

HONG KONG / JUDGMENT

ZJ v. XWN

COURT

Family Court

DECIDED

21 July 2017

CASE / FILE NUMBER

FCMC16899/2014

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bjbj FCMC 16899 /2014 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 16899 OF 2014

BETWEEN ZJ Petitioner and XWN Respondent

Coram: Her Honour Judge Grace Chan in Chambers (not open to public) Date of hearing: 24 - 27
January 2017 Date of petitioner s written closing submission: 6 February 2017 Date of respondent
s written closing submission: 7 February 2017 Date of petitioner s written reply closing
submission: 13 February 2017 Date of respondent s written reply closing submission: 13 February
2017 Date of judgment: 21 July 2017

JUDGMENT

(Relocation & Access)

Introduction

There are 2 applications before me in this trial which concerns a 5-year old boy, who is the only child born within the wedlock of the petitioner wife (mother) and the respondent husband (father), namely: the mother s summons dated 24 December 2015 for holiday access to take place in Shenzhen, China (Access Summons); and the father s summons dated 2 March 2016 for relocating the son with him to Australia permanently (Relocation Summons). It is the mother s case in the Access Summons that the father has been denying her of her right to have liberal access to the son in Shenzhen where she now lives and works, in contravention to their agreement embodied in a consent summons which was made into a consent order dated 12 March 2015 (to be elaborated further below). The father initially raises his objection to the Access Summons on the major ground that China is a non-Hague country, and that the son is still small

to travel to and fro between Shenzhen and Hong Kong. He is of the view that access in Shenzhen is just an option and is subject to his consent that the son can be removed out of Hong Kong. It is his stance (in the case that the Relocation Summons is not permitted) that access in Shenzhen can only take place from time to time upon his consent on special circumstances and the mother's undertaking to return the son to Hong Kong. In relation to the Relocation Summons, the father says that he has a genuine need to move back to Australia due to his business commitment, as his family has invested in a big property re-development project in Sydney which is worth over AUD 15 billion. He needs to station in Sydney personally to run/manage the project, which, due to his inability to fly over to Australia on a frequent interval to supervise the progress for the sake of taking care of the son in Hong Kong, has already been delayed. The mother opposes the Relocation Summons. While she does not doubt that the project in Sydney is a genuine one, she does not believe that it is necessary for the father (and thus the son) to leave Hong Kong for good to live in Australia. She is of the view that the proposed relocation is a continued act of the father in obstructing her access to the son. Nevertheless, it is fair to note at this stage that despite her objection to the Relocation Summons, the mother has not asked for variation of the care and control arrangement of the son, nor has she requested that the current access frequency be increased.

Background facts At the time of this trial, the parties have not spent many years in Hong Kong. The father and the son have lived in Hong Kong only from the end of 2013 (for about 4 years), while the mother does not live here at all. She is based in China. The mother accepts that the father does not have family and friends in Hong Kong, though his mother (paternal grandmother) would come to see their son from time to time. Hence, their connection with Hong Kong is limited. The parties themselves were born in Shantou, China. They both come from wealthy families which have businesses in China and/or Australia, including property development projects. The father is now 35 years old. He is the eldest son of his parents. When he was 16, he emigrated to Australia with his family, and he received his secondary and university education there. Upon obtaining a master degree in property development in Australia in 2006, he worked there for his family business for a while, before he moved back to work in Beijing. The mother is now 33. She received her secondary education in Singapore before she went to university in Australia in 2002. After completing her university education in 2006, she joined her family business in China. They started courtship in 2007 and got married in December 2009, after which they lived and worked in Beijing. Their only son was born in June 2012 in Hong Kong. After his birth, the whole family continued to live in Beijing. In 2013, the parties made a joint decision to move to Hong Kong in order to provide a better living environment, both in terms of education and air quality, for the son. The move to Hong Kong would also provide the convenience to the mother to work for her family business in Shenzhen but with a view that she would eventually stop working. It is indisputable that the mother has all along been a career woman who devotes quite a lot of her time to her family business. The father was not happy about this. He repeatedly requested her to give up her career and leave her family business to be a full time mother. By the end of 2013, the father and the son moved from Beijing to live in Hong Kong. However, things did not turn out as smoothly as one would expect. The mother found it difficult to delegate her responsibilities in her family business to the others. Hence, she spent less than half of her time in Hong Kong with the son. This led to the inevitable result of dispute and

conflict between the parties. Subsequently in December 2014, the mother petitioned for divorce on the ground of unreasonable behaviour of the father. One of her complaints were that he demanded her not to work even part-time . Decree absolute was granted on 3 August 2015. The marriage by then lasted for about 6 years. The Consent Order The parties signed a consent summons on 12 March 2015 to settle custody and ancillary relief matters globally. The said consent summons was made into a consent order on 3 June 2015 (Consent Order). I shall not dwell on the terms of the ancillary relief matters, as they are irrelevant to this hearing, save that I wish to point out that there is no provision for child maintenance in the Consent Order. On custody matters, the Consent Order provides that the father shall have sole custody, care and control of the son, while the mother enjoys reasonable access (1 of the Consent Order). The said consent terms are said to be upon the following acknowledgment and agreement of the parties: The parties acknowledge and accept that it will be in the best interest of the son to remain in the sole custody, care and control of the father with liberal access to the mother including staying access during weekends and school vacations when, upon reasonable notice including the time of returning the son to the father, she may spend time with the son in Hong Kong or Shenzhen; The parties acknowledge and agree that the son shall not be taken out of Hong Kong or his place of residence without the consent of both parties; The parties acknowledge and agree that they will keep each other informed of the welfare, progress and development of the son and will use their endeavours to maintain an open dialogue on issues concerning his upbringing. The current child arrangement As said above, the son has just turned 5 years old. He is studying kindergarten in Hong Kong which teaches dual language, ie English and Putonghua. Since the son came to live in Hong Kong at the end of 2013, he has been taken care of by the father with the assistance of maid(s) and/or the paternal grandmother. The mother is currently based in Shenzhen; she does not live in Hong Kong. She comes to Hong Kong once every other week for access to the son. Occasionally, she is able to see the son in Shantou when the father brings him to visit his extended family. The father has to accept that up to this trial, he has never acceded to the mother s request for access to take place in Shenzhen. From March 2016 onwards, this court has put in place an interim access arrangement like this. The mother can have staying access to the son in Hong Kong on the 2nd and 4th week of each month from Saturday 10 am to the following Monday when she takes the son back to school. This court has also made directions on long holiday staying access of Easter and summer holidays of 2016. By consent, the parties removed the son out of Hong Kong for holidays for Easter and summer holidays of 2017. Applicable legal principles The relevant legal principles on a relocation case are set out clearly in the judgment of the Court of Appeal in *SMM v TWM* [2010] 4 HKLRD 37, where Cheung JA referred to the guidelines/approach laid down by Butler Sloss P and Thorpe LJ in the English authority of *Payne v Payne* [2001] 1 FRL 1053. His Lordship had this to say:

20. *Payne* is based on the earlier decision of *Poel v. Poel* [1970] 1 WLR 1469. In *Re G.* (Leave to remove) [2008] 1 FLR 1587 the English Court of Appeal reaffirmed the principles in *Payne*.
21. The principles in *Payne* can be summarised as follows:

- (a) The distinct features of a relocation application are first, the applicant is invariably the mother and the primary carer; second, generally the motivation for the move arises out of her remarriage or her urge to return home; and third, the father's opposition is commonly founded on a resultant reduction in contact and influence. (per Thorpe LJ at paragraph 27)
- (b) The two propositions that have been consistently applied by the Courts are, first, the welfare of the child is the paramount consideration; and second, refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the Court concludes that it is incompatible with the welfare of the children. (per Thorpe LJ at paragraph 26)
- (c) The application should be approached as follows: Is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life? Then ask, is the mother's application realistic, i.e. founded on practical proposals both well researched and investigated? If the application fails either of these tests, refusal will inevitably follow. If, however, the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland? What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal? The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist in so far as appropriate (per Thorpe LJ at paragraph 40).
- (d) In short, the relevant factors are: The welfare of the child is always paramount. There is no presumption created by section 13(1)(b) of the English Children Act 1989 in favour of the applicant parent. The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight. Consequently, the proposals have to be scrutinised with care and the Court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end. The effect upon the applicant parent and the new family of the child of a refusal of leave is very important. The effect upon the child of the denial of contact with the other parent and in some cases his family is very important. The opportunity for continuing contact between the child and the parent left behind may be very significant. (per Butler-Sloss P at paragraph 85) (my emphasis) In a more recent English authority of *Re TC and JC (Children: Relocation)* [2013] 2 FLR 484, Mostyn J gave a very succinct summary on the governing principles for a relocation case at 10-12 of his judgment:

10. The foundation of the jurisprudence in this field is the well-known case of *Poel v Poel* [1970] 1 WLR 1469. Although there were many other subsequent decisions of the Court of Appeal the next major milestone was the case of *Payne v Payne* [HYPERLINK "https://www.lexisnexis.com/in/legal/search/runRemoteLink.do?A=0.7507689467899691&bct=A&service=citation&risb=21_T26166941875&langcountry=GB&linkInfo=F%23GB%23EWCACIV%23sel1%252001%25page%25166%25year%252001%25"](https://www.lexisnexis.com/in/legal/search/runRemoteLink.do?A=0.7507689467899691&bct=A&service=citation&risb=21_T26166941875&langcountry=GB&linkInfo=F%23GB%23EWCACIV%23sel1%252001%25page%25166%25year%252001%25) \t "_parent"
- [2001] EWCA Civ 166 [HYPERLINK "https://www.lexisnexis.com/in/legal/search/runRemoteLink.do?A=0.9223446807112405&bct=A&service=citation&risb=21_T26166941875&langcountry=GB&linkInfo=F%23GB%23FAM%23sel1%252001%25page%25473%25year%252001%25"](https://www.lexisnexis.com/in/legal/search/runRemoteLink.do?A=0.9223446807112405&bct=A&service=citation&risb=21_T26166941875&langcountry=GB&linkInfo=F%23GB%23FAM%23sel1%252001%25page%25473%25year%252001%25) \t "_parent"
- [2001] Fam 473 , [2001] 1 FLR 1052, where Thorpe LJ set out his memorable discipline in para 40. That decision was controversial, at least in some quarters, for arguably perpetuating a covert presumption in favour of location, at least where the application was made by the child's primary carer. It was reconsidered in 2011 in the case of *K v K (Children: Permanent Removal from Jurisdiction)* [HYPERLINK "https://www.lexisnexis.com/in/legal/search/runRemoteLink.do?A=0.40221353169114127&bct=A&service=citation&risb=21_T26166941875&langcountry=GB&linkInfo=F%23GB%23EWCACIV%23sel1%252011%25page%25793%25year%252011%25"](https://www.lexisnexis.com/in/legal/search/runRemoteLink.do?A=0.40221353169114127&bct=A&service=citation&risb=21_T26166941875&langcountry=GB&linkInfo=F%23GB%23EWCACIV%23sel1%252011%25page%25793%25year%252011%25) \t "_parent"
- [2011] EWCA Civ 793 [HYPERLINK "https://www.lexisnexis.com/in/legal/search/runRemoteLink.do?A=0.8709096230885467&bct=A&service=citation&risb=21_T26166941875&langcountry=GB&linkInfo=F%23GB%23FAM%23sel1%252012%25page%25134%25year%252012%25"](https://www.lexisnexis.com/in/legal/search/runRemoteLink.do?A=0.8709096230885467&bct=A&service=citation&risb=21_T26166941875&langcountry=GB&linkInfo=F%23GB%23FAM%23sel1%252012%25page%25134%25year%252012%25) \t "_parent"
- [2012] Fam 134 , and the entire jurisprudence was recently summarised, and the modern principles enunciated, in a characteristically lucid judgment of Munby LJ (as he then was) in *Re F (A Child)* [HYPERLINK "https://www.lexisnexis.com/in/legal/search/runRemoteLink.do?A=0.751136783569063&bct=A&service=citation&risb=21_T26166941875&langcountry=GB&linkInfo=F%23GB%23EWCACIV%23sel1%252012%25page%251364%25year%252012%25"](https://www.lexisnexis.com/in/legal/search/runRemoteLink.do?A=0.751136783569063&bct=A&service=citation&risb=21_T26166941875&langcountry=GB&linkInfo=F%23GB%23EWCACIV%23sel1%252012%25page%251364%25year%252012%25) \t "_parent"
- [2012] EWCA Civ 1364 .
11. I have considered these four cases most carefully and, doing the best I can, I set out shortly what seem to me to be the presently governing principles derived from them for a relocation application:
- i) The only authentic principle to be applied when determining an application to relocate a child permanently overseas is that the welfare of the child is paramount and overbears all other considerations, however powerful and reasonable they might be. ii) The guidance given by the Court of Appeal as to the factors to be weighed in search of the welfare paramountcy, and which directs the exercise of the welfare discretion, is valuable. Such guidance helps the judge to identify which factors are likely to be the most important and

the weight which should generally be attached to them, and, incidentally, promotes consistency in decision-making. iii) The guidance is not confined to classic primary carer applications and may be utilised in other kinds of relocation cases if the judge thinks it helpful and appropriate to do so. iv) The guidance suggests that the following questions be asked and answered (assuming that the applicant is the mother):

- a) Is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life?
 - b) Is the mother's application realistically founded on practical proposals both well researched and investigated?
 - c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?
 - d) Is the father's opposition motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive?
 - e) What would be the extent of the detriment to him and his future relationship with the child were the application granted?
 - f) To what extent would that detriment be offset by extension of the child's relationships with the maternal family and homeland?
 - v) Since the circumstances in which such decisions have to be made vary infinitely and the judge in each case has to be free to decide whatever is in the best interests of the child, such guidance should not be applied rigidly as if it contains principles from which no departure is permitted. vi) There is no legal principle, let alone some legal or evidential presumption, in favour of an application to relocate by a primary carer. The old statements which seem to favour applications to relocate made by primary carers are no more than a reflection of the reality of the human condition and the parent-child relationship. vii) The hearing must not get mired in taxonomical arguments or preliminary skirmishes as to what label should be applied to the case by virtue of either the time spent with each of the parents or other aspects of the care arrangements.
12. Factor (c) of the guidance always looms large and is particularly problematic, both in principle and in practice. It is a significant feature in this case, as will be seen. Discussing this factor in *Re AR (A Child: Relocation)* [HYPERLINK "https://www.lexisnexis.com/in/legal/search/runRemoteLink.do?A=0.009051006527190375&bct=A&service=citation&risb=21_T26166941875&langcountry=GB&linkInfo=F%23GB%23EWHCFAM%23sel1%252010%25page%251346%25year%252010%25\" \"_parent"](https://www.lexisnexis.com/in/legal/search/runRemoteLink.do?A=0.009051006527190375&bct=A&service=citation&risb=21_T26166941875&langcountry=GB&linkInfo=F%23GB%23EWHCFAM%23sel1%252010%25page%251346%25year%252010%25\)

[2010] EWHC 1346 (Fam) , [2010] 2 FLR 1577 (at para 12) I stated The problem with the attribution of great weight to this particular factor is that, paradoxically, it appears to penalise selflessness and virtue, while rewarding selfishness and uncontrolled emotions. The core question of the putative relocater is always how would you react if leave were refused? The

parent who stoically accepts that she would accept the decision, make the most of it, move on and work to promote contact with the other parent is far more likely to be refused leave than the parent who states that she will collapse emotionally and psychologically. This is the reverse of the Judgment of Solomon, where of course selflessness and sacrifice received their due reward. I do not resile from these views but the paradox does not make the problem any easier to solve. The impact on the mother if her realistic proposal is rejected is a fact which has to be recognised whatever its psychological origin. I have to take the parents as I find them and if one finds himself as a result of my judgment to be a victim of his virtues then that is a cross which he will have to bear in the interests of his children. Hence, it has to be stressed that despite the guidelines set out in these cases, the only authentic principle to be applied in any relocation case is that the interest of the child is paramount. Apart from that, the general principles governing applications concerning children are set out in section 3 of the Guardianship of Minors Ordinance, Cap 13 (See: section 48C of the Matrimonial Causes Ordinance, Cap. 179). Section 3 states that:

- (1) In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of the income of any such property-
- (a) in any proceedings before any court (whether or not a court as defined in section 2) the court -
- (i) shall regard the best interests of the minor as the first and paramount consideration and in having such regard shall give due consideration to - (A) the wishes of the minor if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so; and (B) any material information including any report of the Director of Social Welfare available to the court at the hearing. (emphasis added) When applying the welfare principle under section 3(1) of the Guardianship of Minors Ordinance, the family courts judges may refer to the welfare checklist mentioned in the English Children Act 1989 and the recommendation of the Hong Kong Law Reform Commission's report on custody and access of 7 March 2005 (See: *H v N* [2012] 5 HKLRD 498). Social investigation reports For the purposes of the Relocation Summons and the Access Summons, the following social investigation reports were prepared: An international social investigation report about Sydney, Australia dated 22 June 2016 (ISIR/Australia); An international social investigation report about Shenzhen, China dated 22 July 2016 (ISIR/Shenzhen); A social investigation report dated 11 August 2016 () and prepared by social investigation officer, Mr Chan (). Both parties do not have any dispute as to the living condition and environment of the locality of the mother's home in Shenzhen or the father's home in Sydney. Therefore, I will not describe the content of the ISIR/Shenzhen and ISIR/Australia in details, unless it is necessary. In so far as the SIR is concerned, the SWO observes that both parents have a loving and close relationship with the son. They both truly and dearly love their son. He recognises that the daily care of the child is provided by the father, but he does not support his relocation plan. In his view, it is not necessary for the father to move to Australia for his

family business; he merely chooses to do so and takes out his application after the mother's Access Summons was taken out. His view is repeated below (translated from Chinese): 29. In considering the relocation plan, [I] focus on whether this plan is in the best interest of the child in question. Factors that are taken into account include the needs of the child, his age and development, the reasons for relocation, the necessity and urgency of the plan, and comparison of the advantage(s) and disadvantage(s) caused to the child by the plan.

30. [The son] is a child of tender age of 4. Apart from his daily and basic care, the active participation of both parents, the establishment of a close bond and relationship with his parents and a stable growing environment are particularly important to the physical and psychological development of a small child at this stage.
31. [The father] has not discussed with [the mother] of this relocation plan. He took out his application only after [the mother] applied for access [to take place in Shenzhen]. It is impossible to sort out clearly the motive of [the father], but he has failed to take note of the importance of participation of both parents, and the effect on [the mother] and [the son] caused by her lack of participation in this plan.
32. If to leave Hong Kong, [the son] will need to face an unfamiliar environment and to adapt to living, language, learning and social changes. Leaving Hong Kong would mean lesser time to meet his mother. For [the son] to face such a new life at this young age but without the support of the mother would in turn affect the close parent-and-child bond and relationship.
33. If relocation is not approved, [the father], with his financial strength, should be able to provide [the son] with a good living environment. He may have to deploy more of his time to travel and work in Australia, but that should not be causing any obvious effect on his maintaining the basic life. In so far as his family business is concerned, [the father] should be able to use various methods to handle his work. For example, when he is not in Hong Kong, he may consider letting [the mother] take care of [the son].
34. Upon considering paragraphs 29 to 33 and balancing the advantages and the disadvantages, [I] opine that it is in his best interest to let [the son] continue living in Hong Kong. While I am satisfied that the SWO is aware of the guiding principle that the best interest of the son is paramount, it is, after all, the first time he has ever prepared a report for relocation cases. It is trite to say that in children's matters, the court needs to consider the recommendation made in the social investigation report(s), but the final decision is always within the discretion of the court. The status of the recommendation of the SWO cannot be escalated to the decision of the court. That is the view expressed by me in my other judgment dated 14 December 2016 in *JDYS v EYCK* also known as *KEYC*, FCMC 12871/2009 (26-28 therein), where I relied on the comment made by Roger VP (as he then was) in *Naziya Aslam v Ali* (Custody and Removal) [20009] HKFLR 294. In the *Ali* case, His Lordship has this to say on the status of a recommendation in a social investigation report:

27. It is important, however, that the status of a recommendation in a report from a Social Welfare officer is not raised to the status of a decision which should only be interfered with on grounds similar to an appellate court interfering with an exercise of discretion. The references to the cases referred to are instructive in this regard. Wood J in the case of *Stephenson v Stephenson* pointed out, at pages 1145-1146, that the role of the welfare officer was to assist the court by informing the court of factors which the court would otherwise not know. He went on to say that the officers usually conclude their reports with a summary of the factors for and against each course which it is open to the court to take. He then said in some cases, he or she may feel sufficiently strongly about a case to make a positive recommendation - indeed, on those occasions when they give oral evidence the court sometimes asks for the view of the welfare officer.
28. I would agree with Wood J, that the welfare officer's position to make a recommendation should arise when the circumstances of the case are particularly clear. The welfare officer should not make a recommendation as a matter of course and should certainly not do so where it is a question of balancing the relative merits of one course or another, unless specifically invited to do so by the court. The exercise of the judge's discretion should not be trespassed upon. In any event, it seems to me that the correct approach to a recommendation made by a welfare officer is set out in the judgment of the Court of Appeal in *Re V (residence: review)* [1996] 3 FCR 101 at p.110F: In a judgment where a Judge gives reasons for his decision and those reasons demonstrate that his decision is not manifestly wrong he is not under any further duty to spell out his reasons for departing from the court welfare officer's report. In this situation the Judge's reasons for reaching his own decision are normally the very reasons for his declining to follow the court welfare officer's recommendation. (my emphasis added) The case of *JDYS v EYCK* also known as *KEYC* (supra) went on appeal (HCMP 3584/2016) and my view on the status of the SWO (as well as an expert report) was confirmed by the Court of Appeal (Cheung and Chu JJA) in its judgment dated 3 April 2017 (at 5.3). Upon considering all evidence, I have to say that although I accept the observation of the SWO of his investigation into the background, care arrangement, and parent-and-child relationship, I find myself unable to embrace his recommendation due to the following main reasons. First of all, there seems to be a dispute as to whether it is the SWO who has not asked the father for details of the Australian redevelopment project, or whether it is the father who failed to provide such information to the SWO. In my opinion, it does not really matter which is the correct version of the event. What is more important is that at the time when the SWO prepared the SIR, he did not have all the information/material of the Australia redevelopment project that is now before this court, so that his view on the necessity of the father to move to Australia for handling the redevelopment is somewhat impeded. Furthermore, I express my concern that the SWO may have arrived at his recommendation (of not supporting the relocation) based on assumptions without prior discussion and/or confirmation with the respective parties. Mrs Frances Irving, counsel for the father, has provided a few examples in her closing submission. For example, the SWO suggests that if the father has to fly to Australia for his

business and is not in Hong Kong, it can be considered that the mother can take care of the son. But he confesses in his oral evidence that he just assumes that the mother can be asked to look after the son when the father has to travel to Australia, notwithstanding that the mother merely told that she would consider doing so; she had not said that she would so. It is telling that the mother, despite the relocation application of the father, has not asked for increased access in Hong Kong. For another example, the SWO assumes, without prior discussion and/or enquiry with the father, that the father can find another job in Hong Kong and/or use various methods to handle his work. Yet, even the mother herself does not seriously dispute that the father does not have any friends or job in Hong Kong. The closing submission of Mr Enzo Chow, counsel for the mother, has been considered, but I am not persuaded that I should follow the recommendation of the SWO under the circumstances of this case.

View of the son In his interview with the SWO, the son tells that both parents love him very much and he loves both of them. He feels very happy living with his father, as well as staying overnight with his mother. He also tells that both the paternal and maternal grandmothers love him dearly. Probably due to his young age, he has no idea that the mother wants to take him to Shenzhen for access, nor does he know that the father has the relocation plan to go to Australia. In fact, he is not aware of the divorce of his parents. He thinks that his parents do not live together because his mother needs to work. I find that the son is too young to give any meaningful view on the Relocation or Access Summons. Is the father's application genuine? The father wishes to remove the son to Australia so that he can continue to take care of the son on a daily basis and conduct his business at the same time. He explains in this trial that he has taken up a redevelopment project in Sydney which consists of 2 stages. Stage one involves transforming/rebuilding historic government office building into residential blocks and it will take 6 -7 years to complete. Stage 2 involves the building of office in the open space in front of the government office building. The whole project will thus take years to complete. I notice that this part of his oral evidence is not challenged by the mother. To support his case, the father produces various documents set out more particularly in his solicitors letter dated 2 September 2016, such as certificate of registration of a company which takes up this redevelopment project (AP Holdings), NSW Exclusive Agency Agreement, marketing timeline prepared by CBRE (who is the exclusive sales and marketing agent of the redevelopment project). Further documents to confirm the purchase of the land for development and the stamp duty are produced by the father shortly after the mother raises her query to the project in her affirmation. The mother, however, avers that the motive of the father is not genuine. It is only his choice, rather than his genuine need, to move to Australia permanently. She reminds this court of the suspicion that the Relocation Summons was taken out about 3 months after the Access Summons. She warns that the father may be using the son as a bargaining chip for the dispute that he has with the mother's family over a project in Xian, China. The disputes under this topic can be analysed under the following sub-headings.

Australian redevelopment project In the trial, the mother does not dispute that the father's family has a redevelopment project in Australia. However, she thinks that it is not really necessary for him (and thus the son) to move to Australia for good mainly because: The father enjoys substantive assistance by

various professionals who can help him in managing the redevelopment project without his staying in Australia on a daily basis. For example, he has appointed Mr J Wong, a gentleman known to have substantive experience in property investment in Australia, as the director of AP Holdings and thus he is able to sign documents, such as tenancy agreement, on behalf of the company. The father has also appointed other professional companies to assist him, such as CBRE as the exclusive sales and marketing agent to sell the redevelopment units, and C Group as the construction management agent; The father can monitor the redevelopment project by way of emails and video conferences; The father has other family business in Australia in which he had not been involved. It thus means that it is his choice rather than his need of whether to be involved in a particular family projects and the degree of his involvement. Despite the cross examination by Mr Chow, the father is able to answer in detail questions about the redevelopment project. He is able to explain his role in it, how he is the boss and the key player in the project. It is his evidence that although there are a lot of professionals of different fields taking part in this project, it is only he alone who can play the role of co-ordinating with all the professionals, setting criteria for them to follow and monitoring if they can fulfil such criteria. This, he says, is a long process. The father also says that because as the matter now stands, he cannot be in Australia all the times, the progress of the project has been delayed. By referring to the marketing timeline prepared by CBRE, he tells, by way of an example, that item 11 therein (about preparation for change of floor space ratio), which should have been done by 30 September 2016, is now delayed to April 2017. For another example, the issue of bank financing has not been totally solved. Had he been in Australia, he could have more time to see several more banks to discuss/ negotiate on bank loans. On the other hand, the father points out that it is difficult to monitor or manage such a big redevelopment project by way of emails or video conferences, especially when there is obviously a time zone difference between Sydney and Hong Kong. In my judgment, the father's explanation is reasonable. The mother's submission that he can supervise the redevelopment project by way of emails or video conferences is not helpful. Pausing here, it has to be borne in mind that the mother herself conducts her own family business by stationing in Shenzhen and is only able to afford 2 weekends within a month to come to Hong Kong to see the son. It is unfortunate that she adopts a different standard to the father's business commitment in Australia. It is put to the father during cross examination by Mr Chow that the father can actually delegate and rely on the service of Mr J Wong to sign the company documents or contracts without himself going to live in Australia. The father had in fact done so by asking Mr J Wong to sign the lease of the company. In response, the father says that Mr J Wong was merely told to sign it. The father himself is the person who is in charge of the project. Again, that explanation is accepted by this court. Upon due consideration, I reject Mr Chow's submission that the father does not have a genuine need to relocate to Australia. I accept the father's evidence and his explanation on this topic. After all, it is not in dispute between the parties that it is a AUD 15 billion project. It is thus in my view a reasonable arrangement for the father, being the eldest son in the family and specialising in property development, to take up the lead in this big project, rather than delegating it to other family members or professionals, such as Mr J

Wong or engineers. Proximity in time & the Xian project Mr Chow for the mother stresses during his submission that the father's Relocation Summons was taken out less than 3 months after the Access Summons of the mother. He failed to discuss with the mother of his relocation plan beforehand and enrolled the son with about 3 schools in Sydney in/about January 2016 when the redevelopment project was yet to take its ground. This, Mr Chow submits, shows that the father actually makes no regard to the mother's right which in turn is not for the best interest of the son. Counsel further argues that the Relocation Summons is actually a strategic move of the father with ulterior motive relating to the dispute between them over the Xian project. During the cross-examination of the mother by Mrs Irving, the mother accepts that around the Chinese New Year of 2015, both parties were in Sydney, and the mother was able to see the son and bring him to stay in her apartment in Sydney. She is not seriously disputing that on that occasion, the father gave her a lift home, during which he said to her that it was better for the son to stay in Australia because the life there was more lay-back and relaxed than in Hong Kong or China. There is no evidence before me as to what her response was during that conversation. But it is her oral evidence that she thinks the father merely informed, rather than consulted, her on that occasion. In such circumstances and in my view, although the father has not sent any pre-action letter to the mother immediately before he took out the Relocation Summons and that there is a proximity in time of the Access and Relocation Summonses, it is not the case that he is totally silent on his preference, if not intention, to move to Sydney, Australia, which was already made known to the mother as early as 2015. I therefore do not find it strange that the father made attempts to enrol the son with the schools in Sydney, bearing also in mind that the main contract of the redevelopment project was supposed to be in order and signed in January 2016. It cannot be denied that in the application forms of the son's schools, the father did not fill in the particulars of the mother. He claims that he filled in the application forms in a rush and thus the mother's particulars were left blank. He has promised in this trial that he would provide the mother's particulars to the son's schools in due course. In case he has not done so by the date of this judgment, I shall hold him to this undertaking in order to ensure that the mother would have her reasonable involvement in all the important matters concerning the son's education. On the other hand, there is little evidence on the details of the dispute over the Xian project. The only oral evidence before this court seems to be this. The father used the name of the wife's mother to invest in a property development project in Xian. For unknown reason(s), hiccups occurred and the father was asked to pay some expenses. The mother concedes through her counsel's closing submission that she has not explicitly mentioned the Xian project in any of her affirmations, though in the WeChat messages exhibited by her in her 1st affirmation, it was the father who brought up the topic. Clearly, it is not her affirmation evidence that the dispute over the Xian project is related to the Relocation Summons or her objection to it. As such, there is simply no firm basis for her counsel to co-relate the Xian project with the motive of the Relocation Summons, and his submission has to be rejected. However, I do not wish to leave this topic without saying a few words, hopefully would assist the parties in their future communication or handling of the important matters of the son. This court needs to stress

that even though the custody of the son lies with the father solely, he should discuss with and consult the mother on the important matters concerning the son, and removal of the son permanently to another country is one of such important matters. The concept of sole custody is succinctly summarised in the enlightening words of Hartmann JA (as he then was) in his oft-cited judgment in *PD v KWW (Child: Joint Custody)* [2010] 4 HKLRD 191 as follows:

36. It is to be emphasised in the strongest terms that if one parent only is given custody, that parent is not thereby given an absolute and independent authority to act without further reference to the non-custodial parent. Any such potential misunderstanding was quashed in *Dipper v Dipper* [1980] 3 WLR 626 in which Ormrod LJ said: It used to be considered that the parent having custody had the right to control their children's education, and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing or any other matter in their lives, that disagreement has to be decided by the court.
37. In the same case, Cumming-Bruce LJ, another experienced family judge, said: . it (is) a fallacy which continues to raise its ugly head that, on making a custody order, the custodial parent has a right to take all the decisions about the education of the children in spite of the disagreements of the other parent. That is quite wrong. The parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other major matters. If he disagrees with the course proposed by the custodial parent he has the right to come to the court in order that the difference may be determined by the court.
38. A non-custodial parent therefore has the right to be consulted in respect of all matters of consequence that relate to the child's upbringing. While the right to be consulted does not include a power of veto, it is nevertheless a substantial right. It is not merely a right to be informed, it is a right to be able to confer on the matter in issue, to give advice and to have that advice considered.
39. While therefore a parent who is given sole custody is given the authority, in the event of disagreement with the non-custodial parent, to make the final decision, it should only be made after due consultation and, if the final decision that is made is considered by the non-custodial parent to be inimical to the child's best interests, the court may be called upon to determine the matter.
40. Invariably, therefore, the giving of sole custody to one parent does no more than recognise that, in the circumstances of the breakdown of the marriage, the best interests of the child are secured by giving to that parent the authority, if necessary, to make a final decision concerning matters of consequence in the upbringing of the child but only after the other parent's views have been given full and rational consideration. In summary, an order of sole custody does no more than add a qualification to the otherwise joint endeavour of both

parents in raising their child, that qualification being that the final decision will rest with one parent. (my emphasis added) I urge both parties to read the above quotation with great care either by themselves or with the assistance of their legal team, for it would give them a yardstick on how to handle the son's important matters way forward no matter which country/city that the son is going to stay. Is the father's proposal realistic? In the case that relocation to Australia is allowed by this court, the father proposes that the son would live together with him in his family house standing on a piece of land of over 965 sq metres in the reputable area of Hunters Hill in Sydney, Australia. He has enrolled the son in 3 kindergartens. He is an old boy in one of these schools. He will continue to hire maid(s) to assist him in his child-care. The paternal grandmother would also move to live with him and the son. The grandmother is currently splitting her time by living in Australia, Shantou and Hong Kong. On top of that, he has other relatives living in Sydney who can offer support to him. The mother has no real concern as to the practical care arrangement proposed by the father if relocation is allowed. In fact, she does not even attempt to search if the schools proposed by the father is desirable by her standard. Her counsel accepts in his written closing submission that the education proposed by the father is good for the son. Her counsel, however, raises 2 points in his written closing submission. First, he says that the father is not really going home to Australia, thereby suggesting to this court that this is not a classic home-returning case. Second, he submits that the father is exaggerating his involvement in the daily care of the son, while in fact he relies on the paternal grandmother in the caring of the son. Counsel further suggests that the father is the care and control parent in a legal sense only. With respect to Mr Chow, I do not think it is the latest case of the father that he is returning home in a strict sense. In the words of his counsel, the father is returning to a place he has lived in previously, which is familiar to him, and with a way of life that is familiar to him, and indeed to the mother. No one, in my view, can dispute that both parents have varying degree of connection with Australia, by, for example, living and/or studying there for years, or having family business(es) or landed properties in Australia, or having their extended families living in Australia. The mother's own sister is currently living in Australia as well. The suggestion that the father may not be hands-on in the daily care of the son is not able to be substantiated. It is obvious to me that the father is the primary carer of the son. The SWO observes that the father often accompanies the son in his daily life and that the son is very accustomed to living with the father. The SWO also agrees with the counsel for the father that the son's daily care is provided by the father: Q: Do you agree with me that the day to day care, school event, taking to school and all things are catered for by the father? Agree. Having considered the ISIR/Australia, which I fully accept the observation made therein, I have no difficulty in concluding that the father's proposal is realistic. Impact of refusal on the father The father has clearly pointed out in his evidence that if relocation is not allowed, he would have difficulty in taking care of the son on one hand and travelling to Australia regularly on the other hand. This would cause, and has in fact caused, delay in the redevelopment project, resulting in financial loss and legal consequences (See: REF _Ref488171739 \r \h] above). It should be noted that under the Consent Order, there is no provision for child maintenance. It is accepted by the parties that

the father provides for the son solely out of his own financial resources and savings. There is a real need for him to run a profitable business in order to continue supporting the son financially way forward. It is thus clear to me that if the relocation is not allowed, it would create an adverse financial impact on the father, who is the major and only financial provider to the son. Motive of the mother's opposition Apart from her doubt on the genuineness of the father's relocation (which is already dealt with earlier in this judgment), the mother's other objection to the Relocation Summons mainly relates to her fear that the father will continue to be obstructive regarding her access to the son. She describes how the father rejected her right to have liberal access in Shenzhen which triggers off the Access Summons. She gives examples on his lack of flexibility and/or obstruction regarding access after interim access measures were put in place by this court since March 2016, such as: The father refused to hand-over the son to her in Shantou on 20 October 2016; The father refused to let her have staying access to the son from 12 to 14 November 2016; The father demanded immediate return of the son on 28 November 2016 when in fact the son had no school on that day; The father did not allow any access during the Chinese New year in early January 2017. She therefore says in her 2nd affirmation that, 9. I have grave reservations and doubts on whether the [father] really appreciates the benefit to a child for maintaining frequent contact with his mother and his maternal relatives. Nor is the [father] willing to preserve my ties with the [son]. Moreover, I have grave doubts on whether the [father] really respect my rights to have access to the [son] if he is allowed to relocate the [son] to Australia, giving his uncompromising attitude even the [son] is still subject to the jurisdiction of this Court now. For the purpose of this judgment, I do not find it necessary to go into details of each and every single incident of access and/or communication dispute between the parties, unless I find it necessary and relevant in my deliberation. One of the main examples given by the mother on the obstructive attitude of the father over access, which actually triggers the Access Summons, is his refusal to let the son go to Shenzhen to see the mother. The dispute of whether access can take place in Shenzhen or not arises out of, rightly or wrongly, the parties different interpretation to the Consent Order. While the father's understanding for Shenzhen access is merely an option, to be safeguarded by the clause of non-removal of the son unless with consent, the mother's interpretation to access is a liberal one which can be taken place either in Hong Kong or Shenzhen as she wishes. Looking at the plain wording of the Consent Order, I would say that neither party has fully understood the Consent Order. For the father, he has overlooked that removal of the son is not merely subject to his consent, but to the consent of both parties, which means that he is not supposed to remove the son out of Hong Kong himself unless with the mother's consent. On the part of the mother, she should have taken notice that access may (but not must) take place in Shenzhen and that removal out of Hong Kong would require the consent of both parties. It is also my view that to require the son (of such tender age) to travel to and fro between Hong Kong and Shenzhen during term time, albeit in the mother's private car, is too tiring and hustle and bustle for a young child. The mother must have now realised this and thus seeks to bring the son to Shenzhen for access during long holiday only in the Access Summons. The father has another reason for objecting access in Shenzhen, namely he is afraid that the mother would

not return the son to him, giving him no recourse as China is a non-Hague Convention country. This explanation is not accepted by the mother. Her counsel, Mr Chow, is adamant in pointing out to this court that if the father's concern is genuine, it flies high in his face why he would allow access in other Chinese cities, namely Beijing and Shantou. On one hand, I do note that on those occasions when access did take place in Beijing or Shantou, the father actually travelled with the son to that city and was around in the same city during the material time. This is obviously quite different from the scenario where the mother comes to Hong Kong and picks up the son on her own to go to Shenzhen. Hence, there is a real possibility that the father was subjectively and genuinely concerned about the mother not returning the son to him. However, on the other hand, I have the chance of observing the mother in the witness box. And having done so and in view of the totality of the evidence, I do not form the impression that the mother would refuse to return the son to the father even if access is to take place in China. I would add that the gulf between the different view of the parties is more likely due to their lack of trust and sufficient communication upon their divorce. I do hope that with the passage of time, they can let go of the past and start to build up the minimum level of trust and co-operation between them for the sake of the son. As long as access takes place in Hong Kong, whether before or after the Access Summons, it does not seem to ever pose any problem. The mother confirms so in her own affirmation:

19. Ever since the parties separated, by and large the [father] has acceded to some of my requests for access to the [son] in Hong Kong (both day and staying access), despite his frequent grumbles about me disturbing the daily routine of him and the [son]. For her complaints on the father's lack of flexibility or obstruction after the Access Summons was taken out (see REF _Ref487534582 \r \h] above), the father provides the following explanation, or the mother makes the following concession in her oral evidence : The father was granted leave to remove the son out of Hong Kong between 15 19 October 2016 and he has given an undertaking to this court to return the son to Hong Kong on 19 October 2016. This would be followed by the mother's access starting from 20 October 2016. He took the son to Shantou, where the mother happened to be staying at the same time. So, she asked for hand-over in Shantou on 20 October 2016 instead of in Hong Kong. The father refused her request in the fear that he would be in breach of the aforesaid undertaking to return the son to Hong Kong on 19 October 2016; According to the order dated 7 March 2016, the mother is required to give at least 4 days prior notice to confirm her bi-weekly access to the son. She did not confirm her access for 12-14 November 2016 by 8 November 2016. The father cancelled his business trip (he would arrange his overseas business trip during the mother's access time) to keep the son accompanied. One day later, ie on 9 November 2016, the mother contacted the father to confirm her access. This was rejected by the father on the ground that she was one day late and that he had arranged some activities for the son. In any event, it should be noted that the mother admits in her oral evidence that it is her fault not to confirm that access on time. The order of 7 March 2016 provides that the mother can have access to the son until 4 pm during the 2016 Easter and summer long holidays. During term time, her access will end on bi-weekly Mondays when school starts. The mother concedes in

her oral evidence that she has misunderstood the said court order by thinking that since the son had no school on 28 November 2016, she could have the son until 4 pm; The mother has to accept that she herself agreed that she would not have access to the son during the 2017 Chinese New Year, thus resulting in corresponding terms made into an order dated 22 September 2016. Generally, I accept the father's explanation stated aforesaid. He cannot be said as obstructive to the mother's access. However, it is also my view that at times he could have been more flexible in child arrangement, if the mother's request/suggestion is reasonable. For example, the mother's proposal for hand-over in Shantou on 20 October 2016 would actually save the child from the hustle and bustle of travelling between Hong Kong and Shantou. Provided that the child arrangement is reasonable and agreed by both parties, this court is unlikely to hold the father in breach of his undertaking to this court. On the other hand, it is the submission of the father that in opposing the relocation application, the mother has overlooked the son's interest, in that the son would have to be in Hong Kong for a lot of time without the father, his main carer. She keeps the son in Hong Kong for her own convenience to have access to the son. It needs no elaboration that if the son is to remain living in Hong Kong, which is close to Shenzhen where the mother now lives and works, she can continue to have bi-weekly access to the son. However, I am not prepared to conclude that the mother objects to the relocation application solely for her own interest or some other ulterior motive. As the SWO has observed, the mother, as well as the father, loves the son dearly. It is natural that she would wish to be able to see the son under a more regular and frequent arrangement. Detriment to the mother & her future relationship with the son I do understand that the mother's concern that if the son is to be relocated to Australia, the frequency of access now enjoyed by her would certainly be reduced due to the physical distance between them. However, this is an inevitable consequence that she has to accept if relocation is in the best interest of the son. In *SMM v TWM* (supra), Cheung JA made similar observation as follows:

38. In my view the real issue in this case is really about the difficulties of the father in maintaining contact with the child with the physical distance between them. I recognise the importance of contact. Hence the contact issue has been specified in *Payne* to be two of the relevant factors to be considered. However as a matter of principle, any relocation application will necessarily involve one parent not being able to have the same degree of contact with the child than if they are in the same physical locality. As Butler-Sloss LJ (as she then was) observed in *Re E (Residence: Imposition of Conditions)* [1997] 2 FLR 638, the requirement for frequent rather than extended contact appears to be unnecessary for children for tender age. Furthermore, in view of the relative short period of time the parties have been in this part of the world, the father has to face the reality that they are only temporary residents here and when their marriage breaks down, the mother has every right to return home and, subject to the Court's approval, to bring the child with her as well. (my emphasis added) As the matters now stand, the mother is seeing the son for a full weekend twice a month. She has not asked for more access time in Hong Kong, probably due to her busy work schedule. Despite the limited access, she has close bondage with the son. The SIR

records that the mother-and-son relationship is close and spontaneous. In my view, there is no reason why this relationship cannot be maintained if reasonably generous access is put in place. The father has agreed that a mirror order can be arranged and obtained in Australia, which would further protect the mother's access to the son in Australia. My conclusion I remind myself that there is no presumption in favour of the primary carer in a relocation application. Nevertheless, for all the matters discussed above, I come to the conclusion that it is in the best interest of the son to move to Australia with his father permanently. In this way, the son would enjoy the continued benefit of being cared by his primary carer (ie the father) who would be able to carry on his business and taking care of the son at the same time.

Access proposal There are broadly 4 school terms within a year (2017 is used as an example) in Australia as follows: Term 1 : 30 January 7 April Term 2 : 26 April 30 June Term 3 : 18 July 23 September Term 4 : 9 October 15 December The long school holidays in New South Wales (where the father and son are going to live) would be broadly like these: Summer : 16 December 29 January (ie 6 7 weeks) Easter : 8 25 April (ie slightly more than 2 weeks) Winter : 1 17 July (ie slightly more than 2 weeks) Mid-year : 24 September 8 October (ie about 2 weeks) The latest proposal on access from the father upon relocation is set out in the following: During each of the aforesaid term time, the mother shall have access to the son in Sydney for 2 long weekends, from thursday to monday morning, upon 7 days prior notice to the father; The summer holiday shall be equally split, with the 1st half to the mother and the 2nd half to the father. If access is to take place in China during summer holidays, the mother should ensure that she makes herself available; The Easter and mid-year holidays shall be shared on an alternate basis, such that he will have Easter and the mother will have mid-year holidays in 2017, alternating thereafter in 2018; The winter holiday shall be split equally with the mother taking the 1st half and the father the 2nd half in 2017, and then reversing in 2018 and thereafter on an alternate arrangement; The long school holiday access for Easter, mid-year and winter holidays shall be subject to the arrangement that the mother shall not take the son out of Australia given the short duration of 8 9 days. The mother, however, puts forward a different access proposal as follows: During term time, she shall have 2 staying access lasting for 7 10 days each between February to June and August to November each year. She is prepared to give 7 10 days prior notice to the father; She shall have the whole summer and winter holidays with the son, in order to bring him back to China to meet her family. The father can have the Easter and mid-year holidays. My view on access way forward The father's access proposal during term time provides the mother an opportunity to have staying access with the son twice each of the 4 school terms. The SWO is of the view that such proposal is reasonable. However, the mother expresses her concern that she may not be able to travel that often to Sydney to see the son. Upon further clarification, she adds that she prefers to fly to Sydney with her mother and her assistant so that they can provide assistance to her in taking care of the son and in driving her/the son around (because she does not have a driving licence). I do appreciate that upon the son's relocation to Australia, the physical distance between Shenzhen and Sydney would make it more time-consuming and thus less convenient for the mother to visit the son. However, in order to maintain the close bond already in

place between the mother and the son, I do not think the mother would complain if she has to travel for longer distance, even if by herself alone, to see the son. Her concern that she does not have a driving licence can easily be saved by hiring a car and driver on an ad hoc basis, or by taking taxi, either way of which should be financially affordable by the mother. Hence, I would base but further improve on the father's term time proposal. I shall order that the mother can have staying access to the son from Thursday (after school) to Monday morning (in the case that the son has no school on Monday, to 4 pm of that day) twice each of the 4 school terms set out above, which staying access can be taken in consecutive weeks. For the other times when the mother is in Sydney during school term but not having staying access, she shall be allowed to have additional day/evening access to the son twice each week for 2 hours. I shall now turn to the long school holidays arrangement. It is my firm view that both parties, being working parents, should enjoy quality time with the son, which is usually most viable during the longest summer holiday. In such circumstances, the summer holiday should be split equally between them. One should also note that the Chinese New Year may fall within the summer holiday of Australia. Both parties have strong connection with their hometown in Shantou. I strongly believe that they would bring the son back to Shantou for Chinese New Year whenever the school calendar fits. The mid-year holiday is about 2 weeks only. That should also be shared equally between the parties. The mother acknowledges that it is tiring for the son to travel out of Australia to China if she can have only 1 week to spend with the son in any of the long school holidays. So I expect that her access during her half of the mid-year holiday would take place in Australia only. The Easter and winter holidays would be shared on an alternate basis with the father having Easter holiday and the mother taking the winter holiday in 2018, which will be reversed in 2019 and so on. These 2 holidays are sufficiently long for the mother to take the son out of Australia if she so wishes. The Access Summons Given the above analysis, it is obvious that there is no more need to address on the Access Summons separately. For avoidance of doubt, I am agreeable that access can take place in Shenzhen subject to what I have said in REF _Ref487993512 \r \h]. Costs This is a children's matter and the court would usually make a no order as to costs, unless the litigation conduct of any party warrants a departure from it. During the trial, Mrs Irving for the father cross-examines the mother on her belated affirmation, which was filed 17 days late. Counsel also raises queries on the mother's failure to give her timely response/comment on the documents of the redevelopment projects provided by the father's solicitors after the 1st Children Dispute Resolution (CDR) as well as her failure to attend the 2nd CDR. In my view, the mother was able to offer an explanation in relation to her belated affirmation, namely she lost her handbag including wallet, laptop and mobile on way from Shenzhen to Guangzhou at the material time, as a result of which her solicitors were unable to reach her for arranging her to sign her affirmation. Her absence in the 2nd CDR was due to hospitalisation for gastritis. Very fairly, Mrs Irving has not made any submission for costs in favour of the father in her closing submission. In any event, I myself do not see that the litigation conduct of either party calls for a departure from usual no costs order.

Conclusion

For all the matters aforesaid and in respect of the Relocation Summons, I would grant leave to the father to remove the son permanently out of the jurisdiction of Hong Kong to go to live in Australia in or after September 2017, on the understanding that he is prepared to give the following undertaking to the mother and to this court that: He shall provide the mother's particulars to the school(s) of the son when so requested by the school(s) in any application form(s) or school record(s); He shall co-operate with the mother in obtaining a mirror order of this court order in Australia immediately upon the removal. Immediately upon the relocation, the mother shall have the following access to the son: During term time The mother shall have staying access with the son in Sydney twice during each of the 4 school terms of the son, each from thursday (after school) to monday morning (when she shall bring the son to school if the son has school) or until 4 pm (if the son does not have school on monday), such staying access can be taken in 2 consecutive weeks; For the other times when the mother is in Sydney during term time but not having staying access, she shall be allowed to have day/evening access to the son twice each week for 2 hours; The mother shall give a 7 days prior notice to the father, and the father shall respond within 24 hours; During long school holidays The following long school holiday arrangement will take precedence over the term time arrangement. The summer holiday and mid-year holiday will be split equally before the parties, with the 1st half to the mother and the 2nd half to the father, provided always that if the father takes the son to Shantou in the 2nd half of the summer holiday and it happens to be the Chinese New Year, the mother shall have 2 extra half day access to the son, exact time and date to be agreed by the parties; The Easter and winter holidays shall be shared between the parties on an alternate basis, such that the father will have Easter and the mother will take the winter holiday in 2018, alternating thereafter in 2019; The mother's access to the son in all the long school holidays except the mid-year holiday may take place within or outside Australia at her own discretion, provided that she has informed the father by way of 1 month's prior notice of the place of access. Other arrangement The mother shall have daily Facetime/Skype access to the son during the days when she does not have day or staying access, exact time to be arranged and agreed between the parties; In the case that the mother's access to the son is to take place outside Australia during the long school holidays, the father shall provide the son's original passport to her 48 hours before departure, and the mother shall return the same to the father when she returns the son to the father. I shall make no further order in respect of the Access Summons. A penal notice will be endorsed. Personal service of this court order shall be dispensed with. There will be no order as to costs of both summonses, including all costs reserved. This is an order nisi to be made absolute at the expiration of 14 days. The father's legal team shall draw up the order (in one draft order for both summonses) for approval. Grace Chan District Judge Mr Enzo Chow instructed by Messrs Cheung Chan & Chung for the petitioner (mother) Mrs Frances Irving instructed by Mayer Brown JSM for the respondent (father) 29 of the SIR. 33 of the SIR. 33 of the SIR. [P2/543-606] [P2/434.1] [P2/564] 17 of the mother's closing written submission. 28 of the SIR [P2/337] The mother says that she pays for the son's expenses whenever he is with her. She has paid for her insurance as well. [P2/494/ [P1/49] - PAGE A B C D E F G H I 1udk h(!% h(!% h(!% gdH: gd(!% gd~w gd}! gd~w gdH: gdH: hs22

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Prepared on 28 October 2026 · Esheria