

CHAPTER 6

Injunctions

Injunctions Generally

6.1 The court has power to grant injunctions (1) to enforce existing legal or equitable rights; (2) relating to properties; (3) relating to children; (4) relating to foreign proceedings; (5) and against domestic violence. In matrimonial and family proceedings, the decision to seek injunctive relief from the court is a draconian step. It involves careful consideration of a wide range of procedural and other factors dependent upon the facts of the case and type of relief sought, for example, whether an application is urgent or non-urgent, ex parte or on notice, or whether 'undertakings' would resolve the issue and whether or not such an application will escalate matters. Whilst the scope of injunctions may be very widely drawn, they are usually directed against narrow and immediate issues, limited to what is necessary to prevent or to achieve and for a limited period. Full and frank disclosure must be made in every application. An injunction may be enforced by committal even without a penal notice, if the respondent was well aware of the consequences of disobedience, *Sofroniou v Szgetti* [1991] FCR 332n, CA.

Domestic Violence Matrimonial Injunctions

6.2 By s 3(1) of the Domestic Violence Ordinance (Cap 189), on an application by a party to a marriage, the District Court, if satisfied that the applicant or a specified minor (ie a person under the age of 18 years, s 2(1) and shall apply by his 'next friend' s 3A(3) or other relative living with the applicant has been molested by the other party to the marriage and subject to the limitations with respect to certain injunctions and powers of arrest ss 5, 6, has jurisdiction to grant an injunction. The powers conferred under the Domestic Violence Ordinance (Cap 189) are in addition to and not in derogation from the powers of the Court of First Instance and the District Court, s 9. The term 'molest' does not imply necessarily either violence or threats of violence. It applies, whether or not used in the context of

proceedings brought under the Domestic Violence Ordinance (Cap 189), to any conduct which intentionally causes such a degree of harassment as to call for the intervention of the court: *Horner v Horner* [1982] 2 All ER 495, [1982] 2 WLR 914, CA; *Johnson v Walton* [1990] 1 FLR 350, CA. See also the UK Domestic Violence and Matrimonial Proceedings Act 1976 in which the applicant is not required by statute to satisfy the court that there has been molestation by the other party to the marriage. It is not necessary for the applicant to prove violence: *Spindlow v Spindlow* [1979] 1 All ER 169, CA, physical assault or a reasonable apprehension of the victim: *Phillips v Phillips* [1973] 2 All ER 423, [1973] 1 WLR 615, CA; *G v J* [1993] 1 FLR 1008.

Injunction Provisions

6.3 The injunction under s 3(1) may contain any of the following provisions:

- (a) a provision restraining the respondent from molesting the applicant;
- (b) a provision restraining the respondent from molesting any specified minor;
- (c) a provision prohibiting the respondent:
 - (i) (where the applicant has been molested by the respondent) from entering or remaining in:
 - (A) the residence of the applicant;
 - (B) a specified part of the residence of the applicant; or
 - (C) a specified area whether or not the residence of the applicant is in that area, whether or not the residence is the common residence or matrimonial home of the applicant and the respondent. 'Matrimonial home' includes a home in which the parties to a marriage ordinarily reside together whether or not it is occupied at the same time by other persons, s 2(1);
 - (ii) (where the specified minor has been molested by the respondent) from entering or remaining in:
 - (A) the residence of the specified minor;
 - (B) a specified part of the residence of the minor; or
 - (C) a specified area whether or not the residence of the minor is in that area, whether or not the residence is the common residence of the minor and the respondent;

- (d) a provision requiring the respondent to permit
 - (i) (where the applicant resides with the respondent) the applicant to enter and remain in the common residence or matrimonial home of the applicant and the respondent or in a specified part of such common residence or matrimonial home; or
 - (ii) (where the specified minor resides with the respondent) the minor to enter and remain in the common residence of the minor and the respondent or in a specified part of such common residence, whether or not any other relief is being sought in the proceedings. In s 3, a 'specified minor' means a minor
 - (a) who is a child (whether natural child, adoptive child or step-child) of the applicant or respondent concerned; or
 - (b) who is living with the applicant concerned.

The phrase 'whether or not any other relief is sought in the proceedings' refers to an application in the District Court. The Domestic Violence Ordinance (Cap 189) has not enlarged the jurisdiction of the Court of First Instance: see *Crutcher v Crutcher* (1978) Times, July 18.

Power to Vary or Suspend Access

6.4 By s 3(1A), the court may, in an injunction containing a provision mentioned in subs (1)(a) or (b), include a provision requiring the respondent to participate in any programme, approved by the Director of Social Welfare, that is aimed at changing the attitude and behaviour that lead to the granting of such injunction. Further, by s 7A(1) if:

- (a) the court grants, under s 3 or 3A, an injunction containing a provision mentioned *only* in s 3(1)(c) or 3A(4)(b) that concerns a minor; and
- (b) at the time the court determines the application for the injunction, there is in force:
 - (i) a court order that grants the custody of the minor to the respondent to the injunction; or
 - (ii) a court order that allows the respondent to the injunction to have access to the minor,

the court may vary or suspend the court order in such manner as the court considers necessary for giving effect to the provision.

Cohabitees and Same-sex Couples

6.5 A party to a 'marriage' would include a man and a woman of a cohabitant relationship, Domestic Violence Ordinance (Cap 189) s 2(2) and also a 'former' party to the marriage, s 3(1). Note that despite the decision of the Court of Final Appeal in *Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903, [2007] 3 HKC 545, the Domestic Violence Ordinance (Cap 189) does not apply to cohabiting same-sex couples.

Domestic Violence and Same-sex Partner

6.6 The Domestic Violence (Amendment) Bill 2009, which was gazetted on 5 June 2009 and tabled at the Legislative Council on 17 June 2009, will extend the scope of the Domestic Violence Ordinance to same-sex cohabitants, providing them with additional civil remedies alongside the existing criminal legislative framework. Under the amendments, a new definition of cohabitation relationship as 'a relationship between two persons who live together as a couple in an intimate relationship' will be introduced; structural changes will be made to delineate the categories of protected people under legislation's coverage; and the short title of the ordinance will be changed to Domestic and Cohabitation Relationships Violence Ordinance. In making this announcement the Secretary of State for Labour and Welfare took the opportunity to reiterate the Hong Kong Government's view, that the proposed amendments would not affect the Government's stance of not recognising same-sex marriage, civil partnership or any same-sex relationship as a matter of legal status. In the light of the decisions on discrimination in the criminal law in *William Roy Leung v SJ* [2006] 4 HKLRD 211; [2006] HKCU 1585, CA and indeed in *Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903, [2007] 3 HKC 545, where the CFA found that discrimination on the basis of sexual orientation may be unconstitutional, the Government's continued opposition to 'civil partnerships' and equality before the law for same sex couples looks increasing untenable. See also Dantes Leung, 'The Prospect of Same-Sex Marriage in Hong Kong', *Hong Kong Lawyer* (March 2008).

Relatives

6.7 The term 'relative' in s 3A(2) means:

- (a) the applicant's father, mother, grandfather or grandmother (whether natural or adoptive);
- (b) the applicant's step-father, step-mother, step-grandfather or step-grandmother;

- (c) the applicant's father-in-law or mother-in-law who is the natural parent, adoptive parent or step-parent of the applicant's spouse;
- (d) the applicant's grandfather-in-law or grandmother-in-law who is the natural grandparent, adoptive grandparent or step-grandparent of the applicant's spouse;
- (e) the applicant's son, daughter, grandson or granddaughter (whether natural or adoptive);
- (f) the applicant's step-son, step-daughter, step-grandson or step-granddaughter;
- (g) the applicant's son-in-law or daughter-in-law who is the spouse of the applicant's natural child, adoptive child or step-child;
- (h) the applicant's grandson-in-law or granddaughter-in-law who is the spouse of the applicant's natural grandchild, adoptive grandchild or step-grandchild;
- (i) the applicant's brother or sister (whether of full or half blood or by virtue of adoption);
- (j) the brother or sister (whether of full or half blood or by virtue of adoption) of the applicant's spouse;
- (k) the applicant's step-brother or step-sister;
- (l) the step-brother or step-sister of the applicant's spouse;
- (m) the applicant's uncle, aunt, nephew, niece or cousin (whether of full or half blood or by virtue of adoption);
- (n) the uncle, aunt, nephew, niece or cousin (whether of full or half blood or by virtue of adoption) of the applicant's spouse; or
- (o) the spouse of any person mentioned in paragraph (i), (j), (k), (l), (m) or (n).

Powers of the Court

6.8 The powers conferred by the Domestic Violence Ordinance (Cap 189) on the Court of First Instance must be exercised by a judge, s 11(1). The powers conferred by the Ordinance on the District Court must be exercised by a district judge, s 11(2). The powers that are conferred by the Domestic Violence Ordinance are in addition to and not in derogation from the powers of the Court of First Instance and the District Court, s 9. Jurisdiction remains unaffected by the provisions of ss 3, 3A and 4. Consequently, there must be proceedings for some substantive relief in existence at the time of application or an undertaking to commence such proceedings must be given: *Crutcher v Crutcher* (1978) Times, July 18. The corresponding provision in the UK Domestic Violence and Matrimonial Proceedings Act 1976 is s 1(1) which expressly states that the county court's powers are 'without prejudice to the jurisdiction of the High Court'.

Wide Discretion of the Court

6.9 In the exercise of its jurisdiction to grant an injunction containing provisions relating to exclusion from or entry to the matrimonial home ('ouster' order) under the Domestic Violence Ordinance (Cap 189) s 3(1)(c) or (d), the District Court has a wide discretion as to (1) the conduct of the parties both in relation to each other and otherwise; (2) their respective needs and financial resources; (3) the needs of any child living with the applicant and (4) all the circumstances of the case. The hostile attitude of the husband towards the wife has been taken into account: *Phillips v Phillips* [1973] 2 All ER 423, [1973] 1 WLR 615, CA. See also *P v L* [2007] 1 HKLRD 26, DC, which was a case in which the wife brought applications for non-molestation and ouster orders against the husband, citing the cumulative effect of several incidents that had happened over a three-year period when they were cohabiting in the matrimonial home following their divorce with the son and his spouse. The wife's 'callous and antagonistic' attitude was taken into consideration by Judge Ng when refusing the ouster order as not being necessary. In *P v C* [2007] WL 1683067, DC, [2007] HKEC 1162, the court held that molestation by the husband was ongoing, ie there was no actual physical violence but a high degree of harassment and intimidation deliberately perpetrated by the husband against the wife. A non-molestation order and ouster order was granted. However, that a husband would eventually have to be excluded from the matrimonial home is a proper factor for consideration: *Bassett v Bassett* [1975] 1 All ER 513, [1975] 2 WLR 270, CA.

6.10 Other factors, such as the mental disturbance to the child may be taken into account: *Chan Chun Hon v Chan Lam Lai Bing Shirley* [1994] 3 HKC 196, CA; *Bassett v Bassett* [1975] 1 All ER 513, [1975] 2 WLR 270, CA; *Phillips v Phillips* [1973] 2 All ER 423, [1973] 1 WLR 615, CA. See also *P v C* [2007] WL 1683067, DC, [2007] HKEC 1162, per HHJ Melloy at [84]: '[A]lthough the interests of the child are not paramount, here as in other family law legislation, this is nevertheless a very important consideration for the court to take into account.' See also *Walker v Walker* [1978] 3 All ER 141, [1978] 1 WLR 533, CA; *Chan Chun Hon v Chan Lam Lai Bing Shirley* [1994] 3 HKC 196, CA, the wife was absent from home for four years; the existence of an interim non-molestation order had not resolved the problems and the generous provision made by the husband in favour of the wife was taken into account; an ouster order was given.

6.11 None of the four matters (in 6.9) carry more weight than any of the others and none is made paramount over the others. That the welfare of the child is the first and paramount consideration under the Guardianship

of Minors Ordinance (Cap 13) does not apply in ouster proceedings: *Richards v Richards* [1984] AC 174, [1983] 2 All ER 807, [1984] 1 FLR 11, HL. All four matters have to be taken into account, though the weight given to each of them would depend upon the facts of each case, *Richards v Richards* [1984] AC 174, [1983] 2 All ER 807, [1984] 1 FLR 11, HL. Blame is irrelevant, *Walker v Walker* [1978] 3 All ER 141, [1978] 1 WLR 533, CA.

Ouster Orders

6.12 Under the Domestic Violence Ordinance (Cap 189) s 3(1)(c) and (d), an order that incorporates a provision excluding one party from the matrimonial home or from a specified part of the matrimonial home, or from a specified area whether or not the matrimonial home is included in that area, is commonly called an 'ouster order'. Such an order is draconian in nature and is not to be lightly granted (see *P v C* [2007] HKEC 1162; *Chan Chun Hon v Chan Lam Lai Bing Shirley* [1994] 3 HKC 196, CA; *Davis v Johnson* [1979] AC 264; *Hall v Hall* [1971] 1 All ER 762, [1971] 1 WLR 404, CA), unless it is shown to be really necessary in the circumstances of the case: *Chan Chun Hon v Chan Lam Lai Bing Shirley* [1994] 3 HKC 196, CA. The circumstances may be such that it is proved to be 'impossible' for the parties to live together in the same house: *Hall v Hall* [1971] 1 All ER 762, [1971] 1 WLR 404, CA; *Bassett v Bassett* [1975] 1 All ER 513, [1975] 2 WLR 270, CA. In *Walker v Walker* [1978] 3 All ER 141, [1978] 1 WLR 533, CA, it was stated that the words 'impossible' and 'intolerable' in relation to such situations were subject to misuse and should be dropped. See also *P v L* [2007] 1 HKLRD 26, DC, a case where the wife was shown to have provoked some of the husband's behaviour. It was held that ouster orders were draconian and thus the courts should be exceedingly slow to make one against a party who was not shown to be at fault, appld *Wiseman v Simpson* [1988] 1 All ER 245, CA. See also *YLS v TL* [2009] WL 1700, DC, [2009] HKEC 37, where the court was satisfied that the wife was subject to domestic violence and that the husband had made threats to the social welfare officer; an order restraining the husband from entering the matrimonial home was granted.

6.13 The question that court has to decide is whether it was, in all the circumstances of the case, fair, just and reasonable that a party be excluded from the matrimonial home. Tension pending a divorce, unpleasantness and inconvenience are not sufficient grounds for ordering one spouse out of the home: *Hall v Hall* [1971] 1 All ER 762, [1971] 1 WLR 404, CA; *Bassett v Bassett* [1975] 1 All ER 513, [1975] 2 WLR 270, CA. See also, *Walker v Walker* [1978] 3 All ER 141 at 143, [1978] 1 WLR 533 at 536, CA, per Geoffrey Lane LJ. In *Lee Cheng Mei Ying v Lee Chow*