

HONG KONG / JUDGMENT

# H v. M

## COURT

Family Court

## DECIDED

6 July 2007

## CASE / FILE NUMBER

FCMC10288/2004

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bjbj FCMC 10288 / 2004 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL  
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 10288 OF 2004

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BETWEEN H Petitioner and M Respondent (Stay of proceedings : forum non conveniens)

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Coram : Deputy District Judge K. Levy in Chambers Dates of hearing : 25 May 2007 Date of  
Judgment : 25 May 2007 Date of handing down of reasons for Decision : 6 July 2007

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REASONS FOR DECISION

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The Application

1. The parties were married in 1986 and two boys, now aged 11 and 9, were born. The Petitioner whom I shall refer to as the Wife is an American and the Respondent, whom I shall refer to as the Husband, is a Chinese emigrant to the United States ( ). The family had lived in Hong Kong ( ) for about 7 years before the Wife filed a petition in September 2004 based on the Husband's unreasonable behaviour. The Petition was not contested and a Decree Nisi of Divorce ( Decree Nisi ) was granted on 15th April 2005. Upon the making of the Decree Nisi, the court also granted custody of the children to the Wife with reasonable access to the Husband ( 1st HK Custody Order ) and fixed a date in December 2005 to deal with the issue of ancillary relief. However, for reasons explained below, the parties did not attend the said hearing and the court therefore adjourned the said hearing sine die.

2. As a result of the relocation of the Wife and the children to the US in June 2005, and a series of events having taken place after the Decree Nisi was issued, the Wife instituted a fresh divorce proceeding in US, which subsequently led the issuance of a summons on 11th January 2007 by the Wife ( the Stay Application ) to stay the HK proceedings pending for the final determination of the divorce proceedings in the District Court of the State of Maine in US ( the Maine Court ).
3. At the hearing for the Stay Application, the Wife was represented by counsel, Miss Au Yeung and the Husband, opposing the Stay Application, was represented by counsel, Mr. Surman.
4. After hearing submissions from both counsel, I dismissed the Stay Application and promised to give the reasons at a later date, which reasons I now give. The events and circumstances leading to the Stay Application 5, The facts of the Application are somewhat unusual and merit more detailed discussion, in particular there had been a lapse of two years between the date of the Decree Nisi and the filing by the Wife of a divorce application in the Maine Court in US in June 2006.
6. Shortly after the Decree Nisi was granted, the parties, whilst acting in person, filed on 13th June 2005 a consent summons dated 7th June 2006 ( the Consent Summons ) settling matters relating to custody and ancillary relief. It is not disputed that the Consent Summons was drafted with the help of Messrs. Hampton Winter & Glynn ( which later acted for the Wife in the subsequent proceedings.
7. In the Consent Summons, the parties agreed to have joint custody of the children with care and control to the Wife and reasonable access to the Husband. It was further agreed that the Wife could leave HK with the boys. Thus, in the Consent Summons leave was also sought to allow the Wife to leave the jurisdiction of HK with the boys.
8. Before the court granted order in terms of the Consent Summons, the parties already started to put into effect some of the terms in the Consent Summons. The Wife, with the consent of the Husband who had signed a note on 7th June 2005 giving permission to the Wife to leave the jurisdiction of HK, left HK on 25th June 2005 and started living with the children in the parties joint-named property in Maine in the US ( the Maine House ), which was the family s former summer home when the parties were living in HK.
9. Shortly after the Wife had moved to Maine with the boys, she received a letter dated 27th July 2005 from the HK court directing the parties to clarify the terms of the Consent Summons to include in the Consent Summons inter alia the payment date of the maintenance for the children and the ending dates of the periodical payments for the Wife and the children.

10. The Wife accordingly amended the Consent Summons by adding the dates of payment and the usual ending dates for the periodical payments of the Wife and the children. In November 2005, when the Husband went to the US to visit the children, the Wife had also brought along the amended Consent Summons when she went to collect the Husband from the airport. The Husband also signed on the Consent Summons as amended by the Wife ( the Amended Consent Summons ).
11. However, after the Amended Consent Summons was signed, it was alleged that when the Husband learnt of the Wife having started a new relationship, he became aggressive and allegedly assaulted the Wife. Police were called and the Husband was arrested. The Husband was subsequently released on bail with a condition that the Husband be forbidden from having contact with the boys.
12. After the debacle in November 2005, the Wife raised the allegation of sexual abuse on the older son, E, by the Husband- which allegation the Wife had discussed with a child psychologist, Dr. Knight, shortly before her departure from HK. As a result, E was then brought to see a child psychologist, Dr. Siegel who interviewed E in December 2005 and recommended further psychological assessment. As the Husband was not able to have any form of contact with the children as a result of the conflicts between the parties, the Husband, returned to HK and issued a summons on 28th March 2006 ( s March 2006 Summons ) for (i) the return of the children to HK and (ii) restoring the hearing for ancillary relief which hearing was adjourned in December 2005 when both parties failed to attend.
13. Consequent to the allegations of child abuse by the Wife in the US against the Husband, the Maine Court, with the consent of the parties, granted a Protection from Abuse Order ( April 2006 Protection Order ) by which the Husband was prohibited from visiting the home of the Wife or having any contact with her save for some limited contact in respect of the resolution of the divorce proceedings. The April 2006 Protection Order also awarded temporary parental rights and responsibilities (custody) of the children to the Wife but restricted the Husband s contact with the children. The April 2006 Protection Order is valid for two years.
14. At the hearing for the H s March 2006 Summons on 27th April 2006, the Wife was represented for the first time (at least on record) by HMG and the Husband still appeared in person. At the said hearing presided by Deputy Judge Woo, she directed the Husband to file a financial statement and affirmation regarding his application for the return of the children to HK ( s April Order ). The Husband although had not included in the H s March 2006 Summons a request for withdrawal of the Consent Summons, he had however referred to it in his affirmation in support. Deputy Judge Woo, nonetheless, also directed the Husband to file an affirmation to explain change of circumstances which lead to this renouncement of the Consent Summons .

15. After Woo's April Order, the Wife on 12th May 2006 filed an application for child support in the Maine Court against the Husband, in respect of which application, the Maine Court on 5th July 2006, as part of the April 2006 Protection Order, granted a Child Support Order in the sum of US\$2,892 against the Husband. The date of payment was ordered to commence on 14th April 2006, the same day as the April 2006 Protection Order, and likewise, to expire on the same date as the April 2006 Protection Order.
16. On 9th June 2006, in relation to the criminal assault charge brought by the Wife against the Husband over the said incident in November 2005, the Husband subsequently pleaded guilty to a lesser charge of disorderly conduct as a result of the plea bargain and was fined US\$400.
17. Upon the Wife discovering the Husband of allegedly having had an intention to withdraw or cash out money from his US pension fund known as 401K retirement plan ( the 401K Funds ) worth about US\$366,000 by transferring the funds in an Individual Retirement Account at Fidelity, the Wife on 19th June 2006 filed a Complaint for Divorce ( US Divorce Petition ) and the Maine Court, consequent upon the US Divorce Petition, issued a preliminary injunction on the same day to restrain parties from, inter alia, disposing or dealing with any property of the parties without their consent or an order of court.
18. On 2nd August 2006, the Wife also obtained an ex parte order from the Maine Court against the Husband freezing the said sum of US\$366,000 ( the US Freezing Order ) in the said Fidelity Account.
19. Consequently, the Wife, before the adjourned hearing for H's March 2006 Summons on 18th August 2006, issued a summons dated 8th August 2006 ( s August 2006 Summons ) for (i) custody, care and control of the children; (ii) an order to restrict the Husband's access to the children; (iii) payment of maintenance pending suit to the Wife for the benefit of the children in the sum of HK\$22,500 and (iv) an injunction against the Husband from disposing his assets, particularly the funds in the said Fidelity Account with value of US\$366,000.
20. At the hearing on 14th August 2006, the Wife was still represented by HWG and the Husband was granted legal aid on 8th August 2006 and represented by the assigned solicitor of Messrs. Haldanes. Deputy Judge Woo made a number of orders on 14th August 2006 by acceding to the W's August 2006 Summons in granting to the Wife interim custody, care and control order of the children and restricting the Husband's access to the children in terms of the W's August 2006 Summons. The Husband was further ordered to pay the Wife maintenance pending suit in the sum of US\$2,000 and was restrained from disposing assets per the W's August 2006 Summons. The Husband was again ordered to file affidavit to explain change of circumstances which lead to the renouncement of the Consent Summons. Deputy Judge Woo also called for an international social service report on custody and access and an independent psychological report on both children ( s August Order ).
21. After Woo's August Order, between the periods of September to December 2006, the parties, through their respective solicitors, filed a number of documents in connection with the directions of the Woo's August Order. The Husband had filed a financial statement, two

affidavits respectively in support of his application for the return of the children and in compliance with the direction given in Woo s August Order to explain the change of circumstances since the filing of the Consent Summons. The Husband also filed questionnaire on the Wife s financial statement filed in November 2004. The Wife had also filed a questionnaire on the Husband s said financial statement.

22. At the end of December 2006, after the Husband had filed a Notice of Change of Solicitors that his assigned solicitors were changed from Haldanes to his present solicitors, Messrs. Stevenson, Wong & Co. ( Stevenson Wong ), the Wife filed the Stay Application.
23. At a directions hearing on 19th January 2007 in respect of H s March 2006 Summons, with the consent of the parties, I adjourned it to be heard after the disposal of the Stay Application and again directed the preparation of an international social service report and an independent psychological report. The Stay Application was ordered to be adjourned for arguments.
24. At the hearing for the Stay Application on 25th May 2007, the Husband was still legally aided. Grounds of Application
25. In support of the Stay Application, the Wife s solicitors, Miss Ku of GMH filed an affirmation on behalf of the Wife. It was averred on behalf of the Wife that due to the substantial changes of the parties circumstances since the Consent Summons and in particular, the contentions arising from the issues of the Husband s access to the children and of the fresh financial disputes, Miss Ku submitted that the Maine Court is a more appropriate forum to deal with these contentious matters.

## Applicable Principles

26. Counsel had little dispute with the principles governing applications for stay of proceedings on the ground of forum non conveniens (or forum conveniens, which term is used interchangeably). The guiding principles are derived from the English House of Lords decision of *Spiliada Maritime Corporation v Cansulex Ltd* [1986] 3 WLR 972, which principles were first adopted and applied by the HK Court of Appeal in *The Adhiguna Meranti* [1987] HKLR904. The Court of Appeal also applied the same principles in divorce cases of *Louvet v Louvet* [1990] 1 HKLR 670 and *DGC v SLC nee C* (unrep., CACV37/2005, 1st Aug. 2005), both of which authorities were relied on by counsel. In addition to these authorities, Miss Au Yeung also relied on an English authority of *de Dampierre v de Dampierre* [1988] AC 92 and *Mr. Surman on Yu Lap Man v Good First Investment Ltd.* [1998] 1 HKC 726 and *Butler v Butler* [1997] 2 FLR 311.
27. In *DGC v SLC nee C* (ibid.), the Court of Appeal set out the applicable principles in full and I cannot do better but quote them below : The principles are :

1. The single question to be decided is whether there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of an action i.e. in which the action may be tried more suitably for the interests of all the parties and the ends of justice ?
2. In order to answer this question, the applicant for the stay has to establish that first, Hong Kong is not the natural or appropriate forum ( appropriate in this context means the forum has the most real and substantial connection with the action) and second, there is another available forum which is clearly or distinctly more appropriate than Hong Kong. Failure by the applicant to establish these two matters at this stage is fatal.
3. If the applicant is able to establish both of these two matters, then the plaintiff in the Hong Kong proceeding has to show that he will be deprived of a legitimate personal or juridical advantage if the action is tried in a forum other than Hong Kong.
4. If the plaintiff is able to establish this, the court will have to balance the advantages of the alternative forum with the disadvantages that the plaintiff may suffer. Deprivation of one or more personal advantages will not necessarily be fatal to the applicant for the stay if he is able to establish to the court s satisfaction that substantial justice will be done in the available appropriate forum . (at para.11)
28. Below applying the principles to the facts of this case, I should mention that the English authorities submitted by the parties should be read in the context that in UK, the forum non conveniens applications in divorce cases are governed by the Domicile and Matrimonial Proceedings Act 1973, which provides a statutory test of balance of fairness . In HK, whether they are commercial cases or divorce suits, the principles set out in Spiliada as applied by the HK Court of Appeal in the divorce case of DGC v SLC nee C (ibid.) continue to be applied. Application of Principles Is there another available forum which is clearly or distinctly more appropriate than HK ?
29. In order to succeed on the Stay Application, the Wife would be required to cross the first hurdle of persuading this Court that the US forum (or more specifically the Maine Court), which has competent jurisdiction in this matter, is the clearly or distinctly more appropriate forum than the HK court for the trial of the disputes of the parties. The burden of proof rests on the Wife on the balance of probabilities.
30. In the present case, there is no quarrel that the Wife, when instituting her divorce Petition in HK, had decided to confer jurisdiction in HK in relation to divorce and its related matters on custody and finance. More importantly, the Wife had in fact almost drawn the HK proceedings to a close by obtaining the Decree Nisi and the 1st HK Custody Order in April 2005. Hence, jurisdiction of the parties divorce suit has been clearly founded in the HK court as of right.

31. The parties choice of HK court as the natural forum is clearly manifested by the parties application to the HK Court when with a full knowledge that the Wife and the children were to relocate to US, and that their main assets, the Maine House and the 401 Funds were all situated in the US for the approval of the Consent Summons disposing matters on custody, access and financial arrangement between them.
32. Thus a recapitulation of the chronology tends to show that contrary to the parties original choice of forum- a second forum in US only emerged after the debacle in November 2005, which incident directly or indirectly led to the Wife s allegation of sexual misconduct towards E. Unlike most cases where two competing forums already exist at the commencement of an action, in this case, a second forum only emerged only after the parties had recognised that HK court as being a more suitable forum to deal with their divorce matters. The argument of the Wife that the Maine Court is a more suitable forum should therefore be more aptly described as a consequence of a shifting of forum from HK to Maine rather than it being a suitable forum ab initio. In the circumstances, in deciding if the forum has really shifted as submitted by the Wife, I need to firstly find out what the issues are to be disposed of in this divorce suit.
33. The Wife said that there were still two issues to be resolved in this suit. In paragraph 8 of Miss Ku s affirmation in support of the Stay Application, Miss Ku stated that the real issues in these proceedings are about the Respondent s access to the children and the finances . Hence, according to the Wife, the remaining contentious issues are access and financial matters.
34. Mr. Surman seems to be in agreement that the remaining contentious issues suit are the issues of access and finances and that there is no issue of custody.
35. In order to determine if the said issues as submitted by the parties are the real issues in dispute, I should firstly consider the nature of each of these two issues mentioned by counsel. The remaining contentions
  - (i) Financial matters
36. According to my understanding of the Wife s submissions, the nature of the financial contentions is evidenced by the existing US Freezing Order and the Child Support Order as well as Woo s August Order in HK which order mirrors upon the said US orders. From the contents of these orders, so far as financial matters are concerned, the financial disputes seem to be about the amounts of periodical payments to be paid by the Husband and the disposal of the 401K Funds.
37. It is common ground that in this case, from the commencement of the suit until the Wife s relocation to the US, there was not a single shred of dispute between the parties. The Consent Summons when it was filed by the Wife was evidently intended by the parties to be endorsed and made into a court order so that the entire divorce suit could be drawn to a close. The Husband although has now mentioned an intention to apply to set aside the

Consent Summons, has not however lodged a formal application to do so. It is also not clear if the Wife would oppose any setting aside application should it be formally made. Hence, the Consent Summons is still at large and theoretically can still be approved by the HK court.

38. As the Consent Summons has not been withdrawn or dismissed, the parties are arguably *ex facie* still in agreement in respect of their financial matters. Thus, in order to find out the nature of the present financial disputes, if any, I should examine the terms of the parties agreement in the Consent Summons.
39. In the Consent Summons, the parties have chosen to state their agreed financial settlements substantially by way of undertakings and acknowledgments, which include, *inter alia*, that (i) an acknowledgement that the terms set out in the Consent Summons are accepted as a full and final settlement of the parties claims; (ii) an undertaking by the Husband to transfer to the Wife 50% of his beneficial interest in the 401K Funds; (iii) an undertaking by the Husband to transfer all his beneficial interest in the four joint-named stocks and mutual fund accounts; (iv) an agreement that the parties continue to hold 50% of the shareholding of their joint business in HK operated by their HK incorporated companies called S E and M T ; and (v) an undertaking by the Husband to settle the mortgage in the Maine House. After reciting the said undertakings and acknowledgements, the parties consented to the court ordering the Husband to pay periodical payments to the Wife in the sum of HK\$7,500 and the children in the sum of HK\$22,500.
40. Had the Wife taken care to state the commencement as well as the ending payment dates in their agreed proposed orders in the Consent Summons, the terms in the Consent Summons would have most likely been approved by the HK Court and they would have become an order of the court binding on the parties. Once the Consent Summons is embodied in a consent order, short of the recognised principles such as mistake or fraud, such order cannot be set aside.
41. The subsequent amendments to the Consent Summons were only minor with little material changes to the content. In spite of the fact that the Consent Summons has not been made into a court order, it would be taken into account should this court be required to consider the parties financial matters.
42. The Consent Summons, though has not been approved by the court, it has, for all intents and purposes, been treated by the parties as a binding document. For instance, before the Husband formally transferred his beneficial interests in the aforesaid four stocks / mutual funds accounts to the Wife as referred to in the Husband s undertaking set out in sub-paragraph (iii) of paragraph above, the Wife had already withdrawn from or transferred funds from all the said four accounts specified in the said undertaking in the Consent Summons. Thus, the Husband could be said to have satisfactorily complied with the said undertaking. Apart from the said undertaking, there are also other undertakings in the Consent Summons to be complied with by the Husband. There is however no evidence that

the Husband or the parties will not comply with them. The current restraining orders in both HK and the US in respect of the 401K Funds seem to be rather for the purpose of preventing the Husband from committing a breach of an undertaking rather than pertaining to any substantive financial relief.

43. Furthermore, there is also no real dispute in the financial provisions for the children. The existing Child Support Order made by the Maine Court and the maintenance pending suit order in favour of the Wife for the benefit of the children in Woo s August Order were only an endorsement of one of the terms contained in the Consent Summons. The amount of maintenance in the sum of US\$2,892 when converted into HK currency, is almost the same as the amount in the sum of HK\$22,500 recorded in the Consent Summons. The interim maintenance order in the sum of US\$2,000 specified in Woo s August Order, though its amount is equivalent to the amount of maintenance appeared in the Consent Summons, is still in the nature of a financial provision for the children. A periodical payments order is capable of variation by the HK court and indeed the Husband has made such an application to vary the maintenance order in the Woo s August Order. Despite the variation application, the dispute does not seem to be substantial.
44. Thus properly analysed, without expressing any view on the merits of the Husband s intended application to set aside the Consent Summons, I envisage that the terms of the Consent Summons will need to be further fine-tuned and amended should it finally be approved by the court. However so long as the Consent Summons still remains with the HK Court which has been the case I am unable to discern any real financial disputes. The chance of it being developed into a full-blown contested ancillary relief hearing is rather remote. (ii) Access matter
45. The real contentious issue in my view is really the problems associated with access. Mr. Surman is right that there is really no issue of custody. Neither is there any issue on divorce as the Decree Nisi was already granted by the HK court. Central to the access dispute is the sexual abuse allegation by the Wife against the Husband. Had the said allegation not been made, according to the 1st HK Custody Order and the Consent Summons, the Husband could have been able to exercise unrestricted reasonable access of the children. As a result of the said allegation, the Husband s access is now severely restricted even before any full investigation and assessment are concluded. The evidence so far on the Husband s alleged sexual misconduct, apart from an allegation by the Wife, is only in the form of a preliminary assessment by Dr. Siegal. Whether the Husband has committed any improper sexual conduct towards E or both children is a matter to be further investigated. However, unless the Husband were found to have committed gross sexual act towards the children, the Husband will most likely be given some access no matter how limited it may be. Thus the issue on access is therefore not on whether the Husband should be given access at all, it is rather on the form it should take.

46. Thus, a flurry of applications by the Wife subsequent to the Consent Summons in both jurisdictions can be said to be a direct result of the Wife's allegation of the Husband's sexual misconduct towards E, which had resulted in the present curtailment of the Husband's access to the children.
47. The Husband, in response to the access restrictions imposed on him, had applied to the HK court for the return of the children by virtue of the H's March 2006 Summons, which summons has been adjourned for the said professional reports. From the Husband's 2nd Affidavit dated 4 September 2006, it is however observed that the Husband's application for the return of the children seems to be more a means to remove the current restrictions on access than genuinely wanting to bring the children back to HK. In paragraph 9 of the said affidavit, the Husband states : I am indeed ready to withdraw my application for the return of the children of the family to Hong Kong if my rights of access to my children will not be restricted. Since this Honourable Court had on 14th August 2006 made an Order to call for an International Social Welfare Report and an independent child psychological report on the children of the family, I am willing to withdraw my application for the return of the children of the family to Hong Kong as I trust that my concern over the right of access to the children will be dealt with properly in the good hands of the Hong Kong Court .
48. The Husband's said evidence really highlights the crux of the problem in this case whether the Husband should be allowed unrestricted access to the children which problem can only be resolved until the abuse allegation is disposed of.
49. Having found that access or rather the sexual abuse allegation is the only issue requires to be resolved in this case, I should next consider all the circumstances of this case in order to look for connecting factors which may point in the direction of Maine Court being a more distinctly appropriate forum.
50. Miss Au Yeung has cited a number of connecting factors which she submitted would point to the Maine Court being a more suitable forum to resolve the disputes :
- (1) The Wife and the children have been for almost two years living and will continue to live in Maine;
  - (2) The Wife and the children are US citizens with friends and extended family living in the US;
  - (3) The Husband himself is an US immigrant and does business there;
  - (4) Any expert witness on the issue of child abuse allegation or the Husband's future access will be an US expert of Dr. Siegel; and
  - (5) The officer who will prepare the International Social Service Report pursuant to the directions given by the HK court is also based in the US.

51. On the other hand, as argued by Miss Au Yeung, the parties connections with HK have become tenuous for the fact that not only the Wife and the children no longer reside in HK, the Husband is allegedly not having a permanent address in HK.
52. Based on the parties closer connections with the US than with HK as submitted by Miss Au Yeung the parties would be able to save costs and time should the HK proceedings be stayed in favour of the US forum. Further, there will also be an added advantage of dispensing with any need for registration or reordering should all the orders be made in the US.
53. Miss Au Yeung further informed this court that the proceedings in the Maine Court were progressing steadily with a hearing having been scheduled on 29th May 2007 for the Husband s challenge to the US jurisdiction and, on 9th June 2007, for a pre-trial conference.
54. Mr. Surman, in opposing the Stay Application, contended that the existence of another forum was by and large brought about the Wife s unreasonable manner in the way she litigated the disputes. As already mentioned above, when the Wife commenced the suit in HK, there was in fact no issue on either custody or access. According to the 1st HK Custody Order, the Wife was granted sole custody of the children with reasonable access to the Husband. By this order, the Wife was further prohibited from removing the children from the HK jurisdiction until the children attain the age of 18 years but provided that if either parent to give a general undertaking to the court to return the children with the written consent of the other parent, that parent may remove the said child from HK for a period specified in such written consent.
55. When the background of the present conflicts is considered in its proper context, I cannot say that Mr. Surman s contentions are not without merit. Before the Wife left for the US with the children, the parties albeit the Wife s sexual abuse allegation (without the Husband s knowledge) had started to surface agreed on the issue of custody, access and financial matters. In paragraphs 10 to 13 of the Wife s Affidavit dated 24th April 2006 filed in opposition to the H s March 2006 Application for the return of the children ( s Opposing Affidavit ), the Wife explained how she came to suspect the Husband of having sexually abused E in the past :
10. In May, and specifically on May 24th, whilst I was still in Hong Kong with the boys, I became increasingly disturbed about the behaviour of our son, E, who was then aged 9. On May 30th I saw a child psychologist, Dr. Knight, and Dr. Knight indicated suspicions of abuse by E s father, the Respondent.
11. On the 7th June 2005, E disclosed to that his father had touched him in the privates . I had been planning to leave Hong Kong to return to live in the US with the boys, with the consent of the Respondent, and having heard this from E, I was now determined to leave as soon as possible.

12. On the 7th June 2005, that evening, the Respondent and I both signed a Consent Summons. It has been negotiated from December 2004 onwards incorporating a financial settlement and an agreement that I and the children would leave Hong Kong to return to live in the US. The Respondent and I were trying to decide between the US or HK for me and the boys during the spring, the decision being based primarily on the cost of school in Hong Kong. We didn't reach that final decision on a living location until June 2005. Of course, as of June 7th, I was determined to make sure we'd live safely in the US and I agreed to a reduced financial arrangement to get the Consent Summons signed. The incentive was to try and have the Consent Summons signed before I left. The Respondent had agreed earlier in the day that the boys and I would leave Hong Kong, and then later that day we finalised the financial arrangement.
13. On or around the 22nd June 2005, I again met with Dr. Knight and he advised that since I was leaving Hong Kong with the boys, I should do so as soon as possible. It was clear that if I made a formal report about the Respondent at this stage that there could be a police investigation, which would have a traumatic effect upon E, and would delay our return to the US. Accordingly I left Hong Kong with the boys on the 25th June 2005, with the consent of the Respondent.
56. The above account given by the Wife as to the genesis of the sexual abuse allegation against the Husband seems to suggest that when the parties were contemplating the Wife's relocation to the US with the children, the Wife had already formed a suspicion of the Husband, which suspicion according to her evidence above led her to consult Dr. Knight in HK. Against this background when she signed the Consent Summons in agreeing the Husband having reasonable access to the children, it is quite inexplicable that the Wife neither confronted the Husband with the allegation nor sought referral from Dr. Knight for further follow up in the US.
57. In view of the circumstances under which the sexual abuse allegations by the Wife came about, it is not surprising that Mr. Surman severely attacked the genuineness of the Wife's allegations which were described in his written submissions as spurious on the following reasons :
  - (i) they came very late (ii) at a convenient time for the P (Wife)'s case and immediate situation (iii) they are unsupported by any corroborating evidence (iv) the so called expert appears to have impeded free recall by the child (E) (v) there is absolutely no indication of any history of sexual abuse in the notes of the monitored meetings between father (Husband) and children.
58. The Wife, due to the Husband's frequent business travels, had been the primary carer of the children. Had the Husband abused E for sometime as alleged by the Wife the Wife would have been able to notice some unusual behaviour from E as she had before she left HK. The fact that the Wife only for the first time raised her concerns about E's unusual exhibition of behaviour resulting her seeking professional advice from Dr. Knight a month before she was

due to leave HK has left opened for attacked by the Husband. In view of the timing and the circumstances under which the allegations surfaced, I cannot say that it is unreasonable of the Husband to suspect the Wife s otherwise than genuine motive.

59. The Husband s suspicion of the Wife s contrivance, in my view, seems to be further strengthened by the coincidence that E had allegedly told the Wife that the Husband had touched him in the privates on the same date when the Consent Summons was signed. The coincidence with the timing would no doubt be at issue in the trial on this issue.
60. According to the Wife s evidence above, she seemed to be concerned with the possible sexual abuse E might have been subject to and the adverse consequence it might have on his psychological well-being. It would therefore be more logical that the Wife, after having settled in the US with the children in June 2005, to seek professional help for E without delay. However, the Wife only waited until after the debacle in November 2005 before she consulted Dr. Siegel according to the Husband was for the obvious purpose of restricting the Husband s access. Further Mr. Surman submitted that the Husband s aggression were it true however was not directed to the children but only to the Wife. Thus, the Husband could argue that the access restrictions imposed on him was a spill over from this debacle rather than on the very issue of the sexual abuse allegation.
61. Mr. Surman also took the court through the various reports on the Husband supervised visits compiled by the appointed professionals in the months of June 2006 and December 2006 exhibited by the Husband. Mr. Surman submitted that the fact that these reports all record a close and spontaneous father-son relationship would seem to have greatly contradicted the Wife s allegations.
62. For the matters foregoing, Mr. Surman submitted that before a full assessment and evaluation were concluded, the Wife has not been able to produce any evidence- apart from a preliminary views of Dr. Knight in HK and Dr. Siegel in US corroborating the sexual abuse allegations.
63. Apart from attacking the genuineness of the Wife s allegations, Mr. Surman further complained of the seemingly biased and opinionated view of Mr. Siegel. In support of his contention, Mr. Surman cited a passage from Dr. Siegel s Affidavit dated 20 October 2006. At paragraphs 8, 9 and 10 of the said Affidavit, Dr. Siegel wrote :
  8. I am told by (the Wife) and her attorney in Maine that (the Husband) denies the incidents of sexual touching revealed to me by (E). (The Husband) s reported continuing denial puts both children at risk for further potentially damaging interaction with their father.

9. That damage may occur in two ways. First, without acknowledgment of his sexual misconduct and treatment for such misconduct, (the Husband) remains a risk to victimize both boys with further sexual aggression. Second, such persistent denial by (the Husband) would impose injurious psychological strains on the boys as they try to integrate their acknowledged affection for their father with the reality of their own experiences of his sexually aggressive behaviours.
10. As a result of the foregoing, my recommendation continues to be that (the Husband) have no contact with the boys except by strictly monitored written or telephone communications or in supervised visits . (words in bracket are desensitised)
64. At the time of his affidavit, Dr. Siegel had not carried out any detailed assessment and a full investigation and in fact a full assessment were still to be conducted. Mr. Surman submitted that the tenor of his evidence tended to show that he had already formed some preconceived notion that the Husband had to admit his guilt before access could be properly arranged. After having read the said affidavit, I am inclined to agree with Mr. Surman s view and should take this matter into my consideration.
65. The Wife s submissions based on the convenience of witnesses being in the US are of course based on a supposition that the issue would have to be thrashed out at trial. However, in view of the Husband s said contentions in relation to the genuineness of the Wife s allegations and his mistrust of Dr. Siegel, the Husband would, apart from Dr. Siegel, most likely require other witnesses such as Dr. Knight to give evidence, whose evidence would no doubt impact on the Wife s veracity of her allegations against the Husband. The independent reports called by the HK court would mean that other experts would also be required. In view of the fact that the children are based in US, it is likely that some part of the assessment would have to be conducted there. This factor alone however is insufficient to show that the Maine Court is more suitable to deal with the access dispute.
66. As the children are now living in the US, the children will be more conveniently assessed in the US unless this court orders the return of children to the jurisdiction of HK which has in fact assumed jurisdiction over their welfare. Were the dispute to proceed to trial, it is unlikely that E would be required to give evidence. This is not a case where all the experts will be based in the US there, there will also be witnesses from HK (such as Dr. Knight). Thus a connecting factors of convenience of witness and savings of expenses are equally balanced.
67. So far as the place of domicile is concerned, the factor of the parties respective citizenships is of no relevance at all. The residence and domicile however are of course relevant. The Wife, who would undoubtedly be another crucial witness in the trial on access, is now residing in Maine and it would be more suitable for her to have the proceedings conducted in the US.

68. The Husband, on the other hand, is not residing in US though he frequently travels for business there. The husband is a businessman with busy travel schedules. Thus, he can hardly be described of having a permanent residence in one particular place. However, it is clear that the Husband is substantially based in HK with a residence here. The parties companies, S E and M T have registered addresses still remained with HK. In the US, the Husband does not seem to have a home or a permanent address. The connecting factor on residence is also equally balanced.
69. Further, whilst pursuing parallel proceedings in both jurisdictions, the Wife managed to vary the access order of the 1st HK Custody Order by Woo s August Order of imposing restrictions similar to those restrictions imposed by the April 2006 Protection Order. This shows that a HK court order would likely be given legal effect otherwise it would not have been necessary for the Wife to apply for the imposition of the similar restrictions on the Husband s access in HK. Thus the weight to be given to the submissions by Miss Au Yeung on the inconvenience of registration or re-ordering of a HK order in the US should be to a certain extent greatly lessened.
70. In spite of my finding that the financial matters are not truly contentious, I should, for completeness, also consider if there are connecting factors making the Maine Court a more suitable forum were it found that the financial matters are also in issue. Miss Au Yeung submitted that as the two main assets of the parties, namely the Maine House and the 401K Funds, are both situated in the US, the US would therefore be a more distinctly suitable forum to deal with the financial disputes.
71. Whilst it is true that the two main matrimonial assets are both situated in the US, it does not necessarily follow that US would be a more suitable forum to deal with the issues arising from them. According to the Consent Summons, the Husband has undertaken to discharge the mortgage payments of the Maine House within 4 years of the signing of the Consent Summons. Notwithstanding the Husband s intended application to set aside the Consent Summons, there is no suggestion that the Husband is not complying with or will resile from the said undertaking. In fact, the companies from which the Husband derive his income are incorporated in HK with their registered addresses also in HK.
72. As for the second asset, the 401K Funds, there is no evidence that the location factor would have a significant impact in view of the fact that the parties have originally chosen HK to deal with the said asset. The Wife s application to the HK Court for a similar injunction order for the purpose of preserving the 401K Funds seems to show that irrespective of the location of an asset, an order in HK is as good as one made in the US otherwise it would not have been necessary for the Wife to come to the HK Court to apply for a similar freezing order to be made in the Woo s August Order.

73. When it comes to a question of enforcement, the weight to be given to a location factor may be affected by the remedies required, as a civil remedy can lie in personam (against the Husband personally ) as well as in rem (for example an injunction in respect of the 401K Funds). In the event of a breach of an injunction order, for example, or an undertaking by the Husband, it would definitely be easier to take out enforcement proceedings in HK where the Husband has his last known address as well as where his companies situate.
74. After having considered the issues in dispute and the number of connecting factors submitted by the Wife, I am not inclined to find that the various connecting factors have pointed in favour US being a distinctively more suitable forum than HK.
75. Applying the principles above, I conclude that the Wife has failed to show that there is other available forum which is clearly more appropriate for the trial of the disputed issues, I should on this ground alone refuse the Stay Application.
76. For completeness, however, in the event that I were found to be wrong on the above, I would next consider the second and the third legal principles discussed above. Were the Husband is able to show that he will be deprived of a legitimate personal or juridical advantage if the action is tried in US and not in HK ?
77. Were this court to decide to stay the HK proceedings, could the Husband demonstrate that he would be deprived of advantages of having the contentious matters litigated in HK instead of in the US ? Miss Au Yeung submitted that in terms of advantages, the Wife had shown that the parties would benefit from savings of costs and expenses should the matters be dealt with in the US. Further, it would be more likely that the matters could be disposed of more expeditiously in Maine as the Maine Court had already kept the matter on track by having fixed a pre-trial conference scheduled in the beginning of June 2007.
78. The amount of costs and expenses to be incurred is closely connected with the time it requires to resolve the disputes by the respective forums. In order to estimate the length of time a court requires to bring the proceeding to a conclusion, I need to consider the respective stages the proceedings have reached in the two jurisdictions.
79. According to the chronology of the respective proceedings having been issued in the two jurisdictions, it is shown that the Wife only on 20th June 2006 commenced a fresh divorce suit in Maine, which is almost two years after the HK court granted the Decree Nisi and made the 1st HK Custody Order.
80. Preceding to the US Divorce Petition, the Wife already obtained the April 2006 Protection Order restraining the Husband from having contact with the Wife and the children. Subsequent to the US Divorce Petition, the Wife further obtained from the Maine Court the US Freezing Order in respect of the 401K Funds and an interim Child Support Order against the Husband. As admitted by the Wife, a divorce suit was required for the purpose of obtaining the existing relief she had sought. Hence, the US Divorce Petition was clearly not instituted for a dominant purpose of resolving the issues on marriage and related custody

matters, it was predominately for, in my view, partly enforcing and partly varying the parties agreement in the Consent Summons. If examples are needed, the US Freezing Order as well as the Child Support Order made by the Maine Court are more for the purpose of enforcement of the terms of the Consent Summons while the April 2006 Protection Order, for the variation of the access order made by the 1st HK Custody Order and the terms of the Consent Summons in relation to the Husband s unrestricted reasonable access

81. In view of the matters foregoing, I conclude that Miss Au Yeung s submissions that the US proceedings were already spearing ahead expeditiously with the proceedings are at best only a bare assertion. At worst, the US proceedings may become protracted as all the orders having been made by the Maine Court sofar appear to be interim for the purpose of keeping the status quo. However, it is not clear when the Maine Court can deal with substantive issues such as jurisdiction disputes, the Wife s sexual abuse allegations as well as the final financial matters.
82. When compared to the US proceedings, the HK proceedings are only one step away from having the proceedings finalised by approving the Amended Consent Summons to make the terms into the order of the court. However, before consideration be given to the endorsement of the Consent Summons, this court of course needs to grapple with the possible application for withdrawal of the Consent Summons, which application if opposed may require a consideration of the parties financial matters afresh. There is a further problem with the Wife s allegation of sexual abuse against the Husband. As the suit has commenced in HK and the parties have so far made substantial financial disclosures, once the international social welfare report and the independent psychological report are made available, the HK Court should be able to proceed at a much faster pace in disposing of whatever issues that need to be resolved be it financial or access.
83. Thus analysed, I do not see any cogent evidence showing that the Maine Court, compared to the HK court, is better placed to deal with the current disputes, a fortiori, that it can resolve the matter more expeditiously than the latter.
84. The assessment of the possible advantages is further hampered by the complete lack of evidence of the amount of costs the parties are expected to incur to litigate the issues in the US should the proceedings in HK be stayed. It is noted that the Wife had engaged legal representation in both the US and HK proceedings whilst the Husband only had legal representation in HK at a late stage in August 2006. Further, the Husband has now been granted legal aid. Were the HK proceedings be stayed in favour of the US forum, the Husband will definitely lose the advantage of legal aid.
85. To address the disadvantage resulting from the loss of the Husband s legal aid, Miss Au Yeung in her Reply submissions stated that the there were services called Volunteer Lawyers Project in Maine, which could be available to assist the Husband in the US.

86. This scanty information is simply unhelpful. Firstly, there is no evidence as to the type and extent of legal assistance that can be available to the Husband. The information was simply an addendum provided in the course of counsel s submissions and I am of the view that I should attach weight to it. Secondly, as a saying goes, a bird in the hand is worth two in the bush : the Husband has already been granted legal aid in HK, were the HK proceedings be stayed, the Husband would certainly lose his right to legal aid whilst in the US, his chance of getting legal assistance is far from certain.
87. Further, sofaras expenses are concerned, owing to the present living arrangement, whether the proceedings are to continue in HK or in the US, it would still involve either the Wife coming to Hong Kong for the hearing or the Husband going to Maine for the US hearing. There is therefore no real savings of expenses in the family pot.
88. On the other hand, the Wife has all along been able to retain legal representation for the HK proceedings. She has not been shown to be disadvantaged by having the proceedings conducted in HK.
89. In the circumstances, I find that the Husband has shown that there is real, not just fanciful, disadvantage were the HK proceedings be stayed in favour of the Maine Court. Which forum will better serve interests of all parties and achieve justice ?
90. The Wife has chosen to commence proceedings in HK with a full knowledge that she and the children would relocate to US. Further, according to the various attendance notes of Miss Liu (exhibit MEM
- 23) of Haldanes exhibited by the Husband in his 4th Affidavit dated 9th February 2007, it is shown that before the August 2006 hearing in HK, Miss Liu had had expressly asked Miss Ku of HWG whether the Wife would consider proceeding the matters in the US rather than in HK. Miss Ku informed Miss Liu that the Wife had preferred to conduct the proceedings in HK.
91. Hence, it was with this mutual understanding that the parties had decided to pursue all the matters in HK that led to the parties seeking directions from Deputy Judge Woo at the hearing on 14th August 2006, which directions included calling for an international social welfare report and an independent psychological report.
92. Further, acting on the directions given by Woo s August Order, the parties had continued to incur legal costs in pursuing the proceedings in HK by the Husband filing a financial statement, two affidavits, one questionnaire, and the Wife filing three affidavits and one questionnaire. Shortly after the Husband changed his legal- aid assigned solicitors from Haldanes to his present solicitors, Stephen Wong, the Stay Application was issued. There is no explanation from the Wife for the late application.

93. The above discussion shows that the Wife- with the benefit of legal advice- clearly had had an opportunity to consider the choice of forum and yet had decided to litigate the matter in HK until a rather late stage. Costs and expenses have been unnecessarily incurred as a result of the Wife's delay. She however made no offer of paying for the Husband's wasted costs as a result of her sudden U-turn. In view of the delay caused by the Wife, it would not be fair in my view for this court to grant a stay.
94. Further, there is still the Consent Summons being left at large. Now that the Wife has partially put the terms of the Consent Summons into effect by disposing some of the subject assets in the Consent Summons. Thus the terms of the Consent Summons and the events subsequent would be relevant when considering any application for withdrawal of the Consent Summons, and ultimately the financial disputes of the parties. Thus, it would not, in my view, serve the interests of the parties by granting a stay.
95. The Husband's perception of bias of the expert recommended by the Wife was already highlighted above. It would therefore be more desirable and in fact extremely important that to have independent experts and professionals directed by the HK court to deal with the serious sexual abuse allegation. As discussed, HK is equally suitable if not more suitable than the Maine Court to deal with the said issue.
96. All in all, having considered all the evidence carefully, I conclude that the benefits of maintaining the continuity of the HK proceedings will outweigh any inconvenience that may cause to the Wife by refusing a stay. Costs
97. As the Husband can be regarded as the winning party, I do not see any reason why costs should not follow the event. I therefore make a costs order nisi that the Wife should pay for the costs of the Stay Application, including all costs previously reserved, with certificate for counsel, to be taxed if not agreed. The Husband's own costs are to be taxed in accordance with the Legal Aid Regulations. Unless an application to vary the same is made within 14 days from the date of the handing down of the Reasons, the costs order nisi would be made absolute. ( K. Levy ) Deputy District Judge Ms Au-Yeung, instructed by Messrs Hampton, Winter & Glynn for the Petitioner Mr Surman, instructed by Messrs Stevenson, Wong & Co for the Respondent PAGE - PAGE - pcUcUcUcUcU &`#\$~!P] j% Td ,f@- sy \$ he~"Td c(#\$ 0kJ\$\$ @P\$\$ 1 #':L- E{k' XW(\$ s `( )H/0 -3\*\$ 43\*\$ c7\*+ :p . ;ef1 {^2\ (\$p2\$ 4g3\$ 4QQ4 4lp4 0b50p M|;\$ wzO?p= H#@ \$ 3i@ \$ nSDH lEFE 5)GTd kxL\$ /eNH S\$O\$ vuWOTd c;R\$ Y CR G%9UT RW!W C:~W x% X\$ x8Y\$ L}YH (Yq[ \*n\T #b2^ \$ Q^f Y6xc\$ e>tD ?Dep= ZJg\$ hx;r N)/h vCip= T{sk TCn\ "hsTd gsTu\$ 4xv\$ xDs\ \*y\$ Yay~\_ \_\_z4w {H@.J | >\$> C? } R\$ ~\$ f!\$- C:~W N)/h E{k' 4QQ4 lEFE C? } wzO? gsTu x% X (\$p2 0kJ\$ #b2^ Y6xc R\$ ~ he~" G%9U (Yq[ :p . s `( vuWO c7\*+ Y CR T{sk 1 #' RW!W ;ef1 @\\Hc-oa-ws-656\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \\Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT )Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT )Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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