

HONG KONG / JUDGMENT

LS v. AD

COURT

Family Court

DECIDED

5 October 2012

CASE / FILE NUMBER

FCMC34/2012

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bjbj FCMC 34/2012 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES SUIT NO. 34 OF 2012

BETWEEN LS Petitioner and AD Respondent

Before : HH Judge Bruno Chan in Chambers Date of Hearing : 18 September 2012 Date of
Judgment : 5 October 2012

J U D G M E N T

(Stay of Proceeding : forum non conveniens) The Petitioner (Wife), a 38 years old housewife now residing with her 2 children in Beijing, issued a petition for divorce on 3rd January 2012 under these proceedings against the Respondent (Husband) on the ground of his unreasonable behaviour, and also prayed for custody care and control of their said children as well as general ancillary relief for herself and the children. In her petition the Wife invoked jurisdiction of this court to deal with her divorce proceedings on the basis that the Husband, now aged 52 and the chairman of a company listed in the Hong Kong Stock Exchange, was habitually resident in Hong Kong throughout the period of 3 years immediately preceding the date of her petition, or that he had a substantial connection with Hong Kong at the date of the petition under section 3(b) or (c) of Matrimonial Causes Ordinance, Cap. 179. Allegedly unaware of the Wife's petition, the Husband commenced his own divorce proceedings in Beijing about a week later on 10th January 2012 under Case Number 04342 of 2012, and similarly sought custody of their 2 children and general ancillary relief. On 12th February 2012 the Husband issued a summons in these proceedings for an order that the Wife's petition be stayed on the ground of forum non conveniens in favour of his divorce application in Beijing. At the initial hearing of that summons on 22nd February 2012, the parties agreed to undertake to the court not to proceed with either of

their divorce proceedings (without prejudice to any application in relation to the children) pending the determination of the said summons by this court, and upon the Husband undertaking to pay RMB120,000 per month for the interim maintenance of the children, and to directly pay for their school fees and other expenses, the hearing was then adjourned eventually to 18th September 2012 for argument, which is the matter now before me. Both parties have since filed several affirmations and submitted various legal opinions from their own experts on the relevant PRC laws, and were represented by senior counsel at the hearing, with Mr Johnny Mok SC and Mr Jeremy Chan appearing for the Husband, and Mr Horace Wang SC with Clark Wang for the Wife, but before embarking on the consideration of the parties respective case and evidence, it is important to first set out the relevant background.

Background

Both parties were born and raised in Beijing, where they also worked after leaving school, but the Husband subsequently emigrated to Canada in 1990 where he started a trading business importing various products from China for sale in Canada, and for which he had frequently travelled between the 2 countries over the years. His business had become highly successful and profitable, and after obtaining his Canadian citizenship in 1997, he returned to Beijing with about RMB500 million to explore further business opportunities. There he invested heavily in a petro-chemical business in which he eventually became a major shareholder and chairman, and later successfully listed it in the Hong Kong Stock Exchange. As a result he has been running the company in Hong Kong since about 2001, but it was in Beijing when he first met the Wife who was then working in the Foreign Affairs Department. They subsequently married on 19th March 2001 in Beijing, and it would be helpful to refer to the chronology of events during the marriage exhibited to the Husband's 1st affirmation of 17th February 2012 as AD1-4 (P 1 : 65-66), of which I understand there is no serious dispute from the Wife, as follows : Date Events 19/3/2001 Parties married in Beijing. 7/2001 Husband came to Hong Kong for work, using his Canadian passport. He applied for working visa. Soon after married and until 2002 Wife went to England for her Master Degree. 2002 Wife went back to PRC. 2003 Wife lived in Hong Kong with the Husband. 19/9/2004 Elder Child (a boy), born in Hong Kong, now aged 7. 11/2004 Wife moved back to Beijing with the elder child and stayed and lived there, except for a year between 05/2006 and 06/2007, when the elder child was staying in Hong Kong with the Husband. 15/10/2008 Younger child (a girl), born in Hong Kong, now aged 3. 12/2008 Wife took the younger child back to Beijing and have been staying and living there since then. 3/2009 Husband acquired Hong Kong permanent ID card. 26/3/2009 Husband cancelled his Chinese citizenship 3/1/2012 Wife issued Petition in Hong Kong. 10/1/2012 Husband issued divorce application in Beijing 17/1/2012 Wife's Summons for interim custody, care and control, leave for children to continue to stay in PRC. 19/1/2012 Service of the Hong Kong Petition on the Husband. 31/1/2012 Service of the Beijing divorce paper to the Wife by the Beijing Court. 2/2/2012 Husband's application in Beijing, with the first list of family assets, for assets division. 4/2/2012 Husband filed Form 4 indicating his intention to dispute the forum. 14/2/2012 Wife's application in Beijing to challenge the jurisdiction of Beijing Court on the divorce case. 20/2/2012 First hearing in Beijing. 26/3/2012 First

Appointment Hearing in Hong Kong. The relevant chronology of course does not end in March 2012, as the Husband's Beijing proceedings were initially rejected by the Beijing Court on 1st March 2012, and on 8th March 2012 he lodged an appeal against that decision. On 30th August 2012 his appeal was allowed by the Beijing Appellate Court which directed that his divorce application may proceed in Beijing, although it appears that the Wife intends to apply for a review or appeal against that order. The Application The basis of the Husband's application is mainly set out in his first 2 affirmations (P1 : 45, 285) which is essentially that the parties and children are closely connected to Beijing, that it is and has always been their home, that he does not own any property in Hong Kong where he only stays in a serviced apartment, that his only connection to Hong Kong is his business and that he has never regarded it as his permanent home, and that the laws and judicial process in Beijing make it a more appropriate forum for their case whether for the divorce, custody or financial matters. Before going into details of his case, it would however be relevant to first set out the applicable legal principles. The Applicable Principles The principles governing stay of a proceeding by reason of forum non conveniens have been well established by the House of Lords in the cases of *The Abidin Daver* [1984] AC 398, *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] AC 460, and *de Dampierre v de Dampierre* [1988] AC 92, which have been applied by our Court of Appeal in *The Adhiguna Meranti* [1987] HKLR 904 and *Louvet v Louvet and Another* [1990] 1 HKLR 670, and more recently in *DGC v SLCneeC*, CACV 37/2005 [2005] when Cheung JA summarised them as follows :

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 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. In a more recent case where the above principles were applied in the matrimonial context, *SA v SPH* [2011] 6 HKC 413, in which the husband applied for a stay of the wife's divorce proceedings in Hong Kong in favour of Germany, and where the case on juridical disadvantage to her hinged on 2 nuptial agreements relied on by the husband, Poon J elaborated further in the 3-stage inquiry which the court should make in order to answer that single question referred to above at para 31 on p423 A E when he

stated : 31. In answering the question, the court embarks on a three-stage inquiry : Is it shown that Hong Kong is not only not the natural or appropriate forum for the trial, but that there is another available forum which is clearly or distinctly more appropriate than Hong Kong? Appropriate and natural forum means the forum with which the action has the most real and substantial connection. Connecting factors include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transactions, and the place where the parties respectively reside or carry on business. The evidential burden here is on the applicant. Failure by the applicant at this stage is normally fatal. If the answer to (1) is yes, will a trial at this other forum deprive the plaintiff of any legitimate personal or juridical advantage? The evidential burden here lies upon the plaintiff. If the answer to (2) is yes, the court has to balance the advantages of (1) against the disadvantages of (2). Deprivation of one or more personal or juridical advantages will not necessarily be fatal to the applicant provided that the court is satisfied that substantial justice will be done in the available forum. The applicant bears this ultimate burden of persuasion. He needs to establish that on balance the other forum is more suitable for the interests of all the parties and the ends of justice. Poon J then alluded to three additional points :

33. First, the connecting factors relevant to stage 1 as to the appropriateness of the rival forum may equally have significance as juridical advantages at stage 2 as well : *de Dampierre*, supra, per Lord Goff at p 109A-D and *Louvet*, supra, per Hunter JA at pp 678H-679E.
34. Second, typical examples relied on by a plaintiff as juridical advantages include damages awarded on a higher scale, a more complete procedure of discovery, a power to award interest or a more generous limitation period. As a general rule, the court should not be deterred from granting a stay simply because the plaintiff will be deprived of such an advantage provided that the court is satisfied that substantial justice will be done in the available appropriate forum : *Spiliada*, per Lord Goff at p 482E-F. That said, the underlying principle requires that regard must be had to the interests of all parties and the ends of justice. These considerations may well lead to different conclusions in different cases : *Spiliada*, per Lord Goff at p 483C. So ultimately, much depends on the actual circumstances of the case.
35. Third, stage 3 is the most delicate and difficult aspect of the inquiry because it involves balancing the interests of justice in the broadest sense of that word. The task is most difficult because a juridical advantage to a party almost inevitably results in a disadvantage to the other. When looking at the advantage to the plaintiff, the court does not measure it by the standards of the plaintiff's forum, for example, Hong Kong. The court applies the more international concept of justice to both parties. See *Louvet*, supra, per Hunter JA at pp 676H-J. Hunter JA went on to explain at pp 677A-G : In the matrimonial context I do not think it is difficult to see why. It is, I believe, notorious that most contested matrimonial suits come down to arguments on custody or maintenance or both. It is inevitable that the advantage say to the wife petitioner produces an identical corresponding disadvantage to the husband

respondent. If measured solely by the local standards of different tribunals, justice to one must equal injustice to the other. de Dampierre, and indeed this case has, I think, shown that the French law of maintenance is by the standards of the UK and of Hong Kong 20 or 30 years out of date. Fault still plays a potentially significant role, and a finding of sole fault against a wife, produces what used to be called in earlier days a compassionate allowance. Years ago this was recognised as unjust or unfair to the wives in the UK and in Hong Kong, and was rejected. It is therefore pertinent to ask upon what basis did the House of Lords compel a wife to submit to a regime which by UK domestic standards alone was apparently unjust. The answer, I believe, is that the Lords faced the problem which had been most succinctly put by Oliver LJ in *Spiliada* in the Court of Appeal [1985] 2 Lloyds Rep 116 at p.135 : The difficulty that I felt about this initially was that what is one man's advantage must be another's disadvantage. If one is to look at it as a matter of abstract justice why should a defendant who has a juridical advantage in the jurisdiction in which he ought, *prima facie*, to be sued, be brought into a jurisdiction where he ought not, *prima facie*, to be sued, simply because that jurisdiction deprives him of that advantage and confers a corresponding advantage on his opponent? It is, I think, significant that Oliver LJ was saying that the problem only arose when the defendant was taken out of what was *prima facie* the appropriate jurisdiction. If he was, it is quite plain that you cannot judge by the standards of the individual jurisdictions because you reach a headlong conflict. There is no half-way house. You have to recognize that there is going to be one loser and one winner in the result. The court has accordingly to resort to wider considerations, to perhaps a supra-national standpoint, and try to determine in each case which is the fairer jurisdiction to the parties collectively or, perhaps putting it more brutally, which overall produces the least unjust result. That I believe is basically the *de Dampierre* test. With the above principles in mind, I shall now start the first stage of the enquiry : whether the Husband has discharged his burden to demonstrate that Hong Kong is not the natural or appropriate forum, and that there is another forum in Beijing which is clearly or distinctly more appropriate, the failure of which is, as stated above, normally fatal to his application. The More Appropriate Forum There is no question in my mind that there are factors that connect the case to Beijing, after all, it has been the home of the Wife and the 2 children since late 2004, except for a year between 2005/2006 and for a short period in 2008 for the birth of the younger child in Hong Kong. Naturally both children have since been attending school in Beijing, and it seems that the Wife intends to continue to live there in the near future, where she owns several major properties (some jointly with the Husband) including her present residence and other substantial assets, as well as close family ties and place of origin in the city. Similarly, it is also where the Husband has still maintained close ties and connection in terms of both family and business notwithstanding his move to Hong Kong, that he still regularly spends about 2/3 of his time each year in Beijing, and that given the latest decision of the Beijing Appellate Court, his choice of forum for dissolving his marriage with the Wife has now been allowed to proceed there. There is therefore no question in my mind that Beijing would be an available or appropriate forum, but the same can also be said about Hong Kong by reasons of those connecting factors set out in paragraphs 22-45 of Mr Wang's skeleton

submission, mainly that the Husband leads his life and business in Hong Kong, that the major assets of the family, of which the Wife believes to be in excess of HK\$5 billion, are located here, that the children were born in Hong Kong and all 4 members of the family are Hong Kong permanent residents, that the Wife has issued her proceedings in Hong Kong as of right, and that it would be more convenient of Hong Kong court to deal with cases of international dimension such as the present one. The question henceforth to be answered by the Husband must then be this : What makes Beijing, according to him and in the context of those competing factors, clearly or distinctly a more appropriate forum for the parties divorce proceedings than Hong Kong? His answer lies in the skeleton submission of his senior counsel Mr Mok that Hong Kong is in fact not an appropriate forum for the parties divorce suit to proceed due to the fundamental jurisprudential difference between divorce under Hong Kong law and Mainland PRC law, and therefore by implication and/or comparison Beijing is clearly or distinctly the more appropriate if not the only available forum, as the Wife's current petition for divorce is fault-based, i.e. upon findings of fault on the part of the Husband but he is unable to accept that any breakdown of relationship was caused by unreasonable behaviour on his part, hence if the Wife's petition is allowed to proceed, he will definitely oppose it, and a trial will ensue. A trial of that petition in Hong Kong, Mr Mok submits, is likely to be expensive and prolonged, and is extremely inconvenient, having regard to the numerous allegations made in the petition, and the large number of witnesses, of which the Husband has identified 38 on his side, that need to be called by both parties, but since many of these witnesses are based in Beijing, there may well be all sorts of travel or visa problems to arrange for them to come to Hong Kong for the trial to further inconvenience the Hong Kong proceedings. On the other hand, Mr Mok argues, a divorce in Mainland PRC will be achieved without resorting to any attribution of fault, and that it will be granted simply upon the breakdown of the marriage, hence there will not be any trial or any witness to be called if his petition is to proceed in Beijing, and all the Wife will need to do before the Beijing Court is to concede that the marriage has indeed broken down, which is exactly what she has pleaded in her Hong Kong petition. Mr Mok further submits that he sees no reason why the Wife would not agree to a no-fault divorce in Beijing, and that she has no right to insist on a divorce based on fault in Hong Kong, relying on what Le Pichon JA had said in the appeal of *Premisingh v Kishinani* CACV 845/2000 at para 27 : It must unquestionably be in the parties best interests to achieve a divorce through the no fault provision rather than bitterly contested proceedings. Where the common goal of the parties (i.e. the dissolution of the marriage) can be attained swiftly and without the unavoidable expense, aggravation and emotional toll that come with a contested divorce, there is every reason for the court to encourage the parties to pursue that alternative. That view in fact echoes what Ormrod LJ said in the English Court of Appeal in an earlier case of *Grenfell v Grenfell* [1978] CA, Fam 128, 1 ALL ER 561 : There is no point, as I see it, in a case like this in conducting an enquiry into behaviour merely to satisfy feelings, however genuinely and sincerely held by one or other of the parties. To do so would be a waste of time of the court and, in any event, would be running, as I think, counter to the general policy or philosophy of the divorce legislation as it stands today. The purpose of Parliament

was to ensure that where a marriage has irretrievably broken down, it shall be dissolved as quickly and as painlessly as possible under the Act, and attempts to recriminate in the manner in which the wife in this case appears to wish to do so should be, in my judgment, firmly discouraged. It is further submitted on behalf of the Husband that even if there is to be a divorce in Hong Kong, the parties will still remain married as a matter of Mainland PRC law, under which the marriage was entered into in the first place, unless such time when it is dissolved by a PRC court, which means that the parties will eventually have to do the same thing again in Beijing, but until then there will remain the hiatus of suspended or unknown status in between the two court orders, leading to a wholly undesirable *lis alibi pendens* situation multiplicity of litigation and proceedings in multiple different jurisdiction that may result in a limping marriage, something which the statutory provisions and the case-law strive to avoid where possible. With that in mind, Mr Mok argues that the highly relevant factor of risk of inconsistent judgments also comes into play, and with parallel proceedings in the matrimonial context, the risk of inconsistent judgment becomes multi-fold as after divorce there will follow the questions of custody, care and control and access rights, as well as ancillary relief and maintenance not just between the spouses but also for their 2 children, which may lead to the impossible situation of the Hong Kong court and the Beijing court coming to different conclusions, something which he says has also been alluded to by the Wife in one of her affirmations. Parallel proceedings however may not be a relevant factor to be considered, as pointed out by Mr Wang for the Wife that the plaintiff is entitled to choose the forum he has found as of right in which he prefers to litigate the matter, or be sufficient to stay the appropriate forum, according to *Abidin Daver supra*, and followed by *Pei Zheng Middle School v China Pui Ching Education Foundation Ltd* (unreported) CACV 262/2005 where Cheung JA stated at para 25 : But even if these are to be treated as parallel proceedings, this factor will not be sufficient to stay the Hong Kong proceedings if Hong Kong is in fact the appropriate forum They may of course be relevant under some circumstances, as stated by the House of Lords in *de Dampierre supra*, at p108 : However, the existence of such proceedings may, depending on the circumstances, be relevant to the inquiry. Sometimes they may be of no relevance at all, for example, if one party has commenced the proceedings for the purpose of demonstrating the existence of a competing jurisdiction, or the proceedings have not passed beyond the stage of the initiating process. But if, for example, genuine proceedings have been started and have not merely been started but have developed to the stage where they have had some impact is likely to have a continuing effect upon the dispute between the parties, especially if such impact is likely to have a continuing effect, then this may be a relevant factor to be taken into account when considering whether the foreign jurisdiction provides the appropriate forum for the resolution of the dispute between the parties. This is however not the case with the proceedings before the Beijing Court which is, as pointed out by Mr Wang for the Wife, only in its initial stage and certainly not one where there is any material impact yet on the disputes between the parties. Even if a set of parallel proceedings abroad is relevant by the standard of *de Dampierre*, Mr Wang submits that it is rarely a material factor, as observed by Liu JA in *Nan Tung Bank Ltd, Zhu Hai v Wangfoong Transportation Ltd* [1999] 2 HKC 606 at

610 : It is agreed on all hands that after *The Abidin Daver* [1984] 1 AC 398, a multiplicity of proceedings is not of itself a material factor in an application made on the ground of forum non conveniens but there might be exceptional cases where the bringing of the second action while the foreign action was proceeding, might cause an unusual hardship to a particular defendant . At 409B, Lord Diplock observed : As a general rule, the fact that to permit the (home) action to be pursued would result in concurrent actions on the same subject matter proceeding in two different jurisdictions could not be sufficient to justify depriving the plaintiff of the advantage to which he was entitled to choose it as a forum in which he preferred to litigate the matter.(emphasis supplied) I agree with Mr Wang that the mere existence of the Beijing proceedings would not be sufficient to stay the Wife s divorce in Hong Kong. It is certainly within the rights of the Husband not to accept that divorce based on alleged faults on his part, set out in 14 paragraphs within her petition, and he is certainly entitled to strenuously defend it in Hong Kong, of which he has already made very clear at the very beginning, and has since remained firmly of such intention, but this unacceptable ground of divorce with all those consequential problems and inconvenience associated with a trial alluded to above can and will be absolutely and entirely obviated if the Wife is to change her petition from fault-based to no-fault based on the parties separation, which she has proposed in her solicitor s affirmation of 12th September 2012, and confirmed by her senior counsel at the hearing that she will do so by the end of this year when the parties will have lived apart for 1 year. In other words, she is going to do exactly what the Husband has suggested in accordance with the propositions referred to above in *Primisingh* and in *Grenfell*, i.e. to achieve what is clearly the common goal of the parties : A no-fault divorce to be obtained within a relatively short time swiftly and without unavoidable expenses, aggravation and emotional toll , and which Mr Wang for the Wife says may even be quicker than in Beijing. It is because, as submitted by him, that not only is the Beijing proceedings still in its infancy, but according to the PRC laws may have to be adjourned for 6 months for mediation in the absence of agreement on all matters between the parties, whereas in Hong Kong the Wife would be able to obtain a no-fault divorce based on separation by the latest in early 2013, with the questions of custody and ancillary relief to follow immediately thereafter, which brings me to the next point raised by Mr Mok in favour of Beijing as a forum when it comes to consider the future arrangements of the children . He submits that if the Hong Kong proceedings are stayed, the Beijing proceedings will continue, and once a divorce is effective under PRC laws, it is entitled to immediate automatic recognition under Hong Kong law as well under Part IX of the Matrimonial Causes Ordinance, Cap 179 where Section 56(1) provides that : The validity of an overseas divorce or legal separation shall be recognized if, at the date of the institution of the proceedings in the place in which it was obtained

- (a) either spouse was habitually resident in that place; or

- (b) either spouse was a national of that place. Hence with the Beijing proceedings being proceeded and with the Hong Kong proceedings stayed, Mr Mok submits, it follows that all other matters concerning the children and ancillary relief will also be provided for in Beijing, which is only sensible given that the Wife and the children are all domiciled in and reside there, and intend to continue to do so, and where any order concerning them are enforceable. This is particularly so where the children are concerned, he submits, as they grow up in Beijing and live a Beijing life and hence matters such as their living arrangements, schooling as well as maintenance must be assessed or measured against their Beijing background and standard of living, while any Hong Kong Social Investigation Report will hardly be as relevant or informative. In support he cited the English case of *D v F* (forum conveniens) [1998] 3 FCR 403, which concerned a Dutch husband and an Italian wife who lived most of her life in Italy and was then living in Italy with 2 children, the following facts of importance was noted by the trial judge : The Wife is Italian. She and the children live and will live in Italy The Wife has no connection whatsoever with England. The Husband's connection with this jurisdiction arose out of his contract with his employer which has now ended. It is unlikely that they will return to live or work here it is obvious that the issues relating to these Italian children should be dealt with in Italy Also cited was the case of *C v L* [2004] 2 HKLRD 1 which came before me earlier on the wife's application to stay the husband's divorce proceedings in which I made the following observation : I believe it would be more practical and convenient for the Court in Singapore to deal with the parties divorce there than in Hong Kong. It is clear from the evidence that the Wife and the children have already settled in Singapore. As the children are still relatively small with the youngest only at the age of 4, it would obviously be much more difficult or even impossible for the Wife to leave them behind in Singapore to attend to various hearings in Hong Kong in particular where custody and ancillary relief matters would be in serious dispute. It should also make sense for the issue of custody and/or access to be investigated by the authorities such as Social Welfare Department in Singapore where the children live and attend school than in Hong Kong. By comparison, it would be much less inconvenient for the Husband to travel by himself to Singapore for the proceedings there, or to instruct a lawyer to represent him in those proceedings. There is no question in my mind that the children, and for that matter the Wife as well, are much more connected to Beijing than Hong Kong, and that if their custody indeed becomes an issue, it would appear more convenient for that matter to be dealt with in Beijing, although as pointed out by Mr Wang for the Wife, Hong Kong courts routinely obtain International Social Welfare Investigation Reports for assistance, and hence the children in this case will not have to travel to Hong Kong for that purpose, nor will their life in Beijing be unnecessarily disturbed or interrupted. I however have serious doubt that in reality custody will indeed become a real or major issue between the parties. While both did ask for sole custody care and control of the children in their respective divorce petition, realistically I am unable to see how the Husband would be able to make out a convincing case other than perhaps for joint custody and/or generous or defined access instead of turning it into full-blown battle for care and control in view of the undisputable facts that the Wife has always been the primary carer of the children, now only 4 and 8 living in

Beijing while he is a chairman of a listed company in Hong Kong no doubt committed to running its business here, and has in fact admitted to be unable to take care of the children full time (P1 : 307 2nd Aff 71). I indeed find this children factor grossly overstated in the Husband's case for the Beijing forum. The real and major issue between the parties, I am convinced, lies in their ancillary relief disputes in particularly over the extent and identification of and eventual distribution of marital assets that brings into consideration the different system and approach between the 2 jurisdictions that would ultimately answer the question of which is the more appropriate forum. There is no question that the parties' assets are very substantial but there are clearly serious issues over their extents, location and valuation. In his Beijing application the Husband listed 4 properties in Beijing all held under the Wife's name without stating their value, 1 vehicle held by each party with total value at \$3.7 million, certain jewellery held by the Wife with total value at \$21.59 million, cash held by the Wife at \$7 million, and 21.8 million shares in the said listed company held by him estimated at about \$29 million, making a grand total of just over \$90 million without taking into account of those 4 properties referred to above (P1 : 74). This is however only the 1st list of assets according to the Husband, as he also stated in his Beijing application that there are many more assets amassed by the parties during their 10 years of marriage to be disclosed later after a second and third inventory have been undertaken by the parties (P1 : 73). That was the Husband's estimation then. The Wife has of course put it much higher, and it would be helpful to refer to the skeleton submission of Mr Wang at paragraph 27 to get a taste of what sort of figures she is suggesting for the Husband's assets : There are presently sufficient undisputed evidence to show the Husband has very substantial assets both identified and unidentified in Hong Kong : The Husband acquired what later became (the listed company) using a substantial part of RMB 500 million (Husband 2nd Aff 9, 10 [P1/287,288]); According to the estimation of the Wife and public information, the Husband holds around 74.12% shares of (the listed company), which are worth about HKD400 million (Wife 4th Aff 34 [P3/724]; LS-15 [P1/252,253]); The Husband holds a bank account with UBS in Hong Kong which had a balance of USD94,593,275.85 as of 2 June 2008 (LS-19 [P3/764-785]); The Husband holds a bank account with Standard Chartered Bank (Hong Kong) Ltd. in Hong Kong through a company named Ever Tip Company Ltd. And this account had a balance of at least HKD 130 million in January 2008 (Wife 4th Aff 35 [P3/724]; LS-18 [P3/761-763]); The Husband should have other Hong Kong or overseas bank accounts the details of which are unknown to the Wife (Wife 4th Aff 38 [P3/725]); The Husband personally told the Wife over the phone that he had total assets in the region of HKD 5 billion (Wife 2nd Aff 12 [P1/110]; Husband 2nd Aff 73 [P1/308]; Wife 4th Aff 38 [P3/725]); A Bentley car (Husband 2nd Aff 79 [P1/310]); It was the intention of the Husband to transfer the majority of his assets away from PRC after 2008 (Wife 4th Aff 35, 42 [P3/724, 726]); The assets of the Husband in Hong Kong are potentially liable to execution for a judgment debt of over \$500 million under HCA 996/2010 (see *Pony Hong Kong World Ltd v Vand Petro Chemicals (BVI) Co Ltd and Anor*, HCA 996/2010, unreported, 30 November 2011). Even ignoring the allegation that the Husband had admitted to have assets worth \$5 billion under (6) above, of which he has denied (P1 : 308 73), it is clear that the remaining assets together with those properties in

Beijing are still very substantial by any standard, and may still make him a billionaire. More importantly, Mr Wang submits, while the assets in Beijing are relatively simple and can easily be identified, those in Hong Kong involve mainly shares in both BVI and Hong Kong companies, securities and other financial devices and investments, as well as potential debts which are much more fluid and hence easily disposed or transferred out of the jurisdiction, all of which may require complicated investigation, auditing, valuation, fluctuation and litigation. Given what the Wife believes to be so far very limited disclosure by the Husband of assets which she says dwarfed by the size of those assets in Hong Kong, Mr Wang submits that there are good reasons to believe such complicated discovery process and tracing exercise will indeed be necessary, as he cited the following examples in para 31 of his submission of the Husband's behaviour as evidence of attempts to conceal or mislead his true assets situation : His failure to produce any details of his bank accounts in Hong Kong notwithstanding evidence from the Wife of very substantial transactions in 2 of them referred to above; He deliberately declared in his 1st list of assets only a small fraction of his shareholding in his company held in his personal name only, omitting the majority held by 2 BVI companies controlled by him (P1 : 252 LS 15); His deliberate denial of having any significant financial transactions in Hong Kong evidenced in the IPC Judgment at pp 4-5; His attempt to renege on what he had told the Wife about his assets being worth \$5 billion in his 2nd Affirmation with such an incredible explanation : I do not have assets over HK\$5,000,000,000 as alleged by the Petitioner. I believe this figure came from one of the conversations that I had with the Petitioner in or about December 2011 when I asked her over the phone I was out for a drink with my colleagues and friends at that time and I was a bit drunk if I had HK\$5,000,000,000 whether she would still want a divorce (P1 : 308 73). Whether or not the Husband is guilty as alleged, and he has categorically denied each and every one of them, given the amount of the assets involved and the unyielding stance taken by both sides, there is no doubt in my mind, as I have already noted above, that the ancillary relief dispute between the parties is where the battle line is going to be drawn, and it is where the significant differences between the 2 systems for such a dispute that should in my judgment ultimately determine the issue before me : Which is the more appropriate forum to deal with the parties ancillary relief application. According to the legal opinions obtained by the Wife from her PRC experts (P3 : 805 810, 955), whilst the Beijing Court has jurisdiction covering all assets wherever located including those in Hong Kong, and that PRC laws normally provide for such marital assets to be shared equally between divorcing couples, there is however no proper system or regulations for discovery or collection of evidence, hence the Beijing Court will have great difficulties, Mr Wang submits, tracing and unearthing the assets of the Husband in particularly those in Hong Kong which constitutes the majority but which he argues will require extensive investigation and discovery exercises to ascertain their extent and value. Whereas there cannot be any argument that Hong Kong, as submitted by Mr Wang, has a comprehensive system of discovery including general discovery, specific discovery, interrogatories, subpoenas, anton pillar orders, etc to ensure that relevant evidence and information may be revealed. This difference between discovery procedures in Mainland and Hong Kong was first noted by Deputy Judge Au, as he

then was, in *Botanic Limited v China National United Oil Corporation*, HCA 1852/2005 (unreported), where he summarised at para 80 as follows : From the PRC law expert evidence adduced by both parties, it is common ground that the major difference between the discovery procedure in Hong Kong and the civil procedure gathering procedure in the Mainland can be described as follows : Under the Hong Kong discovery, the parties are obliged to even discover documents which are detrimental or unfavourable to them. On the other hand, under PRC procedure, a party is initially only required to discover documents which it wants to rely on to support its case. He went on to conclude at para 113 that : In the circumstances, I accept that the deprivation of the compulsory and comprehensive discovery and the procedure for the administration of interrogatories would constitute a prejudice to the Plaintiff in obtaining relevant evidence to advance their claim. I therefore further accept that the lack of these procedures under the PRC legal system would result in real risk that the Plaintiffs may not be able to obtain substantial justice if the matter is to be tried in the Shenzhen Court instead of here. Similar observation was made by Deputy Judge To, as he then was, in another case where the discovery process of the 2 jurisdictions was again called into consideration, in *Shenzhen Futaihong Precision Industry Co Ltd & Anor v BYD Co Ltd & Ors*, HCA 2114/2007 (unreported), and where he found that in Beijing inferior : Inferior discovery procedure

95. The discovery process in the PRC is very much different from that in Hong Kong. In the PRC, there is no concept of voluntary discovery of documents which are relevant to the controversy in dispute. It is evident from the Defendant's PRC lawyers that the attitude of PRC lawyers towards discovery is to disclose only documents favourable to their own client's case. Not unless a party has knowledge of the existence of a document in the possession of the other party can he seek discovery. This is very much different from Hong Kong, where under the Peruvian test, discovery would include documents not immediately relevant to the issues but would reasonably lead to a chain of enquiry to documents which are relevant to an issue. In Hong Kong, discovery is not limited to documents in the possession of the party as in the PRC, but also include documents within the power and control of the party. Further, although the Beijing courts have a procedure for investigation and collection of evidence or documents by the court, that is very different in nature from specific discovery in Hong Kong. Under the PRC discovery procedures, the process for such investigation and collection of evidence is largely in the hands of the judge and beyond the control of the parties. Very importantly, such process of investigation and collection of evidence will only be allowed by the Beijing court if the documents requested for will, as perceived by the judge, significantly affect the outcome of the litigation. That is a more stringent test than that under the test of relevance in specific discovery in Hong Kong.
96. Discovery is of particular importance for assessing damages and testing the defence of diplomatic intervention in this case. The Plaintiff has no knowledge if the Defendant has disposed of any of the Orimulsion oil and on what terms and had to rely on the good faith of the Defendant in disclosing its records. Faced with the attitude and practice of PRC lawyers in general and the inferior discovery procedure in the PRC, there is a real risk that the

Plaintiff will suffer a juridical disadvantage if the trial is to take place in the Beijing forum. Mr Wang therefore points out that for the Beijing Court to deal with the assets in its order in this case, it must be shown that they actually exist, but given the lack of or insufficient voluntary disclosure by the Husband, and the likelihood of the majority of them being located outside the Mainland, the Beijing Court is practically unable to exercise any power to request for the necessary evidence and information, which makes it all the more important that the Wife not be deprived of her right to the discovery process available in Hong Kong, without doubt a huge juridical advantage to her. The Husband does not, and cannot in my view, dispute the different discovery process between the 2 jurisdictions, but Mr Mok submits on his behalf that now that PRC laws can provide for delaying or re-opening of ancillary relief at a later date if more assets are discovered later on, and that any loophole as such in the Beijing proceedings may be plugged by the Wife relying on Part IIA of the Matrimonial Proceedings and Property Ordinance, Cap 192 to make a further application for financial relief if necessary in Hong Kong after the divorce in Beijing, hence he argues that in the unlikely event that Hong Kong Court's assistance is required for whatever reason, such recourse is available to the Wife, and he sees no reasons at all for illegitimately maintaining divorce proceedings in Hong Kong which he says are wholly unnecessary to empower the Hong Kong Court with jurisdiction to deal with such matters. While Part IIA was certainly enacted to cure situations such as those in *YL v ML* [2010] 13 HKCFAR 794, following the decision of the Court of Final Appeal that Hong Kong courts had no jurisdiction to deal with ancillary relief application after a party had obtained the divorce elsewhere, and in that case in Shenzhen, such an application under Part IIA cannot be made as of right as in the case of the divorce being obtained in Hong Kong where a mere compliance of certain simple procedural steps including setting out the relevant financial claims in the petition/joint application and filing certain relevant forms would suffice, but would instead be subject to the following specific provisions and conditions : 29AC. Leave of court required for application for financial relief No application for an order for financial relief may be made unless the leave of the court has been obtained in accordance with rules of court. The court must not grant leave unless it considers that there is substantial ground for the making of an application for an order for financial relief. The court may grant leave under this section despite the fact that an order has been made by a competent authority outside Hong Kong requiring the other party to the marriage to make any payment or transfer any property to, or for the benefit of, the applicant or a child of the family. Leave under this section may be granted subject to any conditions the court thinks fit. Furthermore, section 29AF imposes a duty on the court to decide whether Hong Kong is an appropriate venue for such application by having regard to matters which would otherwise not be necessary or relevant in an application for ancillary relief under section 7 of the same Ordinance after a divorce in Hong Kong as follows : Before making an order for financial relief, the court must consider whether in all the circumstances of the case it would be appropriate for the order to be made by a court in Hong Kong, and if the court is not satisfied that it would be appropriate, the court must dismiss the application. The court must in particular have regard to the following matters the connection that the parties to the

marriage have with Hong Kong; the connection that those parties have with the place where the marriage was dissolved or annulled or where they were legally separated; the connection that those parties have with any other place outside Hong Kong; any financial benefit that the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a place outside Hong Kong; if an order has been made by a competent authority outside Hong Kong requiring the other party to the marriage to make any payment or transfer any property to, or for the benefit of, the applicant or a child of the family the financial relief given by the orders; and the extent to which the order has been complied with or is likely to be complied with; any right that the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any place outside Hong Kong and, if the applicant has not exercised that right, the reason for that; the availability of any property in Hong Kong in respect of which an order for financial relief in favour of the applicant may be made; the extent to which any order for financial relief is likely to be enforceable; the length of time that has elapsed since the date of the divorce, annulment or legal separation. Accordingly the Wife would have to overcome not just one but two legal hurdles in her Part IIA application, first to seek leave of the court under s 29AC, and if leave is granted, to satisfy the court of those matters required under s 29AF, the burden of which no doubt is on her, quite possibly a heavy one, with no reason to expect any less strenuous resistance from the Husband then, notwithstanding his present proposition. Clearly in my view a serious juridical disadvantage to the Wife. Mr Wang has gone further to argue that the Wife would in fact suffer severe unfairness as a result due to the risk of the Husband hiding his assets and her inability to seek discovery prior to obtaining leave for the Part IIA application, unlike in normal ancillary relief applications when discovery almost always follows right after exchange of Financial Statement (Form E) by the parties. Mr Wang submits that without the discovery process in Hong Kong to enable an investigation to take off, i.e. an initial paper trail referred to in Shenzhen Futaihong supra that one can follow through and identify the further information and documents for further discovery and investigation, it would be impossible for the Wife to set up a case of injustice or hardship by demonstrating that assets had been hived off from the Beijing Court such as to make its financial order unjust, hence there will be no basis at all for her to apply for, and obtain, leave under Part IIA. Accordingly, Mr Wang submits that Part IIA cannot address the unfairness that is likely to result from the hiding of assets by the Husband and the inability of the Beijing Court to prevent that from happening, hence his reliance on SA v SPH is misplaced. While there is no evidence at this stage of any attempts by the Husband to hide or dispose of his assets from the Wife's financial claims, I can see why she has such concerns in view of his relatively limited disclosure of his assets so far in either proceedings, while his indication in his divorce application in Beijing that further disclosure would be forthcoming (P1 : 73) is mere cold comfort to the Wife, in particular when it has remained outstanding. I also agree with Mr Wang that SA v SPH can be distinguished in that the Pre-nuptial Agreement and Separation Agreement executed by the parties in Germany in that case was found to be such a major connecting factor that at the end the court was satisfied

that Germany was clearly and distinctly the more appropriate forum. In the present case I am unable to find that kind of factor of such importance or significance to connect Beijing as the preferred forum. Nor am I able to find any significant personal or juridical advantage that the Husband may have in the Beijing forum which he will be deprived in the Hong Kong forum other than savings on costs and expenses which is, as pointed out by Mr Wang, insignificant given his wealth and financial resources, now that a no-fault divorce can and will be obtained fairly quickly in Hong Kong, and for that matter by either party. In any event, as I have already alluded to above, whatever personal or juridical advantage the Husband may have in the Beijing forum is far outweighed by the fact that substantial justice would not be done by reason of the juridical disadvantages that the Wife will suffer in that forum.

Conclusion

For all the reasons discussed above, I am not satisfied that Beijing is clearly or distinctly the more appropriate forum for the parties divorce and the subsequent custody and ancillary relief matters. Even if I were, I am convinced that the Wife would as a result be deprived of such important juridical advantage in the discovery process otherwise available to her in Hong Kong, and that she would suffer such juridical disadvantages in her Part IIA application that substantial justice would not be done in the Beijing forum. In the circumstances the Husband s application for stay must fail, which is hereby dismissed, with a costs order nisi to be made absolute at the expiration of 14 days in favour of the Wife to be taxed if not agreed, with certificate for 2 counsel, to whom from both sides I am most grateful for their valuable assistance rendered to the court throughout the hearing. Bruno Chan (District Judge) District Judge Mr Horace Wang SC and Mr Clark Wang instructed by M/S W.K. To & Co. for the Petitioner. Mr Johnny Mok SC and Mr Jeremy Chan instructed by M/S Withers for the Respondent. PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk hS @ h)/H hB:~ h)/H gdB:~ gd+w gdB:~ h)/H hYz- hYz- hu=K hI+\ hT+4 kd0 kdV gdd+\ gdal gdc! |t|t h7hF hB:~ hd+\ hd+\ hd+\ hd+\ xsnin h7hF h7hF vjv[zupupkfkf gdB:~ gdKx gdp h,[L h]A h=uW h]A h,[L h=uW hB:~ h\$tB h[fO h\$tB hB:~ gd}X ~pkfkfk[kV[k[h[fO gdS @ hS @ hS @ hS @ hH hH hS @ hH gdy5 h=~ h3mK h=~ h=~ h3mK h3mK h=~ gdB:~ gd=~ gdy5 h=~ h3mK h3mK h3mK h=~ hSa7 hSa7 hSa7 hB:~ h}-& hSa7 hSa7 hSa7 hSa7 hSa7 hSa7 hSa7 hSa7 gdB:~ gdSa7 h\$5 hSa7 h}-& gdB:~ h,"(h[fO h[fO hB:~ h\$tB &`#\$ H I J K L M N O P Q R S T U V [Content\_Types].xml Iw}, \$yi} \_rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v )I`n 3Vq%`#q x}r :TZaG I u3 L+M2 e\O\* \$\*c? )6-r IqbJ#x ,AGm T[XF64 E)`# R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6? \$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> v|z,v 2 {1h @:T.n .M\;pU v|z, 2 {1 & 6" CACV Judiciary English.dot sokyee tsang Microsoft Office Word Judiciary CACV Title `KXm Microsoft Office Word

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