

HONG KONG / JUDGMENT

B v. A

COURT

Court of First Instance

DECIDED

20 August 2007

CASE / FILE NUMBER

HCMC6/2007

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bjbj HCMC 6/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MATRIMONIAL CAUSES NO. 6 OF 2007

BETWEEN B Petitioner and A Respondent

Before : Hon Hartmann J in Chambers (Not open to public) Date of Hearing : 15 August 2007 Date
of Handing Down Judgment : 20 August 2007

J U D G M E N T

AUTONUMOUT The parties in this matter are husband and wife. Both were born and raised in Argentina. They were married to each other in the capital, Buenos Aires, in 1988. They have two sons, both born in Argentina. AUTONUMOUT The husband, who is the respondent, may be described as an international banker. In or about 1997, he took up employment with an Argentinean bank and has worked for the bank since that time in various parts of the world. AUTONUMOUT In 2000, the husband was transferred from Argentina to Spain. He lived in Spain with his wife and children for some five years before being transferred to Shanghai. His wife and children accompanied him to Shanghai. The family lived in that city for approximately a year before the husband was again transferred, this time to Hong Kong. Again, his family accompanied him. AUTONUMOUT It appears that the wife, who is the petitioner, arrived in Hong Kong with the children in late August 2006. The children were enrolled in local schools and a two-year lease taken on an apartment. The family moved into that apartment in early September 2006. A car, for use by the family, was acquired. AUTONUMOUT To regularise his stay here, the husband obtained a work permit valid for a standard period of one year but renewable. In addition, all the family obtained Hong Kong identity cards. The humdrum requirements for living in Hong Kong were also secured : a bank account was opened, a VIP card at a local store

was obtained, the wife found herself a hairdresser. In short, the family settled into everyday life in Hong Kong. AUTONUMOUT The husband's office was in Hong Kong. His professional base was here. His responsibilities, however, demanded that he travel extensively in the region.

AUTONUMOUT According to the wife, the husband anticipated remaining in Hong Kong for at least three years, looking perhaps to extending his time here by a couple of years as, for example, he had done in Spain. But that being said, the imperatives of his business also made it possible that he might be required to move before he had completed his anticipated tour of duty here.

AUTONUMOUT Towards the end of 2006, unhappy differences arose in the marriage. By January 2007 the couple were living apart. AUTONUMOUT There is evidence to suggest that for a time, in the context of the emotional difficulties occasioned by the breakdown of the marriage, the wife intended to return to Argentina to live there with the children. The boys were removed from school. Quotations were obtained for the shipment of furniture and effects. But the move did not come to pass. The wife decided to remain in Hong Kong. The boys resumed their schooling here.

AUTONUMOUT On 15 March 2007, some six and a half months after the family had taken up residence in Hong Kong, the wife instituted proceedings against her husband seeking a dissolution of the marriage, joint custody of the children and ancillary relief. AUTONUMOUT The wife asserted that the courts of Hong Kong had jurisdiction because, pursuant to s.3(c) of the Matrimonial Causes Ordinance, Cap.179, both she and her husband had a substantial connection with Hong Kong as at the date of the issue of her petition. AUTONUMOUT The husband has disputed this assertion, contending that neither he nor his wife have a substantial connection with Hong Kong and that accordingly the courts of Hong Kong have no jurisdiction.

AUTONUMOUT This judgment determines this single disputed issue; namely, the issue of jurisdiction. AUTONUMOUT S.3 of the Matrimonial Causes Ordinance governs jurisdiction in divorce proceedings. It reads The court shall have jurisdiction in proceedings for divorce under this Ordinance if either of the parties to the marriage was domiciled in Hong Kong at the date of the petition or application; either of the parties to the marriage was habitually resident in Hong Kong throughout the period of 3 years immediately preceding the date of the petition or application; or either of the parties to the marriage had a substantial connection with Hong Kong at the date of the petition or application. [my emphasis] AUTONUMOUT In *Savournin v. Lau Yat Fung* [1971] HKLR 180, the first reported authority on the meaning of s.3(c), Briggs J confirmed that the sub-section had established a new basis for determining the personal law of the parties to a marriage; in short, it had established an additional ground of jurisdiction. AUTONUMOUT S.3 therefore establishes three separate grounds of jurisdiction : Under s.3(a), jurisdiction is established if, at the time of the issue of proceedings, either party considered Hong Kong to be his or her permanent home; that is, his or her place of domicile. Under s.3(b), jurisdiction is established if, at the time of the issue of proceedings, either party had been usually living in Hong Kong for the previous three years; that is, had been habitually resident here for that period of time. Under s.3(c), jurisdiction is established if, at the time of the issue of proceedings, even if neither party considered Hong Kong to be his or her permanent home or had been usually living here for the preceding three years, nevertheless one or other of them had a substantial connection with Hong Kong. AUTONUMOUT What is capable of constituting a substantial connection under s.3(c) is not specified in the Ordinance. But, as Briggs J noted in *Savournin v.*

Lau Yat Fung Domicile in a country is obviously a substantial connexion with that country: so may three years ordinary residence be so considered. Paragraph (c), a substantial connexion with Hong Kong, is in addition to those two requirements. It is not substituted for them. A meaning must be given to the phrase wider than domicile or three years ordinary residence. [my emphasis] AUTONUMOUT As to the meaning of the phrase substantial connection, Briggs J said that it was to be given its ordinary meaning. It is not a term of art. In my view, that must be right. As such, it would be wrong to burden the phrase with qualifications, for example, by specifying inter alia that a person must ordinarily reside here for at least a year before he can be considered to have a substantial connection with Hong Kong. An accumulation of such qualifications would reduce the phrase to a term of art and that, I believe, would be contrary to the legislative intent. AUTONUMOUT The word substantial is not a technical term nor is it a word that lends itself to a precise measurement. In an earlier judgment on this issue, that of S. v. S. [2006] 3 HKLRD 251, I said that it is not a word that lends itself to precise definition or from which precise deductions can be drawn. To say, for example, that there has been a substantial increase in expenditure does not of itself allow for a calculation in numerative terms of the exact increase. It is a statement to the effect that it is certainly more than a little but less than great. It defines, however, a significant increase, one that is weighty or sizeable. AUTONUMOUT That being the case, if the phrase is to be given a wider meaning than domicile or three years ordinary residence, whether a party to a marriage did or did not have a substantial connection with Hong Kong at the time of the institution of proceedings can only be determined in each case by having regard to the facts of that case and coming to a broad conclusion based on those facts. AUTONUMOUT In S. v. S., I said that, when considering the meaning and extent of the phrase substantial connection, it is important to recognise that the legislature saw fit to qualify it with the indefinite article. It is not therefore necessary to show that a party's substantial connection to Hong Kong is his or her only substantial connection with a jurisdiction or is the single most substantial connection. In the present case, therefore, while the fact that the husband and wife have a substantial connection with Argentina may go to an issue of forum non conveniens, it does not determine whether either party had a substantial connection with Hong Kong at the time when the wife's petition was issued. As I said in S. S., no exercise of comparisons is required. AUTONUMOUT It is, of course, fundamental that s.3 of the Matrimonial Causes Ordinance confers jurisdiction in respect of divorce proceedings. In S. v. S., I spoke of this in the following terms 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's 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. AUTONUMOUT In the circumstances, it seems to me that the factual issue of whether or not a party had a substantial connection with Hong Kong at the time of the institution of proceedings may conveniently be determined by asking two questions. First, did the party have a connection with Hong Kong? Second, was that connection of sufficient substance; that is, of sufficient significance or worth, to justify the courts of Hong Kong assuming jurisdiction in respect of matters going to, and consequential upon, the dissolution of that party's

marriage? AUTONUMOUT In respect of the second question, in *Savournin v. Lau Yat Fung Briggs* J observed that while it may be nearly impossible to give a definition embracing all the cases where it can be said that a party to the marriage has a substantial connexion with Hong Kong, it is not difficult to determine when circumstances do not show a substantial connexion. [Counsel] instanced two persons coming here only for the purpose of obtaining a decree. Naturally that by itself is not enough nor is the fact that the marriage was celebrated in Hong Kong sufficient of itself. AUTONUMOUT In *S. v. S.*, I complemented this by saying It speaks for itself, I think, that an artificially constructed connection will not be a substantial one. A connection must be real in the sense, for example, that it has not been engineered for temporary tactical advantage. It was not the intention of the legislature (in passing s.3(c) into law) to create a convenient off-shore divorce jurisdiction. AUTONUMOUT Clearly, as I have said, it was not the intention of the legislature to create a fly in and fly out divorce jurisdiction. What is required under s.3(c) is not merely a connection but a substantial connection. But that being said, I do not accept that a person who has come to live in Hong Kong for a limited period of time is, by that fact alone, incapable of establishing a substantial connection with Hong Kong. As I have emphasised, the particular facts of each case must be taken into account. The question must therefore be asked : what are the circumstances relevant to the limited period of residence and just how limited is it intended to be? To illustrate my point, good sense dictates that there is a difference between residing in Hong Kong for a month or two to oversee a short-term project and being posted here together with one's family for a period of several years. AUTONUMOUT On behalf of the husband, it was however Mr Erving's primary submission that it is simply not possible for a husband or wife who come to Hong Kong for an anticipated period of just two or three years, transferred here for commercial reasons, to acquire a substantial connection with this jurisdiction. AUTONUMOUT I do not agree. Without falling victim to current marketing ploys, it is accurate, I think, to say that Hong Kong is an international city. By international I mean that it is a city which, by reason of its long-recognised financial, commercial, professional, educational and cultural dynamics, attracts large numbers of persons and their families who seek to live and work here for a limited period of time. This group of persons, often referred to as expatriates, constitutes a substantial presence in many areas of endeavour. As with the husband and wife in the present case, their lives become centred on Hong Kong. Their children go to school here, not merely for a few months, but for several years. They move into residential property here, they hire domestic helpers, they buy cars, they join clubs. They make a very real and valued contribution to Hong Kong. In my judgment, the realities demand that such persons may, depending on the facts of their case, acquire a substantial connection with Hong Kong. AUTONUMOUT In the course of submissions, Mr Erving said that the wife was here as a dependent of her husband and that, if she obtains her divorce, she will no longer be a dependent and will have no right to remain in Hong Kong. How therefore, in such circumstances, can she be said to have a substantial connection with Hong Kong? Whether Mr Erving is right or wrong as to the complexities and discretionary nuances of the prevailing immigration scheme, I do not know. I have my doubts. But I do not think it matters. Jurisdiction under the Matrimonial Causes Ordinance is not to be subject solely to administrative policies managed from time to time by the Director of Immigration. AUTONUMOUT Mr Erving made a good point when he said that s.3(c) cannot be intended to be

merely a lesser substitute for s.3(b), replacing the requirement for three years habitual residence with a period of say two years. But sub-sections (b) and (c) demand different things. Sub-section (b) demands no more than usual residence for three years, (c) demands a substantial connection with Hong Kong. AUTONUMOUT No doubt, establishing a substantial connection with Hong Kong will be easier in many cases than establishing domicile or three years of usual residence. But I do not read s.3 as demanding equal severity when establishing each ground of jurisdiction. In that respect, it may be said that s.3 is hierarchical. AUTONUMOUT In her petition, the wife spoke of both herself and her husband having a substantial connection with Hong Kong. This substantial connection arose out of more than the single fact of their joint or several residence. It arose out of the fact that the entire family not just the husband or the wife had centred their lives on Hong Kong; that the husband was working here, running an office, contributing to Hong Kong's welfare, that the two children were being educated here and that she, as a housewife, had the responsibility for managing the family's domestic affairs here. AUTONUMOUT Of course, nothing was written in stone as to how long the family would remain in Hong Kong. The imperatives of international banking, the husband's area of expertise, rarely allow for such certainty. But all being well, it is rational, I think, to say that the family would have anticipated being here for three years, perhaps even a couple of years longer. AUTONUMOUT Three years is a fairly extended period of time. When the wife issued her petition for divorce, she had been in Hong Kong for some six and a half months and, all being well, anticipated staying for another two and a half years or longer, building a life for herself here and seeing her children advance in their education here. AUTONUMOUT In all the circumstances, I believe the wife was correct to make the assertion when she issued her petition that the life of the entire family now being centred on Hong Kong and the intention being to remain here for a fairly extended period of time, a matter not just of months but perhaps of several years both she and her husband did have a connection with Hong Kong of sufficient significance and worth; that is, of sufficient substance, to properly form a basis for determining their personal law : the law governing the dissolution of their marriage. AUTONUMOUT For the reasons given, I am satisfied therefore that this court does have jurisdiction pursuant to s.3(c) of the Matrimonial Causes Ordinance. The husband's application contained in his summons of 22 March 2007 is dismissed. AUTONUMOUT As to costs, I see no reason why costs should not follow the event and there will be an order nisi awarding costs to the wife. The order will be made final one calendar month after the date of handing down this judgment unless either party seeks a different order before that time. (M.J. Hartmann) Judge of the Court of First Instance, High Court Mr Robin Egerton, instructed by Messrs Oldham, Li & Nie, for the Petitioner Mr C.P. Erving of Messrs Erv 1udk 1udk V &`#\$ VaJX@ VaJX & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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