is very similar to, the law in England and Wales namely, the Matrimonial Causes Act 1973. "Matrimonial Causes" are defined under the MCO as "any proceedings for divorce, nullity, judicial separation and presumption of death and dissolution of marriage".[11]

1.010 The law in Hong Kong was amended in 1996 when the MC(A)O 1995 was passed. This went some way to modernise the law, enabling "no fault" divorces based on one or two years' separation to be issued, which was more in line with other jurisdictions such as Australia, and introduced the concept of a joint application, mentioned at **1.006**. It also enabled parties to divorce after only one year of marriage.

1.011 Important reforms to procedure of ancillary relief applications were introduced by Practice Direction (PD) 15.11 "*Financial Dispute Resolution Pilot Scheme*", which follows the modern view that, where possible, parties should seek to settle their differences by way of mediation, either court-assisted or otherwise.[12] This has now been extended to matters regarding children with a similar procedure available to parties disputing arrangements in relation to children.[13] The rationale is to reduce the conflict in such cases for the benefit of the family as a whole and in the interest of saving costs. As part of the initiative to reduce the weight of litigation before the courts and in an attempt to improve case management, practitioners must also be mindful of the Civil Justice Reforms that came into effect in April 2009,[14] which implemented certain changes to the Rules of the High Court (RHC).

1.012 It is worth mentioning at the outset that practitioners should bear in mind the Underlying Objectives of the Civil Justice Reforms contained in the RHC O.1A[15]:

(a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;

(b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;

(c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;

(d) to ensure fairness between the parties;

(e) to facilitate the settlement of disputes; and

(f) to ensure that the resources of the Court are distributed fairly.

1.013 Under RHC O.1A, r.3 there is a duty imposed on the parties' legal representatives and on the parties themselves to assist the court to further the underlying objectives and that 'the court can be expected to criticise strongly parties and their legal representatives if they materially fail in this duty, and to impose costs penalties where appropriate.'

[11] MCO, s 2.
[12] See Chs 7 and 19.
[13] See PD 15.13, which came into effect in October 2012. See also reference to children's disputes in chs 10 and 11.
[14] See PD 15.12 – particularly in reference to evidence, statements of truth, costs and limiting discovery.
[15] See PD 15.12.

2. Applications to Present a Divorce Petition Before One Year

1.014 Under s 12 of the MCO, parties to a marriage must be married for one year before they can petition for divorce.

1.015 The one-year rule on an application for a divorce is not an absolute bar, however, and it is possible to apply for a divorce before the couple have been married for one year on the basis of either exceptional hardship suffered by the petitioner or exceptional depravity on the part of the respondent. The court must have regard to any children of the family and to the question whether there is reasonable probability of reconciliation between the parties during the specified period. In practice, this provision is rarely used, as it is easier and less expensive to simply issue divorce proceedings after the couple have been married for the full year. Separating couples have the option to enter into a Deed of Separation if they need to legalise their relations but cannot yet issue their petition[16]. This is also the case for couples wishing to petition on the ground of one-year separation by consent (see paras 1.069 - 1.075).

1.016 In reality, the "exceptional depravity" ground is very hard to establish. The test is necessarily subjective: what is deemed to be "depraved" behaviour by one person may be acceptable to another. In most cases, applications will be made on the basis of "exceptional hardship". The exceptional hardship may arise from events that are not connected to the other spouse.[17] The words are to be given their usual meaning.[18]

1.017 Applications to present a divorce petition before the expiration of one year will not be granted easily and it will be necessary to show that the hardship suffered by the applicant is exceptional and not merely an example of 'normal' marital discord.

3. Jurisdiction

1.018 Under s 3 MCO, a petitioner can apply for a divorce in Hong Kong if:

"(a) either of the parties to the marriage was domiciled in Hong Kong at the date of the petition or application, or

(b) either of the parties to the marriage was habitually resident in Hong Kong throughout the period of three years immediately preceding the date of the petition or application, or

(c) either of the parties to the marriage had a substantial connection with Hong Kong at the date of the petition or application".

1.019 It is important that the basis of the petitioner's claim for jurisdiction is clearly stated in the petition. It is also advisable (but not a rule) that there be only one ground claimed,

[16] See separation agreements in ch. 8.
[17] *Blackwell v Blackwell* (1973) 4 Fam Law 79; (1973) 117 S.J. 939.
[18] *Sanders v Sanders* (1967) 111 SJ 618.

that being the strongest jurisdictional basis used, and it is suggested that this is in order (a) to (c). If neither domicile nor residence for three years are applicable, then the ground of substantial connection can be used. Care should be taken however as there is an evidential burden on the party seeking to show that one party has a substantial connection with Hong Kong, as set out below.

1.020 "Domicile" is generally understood to mean the country the parties, or one of the parties, consider to be their permanent home. Under the Domicile Ordinance (Cap 596)[19] s 3(2) no individual has, at the same time and for the same purpose, more than one "domicile" and further, an adult, under s 5(2) can acquire a new domicile in a country or territory if (a) he is present there; and (b) he intends to make a home there for an indefinite period. As Hong Kong is comprised of so many expatriates from all over the world, including the PRC, this may not be an appropriate ground for jurisdiction in many cases.

1.021 In her judgment *Y v W*,[20] HHJ Bebe Chu reviewed the legal principles concerning domicile in all petitions and joint applications. In particular, it was noted that a simple reference that the petitioner holds a Hong Kong Permanent ID card will not be considered as sufficient evidence of domicile and more particulars must be provided. Save for the changes under the amendments to the Ordinance, the common law authorities would continue to be relevant, in particular in relation to ascertaining a person's intention. Although a declaration by a person as to his domicile may be relevant in determining his intention, self-serving declarations are likely to be treated with suspicion by the court. In this case, the judge provided a useful checklist of factors to determine domicile. On the facts of this case, the wife was unable to discharge the burden of proof that she was domiciled in Hong Kong and the husband was successful in his application for a stay of her petition. In this case, the wife had only argued in relation to domicile and not habitual residence or substantial connection. The Court of Appeal cited this case with approval in *ZC v CN (Domicile and substantial connection)*.[21]

1.022 If one or both of the parties have been habitually resident in Hong Kong for three years, this should be stated. "Habitually" means where a person voluntarily lives and is settled for the time being. In the Court of Appeal case of *ZC v CN*, this was referred to as 'a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration. It is necessary that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled'.[22]

1.023 If either of the parties has not been resident in Hong Kong for three years and is not domiciled in Hong Kong, the clear choice is to cite "substantial connection". "Substantial connection", according to Briggs J in *Savournin v Lau Yat Fung*,[23] is given a meaning wider than the other two requirements of domicile and three years

[19] (Cap 596) came into effect on 1 March 2009.
[20] [2012] 2 HKC 455; *Y v W (Domicile)* [2011] HKFLR 482; [2012] 2 HKC 455.
[21] *ZC v CN* [2014] HKFLR 469 [2014] 5 HKLRD 43.
[22] Hong Kong Court of Final Appeal case *Vallejos v Commissioner of Registration* [2013] 4 HKC 239; (2013) 16 HKCFAR 45 considered and followed.
[23] [1971] HKLR 180 and see para 3.013 - 3.025.

residence. The term should be given its ordinary meaning (Hartmann J in *B v A*[24] and *S v S*[25]). In *B v A*, Hartmann J set out two tests: first, whether the party had a connection with Hong Kong, and second whether that connection was of sufficient substance or worth to justify the courts in Hong Kong assuming jurisdiction in respect of matters going to and consequential upon, the dissolution of the parties' marriage.[26]

1.024 In *S v S*[27], the petitioning husband was neither domiciled nor resident in Hong Kong at the date of the petition but made his application relying on substantial connection on the basis of his business interests in Hong Kong and his intention to make Hong Kong his future home. From the facts, it was not disputed that the husband and wife were both from South Australia and that substantial wealth had been accumulated in Australia. The family had taken up residence in Switzerland in 1999 but had relocated to Adelaide in 2002. The husband's businesses grew substantially, including those in Hong Kong and he would regularly travel from South Australia to Switzerland, visiting Hong Kong on the way, in order to attend to his business interests there. By the time the husband petitioned for divorce, about half of his liquid assets were in Hong Kong but he had not taken any steps to gain the right of residency and, significantly, it was only four days prior to issuing the petition in Hong Kong that he applied for a capital entrance visa to Hong Kong and only three days before issuing the petition that he entered into a purchase agreement to buy a property in Hong Kong in his own name. It was also considered relevant that the husband, during negotiations with his wife, had attempted a reconciliation that involved the family moving back permanently to Switzerland, which undermined his argument that it was his intention to live permanently in Hong Kong.

1.025 The husband did not have to prove that his connection with Hong Kong was greater than his connection with anywhere else, he simply had to prove "a" substantial connection, but this he failed to do on the basis of the facts of this case. In this case costs were awarded to the wife.

1.026 At para 52 of his judgment, Hartmann J stated:

> "While I accept that in many different respects a substantial connection may be forged in a matter of weeks, or even days, what cannot be ignored, in my judgment, is that the substantial connection which is contemplated in the Ordinance is one which gives jurisdiction to the Hong Kong courts in respect of matrimonial causes; that is, to matters going to the dissolution of marriage – still a profound matter in the eyes of the law – and to matters which flow from that, for example, matters of custody and property distribution. In this respect, and I consider it critical, while the husband was no doubt, in the months leading up to the issue of the petition, acquiring a substantial connection with Hong Kong he has not been able to demonstrate on the balance of probabilities that these links were so substantial at the time of the issue of the petition that the Hong Kong courts should take on jurisdiction to deal with issues concerning the dissolution of the marriage and other matters flowing from it".

[24] *(Substantial connection)* [2008] 1 HKLRD 43, [2007] HKFLR 138.
[25] *(Jurisdiction)* [2006] 3 HKLRD 751, [2006] HKFLR 460.
[26] See also *G v G* [2005] HKFLR 182 in which a substantial connection was found because the husband had maintained a Hong Kong employment visa and had maintained his personal and company accounts in Hong Kong even though he lived in Macau and the wife had relocated to Germany.
[27] *(Jurisdiction)* [2006] 3 HKLRD 751, [2006] HKFLR 460.

1.027 In contrast, in *B v A*[28], where both parties were from Argentina, the husband was described as an international banker and throughout the marriage the family had relocated several times. In this case, the wife and children arrived in Hong Kong in August 2006, the children were enrolled in international schools and the family took a two-year lease on an apartment. The husband's office was in Hong Kong although he continued to travel. By January 2007, the parties were living apart and in March, the wife instituted proceedings in Hong Kong for divorce. The husband disputed that she had sufficient "substantial connection" to claim jurisdiction. Although the wife had only been living in Hong Kong for approximately six months as at the date of filing the petition, Judge Hartmann found that the connection was of sufficient substance, significance or worth to justify the courts of Hong Kong assuming jurisdiction to deal with the parties' law. In this case, the wife and children had centred their lives in Hong Kong, the husband was running an office in Hong Kong and the intention was to remain for an extended period of time.

1.028 Thus, such substantial connection will generally mean where the parties have "centred their lives", where they are living and working, where the children are being schooled and also where some of the family assets are located, even if this is limited to opening a bank account. As in *B v A* it has been held that under certain circumstances six months' residency in Hong Kong was sufficient substantial connection.

1.029 In *RI v SSH*,[29] the Court of Appeal gave a list of factors a court may consider when faced with an application where the ground for jurisdiction cited is substantial connection. Here Cheung JA set out a number of relevant considerations such as the past pattern of the parties' life and whether they regard Hong Kong as their home for the time being, even if their lifestyle may indicate that they may not take root in one place for too long. Related to this issue are matters such as the place of work of the spouses, whether they chose to work in Hong Kong and even, if one of them had to "commute" overseas to work, whether Hong Kong was still treated as their home base. With regard to the children of the family, factors to consider were as to whether they were studying in Hong Kong or spending their vacations in Hong Kong if studying abroad.

1.030 In the case of *Z v Z*,[30] HHJ Chu found that although the husband did have substantial business interests in Hong Kong through his companies, shareholdings and investments, this was not of sufficient substance alone to give the courts in Hong Kong jurisdiction under s 3(c). The parties in this case had lived their married life in Japan and there was an absence of matrimonial connecting factors with Hong Kong. Here the husband had conducted a 'nomadic' life and the wife was unable to prove on the balance of probabilities, that he had a substantial connection with Hong Kong.

1.031 In the case of *YS v TTWD*,[31] Judge Melloy found that the fact that the wife had a permanent ID card and that the marriage was registered in Hong Kong did assist her in her arguments in respect of substantial connection. In addition, the wife had been employed in Hong Kong prior to the marriage and their child was born there. The fact that she had moved to Beijing to be with her family on the breakdown of the marriage did not affect her jurisdictional claims. Further, it was possible to have a substantial

[28] [2008] HKLRD 43, [2007] HKFLR 138.
[29] *(forum)* [2011] HKFLR 318, [2010] 4 HKC 588, (CA).
[30] *(Substantial connection and forum)* [2012] HKFLR 346.
[31] [2012] HKFLR 129.

connection with more than one jurisdiction. In this case, she had a substantial connection with Beijing as well as Hong Kong, but in this case, the husband had failed to establish his right to proceed in Beijing.

1.032 In *ZC v CN (Domicile and substantial connection)*[32] the Court of Appeal considered the legislative history of the term and noted that, although these cases originally arose in the ex-patriate community, increasingly the issue has been raised between the growing numbers of cross border disputes with the Mainland. There are numerous cases before the courts in Hong Kong involving families with substantial ties in both jurisdictions[33] and it is a matter of fact as to whether jurisdictional grounds exist to proceed with the petition, or whether a stay is appropriate. If more than one jurisdiction is deemed to be substantial, then the court must determine which forum would be more convenient under the '*forum non conveniens*' rules.[34]

1.033 Substantial connection will not be accepted if it can be shown that the parties came to Hong Kong only to obtain a divorce. Nor is it sufficient to show the marriage was celebrated in Hong Kong. It is immaterial where the parties were married, but it is material as to where the parties are at the time of filing the petition. If the connection has been engineered, this will not be sufficient. As stated by Hartmann J in *S v S*,[35] it was not the intention of the legislature to create a convenient off-shore divorce jurisdiction.[36]

1.034 Further, in the Court of Appeal case of *YN v NA*,[37] the court confirmed that the relevant time for considering if there was a substantial connection was at the time of the petition. In this case, when the petition was filed, the husband had already moved to India. Also, the fact that the parties had agreed that the Hong Kong court had jurisdiction was not a basis for invoking the jurisdiction.

(a) Recognition of Foreign Decrees[38]

1.035 Overseas divorces and legal separations are recognized in Hong Kong if they have been obtained by means of judicial or other proceedings in any country outside Hong Kong and are effective under the law of that country, provided that at the date of the issuance of the proceedings either spouse was habitually resident in that country or either spouse was a national of that country.[39]

1.036 However, the validity of such a divorce will not be recognized in Hong Kong if it were granted at a time when there was no subsisting marriage between the parties, or where the obtaining spouse had failed to comply with a procedural requirement, or where its

[32] [2014] HKFLR 469.
[33] See also *CL v ZRC (Jurisdiction; forum non conveniens)* [2015] HKFLR 125; *ZJW v SY (Substantial connection; jurisdiction and stay of proceedings in the PRC)* [2016] HKFLR 427.
[34] See Ch 3.
[35] [2006] HKFLR 460.
[36] See also *Griggs v Griggs* [1971] HKLR 299 where the court was satisfied on the balance of probabilities, that the respondent intended to stay in Hong Kong and the parties had not come to Hong Kong to avail themselves of the jurisdiction of the Court (Briggs J). See also Ch 3 for further information on Jurisdiction for Family disputes in Hong Kong.
[37] *YN v NA (Ancillary relief: Compensation)* [2014] HKFLR 517.
[38] See also Ch 3 para 3.064 - 3.071.
[39] MCO, ss 55 and 56.

recognition would manifestly be contrary to public policy.[40] This section was relevant in the case of *ML v YJ*,[41] which went to the Court of Final Appeal on the point. In that case, the husband obtained a divorce in Shenzhen, the wife argued that she would be at such a juridical disadvantage as she would be prohibited at the time from seeking ancillary relief in respect of assets in Hong Kong, that this would be a manifestly contrary to public policy.[42] The problem faced in that case was addressed by the enactment of the Matrimonial Proceedings and Property (Amendment) Ordinance 2010 which came into operation on 1 March 2011 (Part 11A). As observed above, increasingly in Hong Kong, issues of this nature have been heard particularly as so many spouses divide their time between Hong Kong and the PRC.

4. Ground for Divorce

(a) Irretrievable Breakdown – the Sole Ground for Divorce

1.037 In order to obtain a divorce in Hong Kong, the petitioner must state that the marriage has broken down irretrievably. This is the only "ground" for divorce.[43] Irretrievable breakdown can only be established by proving one or more of the five "facts".[44] Although it is the duty of the court to enquire, so far as it can, into the alleged facts, in practice the burden of proof is on the petitioner to establish one of the facts, and for a respondent in a defended suit to show that the marriage has not broken down, or at least not broken down for the reasons alleged in the petition.

1.038 Thus, the petitioner has to prove one or more of the following five facts:

1. adultery;
2. the unreasonable behaviour of the respondent;
3. the parties' one year separation with consent;
4. the parties' two-year separation without consent; or
5. the respondent's desertion.

1.039 Essentially three "fault" facts and two "non-fault" facts.

(b) The Five Facts

(i) *Adultery (s 11A(a))*

1.040 To establish the fact of adultery, the petitioner must show two things:

1. that the respondent has committed adultery, and
2. that the petitioner finds it intolerable to live with the respondent.

[40] MCO, s 61.
[41] [2011] 1 HKC 447; [2011] HKFLR 179.
[42] See Ch. 3, at 3.064 - 3.071; cases on Part IIA: *C v H (foreign decree; Part IIA)* [2012] HKFLR 199; *CMU v WPM (29AC application)* [2012] HKFLR 245; *LS v AD (forum)* [2012] HKFLR 376.
[43] Section 11 MCO.
[44] Section 11A MCO.

1.041 Adultery by itself is not sufficient to prove that the infidelity was the cause of the breakdown of the marriage; the petitioner must also show that he or she finds it intolerable to live with the respondent. Whether the petitioner can tolerate living with the respondent is a subjective test on that particular petitioner.[45] The court is only obliged to find the adultery and the fact that the petitioner finds it intolerable to live with the respondent. It is not relevant whether the adultery caused the irretrievable breakdown of the marriage.[46]

1.042 If the parties live together for more than six months following the adultery, the petitioner will not be entitled to rely on the fact of adultery because it will be denied that the petitioner found it intolerable to live with the respondent. Living with each other means living in the same household. In the case of *Biggs v Biggs and Wheatley*[47] the petitioner obtained her decree *nisi* and then lived with the respondent for six months. The court held that she was not entitled to have the decree made absolute.

1.043 The phrase "and the petitioner finds it intolerable to live with the respondent" is independent of the adultery. The reason for the feeling of intolerability by the petitioner may be as a result of the adultery but may equally relate to other behaviour of the respondent.

1.044 Adultery has been defined as the "voluntary sexual intercourse between two persons of the opposite sex, of whom one or both are married but who are not married to each other".[48] Adultery must be voluntary, so a rape victim has not committed adultery.[49]

1.045 It is not a requirement that the person with whom the respondent has committed adultery be identified. The petition and confession statement can simply say that the respondent has committed adultery with a person unknown to the petitioner and/or with a person whose identity the respondent does not wish to disclose. If the petitioner does know the identity of the third party, then he has a choice as to whether or not he will cite that person as a party so long as the identity of that third party has not been revealed in the petition.[50]

1.046 In practice, if the respondent will not agree to sign a confession statement, this may not be a practical fact to rely upon as proving adultery can be difficult and expensive. If the respondent is prepared to sign a confession statement, which can be accomplished by writing to the respondent directly or to his solicitor preferably prior to issuing the petition, the procedure is straight forward. The confession statement must be attached to the affidavit in support of petition prior to decree *nisi* as evidence of the adultery, or can be lodged with the court on filing of the petition.

1.047 Where there is doubt as to whether or not the respondent will sign a confession statement, it may be more prudent either to plead adultery and unreasonable behaviour or alternatively, to rely on unreasonable behaviour and cite adulterous associations as part of that unreasonable behaviour. Where a petitioner alleges that the other party has

[45] *Cleary v Cleary* [1974] 1 WLR 73, [1974] 1 All ER 498, (1973) 117 S.J. 834.
[46] *Anderson v Anderson* (1972) 117 SJ 33.
[47] [1976] 2 WLR 942; [1977] 1 All ER 20; [1977] Fam 1.
[48] *Dennis v Dennis* [1955] P. 153; [1955] 2 WLR 817; [1955] 2 All ER 51.
[49] Although the co-respondent had. *Long v Long and Johnson* (1890) 15 PD 218.
[50] MCR r 13.

been guilty of an improper association (other than adultery) with a named individual, directions should be sought as to whether that person should also be made a respondent in the cause.[51]

1.048 The petitioner must have certain knowledge of the adultery to be successful, not only a belief that there has been adultery. The burden of proof is not as strict as criminal law, but can be proven by "a preponderance of probability" and there is a presumption of innocence. The alleging party has the burden throughout.[52] A court may not rely on the evidence of the petitioner alone.

1.049 There is a rebuttable assumption of adultery, in cases for example where there is a birth of a child during the marriage[53] and the husband cannot be the father, and where a partner has contracted venereal disease.[54] Where a party refuses to name the husband on the birth certificate,[55] or enters the second respondent's name on it[56] can be admissible admissions of adultery.

1.050 A third party involved in an adultery petition is known as the "second respondent" or "co-respondent" and will normally be joined as a party in the proceedings unless excused by the court for special reasons and if the party has not been named in the petition. If there is insufficient evidence against the second respondent, the court may dismiss that party from the proceedings.[57] Under the Review of the Family Procedure Rules undertaken by the Chief Justice's Working Party, one of the recommendations is that the co-respondent is not named unless the applicant believes that the other party to the marriage is likely to object to the making of a matrimonial order.[58]

1.051 Following enactment of the Matrimonial Causes (Amendment) Ordinance 1995, no action shall lie for damages for adultery.[59]

1.052 Under the definition of adultery in s 2 MCO, adultery does not include sexual intercourse between a man who is a party to a customary marriage, celebrated in accordance with s.7 of the Marriage Reform Ordinance (Cap 178), and a concubine lawfully taken by him.[60]

(ii) *Unreasonable Behaviour (s 11A(b))*

1.053 To establish the fact of unreasonable behaviour, the petitioner has to show that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

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51 Section 13(2) MCR.
52 *Rayden and Jackson on Divorce and Family Matters* (18th ed), p 9.13.
53 *Preston-Jones v Preston Jones* [1951] AC 391; [1951] 1 All ER 124; [1951] 1 TLR 8.
54 *Glenn v Gleen* (1900) 17 TRL 62; *Andrews v Cordiner* [1947] 1 All ER 593. Such allegation must be specifically pleaded: *Squires v Squires* (1864) 3 SW & Tr 541.
55 *Mayo v Mayo* [1949] P. 172; [1948] 2 All ER 869; [1949] L.J.R. 48.
56 *Jackson v Jackson and Pavan* [1964] P. 25; [1961] 2 WLR 58; [1960] 3 All ER 621.
57 MCO, s 14; MCR, r 13.
58 See Ch 2 regarding procedure and parties to a divorce. This is in line with the Family Procedure Rules 2010 in England and Wales.
59 MC(A)O, s 5O(1)(a).
60 See paras 1.129 - 1.147 concerning customary marriages.

1.054 As with adultery, the act of unreasonable behaviour is a question of fact but, unlike adultery, it is the court that must ask the question whether this conduct was unreasonable or not. The court will not test this hypothetically but should test the evidence in the light of the personalities of the individuals before the court and assess the impact of the behaviour on that particular spouse within the context of the history of their relationship. The test has been accepted as that of Dunn J in *Livingstone-Stallard v Livingstone-Stallard*[61]:

> "I ask myself the question: Would any right thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties?"

1.055 This approach was endorsed by the English Court of Appeal in *O'Neill v O'Neill*[62]. It is therefore both an objective and a subjective test. In Hong Kong, the criteria for unreasonable behaviour have been considered in *LSC v PKH (Defended Divorce)*[63].

1.056 In this case the wife, who was considerably younger than the husband, petitioned for divorce on the basis of unreasonable behaviour on account of the husband's violent behaviour, his alleged drinking habits and his alleged failure to maintain the wife and children. The husband filed an answer in defence of the particulars in the petition. HHJ Melloy found that the appropriate test was that set out in *Livingstone-Stallard v Livingstone-Stallard*[64], which was both subjective and objective. The issue was not so much whether the husband's actions were unreasonable *per se*, but rather whether this particular wife found this particular husband's actions unreasonable. On that basis could the wife reasonably be expected to live with him? The judge found on the facts that she could not, due to his violent behaviour and failure to maintain her and the children.

1.057 In a further case before HHJ Melloy, *WCP v TPW (Defended Divorce)*[65], the court found that, where particulars are sufficiently pleaded to enable a decree to be granted, the court will do so without investigating any other allegations, particularly so when separation is pleaded in addition to the fault based ground. In this case the wife had pleaded both unreasonable behaviour and separation. The same principle applies where there are multiple allegations made in respect of fault: it is sufficient to investigate only to the extent that fault is proved.[66]

1.058 As Rayden has put it "there is no point in conducting an inquiry into behaviour merely to satisfy feelings, however genuinely and sincerely felt by the petitioner".[67]

1.059 In addition, it was found in that case that incidents of behaviour which happened many years ago are only relevant in giving the court some background and could not be used in evidence to prove present bad behaviour.

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61 [1974] Fam. 47; [1974] 3 WLR 302; [1974] 2 All ER 766.
62 [1975] 1 WLR 1118; [1975] 3 All ER 289; (1975) 5 Fam. Law 159.
63 [2008] HKFLR 324.
64 [1974] Fam. 47; [1974] 3 WLR 302; [1974] 2 All ER 766. See also *WCP v TPW (Defended Divorce)* [2015] HKFLR 118.
65 [2015] HKFLR 118.
66 Citing *Grenfell v Grenfell* [1978] Fam 128, [1978] 1 All ER 561.
67 *Rayden and Jackson on Divorce and Family Matters* (18th edn), [9.65].

1.060 Mild particulars can be accepted by the court. For example in *Lee Siu Hon v Lee Kam Fai*[68]; the wife was pregnant when the parties married and from the date of the marriage, there was little family life, the husband working long hours. Leonard J held:

> "… for several years the respondent and the petitioner have lived together, as it were, as a matter of convenience rather than as being an integrated family … I am not satisfied that any of the respondent's behaviour was malicious. I don't think it was. I think he, from the very beginning, found himself in a situation in which he hadn't expected to find himself; a situation that was not entirely of his own choosing; that he entered into this marriage through a sense of social duty and because of social pressures rather than with love for the petitioner or the hope that they could set up a family, and has preserved that attitude throughout. This attitude was offensive to the petitioner and such as to cause great pain to any woman who wished to live a normal married life … the marriage has irretrievably broken down and I think the respondent's behaviour in failing to supply anything in the nature of a home to the petitioner amounts to behaviour which renders it unreasonable to expect her to continue to live with him."

1.061 "Unreasonable behaviour" can be extremely diverse for example, a withholding of sexual intercourse, too many sexual demands, wanting children, not wanting children, prolonged periods of silence, anger, lack of communication and so on depending on the circumstances of the case. Mere boredom was not held to be sufficient grounds.[69]

1.062 The matter of unreasonable behaviour has attracted considerable interest in England recently with the Supreme Court decision of *Owens v Owens*[70]. Here the Supreme Court observed that defended divorces were rare and held that an enquiry under this section had three stages:

(a) a determination, by reference to the allegations of behaviour pleaded in the petition, of what the respondent did or did not do;

(b) an assessment of the effect of that behaviour on the petitioner in the light of all the circumstances including the latter's personality and disposition; and (c) an evaluation of whether, as a result of the respondent's behaviour and in the light of its effect on the petitioner, it would be unreasonable to expect the petitioner to continue to live with the respondent.

1.063 The focus was on the respondent's behaviour, albeit assessed in the light of its effect on the petitioner. Any interpretation that involved focusing entirely on the petitioner's reaction to that behaviour was incorrect. The procedure conventionally adopted for the almost summary dispatch of defended suits for divorce was inapt for a case which seemed to depend on a remorseless course of authoritarian conduct and which appeared

[68] (Unrep., HCMC 32/1976, 28 January 1977).
[69] *Kisala v Kisala* (1973) 117 Sol Jo 664.
[70] [2018] UKSC 41. In that case the wife failed to establish unreasonable behaviour following a 40 year marriage and was required to wait a further 2 years to petition for divorce on the basis of 5 years separation by consent (currently the law in England and Wales).

unconvincing if analysed only in terms of a few individual incidents. Nevertheless, the judge had correctly directed himself to apply an objective test, namely what the hypothetical reasonable observer would make of the allegations

1.064 In the past, it has been common amongst family law practitioners, subject to their client's instructions, to issue "mild unreasonable behaviour" petitions, sometimes with the prior approval of the respondent, to avoid inflaming an already emotive situation. This is good practice but great care should be taken, as it has been known for a divorce petition to be rejected by the divorce registry on the basis that the particulars as pleaded did not show sufficient cause, that is there is not sufficient "unreasonable behaviour" for the court to be able to hold that the marriage has irretrievably broken down on that basis. Practitioners must tread a delicate path between ensuring that the situation is not made worse by the petition itself and that the particulars are sufficiently strong to meet the court's own criteria.

1.065 This was tested in the case of *R v S (defended suit)*,[71] where the husband had challenged the validity of the wife's petition on the basis that it did not prove her case and fell short of what the law required to prove a petition of unreasonable behaviour. In this case, the court allowed the matter to proceed and made an order for decree *nisi*: in assessing the reasonableness of the husband's behaviour, the court would look at what he ought to have known, or did know, of the wife's capacity to endure such behaviour.

1.066 Regard can be had to the cumulative effect of behaviour, so a long series of minor acts, each of which do not appear to be unreasonable in themselves, but together over time, may amount to unreasonable behaviour.[72] The behaviour can be when parties live together or are separated.[73]

1.067 It has further been held that behaviour resulting from the mental or physical illness of a spouse is capable of forming the basis of a decree under this section; *Katz v Katz*[74] followed in Hong Kong in *Lee Yuen Sum v Lee Tang Hop Wo*[75] Commissioner de Basto said "it is important to bear in mind that s 11A(b) of the MCO refers to 'behaviour', and not to 'intentional behaviour' … being mentally ill, as such, is not behaviour of the kind contemplated by the Ordinance, but behaviour consequent on such illness may come within the terms of the Ordinance".

1.068 The burden of proof is, as with adultery, proved on a preponderance of probability and, in undefended cases the petitioner's sworn affidavit that the contents of the petition is true, is sufficient and further corroborative evidence is not required.

(iii) *One Year's Separation with Consent (s 11A(c))*

1.069 Whereas adultery, unreasonable behaviour and desertion are cited in "fault" divorces, there are also two facts that can be relied upon and do not cite the "fault" of either party. One of these is to consent to live apart for a period of one year and the other

[71] [2011] HKFLR 381, quoting also *Rayden and Jackson on Divorce and Family Matters* (18th ed), [9.20], [9.21].
[72] [2011] HKFLR 381. The behaviour can be active or passive.
[73] *Hadjimilitis v Tsavlivis* [2003] 1 FLR 81.
[74] [1972] 1 WLR 955; [1972] 3 All ER 219; (1972) 116 S.J. 546.
[75] (Unrep., HCMC 14/1978, 27 October 1983).

Variation of any ante-nuptial or post-nuptial settlement orders (including such a settlement made by will or codicil) made on the parties to the marriage further to sub-s 6(1)(c). This includes an order under 6(1)(d) extinguishing or reducing the interests of either party to a marriage under any such settlement. This may be relevant in a case involving trusts. If the trust names a spouse as one of the beneficiaries, it is open to the court under this section to vary the trust[2] and

(5) Orders for the sale of property: the court has jurisdiction to vary such an order under s 6(1)(e) as well as under s 6A for the sale of property, being property in which or in the proceeds of sale of which either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion.

6.006 Pursuant to s11(2)(e), the court has power to vary any order made by virtue of s 8(5), (8)(6)(a), (b), (d) or (e) or (8)(7)(b). These provisions all refer to s 8 of the MPPO concerning the neglect by a party to a marriage to maintain the other party or a child of the family. These provisions correspond to the same provisions under ss 3–6 as above, namely the equivalent of MPS, periodical payments for the applicant and the child of the family, secured periodical payments for the applicant and the child of the family, and variation of lump sum but only if it is payable by instalments.

6.007 In summary therefore, the jurisdiction of the court under s 11 is extremely wide. It does not relate to final lump sum orders that cannot be varied or the transfer of property. In principle, a lump sum is not variable and the rationale of the law is that a capital order, once made, is final. The provision for variation of payment by instalments is allowed in respect of the amount and frequency of the instalments. In addition, it appears that s 11(2)(b) of the MPPO may allow variation of a lump sum order by instalments made under s 4(2)(b) as to not only the terms of the instalments but in fact also the original amount as s 11(1) provides that the court shall have the power to vary or discharge the order.[3]

6.008 This point was considered by the Court of Appeal in *CH v MEH*.[4] Here, it was held that consent orders could not be reopened unless there was a new event that invalidated the basis or the fundamental assumption on which the order was made, or a very significant change in the anticipated circumstances, or when it would be unjust or impracticable to hold the parties to the original order. The court found that the principle of finality of litigation applied to variation applications, including those relating to a lump sum by instalments, so that orders, especially consent orders providing for a clean break, should not be set aside.[5]

6.009 In this case, the value of the family assets was affected by the credit crunch in 2008, but the Court of Appeal held that the natural process of price fluctuation in assets, however dramatic, will occur one way or the other. Just as the appreciation in the value

[2] See Ch 8 on Trusts for further details. Also see Court of Appeal case *PLTO v KLK* [2013] 2 HKLRD 1089; [2013] 6 HKC 175; Court of Final Appeal: *Kan Lai Kwan (KLK) v Poon Lok To Otto & Anor (PLTO)* [2014] HKFLR 329.

[3] See Rayden and Jackson (18th ed, Ch 18.14) and *Westbury v Sampson* [2002] 1 FLR 166.

[4] *CH v MEH (Variation of Lump Sum in Consent Order)* [2012] HKFLR 89; [2012] 1 HKLRD 751.

[5] *Ibid.*, citing *Westbury v Sampson* [2002] 1 FLR 166, [2001] 2 FCR 210; *Shaw v Shaw* [2002] EWCA Civ 1298, [2002] 2 FLR 1204, [2002] 3 FCR 298; *The Ampthill Peerage* [1997] AC 547; *Barder v Caluori* [1998] AC 20 applied.

of the assets would not provide for a legitimate basis for intervention, the reverse is also true. The authorities have held that the natural process of price fluctuation in assets did not fall within the situation of an unforeseen and unforeseeable situation and this reasoning should apply to a variation application.[6]

6.010 There is a restriction to the court's jurisdiction under Section 11(5) which states:

> 'No such order as is mentioned in section 6 shall be made on an application for the variation of an order made by virtue of section 4(1)(a) or (b) or section 5(2)(a) or (b), and no order for the payment of a lump sum shall be made on an application for the variation of an order made by virtue of section 4(1)(a) or (b) or of section 8(6)(a) or (b)".

6.011 Therefore, if the original order was for periodical payments or secured periodical payments for the spouse or child of the family, the court cannot make a property adjustment order and the court cannot make a lump sum order when the original order was for spousal maintenance (or on an application concerning neglect to maintain).[7]

6.012 There is no statutory power for the court in Hong Kong to capitalise a periodical payment order into a lump sum order. In England, s 31 of the Matrimonial Causes Act 1973 has been amended to allow for this and the power has been exercised particularly in relation to variation applications, but Hong Kong has yet to introduce similar provisions.[8]

(c) Factors to Which the Court Will Have Regard

6.013 Section 11(7) provides as follows:

> "In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates and, where the party against whom that order was made has died, the changed circumstances resulting from his or her death".

(i) *The court's approach*

6.014 The current law in Hong Kong has been summarised by the Court of Appeal in *AEM v VFM (Variation of Maintenance)*[9] as follows:

> "The traditional approach to variation was not to refix afresh the amount of maintenance but to consider the amount of change in the actual means of the parties

[6] *Barder v Caluori* [1998] AC 20 applied; *Cornick v Cornick (No 3)* [2001] 2 FLR 1240 applied. See para 26(6) of the judgment.

[7] But see also dicta of the Court of Appeal in *Yick Yee Lin Josephine v Chung Wing Cha* [2006] HKFLR 526 at para. 6.020 below.

[8] *HCTT v TYYC* (unrep., CACV 380/2007,[2008] HKEC 1105); *HCTT v TYYC (Variation of Consent Order)* [2008] HKFLR 286.

[9] [2008] HKFLR 106 (Cheung JA), [14].

so that the new order should merely be increased or decreased roughly in proportion to the change in the means".[10]

6.015 The proper course for a litigant was to appeal if they were unsatisfied with the original order, if the original order had been correctly made at the time. The court should then proceed to consider to what extent the means of the parties had altered since the original order was made.

6.016 The modern approach is that the court should look at the matter afresh and make an order that is reasonable in the current circumstances.[11] In *Flavell v Flavell*, Ward LJ said that "the court is not required to proceed from the starting point of the original order but looks at the matter *de novo*". According to the Court of Appeal in *AEM v VFM*, the court was required under s 11(7) to look at all the circumstances of the case. "A change in any of the matters to which the court was required to consider when making the original order was one of the circumstances to be considered".

6.017 Therefore, the court must look at the s 7 factors and the modern case law to establish a fairness of result within the context of these factors and all the circumstances of the case. Consequently, it would appear that this would go beyond a payee's reasonable requirements, as it was held in *Primavera v Primavera*[12] where the Court of Appeal in England approved an increase in the wife's periodical payments beyond her strict budgetary requirements.

6.018 Useful guidance has been given in the English case of *Cornick v Cornick (No. 3)*[13] in which the wife's periodical payments were increased to reflect the wife's new budgetary requirements and in proportion to the husband's increased wealth where Charles J said:

> "in my judgment *White v White* … and *Cowan v Cowan* … confirm and support the approach taken in *Cornick v Cornick (No. 2)* that the court should consider the whole picture. The earlier cases and *Cornick v Cornick (No. 2)* shows that the court can take into account an increase in the wealth of the payer and that in section 25(2)(c)[14] namely the standard of living enjoyed by the family before the breakdown of the marriage, is by itself not a determinative factor. In my judgment this approach to section 25(2)(c) accords with the language of the statute and the underlying purpose of section 31.[15] For example if the payer's available resources decrease dramatically the payee would not be able to argue successfully against a downward variation between the payee's standard of living which would then fall below the standard enjoyed by the family before the breakdown of the marriage. In my judgment in those circumstances the payee would be likely to have to suffer the consequences of the inability of the payer to pay as much. It is therefore logical that a payee is not precluded from deriving benefit from an increase in the payer's fortunes even if this results in the payee enjoying a higher standard of living than she or he did during the marriage".

[10] *Foster v Foster* [1964] 1 WLR 1155.
[11] *Lewis v Lewis* [1977] 1 WLR 409; *Flavell v Flavell* [1997] 1 FLR 353.
[12] [1991] 1 FLR 16.
[13] [2001] 2 FLR 1240.
[14] Hong Kong equivalent s 7(1)(c) MPPO.
[15] Hong Kong equivalent s 11 MPPO.

6.019 In *M v M*[16], HHJ Bruno Chan further made the point that, since *White v White* "the objective of the legislation for the courts when exercising these … powers under sub-s 7 must be, in my judgment, the same as for all ancillary relief applications to make fair financial arrangements on or after divorce …".

(d) Hong Kong Cases

(i) *YYLJ v CWC (Application to vary)*[17]

6.020 This was a Court of Appeal case which was heard in January 2001. In this case, a variation of an original order had been successfully made before a district judge in May 2000 in which the judge provided for a variation of a nominal maintenance order to be increased to that of HK$10,000.00 per month but for a period of two years. The wife appealed, seeking a lump sum payment and in the alternative a monthly sum to continue for her life. The wife's appeal was dismissed on the basis that:

(1) in view of s 11(5) of the MPPO, no application for lump sum payment as an alternative to periodical payments could be made without leave;[18]

(2) such an order would be inappropriate without a detailed explanation as to how the lump sum would be used and the court further found that in this particular case "the past experience with the … provident fund payment demonstrates that the petitioner is unlikely to be competent to make proper use of the lump sum";

(3) the lapse of time between making the application following the breakup of the marriage in the divorce proceedings was an overriding consideration; and

(4) insofar as the judge sought to provide for clean break provision at the end of the two-year period, whilst the Court of Appeal agreed with the spirit of such an order, it recognised this would not preclude a variation in the maintenance order "should exceptional and genuinely dramatic circumstances so require".

(ii) *AEM v VFM*[19]

6.021 This case was heard by the district court in May 2006. It was an application brought by the wife for an increase in periodical payments provided for her under an

[16] *M v M* (also known in the Court of Appeal as *AEM v VFM)* [2006] 1 HKFLR 22.
[17] *YYLJ v CWC (Application to vary)* [2006] HKFLR 526.
[18] *YYLJ v CWC (Application to vary)* [11], [12] *per* Rogers VP.
[19] (*Also known as M v M*) Two titles refer to the same case. It was reported at the first instance in [2006] 1 HKFLR 22 and posted on the judiciary website as *M v M*. When the Court of Appeal judgment was posted on the judiciary website, it was named *AEM v VFM* and was thus reported as *AEM v VFM (Variation of Maintenance)* [2008] HKFLR 106; [2008] 3 HKLRD 36. Also followed in *LBO v WWKF (variation of maintenance, leave to enforce arrears and judgement summons)* [2015] HKFLR 300; *WSR v CSL (variation of maintenance)* (unrep., FCMC 8831/2012, [2017] HKEC 1591).

order made in 1998. This was the second such application by the wife since the dissolution of the parties' marriage in 1991. The marriage of 20 years was dissolved in 1991 and the July 1998 order was varied increasing the periodical payments, but had not referred to an index linking provision contained in the original order. The wife returned to the United Kingdom. She had the care of a daughter who was mentally and physically handicapped. The wife sought a further upward variation and to increase the periodical payments by an average earning index which would have increased the periodical payments by 33 per cent. In the alternative, she sought to rely on the Retail Price Index which would have given her an increase of 19.6 per cent. The increase in the cost of living was a change in circumstance to which the court can have regard.

6.022 During the separation, the husband had continued to build his wealth. He was a CFO in a major company and conceded that he had property investments worth more than HK$110 million. He had remarried and had a young child.

6.023 The judge endorsed the modern approach to variation applications as set out in paras **6.013–6.015**. He held that the court must look at the order *de novo* and make an order that is reasonable in the current circumstances. That included an increase in wealth on the part of the payer. The judge also held that it is only fair and reasonable that the wife should not be reduced to a standard well below that commensurate with a divorced wife of a husband of significant financial standing.[20]

6.024 This case then went to the Court of Appeal and is reported under the name of *AEM v VFM (Variation of Maintenance)*.[21] This dealt with the question of backdating and issues in respect of index linking of the maintenance, but the Court of Appeal in this case also endorsed the judge's ruling that it was not required to proceed from the starting point of the original order but to look at the matter afresh.[22] It was further held that:

> "at the same time the basis and intended effect of the original order are relevant factors to which the court on variation should pay regard and there should not be a radical departure from the approach taken by the parties themselves when they had entered into an agreement embodied in a consent order".[23]

6.025 The same case was back before the Court of Appeal in January 2013.[24] Subsequent to the 2006 hearing, in 2009, the husband had successfully applied to the District Court to vary the periodical payments downwards on the basis that the wife had received a substantial inheritance and that she was co-habiting.[25]

[20] *Primavera v Primavera* [1991] 1 FLR 16 cited.
[21] [2008] HKFLR 106.
[22] *Flavell v Flavell* [1997] 1 FLR 353; *Lewis v Lewis* [1977] 1 WLR 409; *Garner v Garner* [1992] 1 FLR 573; *Primavera v Primavera* [1991] 1 FLR 16; *Cornick v Cornick (No. 2)* [1995] 2 FLR 490.
[23] *Boylen v Boylen* [1988] FLR 282 at [14].
[24] *AEM v VFM (No. 2)* [2013] 2 HKLRD 144.
[25] On the co-habiting point, see para. 6.043 below.

6.026 The Court of Appeal allowed the wife's appeal, affirming the 2006 order as modified by the Court of Appeal. The principle was reiterated that the measure to be applied in a downward variation is not "reasonable needs" but what is fair in all the circumstances if the payor is able to pay more than the payee's reasonable needs. This approach was correct for an application for a downward variation, but not necessarily an upward variation. Both parties' financial positions were relevant, not just the wife's and the court found that the husband's capital had increased considerably too. The wife should not be expected to deplete her capital, although interest from the capital should be taken into account when assessing the appropriate level of periodical payments.[26]

(iii) *HCTT v TYYC*

6.027 The same authorities were also looked at by the Court of Appeal in July 2008 in *HCTT v TYYC*[27]. In this case, Lam J held that applications to vary must be handled with caution, particularly if they are to vary a consent order. He quoted from Stock JA in *L v C*[28] where he had said, "the courts must be astute in this field to guard against the manipulative litigant who seeks to undo an agreement … and to bear in mind the factors, quite clear now as a result of developed authority, which might go to vitiate such agreement …

6.028 Lam J added, "the courts in the family jurisdiction must be equally astute to guard against unmeritorious applications for variation by litigants who have second thoughts about settlements they have knowingly reached on their own volition".[29] And further, "it would go against the modern ethos of family dispute management if the court were to entertain lightly an application to vary the terms of a settlement embodied in a consent order" at [46].

6.029 He quoted again from *L v C* and Stock JA as follows:

> "An agreement [on periodical payments] is 'presumptively [not to be varied without material change of circumstances]', the burden being on the parties seeking to achieve a different [term] to show good and substantial cause why the compact should not be respected, and … the scope for so doing is one directed at an injustice in the circumstances in which the agreement came to be concluded or in clear injustice occasioned to one of the parties by reason of events unforeseen at the time of the agreement were the agreement to be enforced to its letter" [47].

[26] There is a trend against this currently in England: *Waggott v Waggott* [2018] EWCA Civ 727 where the wife was expected to utilize her capital in addition to her income from capital, in order to meet her assessed needs. See also *JPH v PK (variation of maintenance)* (unrep., FCMC 13429/2012, [2017] HKEC 1399) where the Judge commented that "it may be high time for her [the wife] to seriously think about finding some form of employment, at least to supplement her income or save something for her own retirement in the not too distant future".
[27] [2008] HKFLR 286. Relevant to law on consent orders and cited at para 12.5.
[28] [2007] 3 HKLRD 819, at 841; [2007] HKFLR 410.
[29] [2007] 3 HKLRD 819 at [43].

6.030 Further, citing *Garner v Garner*,[30] the judge agreed with the Judge in that case that "applications for variation should not be pursued when in substance the grounds advanced for variation tantamount to re-argument of the same issues that have been argued before the court before the making of the original order. If a party is aggrieved by the terms of the original order, the proper course is to appeal against that order" [49]

> "On the other hand, one should go back to the judge for variation where it can be shown that the assumption the judge made about the future conduct of one party has proved by developments subsequent to the hearing to be incorrect"[31] [50]

6.031 In *LBO v WWKF (variation of maintenance, leave to enforce arrears and judgement summons)*,[32] the family court, in considering the variation application following a consent order, found that, although the matter should be viewed *de novo*, the basis and intended effect of the original order were relevant factors to which the court on variation should pay regard and there should not be a radical departure from the approach taken by the parties themselves when they had entered into an agreement embodied in a consent order.

(iv) *AEL v MRL (Variation of MPS)*

6.032 The point as to whether it was more appropriate to appeal rather than apply to vary was considered in *AEL v MRL (Variation of MPS)*[33] in the context of varying a MPS order. In this case, there had been an application for MPS before the Family Court that was heard in July 2007. At the hearing, the husband was ordered to pay MPS of HK$44,000 per month. In October 2008, the wife issued a summons to vary the maintenance upwards. The matter came before the judge in December 2008 and the hearing for full ancillary relief was fixed for June 2009. The judge considered whether there had been a material change of circumstances necessitating a variation on a short-term basis, and in particular whether this application was in fact an appeal through the back door.

6.033 In this case, HHJ Melloy found that there had not been a "change of circumstance of the magnitude necessary to necessitate a variation of the order, especially given the fact that there will be full argument on all of these points in less than six months' time".[34]

6.034 She further held that, on the facts of this case, the wife "clearly felt that the order was wrong and has used this process in order to attempt to rehear the matter when the basis for doing was extremely flimsy".[35]

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[30] [1992] 1 FLR 573.
[31] *Fournier v Fournier* [1998] 2 FLR 990, 995 (Lord Woolf).
[32] [2015] HKFLR 300
[33] [2009] HKFLR 131.
[34] [2009] HKFLR 131. [35].
[35] [2009] HKFLR 131. [38]. The Family Court in *YKC v LMYT and CYFO and ML Ltd (variation of MPS)* [2017] HKFLR 90 also found that it was not appropriate to vary an order for MPS bearing in mind the interim nature of MPS and in addition the court did not find that there had been a change in circumstances to justify a variation.

(v) *Applications to vary child maintenance downwards: WNWG v PBF*[36] *and SMC v JAC*[37]

6.035 In *WNWG v PBF* the husband, who had been a partner in an international law firm, but who subsequently decided to focus on developing property in Thailand, sought to vary the periodical payments for the three children of the family downwards on the basis that he was no longer earning a significant salary. The financial matters had been settled by consent following mediation with the proviso that, should he choose to change career, the parties would review the child maintenance. On this basis, the Family Court allowed the husband's application to vary but the wife appealed to the Court of Appeal.

6.036 The Court of Appeal, citing *HCTT v TYYC*[38], held that, how much weight should be placed on the original order must depend on the circumstances and normally the earlier order will only be varied if there has been a material change in circumstances. The basis and intended effect of the original order are relevant factors, and there should not be a radical departure from the approach taken by the parties themselves when they entered into an agreement embodied in a consent order.[39]

6.037 Although the judge found that the wife would be able to provide for the children without the assistance of the husband, no weight was given to the original agreement as to how maintenance of the children was to be dealt with or whether there should be a variation despite the fact that the husband had the ability to pay or consideration of his earning capacity. Under the Mediation agreement, the burden for providing for the children had been placed on the husband, given the great disparity in earning capacity. Further, there had been no suggestion in the agreement that the wife would have to utilise her clean break spousal maintenance to maintain the children. Part of the clean break comprised the matrimonial home in which she and the children lived. The wife was, and would remain for the foreseeable future, a full time mother and given her age and the standard of living of this family, her complaint that the reduction in maintenance would represent an unreasonable drain on her resources was valid.

6.038 The wife was not expected to drain her capital resources if there was an alternative and the potential earning capacity from the project in Thailand should not be discounted. The husband remained a person with a high earning capacity and the wife a full time mother who would be depending on the lump sum in the years to come. It was the husband's personal choice not to enter the employment market again and although there was accumulated wealth that allowed the husband to retire (and the husband argued that he should not be penalised for that choice), this choice should not impinge on the welfare of the children and the long-term security of the wife. The husband

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[36] *WNWG v PBF* [2012] HKFLR 147. Followed in *WSR v CSL (variation of maintenance)* (unrep., FCMC 8831/2012, [2017] HKEC 1591): father not allowed to reduce maintenance for the children, although spousal maintenance was reduced from HK$4000 per month to nominal maintenance.
[37] *SMC v JAC* [2011] HKFLR 545. Cases referred to in this case were *HCTT v TYYC* [2008] HKFLR, 286; *AEM v VFM* [2008] HKFLR 106 (citing *Foster v Foster* [1964] 3 All ER; *Flavell v Flavell* [1997] 1 FLR 353; *Lewis v Lewis* [1977] 1 WLR 409; *Garner v Garner* [1992] 1 FLR 573).
[38] [2008] HKFLR 286.
[39] See *AEM v VFM* [2008] 3 HKLRD 36; [2008] HKFLR 106 citing *Boylan v Boylan* [1988] 1 FLR 282. Also *LBO v WWKF (variation of maintenance, leave to enforce arrears and judgement summons)* [2015] HKFLR 300.

had sufficient means to keep up the existing level of child maintenance and he should take the financial consequence for his own choice. The wife therefore won her appeal.

6.039 *SMC v JAC*[40] concerned another case where the husband sought to vary his liability for child maintenance downwards. This case was before the District Court and involved the payment of school fees following the permanent relocation of the mother and children to Canada. Following the move, the father had ceased paying periodical payments and the school fees and therefore the mother had applied for an attachment of earnings and for payment of the arrears, which prompted the husband's application for variation. The husband applied for a downward variation in maintenance due to an increase in his rent but no change in his income. The wife was not seeking a revisit to the consent order, but as there had been a material change of circumstances, requested that the court should look at the case *de novo* and that the husband be now ordered to pay for the school fees. The husband disputed that the children should go to private schools in Canada and alleged that the wife had access to trust funds from her father to pay for the children's education.

6.040 In this case, the Family Court held that there had not been a change of circumstances on the part of the husband justifying a variation of the periodical payments for the children. The increase in rental had not resulted in his inability to continue to pay the appropriate sum.

6.041 The court found that the wife would be living off her capital, whereas the husband, a banker with a good salary, was able to continue to utilise his earnings to meet his expenses. The husband failed to establish on the facts that he had any valid objection to the children going to private school other than financial, which on the facts he could afford. There was a finding that there was a material change of circumstances that allowed the court to look at the wife and children's needs *de novo*.

6.042 In *MM v RS (Variation of maintenance)*[41], the father applied for a downward variation of child maintenance on the basis of a reduced income. Here the court found that "when the parents reached their well thought out agreement in 2013, they knew the father would need to look for new employment after his redundancy in 2013, they knew the children would need to have replacement schools after they completed their primary studies, they knew the children's tuition fees and periodical payment would be adjusted annually, they knew when and where the holiday access would be taking place…" DDJ Yim in that case, whilst acknowledging that there had been changes since the consent order, did not consider there to be any material change in circumstances justifying a variation of the consent order.

(vi) *Effect of remarriage or co-habitation on variation applications*

6.043 In the Court of Appeal case of *AEM v VFM* considered above, the fact of the wife's co-habitation was in issue as to whether this was a valid reason for a variation of maintenance. The court was asked to consider whether the contribution of a cohabitee was a material factor and whether there should be disclosure as to the co-habitant's

[40] *SMC v JAC* [2011] HKFLR 545.
[41] *MM v RS (Variation of maintenance)* FCMC 14226/2009, Judgement September 2015.

financial circumstances. It was held here that the question should be not "what are they contributing" but "what they should be contributing".

6.044 Here the same rules in respect of cohabitants apply as with an application for ancillary relief: *Grey v Grey*[42], Wall LJ stated that,

> "… Post-separation cohabitation with a third party is a relevant factor for the court to take into account when considering the level of maintenance pending suit and/or periodical payments which the cohabiting spouse or former spouse should receive from his or her spouse or former spouse. In some cases, the fact of cohabitation will weigh heavily in the scales: in others, it will not. As Thorpe LJ rightly states in para. 28 of his judgment, the real question for the court is usually not what the third party is contributing but – as here – what ought he to be contributing?

6.045 In the Court of Appeal case of *LMH v LWP*,[43] it was the paying party who had remarried. Here the parties had divorced in 1984, and the husband had remarried and had three children from his second marriage. The court held that the first wife had a legitimate application, although they had been separated for so many years, as there had not been a clean break and she too was approaching retirement age. The husband, although retired from his career, still had an earning capacity and had not disclosed his income: it was clear from the fact that his expenses for school fees were in excess of his income. The husband still had an obligation to his former wife; his current wife was financially independent and there was no reason why her resources should not be used towards maintaining their three children, allowing the husband to discharge his increased obligation towards his first wife.

(e) Applications to Recover Arrears of Maintenance

6.046 A common application with an application to vary is one in which a party may seek to recover arrears of maintenance. The power of the court to enforce arrears is contained in s 12 MPPO and provides that certain arrears are unenforceable without leave of the court.

6.047 Section 12(1) provides:

> "A person shall not be entitled to enforce through the court the payment of any arrears due under an order made by virtue of section 3 [maintenance pending suit], 4(1) [periodical payments], 5(2) [periodical payments for children] 8(5) or 8(6) [periodical payments ordered pursuant to an application regarding neglect by a party to a marriage to maintain a party or a child] without the leave of the court if those arrears became due more than 12 months before proceedings to enforce the payment of them are begun".

[42] [2010] 1 FLR 1764, [51].
[43] *LMH v LWH (Variation of Maintenance)* [2012] HKFLR 141.

6.048 Section 12(2) further provides:

> "The court hearing an application for the grant of leave under this section may refuse leave, or may grant leave subject to such restrictions and conditions (including conditions as to the allowing of time for payment of the making of payment by instalments) as that court think proper, or may remit the payment of such arrears or of any part thereof".

6.049 Therefore, an application for recovery of arrears older than one year can only be made with the leave of the court, the rationale being that the applicant cannot have missed the maintenance if no application had been made sooner.

6.050 The leading case in Hong Kong on backdating maintenance following an application to vary is the Court of Appeal case of *AEM v VFM (Variation of Maintenance)*.[44] In this case, the original order had provided for the wife and the children's periodical payments to be index-linked. The wife had subsequently successfully sought an increase in periodical payments for herself and her daughter in 1998, but these payments were not index-linked. In 2006, the wife successfully sought a variation of the 1998 order on the ground that the lack of index-link provision meant that the periodical payments for her and the daughter had not been properly adjusted to meet their rising needs and the increase in the cost of living. The increase was backdated to 1999.[45] The district judge had found that, although the husband's salary had not increased since 1998, his total income had increased in five out of the past seven years and, in applying the index linking provisions to the original order to these income increases, the 1998 award would have been increased by 14.27 per cent over the years. From 1999 to 2005, the judge adopted a 2.2 per cent annual increase, based on the average of the total Retail Price Index increase of 17.6 per cent from 1997 to 2004. He ordered that the payments increase 5 per cent annually based on the wife's evidence of inflation in the United Kingdom, from 1 January 2007 until further order. The husband appealed, arguing the judge was wrong to backdate the order to 1999. The husband also said the 5 per cent increase was wrong as the index linked provision would not by its terms permit any further upward adjustment because the husband's salary no longer increased after 2005.

6.051 The Court of Appeal set out the principle on backdating of an order as follows:

> "1. The Court has an almost unrestricted power to vary its own order retrospectively and to backdate any variation which it makes in a pre-existing order beyond the date of the application for variation.
>
> 2. In practice, orders are not usually backdated to a date prior to the notice of application to vary unless the justice of the case so requires".[46]

[44] [2008] HKFLR 106 and paras 6.020–6.023.
[45] Reported as *M v M* (unrep., FCMC 4070/1990, [2006] HKEC 1063).
[46] *Per* Cheung JA, para 15 *Rayden and Jackson on Divorce and Family Matters* (18th ed, Vol 1), para 18.25 and the cases cited.

6.052 The Court of Appeal held that the district judge had been correct in backdating the order to 1999. It held that there was sufficient evidence before the judge to show that the increase in the price in goods and services eroded the value of the periodical payments received by the wife. The court found that the judge had not radically increased the periodical payments in the 1998 order but only increased them by a modest 2.2 per cent annually. There was no challenge by the husband on the figures adopted by the judge on the adjusted 1998 periodical payments. The adjustment was gradual over the years. There was nothing wrong in the judge adopting this approach in order to ensure that the wife could get what she was properly entitled to from the beginning and the substantial wealth of the husband, which had increased since the divorce, allowed the court to make the upward adjustment. Further, the court held that, while the backdated period was a long one, it did not mean that this was by itself wrong. The court was merely doing what was just in the circumstances of the case.[47]

6.053 The court held that the index linked provision provided a pre-determined formula for annual adjustment. It clearly envisaged variation to be made due to the change in circumstances. The court could not say that this provision showed that the clear intention of the parties was that the wife was precluded from seeking an increase in her periodical payments simply when the husband's salary did not increase. The change of circumstances by reason of the fact that the value of the payment was eroded by an increase in the cost of living and that the husband's wealth was able to meet the adjustment would permit a variation to be made. It held that the court was not departing radically from the agreement of the parties by allowing a variation when the circumstances justified it. Therefore, the Court of Appeal allowed the upward adjustment from 2005 despite the fact that the husband no longer received a salary after that year. However, the court did make a slight adjustment that it should be 3.59 per cent rather than 5 per cent on receipt of new evidence provided by the husband that the annual inflation rate of the United Kingdom from 1986 to 2006 was 3.59 per cent.

(f) Applications to Vary and Enforcement

6.054 Often applications to vary are made following an application to enforce arrears of maintenance. Such enforcement procedure will normally involve an application for a judgement summons. Although the judgement summons is a draconian method of enforcement, ultimately seeking the committal to prison on the basis of contempt of court by the non-payer, it has traditionally been the preferred procedure when a payer has defaulted, in order to pressure him to pay the sums ordered.[48]

6.055 Usually the non-payer will assert that the reason for the non-payment is due to an inability to pay, which prompts the application to vary. It has been held that, in these circumstances, it is appropriate to hear the variation summons before considering the judgement summons application, regardless of which application was filed first.[49]

[47] *S v S* [1987] 1 WLR 382; *Cornick v Cornick (No 2)* [1995] 2 FLR 490 considered.
[48] See section on judgement summonses in Chapter 16.
[49] See *LBO v WWKF (Variation of maintenance, leave to enforce arrears; judgement summons)* [2015] HKFLR 300.

(g) Financial Disclosure in Applications to Vary

6.056 Since the court must have regarded all the circumstances of the case, the capital and income of the parties are relevant; although the court cannot order variation of a capital order, the entire financial position of the parties would be taken into account.

6.057 It is important to demonstrate to the court the change in circumstances. Consequently, evidence of the parties' financial position as at the date of the original order must be adduced and compared with their present financial position, in accordance with the s 7 factors.

6.058 Financial disclosure similar to the application for ancillary relief in the main action is therefore necessary, with an emphasis on the change in circumstances. Items of current expenditure should be listed, together with evidence of income, capital assets (with current valuations) and current liabilities. In relation to private companies, as with an application for ancillary relief, it may be appropriate to obtain an accountant's report to analyze the audited accounts. If the applicant wishes to adduce evidence on how the rate of exchange has affected his periodical payments adversely, details of the rate of inflation over the relevant number of years should be exhibited, with reference to the Hang Seng Consumer Price Index or any other relevant index in the countries in which the parties may be living.

(h) Procedure

6.059 An application to vary maintenance should be commenced with a notice of application with an affidavit in support setting out full particulars of the applicant's property and income and the grounds upon which the application is made.[50]

6.060 There will normally be a directions hearing date given by the court to arrange for the filing of further evidence and to set the matter down for hearing.

6.061 Applications for variation of maintenance do not generally last as long as a full application for ancillary relief, although this depends on the complexity of the case. Although the whole financial position is relevant, the court will not look at the finances in as great a detail.

2. Maintenance Pending Suit

(a) Statutory Provisions

6.062 The purpose of an order for Maintenance Pending Suit ("MPS") is to provide maintenance for a needy spouse during the course of the proceedings while the parties and the court have yet to settle on an appropriate long-term figure.

[50] See sample application to vary maintenance and draft order at Appendix C.

6.063 A court has jurisdiction to make an order for MPS pursuant to s 3 of the Matrimonial Proceedings and Property Ordinance Cap 192 (MPPO). The section sets out as follows:

> "On a
>
> a) petition or joint application for divorce; or
>
> b) petition for nullity of marriage or judicial separation,
>
> the court may order either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the presentation of the petition or making of the application and ending on the date of the determination of the suit, as the court thinks reasonable".

6.064 Therefore, an application for MPS can only be made once the petition has been filed. An order for MPS will cease to have effect on decree absolute.

6.065 Either the petitioner or the respondent can apply for MPS without leave of the court provided there is a request for it in the petition or the answer. If this has been omitted, leave of the court must be sought by way of an *ex parte* application.

6.066 Maintenance Pending Suit is for a spouse. An application for the children of the family is 'interim maintenance", as naturally, they are not part of the divorce "suit" but often, from necessity, the application for maintenance for spouse and children are made together. Applications for interim maintenance for children are brought pursuant to section 5 of the Matrimonial Proceedings and Property Ordinance Cap 192. The interim order may or may not be made into a final order for periodical payment for the children on decree absolute, depending on the facts of the case.

6.067 Provision for interim maintenance, by way of periodical payments, for a child who is born out of wedlock is found in the Guardianship of Minors Ordinance Cap 13 (GMO) s 10(2)(b). The test to be applied is simply whether the provision is "reasonable" having regard to the means of the parent on whom the requirement is imposed. Under s 13(3)(a), the court has power to make an order for interim maintenance when the court has made an adjournment for more than 7 days, but such an order will cease to have effect after 3 months and will cease to have effect on the making of a final order or on dismissal of the application. It has been said that there is nothing to prevent an applicant applying again after the expiry of the 3 months.[51]

6.068 The law in relation to financial provision for children can be found in Chapter 5.

(b) Factors the Court Will Take into Account and Judicial Discretion

6.069 Since the only statutory guidance in MPS applications is contained in s 3, the court has an unfettered discretion, subject to the result being "reasonable".

[51] *LCTK v TKKP (Interim Maintenance)* [2010] HKFLR 442 at [8] per HHJ Chu In *DCB v AB (Interim maintenance for child following wardship proceedings)* [2016] HKFLR 300 Chu J adopted a broad brush approach in an interim application concerning a child of unmarried parents, bearing in mind the immediate and reasonable needs of the child, and including some rental expenses and the mother's expenses while in Hong Kong.

6.070 The law has been summarised by HHJ Bruno Chan in *C v F*[52] as follows:

> "Although the sole statutory guideline in considering maintenance pending suit is that the award shall be 'reasonable', the court will nevertheless bear in mind all the factors drawn to its attention relating to the marriage and the parties to it, and perhaps the two most outstanding matters in every case, as in this one, are the standard of living of the parties, and the ability of the husband to pay".

6.071 Therefore, unlike substantive ancillary relief applications, the court is not bound by the criteria set out in s 7 of the MPPO, although they may be relevant and therefore would be taken into account. Predominantly, the "needs" of the applicant, within the standard of living of the marriage, and the ability of the payer to pay are relevant.

6.072 The approach of the court is to apply a broad-brush approach usually without oral evidence, on the basis that the court can adjust any over or under payment at the time of the substantive order as to ancillary relief.

6.073 HHJ Bruno Chan further considered the existing case law in Hong Kong in his judgment in *C v F*[53] as follows:

> "As it is intended that the award will operate for a relatively short period, several months as is anticipated in this case, it would not be appropriate for the court to make a detailed investigation of the financial position of the parties when considering whether to grant maintenance pending suit, as was held by Power J, as he then was, in *Miller v Miller*[54] when he said that the sole criteria in making an award were reasonableness and the needs of the parties and that the court should not take a long term view nor considering the potential earning capacity and future capital prospects of the parties. This approach was confirmed in the later case of *Wong Wai Chi, Susanna v Kim Miu Sup, Mark*[55] when Liu JA said this in his Judgment:
>
> > 'it is trite law that in an application for interim maintenance, the Family Judge is not called upon to make any thorough investigation of the income and financial capabilities of the parties. At that stage there would simply be no time to be perfect. The Family Judge would have to guide himself by section 3, having regard to the reasonable requirements of the wife and the ability of the husband to pay'".

6.074 Further in *W v I*,[56] HHJ Bruno Chan stated:

> "It has also been said that the approach to maintenance pending suit should be empirical … where there is no oral evidence and therefore it is not possible or necessary to make any detailed investigation of their financial position, the court will have to take a broad view of the wife's needs on the one hand and the husband's ability to pay on the other to come to a 'rough and ready' conclusion, or to take a 'broad-brush approach', but may nevertheless have regard to any of the criteria listed under s. 7 of the Ordinance that has been drawn to its attention, to make a reasonable award intended only to operate for a relatively short period of time pending the final determination of the ancillary relief application".[57]

[52] [2006] HKFLR 41 at [14].
[53] [2006] HKFLR 41, at [13].
[54] [1985] 1 HKC 595.
[55] (Unrep., CACV 263/1998, [1999] HKEC 902).
[56] [2008] HKFLR 305.

6.075 The rationale behind an application for MPS is to provide emergency maintenance to maintain the standard of living of the dependent party, but it is necessarily only a stopgap measure. An application can be made once the petition has been filed, and such subsequent order can be backdated to the date of the petition if necessary. If there has been an over or an under payment of MPS when the matter is finally resolved, there can be an adjustment then, although it has been held that there may be a problem where the parties are also in dispute as to forum. In *YS v TTWD*,[58] the court found that it must be more cautious with such an MPS application to avoid the risk of injustice arising from irrecoverable MPS.

6.076 It is rare that such applications are appealed, as by its nature, the application should be short-lived, but unfortunately this was not the case in the Court of Appeal case of *K v K*[59] in which the matter had run on for at least a further nine months after the FDR had come to an end. Here the support of the husband's parents was taken into account on the basis that he had hitherto received support from them and could expect this to continue at least until the ancillary relief hearing.[60]

(c) Court of Appeal Decision: *HJFG v KCY*

6.077 The Court of Appeal in 2011 in *HJFG v KCY*[61] further clarified the approach to MPS. This case involved an extremely wealthy couple. In late 2009, the husband's declared assets were calculated at HK$1.05 billion and he enjoyed an income of HK$6.5 million per month. The wife too had substantial assets in 2009 of HK$35.5 million but by the time of the hearing in 2011, this had been reduced to HK$1.36 million. In this case, the wife's application was not founded on the complaint that the husband had denied her financial support but rather that he had been paying considerably less than the amount to which she was entitled, regard being had to the lifestyle that she enjoyed prior to the breakdown of the marriage. For example, she had been used to unlimited spending on the credit card and now she was limited to HK$500,000 per month. She complained that she had to use her limited savings to pay for items and had further had to secure a loan against her apartment and to borrow from family and friends. The husband continued to spend extravagantly, purchasing a private jet in late 2009 and also an 86 foot yacht, and the wife's claim for interim maintenance was judged according to the

[57] *F v F (MPS)* [1983] 4 FLR 382; *Miller v Miller* [1985] HKC 525 at p 595.
[58] [2011] HKFLR 439.
[59] [2010] HKFLR 479.
[60] This may or may not be upheld now in light of the Court of Final Appeal's decision in *KEWS v NCHC* [2013] 2 HKLRD 314.
[61] [2012] 1 HKLRD 95; [2012] HKFLR 27.

very high level of daily living that was enjoyed before the couple separated and which the husband continued to enjoy.

6.078 At the first instance, the judge decided that in cases of such extraordinary wealth, a practical resolution would be to allow the husband to elect to pay MPS as a lump sum which could be taken into account when the final decision was made for financial provision, in effect an advance lump sum which could be deducted from the capital sum that would eventually be awarded to her. This approach had been adopted by Coleridge J in *Charman v Charman*.[62]

6.079 Hartmann JA in the Court of Appeal looked again at the established principles set out above, namely that s 3 of the MPPO requires a payment of "maintenance" that the court considers "reasonable". This restricts the court's power to order payments "to meet the recurring cost of living at whatever standard of living is appropriate. That being the case, no matter how great the wealth of the parties and how unevenly distributed that wealth may be at the time an application for interim maintenance is made, the court has no jurisdiction to make orders which for all practical purposes result in a form of pre-trial capital re-balancing".

6.080 Hartmann JA quoted at paragraph 37 from the English case of *TL v ML*[63] in which Mostyn QC, sitting as a deputy High Court judge, set out the following principles in respect of finding fairness in interim maintenance applications:

(i) The sole criterion to be applied in determining the application is "reasonableness", which is synonymous with "fairness".

(ii) A very important factor in determining fairness is the marital standard of living. This is not to say that the exercise is merely to replicate that standard.

(iii) In every MPS application, there should be a specific MPS budget that excludes capital or long-term expenditure, more aptly to be considered on a final hearing. That budget should be examined critically in every case to exclude forensic exaggeration.

(iv) Where the affidavit or Form E disclosure by the payer is obviously deficient, the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources. In such a situation, the court should err in favour of the payee.

6.081 These principles should guide judges in Hong Kong.[64] In the context of providing a monthly maintenance in line with the new fairness approach in *White v White* and *LKW v DD*, s 3 was not as wide. Hartmann JA said at para 56, "Whatever may have been the shortcomings in the final determination of ancillary relief proceedings of the

[62] (Unrep., Family Division of the High Court of Justice, 11 February 2005).

[63] *(Ancillary relief: claim against assets of extended family)* [2006] 1 FLR 1263, 1289. Also referred to by HHJ Melloy in *MY-D aka MY v MJD (Mediation; privilege and Maintenance Pending Suit)* [2016] HKFLR 76.

[64] See also the general principles set out by HHJ Melloy in *P,SYR v Y,WY (MPS and interim maintenance)* (unrep., FCMC 9191/2015, [2016] HKEC 570), at [8].

old approach of 'reasonable needs', in the more restricted context of applications for maintenance pending suit the principles stated by Nicholas Mostyn ensure fairness to both parties. More importantly, they are principles which manifestly comply with the restrictions imposed by s 3 of the MPPO".

6.082 In respect of the level of disclosure that is appropriate, he further commented that "applications for interim maintenance, when the amount to be paid is for a limited period only and not all of the evidence is necessarily before the court, it is not appropriate, nor indeed in most cases possible, for the court to conduct a detailed investigation into the finances of the parties. While, in order to determine what is or is not reasonable, some analysis is always required, that analysis can be conducted on a 'broad brush' basis".

6.083 In respect of the *Charman v Charman*[65] approach, the judge at the first instance had acknowledged that he had no jurisdiction to make such an order for advanced capital, and while Hartmann JA in the Court of Appeal found that there was much to commend the approach, nevertheless, there was no jurisdiction, the parties would have to agree it. Where the judge at the first instance fell into error was to decline any analysis of the reasonableness of the amount claimed which he was bound to do under s 3, and to determine the sum simply as a sum on account of the wife's substantive claim in the ancillary relief proceedings. There was further concern that to say that the wife must pay the husband back for day-to-day living costs advanced to her, which the husband was not required to give a similar account, could be interpreted as discriminating in favour of the husband.

6.084 In *HJFG v KCL* the court ordered MPS to be paid to the wife at a rate of HK$800,000 per month, backdated to the application but with credit given for interim maintenance already paid.

(d) Provision for Legal Costs

6.085 It has been held that an applicant can, as part of her application for MPS, include provision for legal costs. The leading case on this in Hong Kong is *KGL v CKY*.[66]

6.086 This was a Court of Appeal case that followed the English case of *A v A (MPS Payment of Legal Fees)*.[67] It has been subsequently followed in *HJFG v KCY*.[68]

6.087 In *KGL v CKY* it was held that MPS can cover more than "daily living" expenses, following the judgment of Holman J in *A v A (MPS Payment of Legal Fees)*. In addition to her daily living expenses, it was held that legal costs were "at the moment … the wife's most urgent and pressing need and expense".

6.088 Specifically, it was said by Holman J and quoted by Woo JA in *KGL v CKY*

> "… the costs of the suit itself … are, after the provision of a roof over her head and food in her mouth, the wife's most urgent and pressing need and expense. She

[65] [2007] 1 FLR 593;[2007] 1 F.C.R. 33;[2006] W.T.L.R. 1349.

[66] [2003] 2 HKLRD 301.

[67] [2001] 1 FLR 377; *G v G (MPS: legal costs)* [2002] 2 FLR 71.

[68] [2012] 1 HKLRD 95; [2012] HKFLR supra.

> could manage without holidays, though I have made some provision for them. She could no doubt manage for a while without buying new clothes. She could manage without her manicures, pedicures and yoga and keep-fit classes, for all of which I have, on the facts of this case, made provision. She could even manage without the provision for forms of private medical care… but she simply cannot make any progress with the dominating issue in her life if she cannot pay her lawyers …".

6.089 It would be normal for the wife to undertake that the specific sum that may be ordered for the provision of legal fees in MPS should not be used by the applicant otherwise than for meeting her legal costs. It also follows that any overpayment by the paying party should be recoverable by that party in due course.

6.090 It was further held that payment of legal costs was not a lump sum in nature and therefore could fall within the provisions relating to MPS although reference can be made to a dependant party's capital position.

6.091 In *H v H (Interim Maintenance)*,[69] HHJ Bruno Chan quoted the English Court of Appeal case of *Currey v Currey*[70] in which certain conditions were set out namely:

> "1. that the applicant has no assets, or none that can reasonably be deployed;
>
> 2. that she can provide no security for borrowing, or none which can reasonably be offered;
>
> 3. that she cannot reasonably obtain legal services by offering a charge on the outcome of the litigation or
>
> 4. that she cannot secure publicly funded legal help at a level of expertise apt to the proceedings".

6.092 Therefore, provision for legal costs within an MPS application will only be given if the applicant does not have any capital at her disposal which she could utilise for the payment of her legal fees. In *H v H (Interim Maintenance)* although the applicant had capital of approximately HK$500,000.00, it was held that she may need to use this as emergency capital to meet a child of the family's medical expenses.[71]

6.093 There was an issue in respect of provision for legal fees in *HJFG v KCY*.[72] Here the Court of Appeal noted that *Currey v Currey*[73] had been adopted by the Family Court in *H v H (Interim Maintenance)*[74] although it had not been adopted in the Court of Appeal or the Court of First Instance. Therefore the judge in this case was not bound by *Currey v Currey*. Hartmann JA found that the principles in *Currey* should be adopted

[69] [2007] HKFLR 311.
[70] [2007] 2 Costs LR 227.
[71] See *YS v TTWD (*MPS *and forum)* [2011] HKFLR 439 in which the court declined to order provision for legal fees as there was a lump sum at the wife's disposal that she could utilise.
[72] [2012] 1 HKLRD 95; [2012] HKFLR 27.
[73] [2007] 2 Costs LR 227.
[74] [2007] HKFLR 311.

as providing prudent guidance to both judges and practitioners in Hong Kong.[75] The period over which an allowance for legal fees could be paid was further considered by Wilson J in *Currey v Currey*[76] applicants should not expect an order that the allowance be paid until the final determination of all proceedings. If the order was made prior to the FDR hearing, it may be wise only to order up until that hearing on the following basis:

> "The FDR appointment is a watershed and all reasonable inducements to both parties there to negotiate positively in the light of informal judicial indications should be in place. The knowledge of a spouse in receipt of a costs allowance that, absent settlement at or in the immediate aftermath of the FDR, she will have to apply for a further allowance, which may or may not be granted, seems to me to amount only to a reasonable inducement, as opposed to improper pressure, to reach settlement".

6.094 In *HJFG v KCY*[77], HK$500,000 was ordered as provision for legal fees as the wife had depleted her capital and the case was complex and she would need assistance analysing complex corporate structures operating outside the jurisdiction. Fairness demanded that an attempt be made to achieve some "equality of arms".

6.095 The husband was given the option to pay a capital payment to the wife of HK$75 million and if he were to make that payment, the orders in respect of the MPS and provision for legal fees would be set aside and the capital sum will be offset against any final award to her in the ancillary relief proceedings.

6.096 This option in respect of making a capital payment in preference to a monthly sum which was provided in *HJFG v KCY* was distinguished by the Family Court in *AB also known as ABW v MAW (Litigation funding)*[78].

6.097 In this case the petitioner wife sought litigation funding as part of her maintenance pending suit in the sum of HK$800,000 per month, to be backdated to 1st September 2015, or in the alternative, lump sum provision which was to be without prejudice to either party's contention at trial concerning the treatment of each side's litigation costs. The case highlighted a conundrum in the payment of costs in family law, where the payer (normally the husband as in this case) pays his own costs out of capital which thus reduces the marital pot for distribution. If a lump sum is agreed to be paid for the wife, this often is said to come out of her share in the asset division. There was therefore an inherent unfairness which, it was argued, could be avoided by monthly maintenance payments. Therefore should an agreement to pay an interim lump sum always include the words 'to be offset against any final award to the Petitioner (receiving party) in the ancillary relief proceedings'? The Judge also considered whether it was appropriate to allow the respondent husband to pay the wife a lump sum and/or what was the appropriate level of monthly litigation funding if not.

[75] *HJFG v KCY* [2012] 1 HKLRD 95; [2012] HKFLR 27.
[76] [2007] 2 Costs LR 227:
[77] [2012] 1 HKLRD 95; [2012] HKFLR 27.
[78] *AB also known as ABW v MAW (Litigation funding)* [2016] HKFLR 34 at [2].

for is for a carer's allowance[6], which may leave that parent struggling to maintain a home and to provide for the children on a day to day basis.

(a) The legal status of cohabitees

13.003 As with many other countries, there is a public policy reasoning behind the lack of legal protection for cohabitees: the preservation of marriage as an institution and the preservation of the traditional family unit of children born within wedlock to a married man and woman. Outside Hong Kong this traditional model has of course seen tremendous change over the last few years with the recognition in many countries of same sex marriage and the regulation of same sex relationships by the passing of civil partnership legislation.[7] There has been some pressure in England to provide cohabitants with some legal protection, notably the private member's bill the Cohabitation Rights Bill 2014, which continues to gather dust in Parliament and considerable press interest surrounding such cases as that involving Rebecca Steinfeld and Charles Keidan who applied to the have their heterosexual relationship formalised under the civil partnership legislation[8]. The unfavourable Court of Appeal ruling was overturned in the Supreme Court who held, in June 2018, that the current law in England and Wales discriminated against heterosexual couples who sought to formalise their relationships as civil partnerships instead of marriages. The five judges unanimously held that the present situation was unfair. Under the present law, homosexual couples have a choice to marry or enter into a civil partnership, but heterosexual couples do not.

13.004 This ruling has lead directly to an announcement by the government on 3rd October that they will introduce civil partnerships for heterosexual couples[9].

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[6] See para. 13.097 *et seq* below.

[7] In England and Wales the Marriage (Same Sex Couples) Act 2013 legalised same sex marriage from March 2014; Civil Partnership Act 2004 and came into force in 2005. At the time of writing approximately 17 countries recognised civil partnerships (a relationship akin to marriage with many of the same civil rights) and approximately 26 recognised same sex marriages.

[8] *Rebecca Hannah Steinfeld and Charles Robin Keidan v Secretary of State for Education* [2017] EWCA Civ 81. This case went before the Supreme Court in May 2018 and, as at the time of writing, the outcome is unknown.

[9] On 21 October 2015 Tim Loughton MP introduced a Private Members Bill which proposed extension of civil partnerships to different sex couples. That Bill did not receive the requisite support and did not progress. A second Bill met the same fate in 2016. Mr Loughton introduced another Bill, entitled Civil Partnership, Marriages and Deaths Registration etc Bill in the 2017-2019 session. The Bill received its First Reading on 19 July 2017 and its Second Reading on 2 February 2018. It proposed that different sex couples should be permitted to enter civil partnerships. The government felt unable to support that proposal but in advance of the Second Reading it agreed the terms of an amendment with Mr Loughton and a joint amendment was submitted to Parliamentary authorities immediately after the Second Reading." Paragraph 8 *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development (in substitution for the Home Secretary and the Education Secretary)* [2018] UKSC 32.
The government produced a command paper in May 2018 which set out that, as there was a lack of consensus, they would not make any changes at the time but would look at data on the take up of civil partnerships and marriage amongst same sex couples but did not envisage any changes until after the data had been collected and then after a consultation period which would not happen until 2020 "at the earliest". Para 10 *R v Secretary for State* [2018] UKSC 32.

13.005 Such reform is unlike to be seen in Hong Kong any time soon: heterosexual marriage has been protected by the constitution in the Basic Law and endorsed by legislation under s 40 Marriage Ordinance (Cap. 181), being defined as the voluntary union for life of one man and one woman to the exclusion of all others. At the moment civil partnerships or same sex marriages are not legally recognised in Hong Kong on all levels: constitutionally, statutory and at common law.

13.006 However these issues have been raised recently in the cases of *Leung Chun Kwong v Secretary for the Civil Service*[10] and in *QT v Director of Immigration*[11]. In *Leung Chun Kwong* the Court of First instance held in favour of a civil servant who was legally married to his partner in New Zealand finding that his husband should be entitled to pension rights on the basis that there was no legal requirement mandating the application of the legal definition of marriage under the Marriage Ordinance in this scenario. The differential treatment, which constituted at least indirect discrimination on the grounds of sexual orientation, had not been justified. This did not however stretch to the joint assessment of taxes where there was a requirement to recognise the marriage under Hong Kong law which the court did not have jurisdiction to do. This decision was overturned by the Court of Appeal on 1st June 2018. The court was not prepared to grant "the same spousal benefits, which are unique to marriage" to same sex couples because to do so 'would diminish significantly the status of marriage in the eyes of the public'. Further it was of concern to the Court of Appeal in Hong Kong that people might think the government was recognising same sex marriage via the 'back door'. The court found that "the extension in the present case of the benefits and privilege under challenge would lead, almost invariably, to similar extensions in other areas concerning, for instance, public housing, social welfare, public medical benefits, employment benefits and protection, pensions and life insurance".

13.007 In *QT v Director of Immigration* the couple had entered into a civil partnership in England. SS had been granted a work permit for Hong Kong and her partner *QT* applied for a dependent's visa which was denied by the Director of Immigration. The Court of Appeal found that the Director of Immigration had failed to justify the indirect discrimination on account of sexual orientation. Dependents' visas can only be given to spouses and children and therefore the applicant could not meet the eligibility requirement on account of her sexual orientation and this was found to be discriminatory. In *QT* the Court, in looking at whether there were 'core rights and obligations' which should be protected and were unique to the status of marriage and whether there was an obvious link between marriage and immigration, Hon Cheung CJHC said at [14]:

> "There are certainly areas of life which are, whether by nature or by tradition or long usage, closely connected with marriage such that married couples should and do enjoy rights and shoulder obligations which are unique to them as married people. The rights and obligations in these areas of life which go with the status of marriage

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[10] [2017] 2 HKLRD 1132. This subsequently went to the Court of Appeal which overturned the ruling: [2018] HKCA 318. Leave has been granted for this matter to be heard in the Court of Final Appeal.

[11] [2017] 5 HKLRD 166. This subsequently went to the Court of Final Appeal who upheld the ruling of the Court of Appeal: (unrep., FACV 1 of 2018); [2018] HKCFA 28.

> must be regarded as core rights and obligations unique to a relationship of marriage, so much so that the entailing privileged treatments to married couples as compared with unmarried couples (including same-sex couples) should simply be considered as treatments that require no justification because the difference in position between the married and the unmarried is self-obvious. Divorce, adoption and inheritance are obvious examples of these areas of life regarding which the status of marriage carries rights and obligations unique to married couples. Without these core rights and obligations, the legal status of marriage simply has little if any substance in law. And the court must be most slow, if ever, to empty marriage of its legal content and meaning. When the context involved is one of those areas of life, the status of marriage provides the obvious, relevant difference between a married couple and one that is not (heterosexual or same-sex)."[12]

13.008 This case went to the Court of Final Appeal on 5th June 2018 and was upheld in a judgement dated 4th July 2018. In that case the Court found that the findings in the Court of Appeal, that there should be a recognition of certain core characteristics or rights which are self-obvious, should not be followed.

13.009 The Court of Final Appeal at paragraph 66 said as follows:

> "With respect, that approach should not be followed. It proposes that the question: "Why am I being treated differently from a married person to my disadvantage?" may be answered: "Because you are not married and the benefit you are claiming is a 'core right' reserved uniquely for those who are married", without need for justification. It mirrors the Director's first argument and gives rise to similar difficulties regarding circularity and subjective, fruitless debate as to what does or does not fall within the "core". The real question is: Why should that benefit be reserved uniquely for married couples? Is there a fair and rational reason for drawing that distinction? Differences in treatment to the prejudice of a particular group require justification and cannot rest on a categorical assertion.
>
> 67. What may seem obvious to some may be not at all clear to others. One can readily see that divorce, being one of the prescribed legal means of dissolving a marriage, may be said to be a remedy appropriately limited to persons who are parties to a marriage. Why, after all, should anyone who is not married wish to petition for divorce? But it is by no means clear that persons other than married couples may fairly or rationally be excluded from other benefits, such as the rights of adoption or succession mentioned by Cheung CJHC.
>
> 68. Indeed, the suggestion that adoption is a "core right" which is properly restricted to married couples, far from being obvious, runs counter to numerous authorities, the following being a few illustrations."

[12] Thus Cheung CJHC gave the lead judgement in favour of the couple in this case, but against the couple in *Leung Chun Kwong v Secretary for the Civil Service*.

13.010 The court then went on to give examples of where rights which may have been regarded as unique to marriage should be questioned, in particular in regard to adoption and succession rights. The court at paragraph 76 went on to say:

> 'This is not to suggest that a person's marital status is irrelevant as a condition for the allocation of rights and privileges. Such status may in some circumstances be highly important or even decisive. The point we make is that the relevance and weight to be attributed to that status is taken into account in considering whether a particular difference in treatment is justified as fair and rational, and that a person's marital condition cannot determine presumptively that discrimination does not exist.'

13.011 The Court of Final Appeal noted that the Judgement in *Leung Chun Kwong* was delivered prior to the hearing before the CFA but, as noted by the Court, the Court of Appeal in each case had taken a completely different tack. It was not argued in *QT* that the special status of marriage would be undermined if spousal benefits were to be conferred on same-sex relationships. The Court agreed with counsel for QT that this case should be confined to the Director's case referring to the key immigration concerns of allowing talent into Hong Kong, immigration control and the aim of being able to draw a "bright line" between those who do and those who do not qualify for dependant visas thereby promoting legal certainty and administrative workability and convenience.[13]

13.012 These arguments are likely to continue but the Court of Final Appeal and the Court of Appeal have attempted to clarify the situation in certain circumstances. They will however only be guidance for individuals and there is no sign that Hong Kong is ready to legislate on these matters. QT is certainly welcome news for same sex couples wishing to live and work in Hong Kong. It remains to be seen as to whether this would stretch to heterosexual, cohabitating couples.

2. Property problems: Determining the Beneficial Ownership

13.013 Cohabitants are adults who live together as man and wife but they have not married and therefore they have no legal status as a couple. As mentioned above, common law marriage is a myth and people in unmarried relationships have no legal protection on the break up if they have not agreed how their assets should be held. The problem is that, unlike commercial relationships, cohabiting couples often share property based on love and trust without any formalities. Without the legal protection of matrimonial legislation set out in chapters 4 and 5, such couples must rely on equitable principles in trust and property law as to the true beneficial ownership of property. This goes to the ownership of any sort of property including

[13] See *QT v Director of immigration* [2018] HKCFA 28. On 13th September, the government announced a new policy after its review of the dependant visa process, which was prompted by this case. Now, the Director of Immigration will consider an application from a person who has entered into "a same-sex civil partnership, same-sex civil union, same-sex marriage, or opposite-sex civil partnership or opposite-sex civil union outside of Hong Kong" for a dependent visa, if the person meets the normal immigration requirements.

shares in a company, real property or bank accounts, but particularly the home of the cohabitants and the children.

13.014 Falling back on equitable principles was summed up as follows in the leading case in England and Wales *Stack v Dowden*[14]:

> 'To the detached observer, the result may seem like a witch's brew, into which various esoteric ingredients have been stirred over the years, and in which different ideas bubbled to the surface at different times. They include implied trust, resulting trust, presumption of advancement, proprietary estoppel, unjust enrichment, and so on. These ideas are likely to mean nothing to laymen, and often little more to the lawyers who use them.'

13.015 It may be helpful at the outset to set out a few definitions in respect of these legal concepts used by the courts to determine ownership.

(a) Resulting Trusts

13.016 This arises when one person has made a direct financial contribution to the purchase of the property in another person's name, and there are no circumstances (such as the existence of an agreement) to show that the contribution was intended to be a gift or a loan. A resulting trust means that the person in whose name the property is registered holds either all or part of the property, depending on the size of the contribution, on trust for (i.e. for the benefit of) the person who contributed to the purchase price.

13.017 The legal owner may be able to rebut the presumption of a resulting trust, for example, by showing that the contribution was intended as a gift or that the money provided was a loan to the owner.

(b) Presumption of Advancement

13.018 In the case of a gift, it is normally for the recipient of the contribution to prove that a gift was intended. This onus of proof upon the recipient, and the consequent presumption of resulting trust, are reversed where a presumption of advancement applies. This arises where the relationship between the donor and the recipient is such that the donor can be presumed to have intended to promote or advance the welfare of the recipient. Cohabitants can only rely on the clear evidence of a gift.

(c) Constructive Trust or 'Common Intention Constructive Trust'

13.019 If the person did not make a direct financial contribution to the purchase of the property, the concept of resulting trust cannot apply. The second, more complex concept is known as 'constructive trust'. This type of trust can be established when there is evidence that the parties have a common intention that the property was to be jointly owned. In establishing common intention the court will look at whether there is an express agreement,

[14] *Stack v Dowden* [2007] UKHL 17.

arrangement or understanding between the parties that the property should be shared. One person may have made promises to the other so as to make them believe that they will receive a share in the property and the other relied on that promise to his or her detriment. Such an agreement, arrangement, understanding or promise may be in a formal document, or it could be confirmed by a statement only made orally and imprecisely.

13.020 Where there is no such express agreement, arrangement, understanding or promise the court may consider the parties' whole course of conduct in relation to the property and from that can infer or impute an intention of shared ownership if circumstances justify.

13.021 Once the existence of joint ownership has been established the court will then consider what share each party has in the property. Again, this is established by reference to express agreement or finding a common intention, which the court may infer or impute. The House of Lords reviewed the law in this area in its decision in the case of *Stack v Dowden*[15] and made clear that the starting point in all cases should be that the legal ownership reflects the parties' beneficial interests. The burden of proof falls heavily on the person seeking to argue against that principle. However, if there is sufficient evidence the court can rebut this presumption. It found that there was sufficient evidence in the case of *Stack v Dowden* – so that although the property was in joint names the court found that one party had a 65% share and the other a 35% share. The House of Lords made clear, however, that the task of seeking to prove that the parties' beneficial interests are different to their legal interest was not to be 'lightly embarked upon'.

13.022 Also a distinction must be drawn between contributions to the property that were made on the basis that a party thought they had an interest in it, and contributions that are explicable on the basis that the parties were in a relationship and so would do things for each other because of their relationship and not because they assumed that they had an interest in the property. Such cases are fact specific and will be determined on their own facts. Persons seeking to claim a beneficial interest will have difficulty in doing so where there has been neither expressed common intention nor financial contribution, i.e. where they seek to rely on conduct only. The Supreme Court in *Jones v Kernott* has made clear that it is not open to a judge to impose a solution which is contrary to the parties' intentions simply because it would be fair to do so. However, if it cannot deduce what the parties' actual intentions were it may have to ask what reasonable and just people would have intended at the time.

13.023 In the Court of Appeal case of *Capehorn v Harris*[16], the court said there should be a two stage analysis in order to determine whether there is a common intention constructive trust. First the person claiming the beneficial interest must show that there is an agreement that he should have a beneficial interest in the property owned by his partner even if there was no agreement as to the precise extent of that interest. Secondly, if such an agreement can be shown to have been made, then absent an agreement as to the extent of the interest, the court may impute an intention that the person was to have a fair share in light of all the circumstances.

[15] [2007] UKHL 17.

[16] [2015] EWCA Civ 955; see also *Curran v Collins* [2015] EWCA 404 concerning co-habitants and intention as to the beneficial interest in property.

(d) Proprietary Estoppel

13.024 It is not necessary to establish an agreement or common intention in order to make a claim for proprietary estoppel; instead the claimant must show that the other party behaved in a way to make them think that there was an agreement, and that that party relied on that belief to their detriment. Reliance on that belief must be reasonable. They must also show that the other party knew of their mistaken belief and encouraged them to act to their detriment. Such cases are relatively rare as they are difficult to prove but courts have been more flexible as to outcome, as it is for the court to effectively compensate the claimant for the damage done by the intentional actions of the other party: it may not be that a share in the property is an appropriate outcome, it could also be that they are awarded the right to stay there for a period of time, or awarded a capital sum[17].

13.025 In *Davies v Davies*[18] the court found an equitable interest in favour of a daughter based on a promise made to her 25 years ago against a thriving family business. It was not necessary for the daughter to establish that there was an agreement, or even a common intention that she should have an interest in her parent's farm to be successful in her claim, but only that representations, on which she was entitled to rely, had been made to her that she had or would have such an interest. One of the arguments was that the daughter had acted to her detriment when she turned down an alternative career path to remain on the farm.

3. England and Wales

(a) Trusts of Land and Appointment of Trustees Act 1996 (TOLATA)[19]

13.026 Hong Kong does not have the equivalent of this act, which came about as a result of a need for reform in respect of trusts relating to land. Generally, it regulates the powers and functions of trustees in respect of land and beneficial interests in land. Court proceedings in England and Wales are often brought under this Act because under s 14, any person who is a trustee of land or who has an interest in property subject to a trust of land, may make an application to the court for an order relating to the exercise of the trustee's functions or to declare the nature or extent of a person's interest in property subject to the trust. Under section 15, there is a list of factors the court should take into account which include: the intentions of the persons who created the trust; the purpose for which the property subject to the trust was held; the welfare of any minor who occupies (or may occupy) the land subject to the trust as his home and the interest of any secured creditor of the beneficiary.

[17] *Davies v Davies* [2014] EWCA Civ 568.

[18] [2014] EWCA Civ 568.

[19] In England and Wales relevant statutes in respect of cohabitants are TOLATA, Law of Property Act 1925 s53(1)(b); Child Support Act 1991 ss 4(10)(aa), 8(5), 9(2), 9(3) and Children Act Schedule 1.

(b) Caselaw

13.027 Hong Kong cases involving these issues invariably cite the leading cases from England and Wales, in particular the cases referred to above, *Stack v Dowden* and *Jones v Kernott*. Therefore it is useful to look at these cases in detail.

(i) *Stack v Dowden*[20]

13.028 This case involved an unmarried couple with 4 children who had cohabited for many years. In 1983 they started cohabiting in a house solely owned by the defendant, the mother. In 1993 the house was sold and another property bought and put into joint names. The land registry form at that time did not contain a declaration of trust but did contain a declaration that the survivor could give a good receipt for capital monies on the sale. The purchase price was provided by the mother's savings from the sale of her previous house and a loan from the bank. The mortgage payments were made by the claimant, the father. Both parties made some capital contributions to the repayment and improvements were made to the property over time. The parties throughout kept separate bank accounts and made separate investments and savings. They separated in 2002, the father left and the mother stayed in the house with the children. The father sought an order for sale of the house and an equal division and was successful at first instance. On appeal, the Court of Appeal allowed the mother's appeal and divided the proceeds 65% to 35%. The father appealed to the House of Lords.

13.029 At issue was whether a conveyance into joint names indicated only that each party was intended to have some beneficial interest but said nothing about the nature and extent of that beneficial interest, or whether a conveyance into joint names established a prima facie case of joint and equal beneficial interests until the contrary was shown. The question then arose whether the starting point was the presumption of a resulting trust, under which shares were to be held in proportion to the parties' financial contributions to the acquisition of the property, unless the contributor or contributors could be shown to have had a contrary intention or whether the contrary could be proved by looking at all the relevant circumstances in order to discern the parties' common intention.

13.030 The court found that a conveyance into joint names indicated both legal and beneficial joint tenancy, unless and until the contrary was proved. The court was to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in light of their whole course of conduct in relation to it. The burden was on the person seeking to show that the parties intended their beneficial interests to be different from their legal interests and in what way.

13.031 In the judgement Baroness Hale said 'In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why the survivor was authorised to give

[20] [2007] UKHL 17.

a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed both initially and subsequently, how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. The parties' individual characters and personalities might also be a factor in deciding where their true intentions lay[21].

13.032 In the cohabitation context, mercenary considerations might be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. Having taken all those factors into account, cases in which the joint legal owners were to be taken to have intended that their beneficial interests should be different from their legal interest would be very unusual.'

13.033 The facts of *Stack v Dowden* were unusual and there were many factors to which the defendant could point to indicate that the parties did have a contrary intention and supported the inference of an intention to share otherwise than equally. Due regard was given to the nature of the parties' conduct and attitude towards their property and finances. There could not be many unmarried couples who had lived together for so long, who had four children together and whose affairs had been kept as rigidly separate as the parties were kept. That was all strongly indicative that they did not intend their shares, even in the property which was put into both names, to be equal. The defendant had made good her case for a 65% share.

13.034 In the course of this judgement Lord Neuberger made it clear that mere payment towards household bills and outgoings, or merely living together for a long time or having children together, would not by themselves support an intention to alter the beneficial entitlement even where the parties had purchased the property in joint names. The case of *Burns v Burns*[22] continues to be good law in the context of a non-owning claimant who sought to claim a beneficial ownership based solely on homemaker contributions where there was no formal declaration of trust.

(ii) *Jones v Kernott*[23]

13.035 The parties bought the property in joint names in 1985, with the benefit of a mortgage in their joint names. They lived there together, sharing the household expenses, for over eight years, and K moved out of the property in 1993. Thereafter, J remained in the property with their two children, and paid all the household expenses herself. K made no further contribution towards the acquisition of the property. That situation continued for over 14 years, when the property was put up for sale. K commenced proceedings in the county court claiming a declaration that the beneficial interest be split 90% to 10% in her favour which was granted. The Court of Appeal allowed K's appeal and held that the property was held as tenants in common in equal shares. The appellant (J) appealed.

[21] Baroness Hale, at [68] - [70].
[22] [1983] EWCA Civ 4.
[23] [2011] UKSC 53; [2012] 1 AC 776.

13.036 The Supreme Court allowed the appeal. In line with the decision in *Stack v Dowden* where a property was purchased in the joint names of a married or unmarried couple for joint occupation, who were both responsible for any mortgage, and where there was no express declaration of their beneficial interests, there was a presumption that the beneficial interests coincided with the legal estate. That presumption could be rebutted by evidence of a contrary intention, which might more readily be shown where the parties had contributed to the acquisition of the property in unequal shares, but each case would turn on its own facts. It was for the court to ascertain the parties' common intention as to what their shares in the property would be, in the light of their whole course of conduct in relation to it[24].

13.037 At [51], Lord Walker and Lady Hale set out the following principles:

> "In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.
>
> (1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.
>
> (2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.
>
> (3) Their common intention is to be deduced objectively from their conduct: "the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party" (Lord Diplock in *Gissing v Gissing* [1971] AC 886, 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v Dowden*, at para 69.
>
> (4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, "the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property": Chadwick LJ in *Oxley v Hiscock* [2005] FAm 211, para 69. In our judgment, "the whole course of dealing … in relation to the property" should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions.

[24] *Gissing v Gissing* [1971] AC 886 and *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam. 211 applied, *Stack* followed (see paras 10-15, 25, 51 of judgment).

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).”

13.038 Any challenge to the presumption was not to be lightly embarked on, since a decision to buy a property in joint names indicated an emotional and economic commitment to a joint enterprise, and the notion that in a trusting personal relationship the parties did not hold each other to account financially, was underpinned by the practical difficulty of taking any such account after years of living together at [19] - [22]. The search was primarily to ascertain the parties' actual shared intentions, whether expressed or to be inferred from their conduct. However, where it was clear that the beneficial interests were to be shared, but it was impossible to divine a common intention as to the proportions in which they were to be shared, it was for the court to impute an intention to the parties which they might never have had. The court could not impose a solution on them which was contrary to what the evidence showed that they actually intended at [31], [46] - [47].

13.039 Where a family home was put into the name of one party only, the starting point was different, and the first issue was whether it was intended that the other party should have any beneficial interest at all: there was no presumption of joint beneficial ownership, but their common intention had again to be deduced from their conduct at [52]. In *Jones v Kernott* there was no need for the court to impute an intention that the parties' beneficial interests would change, as the judge had made a finding that their intention did in fact change, and that was an intention which he both could have and should have inferred from their conduct.

13.040 The parties' common intentions may be changed subsequent to the acquisition of the property. Lord Walker said in [14]:

> “It was also accepted that the parties' common intentions might change over time. ... an example... was where one party had financed or constructed an extension or major improvement to the property, so that what they had now was different from what they had first acquired.”

(iii) *Smith v Bottomley*[25]

13.041 In this Court of Appeal decision the appellant appealed against the award to his former cohabitee of a half share in a property held in a company's name and GBP 21,000 underpayment in respect of the proceeds of sale of jointly owned property, the cohabitee basing her entitlement on a promise made by the appellant that she would get a 50/50 share in property purchased with the intention that it would be their family home. The court considered the arguments that the company had paid for the property out of company funds and not been a party to the promise. The case was in the aftermath of *Prest v Petrodel* where the court found that there was a presumption that there may often be a resulting trust in respect of the matrimonial home. Here the court found that the company had provided the purchase monies and that, had it been

[25] [2013] EWCA Civ 953.

sold, the company would have received the sale proceeds. The fact that the property was, in fact not used as a home may have been a factor in the court's decision.

(iv) *Bhura v Bhura*[26]

13.042 A useful summary has been provided by Mostyn J which is regularly cited in cases involving these issues in the Hong Kong courts:

> “The applicable legal principles concerning a property dispute such as this are tolerably clear and ...are as follows:
>
> (i) If there is an express declaration of beneficial interests then that is, almost invariably, the end of the matter. Such an express declaration can only be displaced if it has been procured by fraudulent conduct ...
>
> (ii) If there is no express agreement about the beneficial interests then there is likely to be (at least) a tacit understanding. This is hardly surprising as one would expect that when people enter into what may very well be the most important economic transaction in their lives – buying a home – they would have a pretty clear understanding of who owned what share of it. In determining whether there was such a tacit understanding, and if so what it was, the court will look at all the evidence holistically and will examine the whole course of the parties' conduct in relation to the property.'
>
> (iii) In the rare case where the evidence does not reveal a tacit understanding about ownership the court can reach for the presumptions. An obvious presumption is that beneficial ownership is the same as legal title (see *Jones v Kernott* at paras 17 and 51(1)).
>
> (iv) Another is the presumption of resulting trust. In *Pettitt v Pettitt* [1970] AC 777 at 824 Lord Diplock doubted that it was of much relevance in the modern era ...
>
> (v) A further presumption is the presumption of advancement but this can be regarded as being on the death-bed ...
>
> (vi) But presumptions are only presumptions
>
> (vii) “Actual facts” are those which suggest that a result steered by a presumption is unfair. Although there are different degrees of emphasis and nuance all of the Justices in *Jones v Kernott* accepted that where a tacit agreement could not be found by a process of inference the court could impute to the parties a fair agreement which they never in fact made but which they should “be taken” as having made (see paras 45, 60, 72, 85(2)). Of course, as Woodhouse J pointed out, this involves a “fictional attribution of intention”, but the process has a long pedigree. One only needs to remind oneself of Lord Denning MR's statement in *Appleton v Appleton* [1965] 1 WLR 25 at 28 to see how the wheel has turned full circle. There he said “A judge can only do what is fair and

[26] [2014] EWHC 727.

reasonable in the circumstances. Sometimes this test has been put in the cases: What term is to be implied? What would the parties have stipulated had they thought about it? That is one way of putting it. But, as they never did think about it at all, I prefer to take the simple test: What is reasonable and fair in the circumstances as they have developed, seeing that they are circumstances which no one contemplated before?" I cannot see any difference between that statement and that of Lord Wilson in para 87 where he rhetorically asked "where equity is driven to impute the common intention, how can it do so other than by search for the result which the court itself considers fair?"

(v) *Marr v Collie*[27]

13.043 Many of these issues revolve around ownership of the home, which, as Mostyn J observed in *Bhura*, is usually the most valuable asset owned by the parties. However, there are significant cases which involve both property and the ownership of companies and where there was a commercial aspect to the relationship.

13.044 In *Marr v Collie* the appellant was a banker working in the Bahamas and the respondent was a building contractor. The two were in a romantic relationship for 17 years before its breakdown in 2008. On the breakdown of their relationship, a dispute arose over the beneficial ownership of the family home and a number of investment properties and some chattels. It was not in dispute that the appellant had paid the mortgage on all the properties and the costs associated with the purchase. The respondent argued that he had renovated and maintained four out of five of the investment properties.

13.045 In respect of the family home, this had been purchased by the appellant but the respondent had begun to construct a cottage, swimming pool and three car garage using his own finances and resources. As a result he claimed an equitable interest. The appellant claimed that he had been paid for his labour and reimbursed for costs incurred. All the investment properties were in joint names and the family home was in the name of the appellant. The appellant contended that he was the sole beneficial owner of the investment properties as he had made virtually all the payments for their acquisition. The respondent relied on the legal ownership and that they should be beneficially owned in the same way.

13.046 The Court of First Instance followed *Stack* in that the starting point should be that the beneficial ownership should follow the legal title, at least in the domestic context. But the judge relied on *Laskar v Laskar*[28] for the proposition that *Stack* was strictly confined to this context and that it was "*not right to apply the so-called Stack v Dowden presumption in cases where the primary purpose of the property purchase had been as an investment, even if there was a personal relationship between the parties*"[29]. On this basis, Isaacs J found that, since Mr. Marr had bought the properties, there was a presumption that Mr. Collie held these on resulting trust for Mr. Marr, unless he could "*demonstrate that a gift was intended*". The judge found that Mr. Collie had "fallen

[27] [2017] UKPC 17.
[28] [2008] EWCA Civ 347; [2008] 1 WLR 2695.
[29] [2008] 1 WLR 2695, at [52].

far short of rebutting the presumption of a resulting trust". In consequence, a resulting trust had been created in relation to all "the investment properties".[30]

13.047 The Court of Appeal allowed the respondent's appeal in part and allowed a sale of the investment properties with the proceeds to be distributed in relation to contribution. In respect of the family home, the respondent had not demonstrated a common intention to share the beneficial interest.

13.048 The Privy Council would not be drawn into polarizing a view in respect of property purchased in a domestic relationship and properties purchased as a commercial venture and instead made clear that the important issue was the intentions of the parties. At paragraph 54, the Board held: '*save perhaps where there is no evidence from which the parties' intentions can be identified, the answer is not to be provided by the triumph of one presumption over another. In this, as in so many areas of law, context counts for, if not everything, a lot. Context here is set by the parties' common intention - or by the lack of it. If it is the unambiguous mutual wish of the parties, contributing in unequal shares to the purchase of property, that the joint beneficial ownership should reflect their joint legal ownership, then effect should be given to that wish. If, on the other hand, that is not their wish, or if they have not formed any intention as to beneficial ownership but had, for instance, accepted advice that the property be acquired in joint names, without considering or being aware of the possible consequences of that, the resulting trust solution may provide the answer.*'

13.049 The court found that both courts below had erred to an extent and as a result the matter was remitted for hearing on issues particularly in respect of the intentions of the parties at the time of the purchase of the investment properties and the subsequent course of dealing with those properties.

(c) Property Held by Family Members and Friends Cohabiting

(i) *Laskar v Laskar*[31]

13.050 Although the law in England and Wales would seem to be clearly in favour of common intention, the case of *Laskar* is worth a mention. In this case an investment property was purchased by family members. The court concluded that, despite the family relationship, the investment was commercial and a resulting trust should apply, awarding interests in the property strictly in proportion to the parties' respective financial contributions.

(ii) *Gallarotti v Sebastianelli*[32]

13.051 In this case involving friends sharing a flat, the court adopted a resulting trust approach and awarded shares to each of them in proportion to their respective financial contribution. If evidence to the contrary was available, the court may have found a common intention constructive trust had arisen. In this case each had made a financial contribution although the property was registered in the name of Mr Sebastianelli.

[30] Per Lord Kerr at [59], also see [18].
[31] [2008] EWCA Civ 347; [2008] 1 WLR 2695.
[32] [2012] WTLR 1509.

On the basis of the parties' conduct, the court was able to find evidence of a common intention and award him a 75% interest on the basis of a constructive trust.

4. Hong Kong Cases

13.052 These issues arise in the Hong Kong courts very often due to the fact that families in Hong Kong commonly share property. Property, including the matrimonial home, may be in the name of parents, or held by companies who own the legal title but who in turn are owned jointly with parents or siblings. It has become common practice in Hong Kong courts that, in order to ascertain the marital assets to fulfil the requirements of Step 1 of *LKW v DD*, such beneficial ownership should be established as a preliminary issue before the FDR or further ancillary relief proceedings[33]. Further details in respect of beneficial ownership involving families can be found in Chapter 5. It is clear from the Hong Kong cases dealing with the issue of beneficial ownership that the courts will look to English precedent, in particular *Stack v Dowden, Jones v Kernott* and the summary provided by Mostyn J in *Bhura v Bhura*[34].

13.053 Thus, in considering the ownership of the property, the court will look at the intention of the parties. Inferred intention and course of dealings and conduct are all relevant[35]. In *Chan Chui Mee v Mak Chi Choi*[36], it was held by Hon Lam (as he then was) that the determination of beneficial ownership under a common intention constructive trust involved a two-stage test.

(1) the key was to establish the parties' true common intention that the claimant should have a beneficial interest

(2) it was necessary to ascertain the extent of the parties' respective interests in the property, by adopting a holistic approach to quantification, surveying the whole course of dealing and conduct which threw light on what shares the parties must have intended. The court could not impose its own view of what it considered fair.[37]

13.054 The applicable legal principles in a domestic context were further considered in the Court of Appeal in *WML v LCK*[38] in which Cheung JA commented that where there was discussion and agreement on the nature of the holding of the property in question at the time of the acquisition, the starting point should be whether there was a common

33 *TL v ML (Ancillary Relief: Claim against Assets of Extended Family)* [2006] 1 FLR 1236].

34 See cases such as *LCJWY v LCKS and CWKC and LLC (Specific discovery)* (unrep., FCMC 16239/2013, [2016] HKEC 2037) citing *Jones v Kernott* and *Bhura v Bhura; LC v LCHW* (unrep., FCMC 6311/2013, [2015] HKEC 493) on common intention constructive trusts to determine the ownership of the former matrimonial home following the death of the legal co-owner, the husband's mother; *TJCJ v HDCK* (unrep., FCMC 7332/2013, [2015] HKEC 657) which involved the beneficial ownership of a company which held the matrimonial home; *EL v CFL (Preliminary Issue on Ownership of Properties)* HKFLR [2014] 211 which involved a dispute relating to the validity of a declaration of trust; Judge Melloy in *HSYC v CLTK* (unrep., FCMC 11141/2013, [2017] HKEC 2025).

35 *Ip Man Shan Henry v Ching Hing Construction Co Ltd* [2003] 1 HKC 256.

36 [2009] 1 HKLRD 343.

37 This appears to be at odds with the English Court of Appeal in *Capehorn v Harris* but it preceded that case and also it was not a purely domestic context.

38 (unrep., CACV 82/2014, HCMP 3011/2014, [2015] HKEC 338).

intention constructive trust[39]. He then went on to cite in full the relevant summary on constructive trusts by Godfrey Lam J in *Liu Wai Keung v Liu Wai Man*[40].

13.055 The position in the family court in Hong Kong has been recently summarised by Her Honour Grace Chan in *LLC v LMWA*[41]:

"(1) In a domestic context, when a property is held in joint names, and without any express declaration of trust, the starting point is that the beneficial interest is held equally. There is no presumption that that the parties intend that the beneficial interest be shared in proportion to their financial contributions to the acquisitions of the property: *Jones v Kermott*

(2) A party seeking to show that the beneficial title does not follow its legal title bears the burden of proof in asserting the otherwise. This is an onerous burden. In joint names cases, it is also unlikely to lead to a different result unless the facts are very unusual: *Stack v Dowden*

(3) The court is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it: *Stack v Dowden*

(4) The elements required to prove this type of trust have been succinctly set out by Godfrey Lam J in *Liu Wai Keung v. Liu Wai Man* [2013] 5 HKLRD 9, which was adopted by the Court of Appeal in *WML v LCK*

(5) In order to ascertain the true intention of the parties in a domestic context, which is very different from the commercial world, Baroness Hale set out at §69-70 in *Stack v Dowden* (supra) a list of relevant factors but emphasised that this was not an exhaustive list. Baroness Hale emphasised that nowadays, financial contribution in a domestic context was only one of the factors for consideration"

13.056 In *YKC v LMYT*[42] another recent preliminary issue case, the family court further considered the law relating to the presumption of advancement. Here Deputy District Judge Pang cited the Court of Appeal case *Au Yuk Lin v Wong Wang Hin Eddy*[43] in which it was held that the court would only resort to a presumption of advancement where there was no acceptable evidence of the actual intention of the providers of the purchase money. Here the court found that, under common intention constructive trusts, the mother was 100% beneficial owner of bank accounts held in the name of herself and her daughter, as well as 40% beneficial ownership of a shop which was held by a company held by the husband and wife in equal shareholdings but in which she had provided 40% of the purchase price. 50% of the beneficial ownership of a further investment property held by the company was found to belong to the mother as she had provided 50% of the purchase price, but the Husband had met the monthly mortgage and therefore the mother could not claim a 100% interest.

39 at para 41.

40 [2013] 5 HKLRD 9.

41 (Unrep., FCMC 4683/2014, [2017] HKEC 1497), at [50] - [58].

42 (Unrep., FCMC 9062/2015, [2017] HKEC 1226).

43 [2013] 4 HKLRD 373.

(a) *Z v X (C intervening)*[44]

13.057 The arguments were raised by a cohabitee in the Court of Appeal case of *Z v X (C intervening)*. In this case the husband and wife married in Mainland China in 1982 and they had one child. The husband met the Intervener in 1990 and had 2 children with her in 1995 and 1998, his current co-habitee. The preliminary issue was the beneficial ownership of 83.1% of the shares in a BVI company, NAIGL in which the intervener argued her family had an interest. She argued that her family had an interest in the company before it came under the control of the current company. At first instance the judge found that the shares were beneficially owned by the husband. He held that there should be small departure from equality 55/45. Despite the parties not living together for many years, it was nevertheless a long marriage.

13.058 On appeal the court held that the finding on the husband's beneficial ownership was a fact and not to be disturbed unless plainly wrong. The long relationship between the husband and the intervenor was not an indication of joint beneficial ownership of the shares because it was not in a pure domestic context but in a commercial setting where other parties were also involved.

13.059 At paragraph 18.5 the court found as follows:

> "The Intervener sought reliance on *Stack v Dowden* [2007] 2 AC 432 where the House of Lords held that where a domestic property was conveyed into the joint names of cohabitants without any declaration of trust there was a prima facie case that both the legal and beneficial interests in the property were joint and equal. However, as Baroness Hale of Richmond who delivered the lead judgment held, 'In law "context is everything" and the domestic context is very different from the commercial world.' The present case, unlike *Stack v. Dowden*, is not concerned with the domestic dwelling of cohabitees who lived as man and wife (a point further emphasised in *Laskar v Laskar* [2008] 1 WLR 2695 at paragraph 15), but a commercial setting where, apart from the Husband and Intervener, other parties are involved as well. It is simply not possible in the circumstances to hold that because of their long term relationship, the Intervener and the Husband are joint beneficial owners of the Husband's shares."

(b) *Chen Lily v Yip Tsun Wah Alvan*[45]

13.060 The Court of Appeal further considered the position of cohabitants in a case where the plaintiff filed a notice of appeal for an order that "there be a division of the sale price of the Property at the ratio of 68.6%:31.4% between the Plaintiff and the Defendant or as such ratio more favourable to the Plaintiff than 50% as the Court of Appeal may think fit to determine" and consequential costs orders.

13.061 In this case the parties began a relationship in 2006. They intended to cohabit with a view to getting married and in 2007 they entered into a provisional sale and purchase agreement to purchase a flat. The defendant paid the deposit but was unable to

[44] [2012] 5 HKLRD 791.
[45] (Unrep., CACV 4/2016, [2016] HKEC 2326).

secure a mortgage and so the plaintiff took out a mortgage on a property held in her sole name to fund the purchase. She was not able to access these funds in time for the completion date and therefore she borrowed from her mother. The relationship broke down in 2011 and the defendant moved out. The plaintiff remained in the property and was responsible for the mortgage. In 2013 she issued a writ for a declaration that the property was beneficially owned by herself and the defendant in the respective shares 95:5. The defendant sought a declaration that the property was beneficially owned in respective shares of 20;80. In her reply and defence and counterclaim, the Plaintiff deviated from the resulting trust case and instead it was pleaded that when the property was registered in their joint names, it was the parties' mutual intention to be joint tenants in law and in equity, but thereafter there was a change in the mutual intention, primarily because the defendant had failed to fulfil his promise. In other words, the plaintiff's case in the reply and defence to counterclaim was that whilst they originally intended to own the property in equal shares without her making any financial contributions, they changed their intention such that she would own a greater share in the Property when she made financial contributions.

13.062 At trial, the judge applied the common intention constructive trust principles laid down by in *Stack v Dowden* and *Jones v Kernott* that for a property held by co-habitees in joint names, there was a presumption that the parties were equal beneficial owners. The judge found on the evidence that there was no change of that intention. Accordingly the judge decided that the Property was beneficially owned by the parties in 50:50 shares. It was also ordered that the defendant pay the plaintiff HK$500,000 in respect of the sum incurred for joint living expenses paid for by her and for 50% of the mortgage payments met by her.

13.063 The Court of Appeal considered whether there had been a change in the common intention and decided that there had not been a change and dismissed the appeal. The court found as follows:

> "It was clear before the Property was registered in the parties' names that they needed to pool their resources. The plaintiff could not look to the defendant alone to pay for the Property. However she nevertheless took up the assignment with the defendant as joint tenants. This was entirely natural and understandable as they were in an intimate relationship and had purchased the Property as a home for their cohabitation and future married life. But it shows that, contrary to the plaintiff's case pleaded at paras. 3(c) and (d) of her reply and defence to counterclaim, the plaintiff was aware that the defendant was not able to fulfil his promise even before registration in joint names, and it was not as if it was a revelation to her only after such registration, which aroused a change of intention of equal ownership.
>
> 24.1. In any event, even if it is assumed that it was only after a passage of time into their cohabitation that the plaintiff became aware of the defendant's inability to be solely responsible for the payment for the Property, there was no evidence that the parties "later formed a common intention that their respective shares would change" (*Jones v Kernott* paras. 51, 68).
>
> 24.2. When the defendant moved out, he proposed to pay half of the mortgage repayments. That was entirely consistent with the original 50:50 shares

of a joint-name purchase in a domestic context. The plaintiff rejected that proposal but the matter rested there. There was no evidence that they formed any common intention to change their share of ownership in the Property.

24.3. A change in the parties' common intention does not need to be express, but there must be some conduct of both parties from which a court could infer a change in common intention. For example in *Jones v Kernott*, the parties cashed in a life insurance policy and shared the proceeds, and Mr Kernott used his share to acquire another property. The Supreme Court held that this was evidence of a new plan by both parties for Mr Kernott's share in the jointly-held property to be crystallized at this time.

24.4. In the present case, although the plaintiff in her own mind might have considered it fair (given the defendant's promise) that she should have a greater share in the Property because she had to pool her resources with the defendant's, there was no evidence that both parties had such a change in common intention. The parties were still in an intimate relationship, sharing their lives in a joint home on a basis of mutual trust and in the expectation that their relationship would endure. The plaintiff's claim in the notice of appeal for a 68.6%:31.4% share, calculated ex post facto for the purpose of litigation by trawling through the parties' financial documents, is precisely the sort of artificial "balance sheet approach" that was disapproved by *the House of Lords in Stack v Dowden*."

(c) Land Law Considerations[46]

13.064 The applicant can also ask the court to order the sale of the property or to postpone the sale of the property until a date in the future, such as when the youngest child of the family reaches 18 years or completes full time education. The cohabitant who has moved out of the property may be able to obtain occupational rent from the cohabitant who has remained living in the property. The cohabitant who has stayed in the property may be able to claim credit from the outgoing cohabitant for the payments of the mortgage or other capital expenditure previously made on behalf of the other cohabitant.

5. Cohabitation Agreements and Declarations of Trust/ Deeds of Trust

13.065 What is clear from the reported cases is that, when cohabitants move in together, and in particular when they buy property together to be their joint home, express and clear agreements preferably contained in a Deed of Trust or a Declaration of Trust setting out their respective legal and beneficial ownership in such property should be made. This should also include who is to be responsible for the mortgage and what should happen to payment of the mortgage in the event of relationship breakdown. Problems arise when separating cohabitants argue as to whether or not there was an agreement

[46] It is beyond the scope of this title to go into detail in respect of the law of property.

between them that the non-legal owner was, or was intended to be, a beneficial owner of the property, in particular where a cohabitant not named as a legal property owner has made some contributions to the property. The non-legal owner of the property will be very vulnerable upon relationship breakdown. In order to avoid these complications, parties should make their intentions clear in writing. Such cases are complex and expensive and can be avoided by entering into a cohabitation agreement making the parties' understanding as clear as possible.

13.066 The most common type of cohabitation agreement is between a couple who are living together as man and wife, but they can also be useful in regulating property arrangements for others who share a property. The cohabitation agreement differs from a Deed or Declaration of Trust as this is limited to beneficial title in property, and is often used where the legal title differs from the beneficial title. It is advisable to have both documents or to incorporate the deed/declaration into the cohabitation agreement.

13.067 A cohabitation agreement can regulate a number of aspects of living together, although the most common is in respect of property where there is co-ownership. It can record each parties' rights in relation to the property where they are living or intend to live, the financial arrangements between them during the cohabitation and after it, and the division of assets in the event of separation.

(a) The Contract

13.068 The agreement should be in writing and must be if it deals with an interest in land[47]. A properly concluded cohabitation agreement will be binding[48] so long as it accords with normal contractual principles: there must be an intention to create legal relations, which is normally contained in a recital; there should be consideration (in the context of a cohabitation agreement, the agreement could be executed as a deed to overcome this hurdle) and there must be certainty as to the terms and obligations of each party.

13.069 An agreement may not be enforceable if there is any doubt in relation to duress, misrepresentation, undue influence, fraud, mistake and illegality. Therefore it is advisable for both parties to obtain independent legal advice and to ensure that the agreement is not signed at a time when either or one of the parties is in a vulnerable position. There should also be full and frank financial disclosure, preferably with a Form E for each party annexed to the agreement. A severability clause is also advisable should some part of the agreement be unenforceable, but not others.

(b) Contents

13.070 The contents can be wide-ranging but best practice would be to restrict it to matters relating to finances and property and any financial arrangements for the children.

[47] See Conveyancing and Property Ordinance s. 3 (Cap. 219).
[48] *Sutton v Mishcon de Reya* [2003] EWHC 3166 (Ch).

13.071 The agreement can regulate terms in respect of personal property, transfer of company shares, liabilities, expenses, and bank accounts. It can also regulate what should happen on the death of one of the parties and in respect of their intentions concerning their wills.

13.072 In relation to property, in addition to making it clear how they intend to hold the property and what the legal and beneficial interests are, it may be important for the parties to clearly set out their contributions made to the purchase, who will be responsible for the payment of outgoings, including the mortgage, and what they intend to happen to the proceeds in the event of a sale.

13.073 The agreement can also set out any financial support during the parties' cohabitation as well as any agreement on separation. In both cases, there should be clarity as to term duration and the quantum of the financial support. If applicable, there could be a declaration that neither shall support the other on separation.

13.074 In respect of children, the obligation for one or both parties to maintain the children should be clear and further clarity given in respect of quantum and when such payments should be made. The agreement will often contain a declaration that, should the parties cease to live together, they will place property on trust for the occupation of the children and provision as to school fees.

13.075 Provision can be included in respect of bank accounts, chattels and other personal property including:

(i) The contribution made or to be made by each party and the purpose of the account

(ii) Details of their intention as to the account should they separate

(iii) Whether the parties will have joint or separate credit cards

(iv) Who is responsible for the payment of any loans obtained for the benefit of the family

(v) How joint purchases will be funded and what should happen to jointly purchased items on separation

(vi) Details of regular expenses such as the running cost of the car

(vii) Who should keep certain items and how to deal with how to choose in the event of disagreement

(viii) How household bills will be divided but not to include regulation as to the day to day running of the house.

13.076 In complex cases, further legal advice from a tax and private client lawyer may be advisable, and any foreign legal expertise if the agreements covers property overseas. The agreement should also contain clauses in respect of jurisdiction.

13.077 Clearly the agreement will no longer be effective if the parties were subsequently to marry. In that scenario, the cohabitation agreement could form the basis of a prenuptial agreement.

(c) Requirements in the Absence of a Cohabitation Agreement

13.078 In the absence of a written agreement, the cohabitant who seeks to claim a beneficial interest in the property will need to gather documentary evidence of contributions made and the financial arrangements of the parties during the relationship. A copy of the conveyancing file when the property was purchased should be sought at an early stage. The mortgage lender should be informed that there is a dispute as to the ownership of the property: this may assist in preventing one party drawing down on the mortgage and thereby creating a greater debt secured on the property and reducing its net equity.

6. Children of Cohabitees

(a) Legitimacy and the Position of Fathers

13.079 The law in relation to the children of unmarried parents is governed by the Guardianship of Minors Ordinance (Cap 13). The 'welfare principle' which governs all dealings in the courts in relation to children, is contained in s. 3(1) of this ordinance:

> "in any proceedings before any court … the court:
>
> i) shall regard the best interests of the minor as the first and paramount consideration".
>
> The section goes to specify that the court:
>
> ii) shall not take into consideration whether, from any other point of view, the claim of the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."[49]

13.080 Therefore, on the face of it there appears to be parity with married parents. However, under s 3 (1)(c) there is a proviso where the child is illegitimate whereby the mother is given all the rights and authority the law allows in respect of the child, but under s 3(1)(c)(ii) the father will only have such rights as ordered by a court on an application brought by the father under s 3(1)(d):

> "The Court of First Instance or a judge of the District Court may, on application, where it is satisfied that the applicant is the father of an illegitimate child, order that the applicant shall have some or all of the rights and authority that the law would allow him as a father if the minor were legitimate".

13.081 This section was examined in detail in the recent Court of First Instance case of *C v S (Wardship; GMO)*[50]. Here the court looked at the development of the law in England and Wales and the reasons behind the disparity of treatment. Bebe Chu J in that case

[49] Also see Chapter 10.

[50] [2017] HKFLR 562; [2018] HKCFI 1381, (unrep., HCMP 929 of 2017, [2018] HKEC 1759).