasonable requirements' so as to reflect the extent of the contribution.

#### The finality of consent orders

Although Pegg correctly notes that consent orders made in proceedings for ancillary relief are final and can only be challenged either on appeal or by instituting a fresh action, he expresses doubt as to the grounds upon which such challenge can be launched in Hong Kong. Hence, in order to illustrate the possible grounds upon which courts in Hong Kong might be inclined to set such orders aside, Pegg resorts to English authorities. Yet this exercise might have been unnecessary if the author had either fully drawn from *de Lasala* or relied on the Court of Appeal's decision in *Lui Sik-kuen v Lee Suk-ling* [1992] 2 HKLR 371. Both decisions support the proposition that a consent order can only be set aside on the ground of fraud, mistake, or material non-disclosure. And this must be by way of appeal or by institution of a 'fresh action.'

The issue of what constitutes a 'fresh action' was raised and decided in *Lui Sik-kuen*. Fuad VP held that the expression 'fresh action' cannot embrace an application in proceedings already instituted. In the view of Fuad VP, the phrase 'fresh action' means a new action commenced by writ in the High Court. Although the foregoing interpretation was in accordance with judicial authority and was also fully endorsed by the other two justices, there was much sympathy for a speedier and less costly procedural option suggested by Gould

J. It is unfortunate that despite the known cost of litigation in Hong Kong, Gould J's advice has not yet been heeded.

#### Rights in the matrimonial home

Pegg's discussion concerning the occupation rights of spouses in the matrimonial home is well done. However, this area of the law has also been growing fast and some interesting points have not been picked up in his book. For example, the Court of Appeal has held, in *Baring v Baring* [1992] HKLR 526, that a wife's right to reside in the matrimonial home cannot be defeated merely by the husband's act of terminating the lease on the premises in which the parties used to reside. In such cases the wife's right against the husband, though personal, will attach to the next premises which the husband may acquire even though the parties have not previously lived there. As the court observed, 'it was artificial to assert that, because the parties had never cohabited there, those premises could not be considered to be the matrimonial home.' The court also held that it was immaterial that the wife had consented to the termination of the lease because such consent did not amount to giving up her occupation rights in the matrimonial home.

In *Hamlett v Hamlett* [1993] HKLD G77 (Civ App No 100 of 1993) the Court of Appeal was faced with the novel task of determining whether a spouse can obtain an injunction to restrain the other spouse from allowing a third party into occupation of the former matrimonial home. In this case the matrimonial home was jointly owned by the couple through a limited company solely owned by both parties. By mutual arrangement, the wife was permitted to stay in the matrimonial home until the matrimonial proceedings were finalised. In the meantime, she began to cohabit with another man which event may have provoked the husband to apply for an injunction. The District Court granted the injunction but, on appeal by the wife, the Court of Appeal held that the husband had no proprietary rights capable of being protected by an interlocutory injunction. It was further held that since the wife was in sole possession of the premises, the husband had no right to interfere with her occupation rights. The court compared the rights of the husband as being no greater than that of a bank mortgagee.

Another important case not discussed in Pegg's book is that of *Choy Kin-choy v Choy Chan Lai-ngar* [1993] HKLD 79. This decision is important for two reasons. First, it sheds further light on how courts are to exercise their discretion under s 7(1) of the MPPO, and second, it stresses, obliquely, the need to give courts statutory power to order a sale of the matrimonial home in appropriate cases. In this case the Court of Appeal reversed the order of the High Court in which the husband was in effect ordered to transfer to the wife 75 per cent of his interest in the matrimonial home and to pay to her a hefty lump sum of

money. The lump sum, if paid, would have had the effect of crippling the husband's capacity to establish a new business. He would also have no means to acquire alternative accommodation. The effect of the original court's order was that the husband could not realise his 25 per cent interest in the property until nine years later. The Court of Appeal held that this case was not an appropriate one for invoking what has come to be known as the *Mersher* order (see *Mersher v Mersher & Hall* [1980] 1 All ER 126). The court then made fresh orders, inter alia, that the matrimonial home be sold forthwith and the wife be given two thirds of the proceeds. This would enable the wife to purchase a reasonable flat in the same residential area. Although the decision of the Court of Appeal is certainly to be commended, it is also in conflict with *Cheung v Cheung* [1991] 1 HKLR 698 where the same court held that courts have no jurisdiction to order a sale of the matrimonial home.

Until 1981, courts in England were similarly constrained but this situation was altered by the enactment of the Matrimonial Homes and Property Act which granted courts the power to order sale (see s 24A, MCA 1973). Pegg has correctly argued that 'a similar power should be given to the courts in Hong Kong' (p 75). It seems to me that the significance of *Choy v Choy* lies in underlining the fact that in the interest of justice, the power to order a sale should be granted to the courts as soon as possible.

#### *Some editorial slips*

It might be argued that the editorial slips found in *Family Law in Hong Kong* are not worth raising especially in view of the length of this review. But as will be shown, these slips are not unimportant. First, they tend to show that the author may not have reviewed the material thoroughly and second, they are misleading.

For example, words such as 'more recently' or 'in the recent case' or 'a recent amendment' which appear on a number of pages (pp 7, 23, 27, 95, 115, 176, 182, 213, and 214) are misleading, especially when similar words are used by the author to refer to actual recent cases decided in the 1990s (see p 204, n 260). Another comparable illustration is found on p 80 where Pegg notes that the 'three year rule has now been abolished in England.' The fact is that this change in the law occurred in 1984 (see n 51 in 2nd Ed and n 127 in 3rd ed). In case the reader is wondering how this error could have occurred, the answer lies in the second edition of the book where the same phrases have been used to refer to the same sources.

Another example of an editorial slip is found at p 59 n 10 where the reader is referred to chapter 4 for additional details on legitimacy of children but, as it turns out, chapter 4 now deals with the matrimonial home and not children as is the case in the earlier edition.

*Conclusion*

This review essay of *Family Law in Hong* is based on the writer's short working experience with Hong Kong family law. During this time I have learnt much from Pegg's earlier editions and from his other writings on family law. However, I have also been a constant target of regular critique from family law students on a range of issues generated by Pegg's earlier editions. I was hopeful, therefore, that the third edition might address some of the questions I have raised here. It is evident, on the other hand, that this edition is undoubtedly a great improvement on the previous one. I do hope very much that in the preparation of the fourth edition some of my comments will be noted. Moreover, I hope that in future the publishers will consider shortening the time between the completion of the revised manuscript and its final publication. In the instant case, the period was almost one year.

Bart Rwezaura\*

### Books Received

*Australian Criminal Justice* by Mark Findlay, Stephen Odgers, and Stanley Yeo [Melbourne: Oxford University Press, 1994. xvi + 374 pp, paperback, \$280]

*Civil Litigation vol 1 — From Instructions to Trial (Hong Kong Legal Practice Manuals)* by P P Sherrington [Hong Kong: Longman, 1994. 403 pp, paperback, \$250]

*Civil Litigation vol 2 — Post Trial and Alternative Proceedings (Hong Kong Legal Practice Manuals)* by Michael Mantheou [Hong Kong: Longman, 1994. 486 pp, paperback, \$220]

*Conveyancing (Hong Kong Legal Practice Manuals)* by Nigel Bacon [Hong Kong: Longman, 1994. 486 pp, paperback, \$220]

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