

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
MATRIMONIAL CAUSES NO 7824 of 2015

BETWEEN

ZJW

Petitioner

and

SY

Respondent

Before: HH Judge Bruno Chan in Chambers

Date of Hearing: 31 March, 12 – 13 July 2016

Date of Judgment: 21 September 2016

JUDGMENT

(Jurisdiction and Staying Proceedings)

1. The Petitioner Wife, a Chinese resident of Shenzhen, PRC, issued a petition for divorce in these proceedings on 22nd June 2015 by invoking the jurisdiction of the Hong Kong Court on the ground that the Respondent Husband, also a Chinese resident of Shenzhen, had a substantial connection with Hong Kong at that date. In her petition she also sought general ancillary relief against the Husband whom she claims to own very substantial assets in Hong Kong.
2. After being served with the divorce papers, the Husband issued a summons on 20th August 2015, which is the matter now before me, for an order that the petition be dismissed for lack of jurisdiction of the Hong Kong courts to deal with their divorce by disputing that he had substantial connection with Hong Kong, and failing which that the divorce proceedings be stayed on the ground of *forum non conveniens* in that the Shenzhen Court is the more suitable forum than the Hong Kong Court for these proceedings.

[Background](#)

3. Both the Husband, now aged 54, and the Wife, aged 47, were born, raised and educated in Mainland China.
4. They were married on 14th December 1992 in Gu Lou District, Fuzhou City, Fujian Province, and thereafter made their home in Shenzhen where the Husband ran various companies while the Wife was a full-time housewife. In 2001 the Husband purchased a property at Luohu District, Shenzhen which had since been their matrimonial home.
5. In 1995 the Wife gave birth to their only child, a son, in Shenzhen where he was raised and attended school until September 2013 when he went to Shanghai to attend Shanghai East China Normal University, and then in December 2014 to Rensselaer Polytechnic Institute in USA where he has remained as a student.
6. On 1st January 2009 the Husband was appointed an executive director of a company known as CGFGRG Limited listed in the Hong Kong Stock Exchange. In the same year he obtained a working permit from the Hong Kong Immigration Department under the Admission Scheme for Mainland Talents and Professionals when a Hong Kong Identity Card was issued to him as well as the Wife and their son as his dependents.
7. On 30th September 2009 the Husband resigned from CGFGRG Limited but had thereafter been involved in a number of other companies in Hong Kong, and on 12th May 2014 he issued a writ in Hong Kong under HCA 813/2014 (“High Court Action”) as a plaintiff for proprietary claims against a company known as SJ Ltd and the Wife’s younger brother LLD as defendants for declarations that they hold the assets in certain accounts on trust for him, for orders that they pay, deliver and transfer such assets to him, and for injunctions restraining them from disposing or otherwise dealing with such assets pending the outcome of the action.
8. On the day after the Husband had instituted the High Court Action, the Wife moved out of the matrimonial home to reside in another flat in Shenzhen and has since lived apart from the Husband. Meanwhile in October 2014 the Husband rented a service apartment at the Convention Plaza in Wanchai, Hong Kong under a 2-years lease where he would reside whenever he stayed over in Hong Kong.
9. On 22nd June 2015 the Wife issued the petition for divorce in these proceedings against the Husband based on his unreasonable behaviour in which she also sought general ancillary relief.
10. In her petition the Wife relied on one single ground for invoking the jurisdiction of the Hong Kong Court for her divorce proceedings in that the Husband had a substantial connection with Hong Kong at the time of the presentation of the petition under Section 3(c) of Matrimonial Causes Ordinance, Cap 179 (“MCO”).
11. In support of that ground the Wife specifically stated 7 factual basis in her petition as summarised in the Husband’s Skeleton Submission as follows:

- (i) that in 2009 the Husband obtained a working permit from the Hong Kong Immigration Department under the Admission Scheme for Mainland Talents and professionals, that Hong Kong Identity Card were issued to all three family members, and that the Husband has since obtained the right of abode in Hong Kong and has been living in Hong Kong;
- (ii) that the Husband has worked for several listed companies in Hong Kong as executive director;
- (iii) that the Husband is currently working for BP limited which is a subsidiary of a listed company in Hong Kong, with his residential address close to the Hong Kong office of BP Limited;
- (iv) that the Husband holds Hong Kong bank accounts;
- (v) that the Husband's residential address in Hong Kong is at his rented service apartment at Convention Plaza;
- (vi) that the Husband has over the past years come and lived in Hong Kong for more than 30 days per year on average;
- (vii) that the Husband is the plaintiff of the said High Court Action in Hong Kong involving disputes over assets worth HK\$337 million, and that he also has substantial assets in Hong Kong.

12. As noted above, upon being served with the petition, the Husband on 20th August 2015 issued the summons for the matters now before me, and in support of the application he has filed 2 affirmations, and whilst he does not dispute having a connection with Hong Kong, he insists that it is not sufficiently substantial at the time of the issue of the petition to fulfil the requirement under Section 3(c) of MCO on the following basis: that all three members of the family were domiciled and habitually resident in Shenzhen, that his companies and businesses were all based in Shenzhen, and while he had been involved in some investment consultancy employments in Hong Kong, he would perform his duty mostly in the Mainland, that his trips to Hong Kong were mainly for business meetings and were mostly same-day visits, that his application under the Admission Scheme for Mainland Talents and Professionals was for convenience only to facilitate his travel to Hong Kong but he had no plan to live in Hong Kong, that he rented the serviced apartment in Convention Plaza to facilitate his handling of the High Court Action but itself is irrelevant to his summons herein, and that if Hong Kong Court does find jurisdiction for the divorce proceedings, for the same reasons he believes that the proper, natural and appropriate forum to deal with the dissolution of their marriage and the resultant ancillary relief proceedings would be Shenzhen, PRC.

13. In response the Wife has filed one affirmation disputing the Husband's case, and although she accepts that Shenzhen courts also have jurisdiction to deal with the parties' divorce proceedings, she insists that Hong Kong is the more appropriate forum to do so.

14. Whilst the questions of whether the Husband had a substantial connection with Hong Kong at the time of the issue of the petition or that the Shenzhen Court is clearly or distinctly the more appropriate forum for the parties' divorce are essentially factual issues, it would of course be relevant to first set out the applicable law and principles, starting with those on jurisdiction.

Applicable Principles on Jurisdiction

15. In its full contents Section 3 of MCO provides 3 alternative situations in which the court shall have jurisdiction in proceedings for divorce, namely –

- (a) either of the parties to the marriage was domiciled in Hong Kong at the date of the petition or application;
- (b) either of the parties to the marriage was habitually resident in Hong Kong throughout the period of 3 years immediately preceding the date of the petition or application; or
- (c) either of the parties to the marriage had a substantial connection with Hong Kong at the date of the petition or application.

16. Whether a person has a substantial connection with Hong Kong is clearly a question of fact, but before one is to look to see whether that person has connection and if so whether it is substantial, it would be relevant to first ascertain the meaning and extent of that phrase "substantial connection" in the context of s.3 of the Ordinance, which was first discussed by Briggs J, as he then was, in the case of *Jean Michael Sanournin v Lau Yat Fung* [1971] HKLR 180 when he held that as a new and additional ground of jurisdiction, a meaning must be given to the phrase wider than domicile or three years ordinary residence at 184:

"Domicile in a country is obviously a substantial connection with that country: so may three years ordinary residence be so considered. Paragraph (c), a substantial connection with Hong Kong, is in addition to those two requirements. It is not substituted for them. A meaning must be given to the phrase wider than domicile or three years ordinary residence."

17. *Sarournin* was of course a case of more than 45 years ago when Briggs J examined what was then new legislation introduced in 1970 as part of the marriage reform giving Hong Kong courts additional jurisdiction to grant divorces, and it would be helpful to look at the more recent decisions on the meaning of that phrase, which was considered by Hartmann J, as he then was, in *S v S* [2006] 3 HKLRD 751 at 755F where he held that the phrase should be given its ordinary meaning, that it was sufficient to demonstrate "a" substantial connection with Hong Kong but not necessarily the only substantial connection or the most substantial connection, and that it must be real and of sufficient significance and not temporary or transitory:

“[13] In my view, when considering the meaning and extent of the phrase, it is important to recognise that the Legislature saw fit to qualify it with the indefinite article “a”. It is not therefore necessary for a petitioner to demonstrate that his substantial connection with Hong Kong is the only substantial connection he has with any jurisdiction or that his connection with Hong Kong is the most substantial connection he has with any jurisdiction. No exercise of comparisons is required. It is sufficient if he demonstrates that, among others perhaps, he has “a” substantial connection with Hong Kong.

[14] Increasingly we are living in a world without borders. Capital sums are moved in moments from one side of the world to the other with little or no regard for national boundaries. The Internet is universal. It is commonplace for even the modestly affluent to have homes in two countries. It is no longer only in the world of fiction that successful business people may at the same time live and work in two countries. Section 3(c) is not at odds with this new reality. The subsection recognises that a petitioner who asserts a substantial connection with Hong Kong may have a substantial connection with one or more other jurisdictions.

[15] But, of course, if the Hong Kong courts are to exercise jurisdiction, it must be shown on a balance of probabilities that a petitioner not merely has a connection with Hong Kong but that, bearing in mind the scope and purpose of the Ordinance, the connection is “substantial”.

[16] “Substantial” is a plain enough English adjective. We all understand what it means – at least in substance (if I may be excused the play on words). I say that because it is not a word that lends itself to precise definition or from which precise deductions can be drawn. To say, for example, that “there has been a substantial increase in expenditure” does not of itself allow for a calculation in numerative terms of the exact increase. It is a statement to the effect that it is certainly more than a little but less than great. It defines, however, a significant increase, one that is weighty or sizeable.

[17] It speaks for itself, I think, that an artificially constructed connection will not be a substantial one. A connection must be real in the sense, for example, that it has not been engineered for temporary tactical advantage. It was not the intention of the Legislature (in passing s.3(c) into law) to create a convenient off-shore divorce jurisdiction. As it has been said in an earlier authority, the subsection is not intended for “birds of passage”.

[18] As the jurisdiction looks to the determination of matrimonial proceedings, a material factor will be whether both parties to the marriage have lived in Hong Kong and, if so, how long they have lived here, as man and wife. But those factors will not necessarily be determinative. In each case the factors to be considered will be different and the weight to be given to them, in the factual context of each case, will no doubt be different too.

[19] In summary, whether – for the purpose of the Ordinance – a connection is substantial or not can only be determined on the basis of a broad objective assessment, taking all relevant factors into account.”

18. In that case, where some of the facts are quite similar to the one now before me, the husband and wife were both born and raised in Australia. In the 1980s the husband and a partner set up a successful business of punters' club for horse racing in Australia. In 1994 the parties were married and continued to live there with their child. In 1999 the club purchased commercial premises in Hong Kong in which the husband also acquired an interest. Between 1999 and 2002 the family lived in Switzerland where they purchased property. In June 2002 they returned to live in Australia but by then the husband had also become a regular visitor to Hong Kong where he had incorporated a company which traded globally in futures in which he held the majority shareholding and took an active managerial role. He also claimed that by mid-2004 about half of his liquid assets had been moved to Hong Kong, that he had begun to learn Chinese, that by late 2004 certain small domestic matters of his personal life were centred in Hong Kong, and in late January 2005 he took steps to secure his long-term residence such as submitting an application for a business investment scheme under which his right of residence in Hong Kong was subsequently granted, and agreeing to purchase a residential property. However, after an unsuccessful attempt to reconcile with the wife in end of January 2005, he issued a divorce petition in Hong Kong on 1st February 2005 on the basis of his substantial connection with Hong Kong, to which the wife dispute in that the parties had never lived in Hong Kong and that neither parties had substantial connection with Hong Kong at the time of the issue of the petition.

19. In finding that the husband had failed to demonstrate a connection of sufficient substance as at 1st February 2005 so as to give the Hong Kong courts the power to adjudicate on matters going to the dissolution of his marriage to his wife and matters which flow from that such as custody and property distribution, His Lordship explained his reasons as follows:

“[51] This has not been the easiest matter. In many respects it has been finely balanced. I accept fully that in late 2004 and in January of this year, after leaving the matrimonial home and coming to Hong Kong, the husband was in the quickening process of acquiring a substantial connection with Hong Kong. However, taking all matters into account, I am not satisfied that – for the purpose of the Ordinance – he had acquired that substantial connection by the date of the issue of the petition.

[52] While I accept that in many different respects a substantial connection may be forged in a matter of weeks, or even days, what cannot be ignored, in my judgment, is that the substantial connection which is contemplated in the Ordinance is one which gives jurisdiction to the Hong Kong's courts in respect of matrimonial causes; that is, to matters going to the dissolution of marriage – still a profound matter in the eyes of the law – and to matters which flow from that, for example, matters of custody and property distribution. In this respect, and I consider it critical, while the husband was no doubt, in the months leading up to the issue of the petition, acquiring a substantial connection with Hong Kong he has not been able to demonstrate on the balance of probabilities that his links were so substantial at the time of the issue of the petition that the Hong Kong courts should take on jurisdiction to deal with issues concerning the dissolution of the marriage and other matters flowing from it,

[53] The husband had not, for example, as I understand it, formally acquired a visa to reside in Hong Kong on the date when the petition was issued. Indeed, he had only filed an application in this regard a few days before. Equally, he had only taken steps to acquire residential property – a place where he and the child of the marriage could, if necessary live – a few days before the issue of the petition.”

20. Two years later in *B v A* [2008] 1 HKLRD 43 His Lordship again came to examine the meaning of “substantial connection” when he supplemented his decision in *S v S* by adding that whether or not the connection was of sufficient substance, significance or worth involved arriving at a broad conclusion based on all relevant facts, and that an artificially constructed connection would not be a substantial one, as it would not be the Legislature’s intention to create a convenient off-shore divorce jurisdiction:

“[22] It is, of course, fundamental that s.3 of the Matrimonial Causes Ordinance confers jurisdiction in respect of divorce proceedings. In *S v S*, I spoke of this in the following terms:

While I accept that in many different respects a substantial connection may be forged in a matter of weeks, or even days, what cannot be ignored, in my judgment, is that the substantial connection which is contemplated in the Ordinance is one which gives jurisdiction to the Hong Kong courts in respect of matrimonial causes; that is, to matters going to the dissolution of marriage – still a profound matter in the eyes of the law – and to matters which flow from that, for example, matters of custody and property distribution.

[23] In the circumstances, it seems to me that the factual issue of whether or not a party had a substantial connection with Hong Kong at the time of the institution of proceedings may conveniently be determined by asking two questions. First, did the party have a connection with Hong Kong? Second, was that connection of sufficient substance; that is, of sufficient significance or worth, to justify the courts of Hong Kong assuming jurisdiction in respect of matters going to, and consequential upon, the dissolution of that parties’ marriage?

[24] In respect of the second question, in *Savournim v Lau Yat Fung*, Briggs J observed that:

... while it may be nearly impossible to give a definition embracing all the cases where it can be said that a party to the marriage has a “substantial connection” with Hong Kong, it is not difficult to determine when circumstances do not show a substantial connection. [Counsel] instanced two persons coming here only for the purpose of obtaining a decree. Naturally that by itself is not enough nor is the fact that the marriage was celebrated in Hong Kong sufficient of itself.

[25] In *S v S*, I complemented this by saying:

It speaks for itself, I think, that an artificially constructed connection will not be a substantial one. A connection must be real in the sense, for example, that it has not been engineered for temporary tactical advantage. It was not the intention of the Legislature (in passing s.3(c) into law) to create a convention off-shore divorce jurisdiction.

[26] Clearly, as I have said, it was not the intention of the Legislature to create a “fly in and fly out” divorce jurisdiction. What is required under s.3(c) is not merely a connection but a substantial connection. But that being said, I do not accept that a person who has come to live in Hong Kong for a limited period of time is, by that fact alone, incapable of establishing a substantial connection with Hong Kong. As I have emphasised, the particular facts of each case must be taken into account. The question must therefore be asked: what are the circumstances relevant to the limited period of residence and just how limited is it intended to be? To illustrate my point, good sense dictates that there is a difference between residing in Hong Kong for a month or two to oversee a short-term project and being posted here together with one’s family for a period of several years.”

21. In that case both the husband, an international banker, and the wife were born and raised in Argentina. They married in 1988 and had two sons. In 2000 the husband was transferred to Spain where he and his family spent 5 years. The husband was then posted to Shanghai with his family for about one year, and in 2006 he was transferred to Hong Kong where the wife and children joined him later in the same year. The children enrolled in school and the family leased a flat for two years, bought a family car and hired domestic helpers. The husband obtained a renewable one-year work permit and also acquired Hong Kong Identity Card as did his family. While the husband was based in Hong Kong, he travelled extensively in the region. In January 2007 the parties separated. On 15th March 2007 the wife issued a divorce petition in Hong Kong against the husband, claiming both of them to have a substantial connection with Hong Kong at the date of the petition and therefore Hong Kong had jurisdiction pursuant to s.3(c) of MCO, but the husband disputed this.

22. In disagreeing with the husband's argument that it was not possible for a party who comes to Hong Kong for an anticipated period of just two or three years and transferred here for commercial reasons to acquire a substantial connection with Hong Kong, and in holding that both the wife and husband had a connection with Hong Kong of sufficient significance, worth and substance to properly form a basis for determining the law governing the dissolution of their marriage, His Lordship gave his reasoning as follow:

“[26] Clearly, as I have said, it was not the intention of the Legislature to create a “fly in and fly out” divorce jurisdiction. What is required under s.3(c) is not merely a connection but a substantial connection. But that being said, I do not accept that a person who has come to live in Hong Kong for a limited period of time is, by that fact alone, incapable of establishing a substantial connection with Hong Kong. As I have emphasised, the particular facts of each case must be taken into account. The question must therefore be asked: what are the circumstances relevant to the limited period of residence and just how limited is it intended to be? To illustrate my point, good sense dictates that there is a difference between residing in Hong Kong for a month or two to oversee a short-term project and being posted here together with one's family for a period of several years.

[27] On behalf of the husband, it was however Mr Erving's primary submission that it is simply not possible for a husband or wife who come to Hong Kong for an anticipated period of just two or three years, transferred here for commercial reasons, to acquire a substantial connection with this jurisdiction.

[28] I do not agree. Without falling victim to current marketing ploys, it is accurate, I think, to say that Hong Kong is an international city. By “international” I mean that it is a city which, by reason of its long-recognised financial, commercial, professional, educational and cultural dynamics, attracts large numbers of persons and their families who seek to live and work here for a limited period of time. This group of persons, often referred to as “expatriates”, constitutes a substantial presence in many areas of endeavour. As with the husband and wife in the present case, their lives become centred on Hong Kong. Their children go to school here, not merely for a few months, but for several years. They move into residential property here, they hire domestic helpers, they buy cars, they join clubs. They make a very real and valued contribution to Hong Kong. In my judgment, the realities demand that such persons may, depending on the facts of their case, acquire a substantial connection with Hong Kong.

...

[30] Mr Erving made a good point when he said that s.3(c) cannot be intended to be merely a lesser substitute for s.3(b), replacing the requirement for three years' habitual residence with a period of say two years. But sub-ss.(b) and (c) demand different things. Subsection (b) demands no more than usual residence for three years, (c) demands a substantial connection with Hong Kong.

[31] No doubt, establishing a substantial connection with Hong Kong will be easier in many cases than establishing domicile or three years of usual residence. But I do not read s.3 as demanding equal severity when establishing each ground of jurisdiction. In that respect, it may be said that s.3 is hierarchical.”

23. The meaning of the phrase of “substantial connection” was examined at length by the Court of appeal in *ZC v CN (Divorce: Jurisdiction)* [2014] 5 HKLRD 43, where the husband was born in Mainland China but moved to Hong Kong as a teenager and became a permanent resident here. Since 1982 he had lived in Shenzhen and been involved in the entertainment business on the Mainland. He met the wife in 1995 and cohabited until he divorced his first wife, and in 2005 the parties married in Hong Kong but their matrimonial home remained in Shenzhen. In 2007 the parties bought a flat in Hong Kong which they sold in 2011, and in 2008 they bought another flat in Hong Kong in which they stayed when visiting. Between November 2007 and August 2012 the wife travelled to Hong Kong on a two-way permit for fertility treatment, whilst the husband had since 2010 been receiving medical treatment for a serious lumbar condition in Hong Kong and the mainland. In May 2010 the wife was granted a one-way exit permit to come to Hong Kong and a Hong Kong identity card, but she was not a permanent resident. On 15th May 2012 she petitioned for divorce in Hong Kong, claiming that she and the husband had a substantial connection with Hong Kong at the date of the petition pursuant to s 3 of the matrimonial Causes Ordinance, Cap 179, which was however disputed by the husband in that neither had substantial connection with Hong Kong. The judge of first instance held that the parties were not domiciled here but had a substantial connection with Hong Kong. The husband appealed.

24. In allowing the appeal, Cheung JA of the Court of Appeal examined first the modern approach of the statutory interpretation of the words “substantial connection” of which he agreed that one should not just look at their natural and ordinary meaning but also the context and purpose of the term, and then proceeded to examine the development of the case law:

“9.1 In line with the modern approach of statutory interpretation, one should not simply look at the natural and ordinary meaning of the words “substantial connection” but also the context and purpose of this term.

...

9.4. Whether a person has a substantial connection with Hong Kong is clearly a question of fact. No definition for this term will be succinct or comprehensive enough. What one may do is to look at the surrounding factors to see whether that person is substantially connected with Hong Kong at the time of the petition. As a starting point, one begins to see if that person has connection here and then decide whether that connection is a substantial one, see *S v S* [2006] 3 HKLRD 751, [15]. In terms of connection, there must be physical presence in Hong Kong, this must be the ground rock of invoking the divorce jurisdiction. But because of the requirement of “substantial”, the presence cannot be of a transitory nature otherwise this will encourage “fly in” and “fly out” divorces, a theme that the Court has consistently emphasised, see, for example, *Griggs (nee Sharp) v Griggs* [1971] HKLR 299, *Ta Tran Thi Thanh v Ta Van Hung* [1981] HKDCLR 37 and more recently *S v S, B v A* [2008] 1 HKLRD 43.

9.5 In the majority of cases, where a married couple is in Hong Kong, the Court will have no difficulties in ascertaining whether they have a substantial connection here. Thus in *RI v SSH* [2010] 4 HKC 588, this Court held that:

[4] ... Hence in order to see whether the proceeding has a real and substantial connection to Hong Kong one must, first of all, ascertain whether at the time of its commencement the parties have subsequently conducted that matrimonial life in Hong Kong. Hong Kong being an international commercial city, the identification of this issue is most acute for expatriate families who live in Hong Kong. The relevant considerations are, for example, whether the parties' matrimonial home is here, what is their past pattern of life; do they regard Hong Kong as their home for the time being even if their life style may indicate that they may not take root in one place for too long a time. Related to the issue are matters such as the place of work of the spouses: do they choose to work here; even if one of them has to 'commute' overseas to work, is Hong Kong still treated as their home base. Likewise for the children of the family: are they studying here or spending their vacations here even if they are studying abroad.

See also *LN v SCCM* (unrep., CACV 62/2013, [2013] HKEC 870) (4 June 2013) and *DGC v SLC* (nee C) [2005] 3 HKC 293.

9.6 While the discussion in *RI v SSH* was in the context of *forum non conveniens*, the question of forum is dependent on the place where the parties have the most real and substantial connection with the action. Hence the suggested factors are clearly applicable to the present discussion.

9.7 Traditionally, the discussion of this topic mainly centred on the foreign expatriate community who are present in Hong Kong because of business commitments or to avail themselves of the opportunities in this international commercial city, see, for example, *S v S, B v A, G v G* [2005] HKFLR 182 and *Z v Z (Substantial Connection and Forum)* [2012] HKFLR 346. Increasingly in recent years this issue is extended to many of the Hong Kong and Mainland Chinese families who have homes or businesses both here and on the Mainland. Examples can be found in this and other cases such as *LS v AD (Forum: discovery in the PRC)* [2012] HKFLR 376 and *YS v TTWD (Substantial Connection: Forum)* [2012] HKFLR 129. The focus of discussion in those cases is not about mainlanders who came here on visitors' two-way permit but those who have resident status in Hong Kong. Needless to say, the same approach of looking at the surrounding circumstances in order to ascertain the presence of substantial connection is to apply to these parties as well.

9.8 The fact that a party has resident status which allows him or her to live here legally is only a factor to be taken into account. He or she may not be living here on a long term basis and only comes here occasionally. No doubt one has to look at other factors such as the party's past pattern of life, the frequency of his visit to Hong Kong, the length and purpose of the stay, whether the party is engaged in business or work here, whether the rest of the family is here and whether a home has been established here and whether the children are at school here. It is also important to bear in mind that since the legislation only requires the party to establish a substantial connection in Hong Kong, he or she at the same time may have a substantial connection elsewhere, see *S v S*. In my view, if a party is shown to have substantial connection elsewhere by reason of his home or work, this may be used to contrast with the connecting factors he has in Hong Kong to see whether the Hong Kong connection is a substantial one.

9.9 It was said in *Savournin* [1971] HKLR 180, 184 (and also *B v A* [2008] 1 HKLRD 43, at [20]) that a meaning must be given to substantial connection wider than domicile or three years' ordinary residence. But this is not intended to be interpreted so loosely as to encourage residence of passage (*Indyka v Indyka* [1969] 1 AC 33 at 105) or divorce of convenience. At the same time it will be unduly restrictive if one confines the connecting factors solely to that of a family context, namely, accommodation in a matrimonial home and presence of spouses and children. While in the majority of cases, family context is the focus of the inquiry and a material factor, there may well be situations where a party is in Hong Kong without the presence of his family, but nonetheless is able to show that he has substantial connection here. It really depends on the circumstances of the case. Such cases, however, must be regarded as exceptional."

25. His Lordship then proceeded to explain why the judge was wrong in her finding on substantial connection:

“11.1 ... (The Judge) was plainly wrong on the finding on substantial connection. The overall view that emerges from the parties’ pattern of life is that they conducted their matrimonial life on the mainland prior to the wife’s petition. Let us look at the position of the husband first. For the past 30 years he has conducted his life away from Hong Kong in the Mainland where he has his business and matrimonial home. He still lives in Shenzhen. The wife in her oral submission said that the husband spent his time in other parts of the Mainland as well, namely, Shanghai and Zhanjiang. But that does not detract from the fact that the husband’s life has been spent away from Hong Kong. The fact that the husband has Hong Kong properties where he can stay while in Hong Kong, local bank accounts and also a company registered in Hong Kong does not necessarily establish a substantial connection here. It is not uncommon for someone in this modern age of globalisation to hold foreign properties, bank accounts and companies, particularly in light of the close proximity between Hong Kong and the Mainland and the large volume of commuters crossing the mainland borders to Hong Kong. While the husband is a Hong Kong permanent resident, his travel record clearly reveals that his entry into and stay in Hong Kong is really in the nature of a residence by passage only. They consist of frequent same day returns and short overnight stays.

11.2 The fact that the husband had in his earlier divorce petition in Hong Kong relied on his domicile in Hong Kong is irrelevant to the issue now under consideration. The Court in the previous proceedings had not made any determination on that point.

11.3 In respect of the wife, her travel pattern also reveals the same transitory nature of her stay in Hong Kong. Her more frequent entries to Hong Kong between 2008 and 2010 to seek fertility treatment do not turn an otherwise unsubstantial connection into a substantial one. The reality is that by the time of her petition she had not spent any substantial part of her life here. This is a point recognised by the Judge when she was dealing with the parties’ domicile. While I accept that the concept of domicile is different, I find it odd that this impediment has not been recognised in the inquiry on substantial connection. The other factors that the Judge relied upon, namely, the wife is a Hong Kong resident (but not a permanent resident) with Hong Kong identity card and her ownership of the flat in Palazzo (initially as joint tenant, now as tenants in common) are clearly not enough to tip the scale in her favour.

11.4 While the concept of substantial connection is wider than domicile and habitual residence ... the line has never been as low as where the Judge in this case has set it, namely, where the parties have never lived or worked in Hong Kong throughout their entire marriage, but only established their ties with Hong Kong through their real estate investment and bank accounts, and their frequent daily visits to Hong Kong.”

26. It is with all these principles in mind that I now proceed to consider the Wife’s case of the Husband’s substantial connection with Hong Kong at the date of the presentation of her petition in June 2015, starting with the first factual basis listed in her petition: His application for residence for himself and family.

Husband’s Application for Residence in Hong Kong

27. It is not disputed by the Husband that the entire family had been issued the Hong Kong Identity Card under the Admission Scheme for Mainland Talents and Professionals, and that as a result they could stay and reside in Hong Kong, but he insists that both he and the Wife were and still are domiciled and habitual residents in Shenzhen, that neither of them was yet a permanent resident here, that the Wife and son hardly came to Hong Kong and had never lived here, that he himself came to Hong Kong mostly for business meetings, and that he applied under the Admission Scheme for convenience only as it would facilitate his travel to Hong Kong for his business meetings and that he had no intention to relocate here either for himself or his family.

28. In addition, it is also the Husband’s case that when he was appointed an executive director of CGFGRG Ltd on 1st January 2009 for which he was to receive a remuneration of HK\$800,000 per annum, he was required by the company to obtain a working permit in Hong Kong, as he alleged in his 2nd affirmation [B1/45].

29. Accordingly about 2 months later he submitted his Application for Employment as Professionals in Hong Kong dated 1st March 2009 to the Immigration Department on 10th March 2009 as evidenced by the Department's receipt chop of the same date on the 1st page of his application [B2/155].

30. The Wife however argues that all of these would not be necessary if the whole purpose was merely to facilitate the Husband's travels to Hong Kong, as he could have easily applied in Shenzhen for a Multiple Entry Visa to enter Hong Kong, and insists that his Application for Employment as Professionals was part of his scheme to relocate the family to Hong Kong.

31. The notice issued by the Shenzhen Authority of the implementation of the Multiple Entry Visa and produced by the Wife as evidence [B4/923] however reveals that it was dated 31st March 2009 and that the implementation was to commence only on 1st April 2009 which was about one month after the Husband's application, and of which he claims to be unaware when he made his application on 1st March 2009. In any event it is not disputed that he did thereafter travel to Hong Kong from time to time, and the Wife believes that this is how he started his connection with Hong Kong which had since grown so substantially by June 2015 so as to justify Hong Kong courts invoking its jurisdiction to deal with their divorce proceedings. The Husband however insists that his travels to Hong Kong had been very infrequent and mostly for business meeting and that he was in and out on the same day.

Husband's Travel to Hong Kong

32. As evidence in support of his case, the Husband has produced his travel records to Hong Kong since July 2009 [B2/107-118] which he summarised in his 1st affirmation [B1/21] as follows:

<u>Year</u>	<u>Total # of Visits</u>
2009	30 visits of which 24 were same-day visits
2010	48 visits of which 37 were same-day visits
2011	43 visits of which 33 were same-day visits
2012	21 visits of which 15 were same-day visits
2013	38 visits of which 33 were same-day visits
2014	53 visits of which 32 were same-day visits
2015	45 visits of which 21 were same-day visits

33. On the basis of these figures, even taking the highest number of 53 visits to Hong Kong in 2014, of which 32 took place within the same day, it seems to me that they can hardly be said to be substantial, but the Wife argues that they do not show the full picture of the time spent by the Husband in Hong Kong, as she summarised in her affirmation [B1/28] of the total number of days which he had spent or stayed in Hong Kong during the same period:

<u>Year</u>	<u>Total # of Days in Hong Kong</u>
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7/2009 – 6/2010	72
7/2010 – 6/2011	74
7/2011 – 6/2012	46
7/2012 – 6/2013	40
7/2013 – 6/2014	63
7/2014 – 6/2015	171

34. For the 12 months leading up to June 2015 at least, 171 days spent in Hong Kong would amount to almost half of the entire year and can indeed be said to be significant or substantial, and the Wife further points out that during the first 6 month of 2015 up to the time when she issued the petition, the Husband had stayed in Hong Kong for 106 days which were also significantly more than in previous years, of which she submits as strong indication of an intention to spend more and more time in Hong Kong, but which the Husband argues was essentially for handling the many applications issued under his High Court Action, and which was also the reason why he decided to rent the service apartment at Convention Plaza rather than just staying in the hotel, but of which he insists to have nothing to do with any plan to take up permanent residency in Hong Kong.

Husband's Residence in Hong Kong

35. The service apartment was rented by the Husband under a lease dated 22nd October 2014 for 2 years up to 21st October 2016, but with a break clause after 12 months by giving a 2-months notice according to a copy of the tenancy agreement exhibited to his 1st Affirmation [B2/98, 103], of which the Husband argues as indication that it was just a temporary arrangement to save on his accommodation costs while visiting Hong Kong for dealing with the said High Court Action and for his business meetings, and of which he explained in his 2nd Affirmation:

“[23] My visits to Hong Kong were mainly business oriented and starting from May, 2014 till the present moment, a large number of visits were due to the litigation in HCA813/ of 2014, there have been (1) 4 injunction order hearings, 2 for ex-parte application and 2 for hearing on returnable date; (2) 3 Bankers Trust Order application; (3) 1st and 2nd Defendants’ application for fortification of damages undertaking hearing; (4) preparation of Reply and Defence to Counterclaim with facts raised by the 1st and 2nd defendants dating back to the early 1990s; and (5) amendments of the Writ and statement of Claim adding new parties after discovery under the Bankers Trust Orders. This involves considerable time to giving detailed instructions and approving draft affirmations.

...

[27] The main reason for the renting of the Service Apartment is to handle the litigation in HCA813 of 2014. The increase in demand for my business is also one of the contributing factors. With the large number of applications set out in paragraph 23 herein, apart from the first injunction order and its returnable day hearing, the rest of the applications were made after October 2014. It was in anticipation of the large number of applications that I made up my mind to start renting the service Apartment in October, 2014.”

36. It is therefore the Husband’s case that his residence in Hong Kong was essentially for the High Court Action and not relevant to any intention to move to Hong Kong in the future, and that in any event the parties had never conducted their marriage life in Hong Kong either, which he argues is a significant if not determinative factor as to his connection with Hong Kong.

37. Of that latter point raised by the Husband, Ms Anita Yip SC appearing for him with Ms Cindy Lee submits that it is relevant to note the following facts in respect of the parties' marriage life:

- (a) that the parties conducted their marriage life from beginning to end in Shenzhen all along the 22 years of their marriage;
- (b) that the matrimonial home has always been in Shenzhen and not in Hong Kong;
- (c) that their son studied in the Mainland all along until 2015 when he started attending university in the US, and that he would return to Shenzhen and not Hong Kong for vacation;
- (d) that after the son obtained his Hong Kong Identity Card in 2009, he had visited Hong Kong only a few times.

38. It is in fact not disputed that the Wife had no substantial connection with Hong Kong herself, as otherwise she would have pleaded so in her petition, nor had the parties lived in Hong Kong as husband and wife, but Mr Horace Wong SC appearing with Mr Clark Wang for her submits that that fact is not necessarily determinative as it was held in *S v S* above, and that it would be unduly restrictive if one confines the connecting factors solely to that of a family context such as matrimonial home or the presence of spouses and children, and while in the majority of cases family context is the focus of enquiry and a material factor, there would be exceptional situations where a party is in Hong Kong without the presence of his family and nonetheless has a substantial connection here.

39. Mr Wong further submits that the intention of the parties after the marriage broke down is also important, if not more important, as the Court of Appeal explained in *LYCP v YEK* [2015] 4 HKLRD 798 at 834:

“[43] Whilst the Judge recognised in [34] that “the Wife and children are here because the Wife has chosen to remain in Hong Kong following the breakdown of her marriage”, and “it is true that the Wife has recently set up home here and that the children are attending school”, she considered that that must be seen “in the context of the fact that the original intention was that this would be a temporary move of 1-2 years”. She fell into the same error as in assessing the factors relevant to the Wife’s intention regarding domicile, and failed to give recognition to the material fact that in view of the breakdown of her marriage, there was a change from the Wife’s perspective and she had decided not to return to the matrimonial home in New Jersey but to stay on in Hong Kong indefinitely.”

40. In that case the wife was born and raised in Hong Kong, while the husband was an American grew up in New Jersey. The parties met in Hong Kong and married in New Jersey in 1997, and subsequently moved to New Jersey where the wife gave birth to two sons. In July 2013 the wife moved with the children to Hong Kong. In December 2013 she discovered that the husband was having an affair and issued divorce proceedings in April 2014 in Hong Kong, while the husband also issued divorce proceedings in New Jersey in May 2014. In January 2015 the husband obtained a stay of the Hong Kong proceedings on the ground that the Court had no jurisdiction over the divorce because neither party was domiciled in or had a substantial connection with Hong Kong as at the date of the petition, as his case was that the wife had originally agreed with him that the children's move to Hong Kong was only temporary. The husband then issued an application in Hong Kong under the Hague Convention on the Civil Aspects of International Child Abduction 1980, citing the wife's wrongful retention of the children in Hong Kong. The judge found that the parties shared an intention that the wife's move to Hong Kong with the children was for a limited duration ending around July 2015, that the children's habitual residence remained in New Jersey and their retention in Hong Kong was wrongful.

41. The wife appealed against the stay, and in allowing her appeal, the Court of Appeal held that although the parties' original agreement was to move to Hong Kong temporarily, the wife before the agreed time expired had changed her mind and decided to stay in Hong Kong, and that the absence of joint parental intention to live permanently in a particular country was by no means decisive, nor was an intention to live in a country for a limited period of time inconsistent with becoming habitually resident there, hence the judge erred in finding that the wife was not domiciled in, and did not have a substantial connection with, Hong Kong when she issued those proceedings, and for attaching excessive weight to how the parties had conducted their marriage in the past and failing to recognise the material fact that in view of the breakdown of the marriage the wife's perspective had changed and she had decided not to return to the matrimonial home in New Jersey but to stay on in Hong Kong indefinitely.

42. In the present case, however, it is plain that the parties had never conducted any marriage life in Hong Kong, a fact actually confirmed by the Wife herself when she pleaded in her petition that the parties had since March 2007 slept in separate bedrooms in their matrimonial home in Shenzhen and ceased all normal sexual intercourse as between husband and wife. It also seems to me that neither had the Husband established any formal or permanent home in Hong Kong as otherwise he would have been expected to acquire a much more substantial and permanent residence in Hong Kong given the standard of the former matrimonial home in Shenzhen and his very substantial purchasing power at least according to the Wife, instead of just renting a comparatively much smaller service apartment at the Convention Plaza, which seems plain to me was more for his convenience to be close to his employment at BP Ltd instead of staying in the hotel during his visits in Hong Kong whether for his business meetings or for his High Court case.

43. The same can be said, according to the Husband, about his social life which he insists to have always been conducted in PRC with none in Hong Kong, and in support he cited as being a member of 3 clubs in the Mainland namely Camelot Riding Resort & Country Club, Mission Hills Golf Club and Hainan Tai Dah Golf Club but with none in Hong Kong.

44. Whilst it is the Wife's argument, on the other hand, that the Husband has in fact integrated well in the Hong Kong society with many high-flying Hong Kong residents as his friends such as those named in her affirmation [B1/37-38], which even if true is in my view neither here nor there given his wealth and position in PRC as well as his directorship in those companies publicly listed in Hong Kong, that it is hardly surprising that he would have established such social connection in Hong Kong as well, but it certainly by itself would not be sufficient to establish a substantial connection of the Husband with Hong Kong.

45. I do however agree with Mr Wong that the fact that the parties had never conducted any marriage life in Hong Kong is not necessarily determinative as to whether the Husband had a substantial connection for the purpose of section 3(c) of MCO, as otherwise it would be unduly restrictive if one were to confine the connecting factors solely to that of a family context, and that it is clearly the legislative intention to allow other connecting factors to establish substantial connection, with the most common ones being employment or business connection, as is according to the Wife the case of the Husband, although it is also worth noting of what Deputy Judge B. Chu, as she then was, said in *Z v Z (Substantial Connection and Forum)* [2012] HKFLR 346 at 367:

“[90] In deciding whether there is ‘substantial connection’, this Court would have to have regard to all relevant factors. I agree with Mr Scott that in considering jurisdiction for matrimonial proceedings under s 3(c) of MCO, material factors should include some connection with the marriage or connection with the parties on a ‘personal’ level or ‘personal’ sense and not only from a ‘corporate’ or ‘business’ sense ...”

46. Thus bring me to the next issue of what were the Husband's employments and/or businesses in Hong Kong and whether they would so substantially connect him to enable Hong Kong courts to find jurisdiction to deal with the parties' divorce proceedings.

Husband's Employments in Hong Kong

47. Of the Husband's employments in Hong Kong, the Wife believes them to be substantial but criticises him of being very evasive as demonstrated by his single sentence in paragraph 21 of his 1st Affirmation where he stated to “ **... have an investment consultant employment in Hong Kong, I perform my duty mainly in PRC. I come to Hong Kong mostly for business meetings**”, and that it was only after she had pointed to his various employments in Hong Kong in her affirmation that he responded to confirm the same, while still trying to play down their significance, of which she submits that he was plainly not prepared to volunteer any information regarding his employment history in Hong Kong.

48. Notwithstanding such reluctance of the Husband, the Wife claims to have uncovered the following information of his employments and business involvements in Hong Kong since 2009:

- (1) executive director of the said Hong Kong publicly listed company CGFGRG Ltd between 1st January and 30th September 2009;
- (2) non-executive director of another listed company in Hong Kong known as **MH International Ltd** between 27th October 2010 and 2014;
- (3) director of **ACSF Ltd** between 2010 and 30th April 2014;
- (4) investment consultant of BP Ltd, a wholly subsidiary of BH Ltd, another publicly listed company in Hong Kong, from June 2010 up to the present.

49. Mr Wong submits for the Wife that in comparison there is no evidence to suggest that the Husband has other employment in any place other than Hong Kong, and that he has certainly built his career in Hong Kong and has maintained a deep-seated connection with Hong Kong in terms of career and employment, while his bare allegation in §35 of his 2nd Affirmation [B1/51] that **“the focus of my work and business is in Shenzhen”** is totally devoid of substance as he has not condescended to any particulars and the allegation plainly does not sit well with his employment history or his evidence in the High Court Action. If indeed he has an employment history in PRC comparable with that in Hong Kong, Mr Wong submits, one would have expected him to allude to the same in these proceedings.

50. Whilst it is true that there were much less details in the main contents of the Husband’s two affirmations filed in these proceedings as to his employments and businesses in the Mainland than those he has had in Hong Kong, it seems to me too simplistic if not downright incorrect to assert that he did not have an employment history in PRC comparable with that in Hong Kong, as he did clearly refer to 2 companies set up by him in Shenzhen with one still in active operation [B1/18-19], and from the many exhibits to those affirmations of his, it is quite plain that his career in PRC was in fact much more well-established and substantial than in Hong Kong, as evidenced by, for example, the public announcement by CGFGRG Limited of his appointment as executive director in January 2009 and exhibited to his 2nd Affirmations [B2/149] as follows:

“The board (the “Board”) of directors (the “Directors”) of CGFGRG Limited (the “Company”) is pleased to announce that Mr SY (the Husband) and ... have been appointed as executive directors of the Company with effect from 1 January 2009.

Mr SY, aged 46. Mr SY graduated from the Department of Industrial Economics and Business Administration of Shanghai University of Finance and Economics. He has worked in the Ministry of Housing and Urban-Rural Development of the people’s Republic of China and China’s Rural Trust and Investment Corporation, and has also held the posts of the Chairman of Shenzhen Junju Development and Investment Company and the Managing Director of Pomoda (Shenzhen), Inc. Mr SY has about 20 years of experience in real estate investments and over 15 years of working experience in finance and managing investment enterprises. Save for the directorship with the Company, Mr SY has not held any other position with the Company or any of its subsidiaries. Mr SY did not hold any other directorships in the last three years in public companies the securities of which are listed on any securities market in Hong Kong or overseas. Save as disclosed above, Mr SY has no other major appointments and professional qualifications ...”

51. As for his various employments in Hong Kong since 2009, and there is no evidence to suggest that he had formed business here, the Husband insists that his responsibilities and involvements in those employments were mostly carried out in the Mainland instead, as he explained in his 2nd Affirmation [B1/49]:

“[28] Notwithstanding I have different jobs at different point of time in Hong Kong, in truth and in fact, all the job responsibilities of these jobs were in PRC.

[29] I was appointed as executive director of CGF (CGFGRG Limited) on 1st January, 2009 and resigned on 30th September 2009. My job responsibility was to handle all matters of the group of companies of CGF in PRC. I did not take part in the daily management of CGF. I resigned on 30th September, 2009 after I have assisted in the re-structuring of CGF.

[30] I was appointed as a director of ACSF Limited (“A”) for the period from February, 2010 to April, 2014. A was only one of the PE fund under A Investment Management Limited. My job responsibility was to provide investment advice to the domestic PE business and considering the annual financial report. I did not take part in the daily management of A and did not even have an office in the office premises of A. I only went to the office of A when meeting was called for considering investment projects and providing my opinion and suggestions to those investment projects. There is now produced and shown to me marked “SY-20” a copy of letter from A dated 9th December, 2015 confirming my directorship with them.

[31] I was appointed as an investment consultant in the capital market department of BP Limited (“B”) from 1st June, 2010 up to present. The same as my previous jobs, my job responsibility was to give advice in investment opportunity whenever required and did not take part in the daily management of B and I did not have an office in the office premises of B.

[32] The renting of the Service Apartment was due to the fact that I like the environment, renovation and management of the Service Apartment. While its location being near the office of B was a convenience, it has no bearing in my determination to rent the service Apartment. Moreover, it was a temporary arrangement and by no means an intention to set up a permanent home in Hong Kong.

[33] I was appointed as non-executive director of MH International Limited (“M”) (Stock Code: XXXX) on 27th October 2010. Being a non-executive director, I did not take part in the daily management of M and did not even have an office in the office premises of M. I resigned in June 2014.

[34] According to the aforesaid, I did not take part in the daily management of these companies and my job responsibility in these companies are mostly if not all relating to the PRC market. In some of these jobs, I did not even have an office in the office premises of the company concerned.

[35] As set out in paragraph 18, 19 and 20 of my 1st Affirmation, I have my own company set up in Shenzhen since 1995 up till now with its own office premises and employees. I am a shareholder and the authorized representative of my own company. The focus of my work and business is in Shenzhen. My jobs in Hong Kong companies aforesaid were joining meeting, providing opinion and making suggestion. I did not take part in the daily management of these companies.”

52. Whilst it is accepted that the Husband's employments in Hong Kong would be one of relevant factors to determine whether he had a substantial connection with Hong Kong at the time of the Wife's petition in June 2015, the plain fact is that by then his only employment in Hong Kong was as an investment consultant of BP Ltd, of which his responsibility according to him was to give advice on investment opportunity only whenever required without any involvement in its management or any office in the company, and based on the Wife's figures of his average number of visits per year to Hong Kong from 2010 to 2015 of 76 days, even taking the highest one of 171 days for the period of July 2014 to June 2015 as set out in §33 above, of which the Husband explained were mostly for dealing with the High Court Action in particularly the many applications arising therefrom at that time, and that almost half of those visits in 2015 were for same day only, I agree with Ms Yip for the Husband that his employment with BP Ltd could hardly be said to be substantially connected with Hong Kong if one were to look at those figures in isolation.

53. Mr Wong for the Wife however argues that one should also look at the Husband's assets and investments in both the Mainland and Hong Kong, of which he submits to be much more substantial in the latter than the former by comparison, and which should go to support the Wife's case of his substantial connection with Hong Kong.

Husband's Assets in Hong Kong

54. In his 2nd Affirmation where the Husband alluded to his assets, he disclosed that the matrimonial home in Shenzhen to be worth RMB20 million, and whilst he admits holding Hong Kong bank accounts and investing in the Hong Kong stock market, he insists that they do not necessarily establish a substantial connection with Hong Kong.

55. Mr Wong for the Wife however points out that there is a thundering silence in that affirmation of the Husband on his assets and investments in Hong Kong, of which the Wife believes to be worth at least HK\$400 million in April 2015 and likely more based on the evidence disclosed in the High Court Action as follows:

Personal Banks and Securities Accounts	HK\$11,011,395
Crescent Investment's Banks & Securities Accounts	HK\$39,829,638
SJ Ltd's Banks & Securities Accounts	HK\$346,107,995
	Total : HK\$396,949,029

56. Mr Wong stresses that these figures reveal only an incomplete picture as some of the accounts did not show the latest balance, and that the evidence also show that the Husband had held shares in the following companies in Hong Kong:

- (1) 360,000 shares of MH International Ltd in 2013 worth over HK\$2 million;

(2) Share option of 90 million shares in 2009 of HXCH Ltd listed in the Hong Kong Stock Exchange;

(3) Share option of 20 million shares in 2009 of CGFGRG Ltd listed in the Hong Kong Stock Exchange.

57. By comparison, Mr Wong submits, the companies and assets which the Husband has admittedly owned in the Mainland pale in magnitude and significance:

(1) His first company (深圳市君與投資發展有限公司) established in 1995 in Shenzhen which is now dormant [B1/18] and hence has no value;

(2) His other company (深圳市成倉投資發展有限公司) established in October 2009 in Shenzhen has been merely used to carry out supportive work to assist the business of Crescent Investment in Hong Kong and appears to be a branch company of Crescent [B/32] and is therefore unsubstantial;

(3) The former matrimonial home in Shenzhen which he puts at RMB20 million.

58. That last mentioned asset of the Husband, a property which he purchased in the same year of his marriage to the Wife, is in my view significant in that it was the only landed property of his as disclosed by both parties, and that notwithstanding the Wife's belief that he has more than HK\$400 million worth of assets in Hong Kong, they are essentially cash, equities and securities which can be easily transferred, purchased or traded through brokers or the internet, but somehow he has acquired no landed property at all in his investment portfolio in Hong Kong, which seems most unusual to me or at least appears inconsistent with someone financially so well off as he is, if it was indeed his intention to make Hong Kong his home.

59. Mr Wong however argues that when one takes into account of the relatively insignificant value of the Husband's assets in Shenzhen, the overwhelming focus and connection of his business and financial life with Hong Kong is obvious, as at April 2015 the value of his assets in Hong Kong was 20 – 40 times more than that of his assets in Shenzhen, with the former matrimonial home the only asset in PRC disclosed by him to be of any value. Hence in this connection, Mr Wong submits, there is plainly no basis for the Husband's submission that most if not all of the family assets are situated in Shenzhen.

60. Mr Wong further argues that the Husband's High Court Action itself speaks volumes of his substantial connection with Hong Kong, as the very worth of SJ Ltd, of which he claims to be the sole beneficial owner, plainly points to his intention to have a significant part of his assets and investments held and conducted in Hong Kong. Whether or not that is indeed the case, it would of course be relevant to look into more details of that action.

Husband's High Court Action in Hong Kong

61. The Husband in his 2nd affirmation [B1/43] said this about the action:

“[4] In HCA813 of 2014, I am the Plaintiff making a proprietary claim against SJ Limited, the 1st Defendant for, inter alia, (1) a declaration that the 1st defendant holds all the monies, securities and/or assets in the securities account No.0341335-00-1 at Shenyin Wanguo Securities (HK) Limited (“SWS Account) on trust for me; (2) an injunction restraining the 1st Defendant, whether by itself or its servants or agents or otherwise howsoever, from disposing of or otherwise dealing with the monies, securities or assets in the SWS Account otherwise than by payment, delivery up or transfer to me, and against (LLD), the 2nd Defendant (the younger brother of the petitioner), for, inter alia, (1) a declaration that the 2nd Defendant holds the misappropriated sum of HK\$14,707,995.54 on trust for me; (2) an injunction restraining the 2nd Defendant, whether by himself or his servants or agents or otherwise howsoever, from disposing of or otherwise dealing with the 2nd Defendant’s Account up to the value of the misappropriated sum, otherwise than by payment, delivery up or transfer of the misappropriated sum from the 2nd Defendant’s Account to me.”

62. The Statement of Claim filed under the High Court Action and which was exhibited to the Wife’s Affirmation [B2/182 – 196] clearly shows that it was the Husband’s case that SJ Ltd was incorporated for the purpose of holding his assets in Hong Kong and that the Wife’s brother was his nominee and trustee as the shareholder and director of SJ Ltd which was to conduct various investments in stocks and shares on his behalf in Hong Kong. Given the substantial amounts of the monies and assets involved, it however raises the obvious question of why would the Husband place such assets in a third party, albeit his brother-in-law, if he already had such substantial connection with Hong Kong, or as alleged by the Wife, that he did have every intention to reside in Hong Kong?

63. Mr Wong argues that it was in fact so alleged by the Husband in his affirmation filed on 12th May 2014 in the High Court Action in support of his ex-parte application for a preservation order restraining the Defendants from dealing with his assets, that he was then a Hong Kong resident and would become a permanent resident in one and a half year time [B3/306-7].

64. Whilst it is not disputed that the Husband, and for that matter the Wife as well as their son, will stand to be issued their permanent Hong Kong Identity Card and permanent residency in Hong Kong sometime in 2017, the fact is that they were not yet permanent residents in June 2015 when the Wife issued her petition, and the Husband’s High Court Action issued in 2014 would not make him so either.

65. Mr Wong however submits that it should not detract from all the other evidence which when considered as a whole would clearly show that the Husband’s residence in Hong Kong was not merely of a transitory nature, that by virtue of his residence here, he is expected to obtain Hong Kong permanent residency soon, that his travel records reveal a clear trend of spending increasingly prolonged periods of time residing in Hong Kong, and that such increased period of residence and his renting of the service apartment in Hong Kong are completely in line with the fact that he is enjoying **“increasing business activities in Hong Kong “** and regularly spending **“half of each week in Hong Kong”** to **“work and manage his investments”** here, as he admitted in the High Court Action [B4/841].

66. The plain facts however are that it was in June 2010 when the Husband started working for BP Ltd, and for the next 4 years up to 2014 he was also a director of two other companies ACSF Ltd and MH International Ltd, yet as shown above he had spent only between 40 and 74 days a year during those 4 years working on 3 jobs, representing at best no more than 1/5 of the total number of days of each year which certainly cannot be said to be significant or substantial. It is of course entirely possible that there may indeed be increased business activities in 2015 when the number of days that he spent in Hong Kong went up significantly to 171 days, but it would be too much of a coincidence to say that they had nothing to do with those increased applications and activities that he also happened to have encountered in the High Court Action, which also seems to dovetail very well with the time when he decided to rent the apartment at Convention Plaza.

67. The Husband had already alluded above to those increased activities arose from the High Court Action at that time which required him to spend more time in Hong Kong to deal with them, and it would be useful to put them within the context of the chronology of the High Court Action based on those related documents produced in these proceedings [B2-4/182 – 919]:

<u>Date</u>	<u>Documents</u>
11 th May 2014	Husband's 1st Affirmation for ex-parte injunction
12 th May 2014	Writ of Claim
12 th May 2014	Injunction Order
12 th November 2014	Statement of Claim
23 rd December 2014	Husband's 2 nd Affirmation
10 th February 2015	Defence & Counterclaim
10 th February 2014	Defendants' application for fortification and discharge of gagging order
21 st March 2015	Husband's 3 rd Affirmation for ex-parte orders
22 nd April 2015	Husband's 4 th Affirmation to oppose Defendants' discharge application
8 th May 2015	Husband's 5 th Affirmation for further injunction
8 th May 2015	Reply & Defence to Counterclaim

68. From this chronology and given the amount of money involved or at stake in the High Court Action, one can easily see why there was a substantial surge in both the numbers of trips the Husband had made to come to Hong Kong and the days he had stayed over here since the commencement of the High Court Action leading up to June 2015, and I find his explanation that his handling of the High Court Action was the main reason behind his increased stay in Hong Kong and his renting of the serviced apartment at Convention Plaza more convincing than the Wife's argument that they go to show his intention to take up residence in Hong Kong.

Summary

69. In summary, and echoing Hartmann J in *B v A* supra, common sense dictates that there is a difference between residing in Hong Kong for a month or two to oversee a short-term project and being posted here together with one's family for a period of several years. Here the Husband had never resided with his family in Hong Kong, let alone for a period of time, while his own limited time spent in Hong Kong had essentially been for business meetings and the High Court Action, with the latter to be suitably regarded as a short-term and purpose-driven project which can be overseen from time to time only.

70. Above all, for the reasons already articulated above, I find it hardly convincing or even downright incredible for someone like the Husband with all his wealth and influence, if indeed it was his intention or desire to reside in Hong Kong, that he would instead spend such insignificant amount of time coming to Hong Kong, with about half of which he would leave on the same day, and for the rest of the time that he would stay over in the hotels for almost 5 years before deciding to rent a small service apartment in Wanchai instead of some luxurious mansion in expansive neighbourhood, as most people in his means and position would no doubt do. In my view none of these suggest any real intention on the part of the Husband to establish substantial connection with Hong Kong.

71. The same can also be said about his employments in Hong Kong. The fact that he did not in any of those years come to Hong Kong on a daily basis to perform his work, duty or responsibility in any of them just go to support his case that they were mostly of consultancy basis rather than substantial posts or positions, and as he has alleged and supported by some of the employment documents that they could be carried out mainly in the Mainland and by just attending occasional meetings in Hong Kong.

72. As for his investments in Hong Kong, whilst there is no question that they are very substantial but which are essentially cash and equities and conspicuously absent any landed properties, the fact that the Husband chose to hold them through a nominees and/or trustee and to deal with them mostly by telephone from his home in Shenzhen, as he explained in his 1st Affirmation filed in the High Court Action [B3/200], again does not in my view go to support the Wife's case of a desire or intention on his part to establish any substantial connection with Hong Kong.

73. Clearly, and as stated in those authorities cited above, it could not be the intention of the Legislature to create a "fly in and fly out" divorce jurisdiction, and I do not accept that a person who has not come to "live" in Hong Kong in the ordinary sense and meaning of that word, but has instead held substantial investment in Hong Kong through a nominee, by that fact alone, is capable of establishing a substantial connection with Hong Kong.

74. In all the circumstances and for the reasons articulated above, I do not agree that at the time of the issue of the petition the Husband was residing in Hong Kong or that he had any real intention to do so, and that while he did have a connection with Hong Kong through his employments and investments here, it was in my judgment not of sufficient substance to properly form a basis for determining the law governing the dissolution of his marriage to the Wife and the matters that flow from it, hence I am not satisfied that the Wife has been able to demonstrate that the Husband had a substantial connection with Hong Kong at the time of the issue of her petition.

Forum Non Conveniens

75. To complete the picture, if I am wrong with my finding and that the Husband indeed had substantial connection with Hong Kong at the date of the Wife's petition, as emphasised by the Court of Appeal in *DGC v SLC (nee C)* [2005] 3 HKC 293, the Wife would then be entitled to sue in Hong Kong as of right in the divorce proceedings, and as noted above the Husband who is also seeking the stay has to establish that there is another available forum which is clearly and distinctly more appropriate than the Hong Kong forum, which according to him is Shenzhen, PRC, but first a brief summary of the principles of *forum non conveniens* which are non-controversial between the parties.

Applicable Principles

76. The general principles of *forum non conveniens* first set out in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 is well established in their application to the stay of matrimonial proceedings which were restated by the Court of Appeal in *DGC v SLC (nee C)* supra and affirmed by the Court of Final Appeal in *SPH v SA* [2014] 3 HKLRD 497 at 517 as follow:

- (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 ie in which the action may be tried more suitably for the interests of all the parties and the ends of justice?
- (2) In order to answer this question, the applicant for the stay has to establish that first, Hong Kong is not the natural or appropriate forum ('appropriate' in this context means the forum has the most real and substantial connection with the action) and second, there is another available forum which is clearly or distinctly more appropriate than Hong Kong. Failure by the applicant to establish these two matters at this stage is fatal.
- (3) If the applicant is able to establish both of these two matters, then the plaintiff in the Hong Kong proceedings 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.

77. Before answering that single question referred to above, Ms Yip submits for the Husband that if both parties desired a divorce, it would be in their best interests to have only one set of proceedings, and since they were married in PRC, the dissolution of their marriage should therefore be done in PRC for it to be recognizable, and would be entitled to automatic recognition in Hong Kong pursuant to Part IX of MCO where Section 56(1) provides that the validity of overseas divorce shall be recognised if at the date of the institution of the proceedings in the place in which it was obtained if either spouse was habitually resident in that place or was a national of that place, whereas orders of Hong Kong courts, whether as to divorce or divisions of assets, would not be recognized nor enforceable in PRC, and hence a divorce in PRC would still be necessary in any event.

78. Indeed the Husband's PRC expert has so advised in his opinion [B5/1005], and Ms Yip submits that for the parties' matrimonial assets including their former matrimonial home in Shenzhen, they would clearly require an order by a PRC Court which is enforceable in the Mainland. Hence, Ms Yip submits that it would be in the parties' best interest to avoid fresh proceedings in PRC for the recognition or enforcement of any Hong Kong divorce or property division order, which would be unnecessary if the divorce proceedings are conducted in the PRC which would allow for mutual recognition of the divorce and property division orders.

79. Mr Wong however submits that that argument of the Husband is plainly fallacious as the absence of mutual recognition cannot by itself be a good reason for handing over the jurisdiction of this court to a foreign court, which he submits as totally against the fundamental rationale of the *forum non conveniens* principle which is premised upon international comity and mutual respect, to which he would not dignify any detailed reply, and submits that the single question should instead be answered in favour of the Wife given the relevant connecting factors already referred to above.

80. For that purpose it is not disputed that the Husband as the applicant has to establish that Hong Kong is not the natural or appropriate forum, and that PRC is distinctively the more appropriate forum under stage 1 of the inquiry.

Stage 1 – The More Appropriate Forum

81. Firstly, Ms Yip submits, as the Husband has already been advised by his PRC expert that PRC's courts do not recognise divorce judgments by Hong Kong courts, this inherently supports his proposition that Hong Kong is not the natural or appropriate forum.

82. Secondly, Ms Yip submits that PRC is distinctively the more appropriate forum than Hong Kong for the following reasons:

- (1) the parties were married in the Fujian province, therefore a divorce in PRC is necessary because any divorce order in Hong Kong will not be recognised under the PRC law according to the Husband's PRC legal opinion [B5/1005];
- (2) the matrimonial home is situated in Shenzhen, hence any court order regarding it and any other PRC properties would need to be enforced in PRC;
- (3) most of the family assets including bank accounts, 3 cars, a Shenzhen company and club memberships are all situated in Shenzhen, while the only asset in Hong Kong are shares of a Hong Kong company in which the beneficial interest is subject to dispute under the said High Court Action;
- (4) all three family members have their household register maintained in Shenzhen show their desire to preserve their Mainland connection;
- (5) throughout the 22 years of their marriage the parties chose to conduct their marriage life in Shenzhen.

83. Ms Yip therefore submits that it is plain that there is an alternative available forum in PRC with competent jurisdiction to hear the parties' divorce, and that the Husband has established that Hong Kong is not the natural or appropriate forum, and that instead PRC has the most real and substantial connection with this divorce case, and that the Shenzhen Intermediate People's Court is clearly and distinctly a more appropriate forum than Hong Kong courts.

84. As I have already found above when dealing with the question of jurisdiction, both parties are residents of Shenzhen who have lived all their life as well as their marriage exclusively in PRC, and for the Husband who has worked mostly in the Mainland, and with their matrimonial home and other assets in Shenzhen, which are all clearly significant factors connecting the case to PRC, while those factors connecting the Husband, and him only, to Hong Kong through his jobs and/or investments are either transitory, superficial, temporary or specific-purpose driven or related only, I agree with Ms Yip that Shenzhen in PRC is clearly and distinctly the more natural and appropriate forum for trying the parties' divorce proceedings, which thus brings me to Stage 2 of the inquiry: Whether the Wife will be deprived of any legitimate personal or juridical advantage if the divorce proceedings were to be tried in Shenzhen instead of in Hong Kong.

Stage 2 – Personal or Juridical Disadvantage

85. Mr Wong for the Wife submits that there is little doubt that the marriage has come to its end as the relationship between the parties has broken down irretrievably and hence divorce is inevitable, and since their son has already attained adulthood and currently studying in the US and his custody is clearly not an issue, as a result the key issue in the divorce proceedings clearly relates to ancillary relief and property distribution, and regarding the latter in particularly the extent of the matrimonial assets, the parties clearly stand on very different grounds.

86. Mr Wong submits that the Wife is a housewife with little knowledge of the income and assets of the Husband, and hardly any means to investigate the same, will therefore be deprived of the more comprehensive discovery procedure in Hong Kong if the proceedings are to take place in PRC where there will also be difficulty of applying Hong Kong law by the PRC court.

87. Mr Wong further argues that the information which the Wife has obtained from the said High Court Action as to the Husband's assets is very limited and not at all complete, and that most of those known assets are held under various arrangements in Hong Kong with such complicity of ownership structure that without a proper discovery procedure the Wife would have no means to find out information about these assets at all.

88. More importantly, Mr Wong submits, that it is clear that the Husband would not be prepared to provide any information about his assets and income unless compelled to do so, as evidenced by the very limited information disclosed by him in either of his 2 affirmations filed in these proceedings, there is a real concern that he would do whatever possible to hide, conceal or dispose of his assets beyond discovery and reach of the Wife in order to defeat her financial claims, and hence discovery of assets controlled by him necessarily takes centre stage in ensuring justice between the parties, and in this regard the Wife's PRC legal opinion has clearly identified significant weaknesses in the discovery procedure in the PRC justice system [B5/1016-1021] which can be summarised as follows:

- (a) there is no general duty on the part of the parties to disclose evidence and information;
- (b) there is no specific discovery procedure or any procedure similar to interrogatories in Hong Kong;
- (c) each party bears his own responsibility to produce evidence in order to prove his case, which has resulted in what PRC academia called imbalance of evidence whereby the party with control power or custody over evidence prejudicial to himself would be in a position to withhold the same and prevent the other party from obtaining or producing the relevant evidence in legal proceedings, with such resultant unfairness which has been the subject of repeated criticism of PRC academia and the judiciary;
- (d) the absence of any practical arrangement for the Shenzhen Court to collect evidence located in Hong Kong.

89. In this regard, Mr Wong submits that courts in Hong Kong have noticed such difficulties in the PRC system and have held the same to be capable of constituting a legitimate juridical disadvantage in the context of applications on grounds of *forum non conveniens*, as in the case of *Shenzhen Futaihong Precision Industry Co Ltd & Anor v BYD Co Ltd & Ors*, HCA 2114/2007, unreported 27 June 2008 when Deputy Judge Au, as he then was, observed at §80:

“[80] 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:

(1) Under the Hong Kong discovery, the parties are obliged to even discover documents which are detrimental or unfavourable to them.

(2) On the other hand, under PRC procedure, a party is initially only required to disclose documents which it wants to rely on to support its case.

[81] It is so accepted by the 1st and 2nd defendants that there is no procedure under the PRC legal system similar to that of the administration of interrogatories as available in Hong Kong.”

90. The Learned Judge then noted that in a case where the issues involved would require an initial “paper trail” to provide information for further investigation, the automatic and compulsory discovery procedure in Hong Kong that require a party’s discovery of documents that are unfavourable or detrimental to him is a distinct juridical advantage:

“[95] However, without the automatic and compulsory Hong Kong discovery and interrogatories to provide the initial “paper trail”, especially for documents which are detrimental or unfavourable to the 1st and 2nd defendants’ own case, it is very difficult (if not impracticable) for the plaintiffs to identify the existence of these further documents, so as to invoke those articles under the PRC procedure law.

[96] This is particularly so in the present case, which is primarily premised on the defendants’ breach of confidence and wrongful use of the Confidential Information. For cases like this, most of the relevant evidence concerning the breach, the wrongful use and the extent of the said use of the Confidential Information, is likely to be only within the defendants’ own knowledge and possession. Therefore, without the initial paper trails and information that would have been created by the compulsory and comprehensive discovery and interrogatories procedures, it would even be more difficult for the plaintiffs to satisfy the preconditions under the PRC procedure law to invoke the relevant articles to invite the Shenzhen Court to demand the disclosure of unfavourable evidence and documents from the Defendants.

[97] I therefore accept that there is an appreciable and significant difference between the two discovery procedures in Hong Kong and the Mainland. For the purpose of this particular case, this could be properly regarded as a legitimate juridical advantage that is available to the Plaintiffs if the proceedings are to remain in Hong Kong.”

91. The Learned Judge therefore concluded at §113 that the deprivation of the compulsory and comprehensive discovery and the procedure for the administration of interrogatories would constitute a prejudice to the Plaintiffs in obtaining relevant evidence to advance their claim, and 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 was to be tried in the Shenzhen Court instead of in Hong Kong.

92. Similarly, Mr Wong submits, in *Botanic Limited v China National United Oil Corporation*, HCA 1852/2005, unreported, 25 August 2008, Deputy Judge To, as he then was, also found [at §§95 – 96] similar difference in the discovery procedure between Hong Kong and PRC and held it to be a juridical disadvantage in a case where one of the parties had significantly less knowledge, information and evidence than the other party.

93. Mr Wong submits that the consequences arising from the difference in the discovery procedure in the PRC are particularly acute in the present case given the fact that the Husband is determined to withhold information concerning his assets and income in these proceedings, and the risk of grave injustice to the Wife if she is deprived of the assistance of the comprehensive and compulsory discovery procedure in Hong Kong is therefore almost certain.

94. The key, Mr Wong submits, is to be able to properly discover where and what are the family assets so that they can be divided between the parties in a fair and just manner. Even if separate proceedings in the PRC is required, Mr Wong submits that inconvenience should not be allowed to override the very grave injustice that would be caused to the Wife in not being able to have access to information, and the resultant consequence of having a major part of the Husband's assets left out from property distribution. If a further PRC Court order is required for the distribution of these assets after they have been discovered, Mr Wong submits that so be it, that the Wife would be able to adduce evidence of such assets in the PRC proceedings, and the PRC Court can also be assisted with the evidence already discovered under the comprehensive discovery procedure in Hong Kong and a separate action even if necessary could be proceeded and dealt with expeditiously. Such added inconvenience, Mr Wong argues, plainly cannot be a greater vice to the substantial injustice that will be caused to the Wife in having to suffer the judicial disadvantage of not being able to have access to information over the husband's assets in Hong Kong.

95. Ms Yip for the Husband however argues that from the documents and information which the Wife has obtained from the said High court Action and produced in these proceedings, the Wife apparently did not encounter any difficulty obtaining all the evidence regarding the Husband's company in Hong Kong of which she alleges to be the bulk of the family asset, and that moreover to her advantage, it is very likely that in determining the issues in the High Court Action, the beneficial interests of the Hong Kong company including those of the Husband will be determined by the court here thereby minimizing the need to determine the same issues in the parties' divorce proceedings.

96. Whilst that may well be the case, and if the court in that action is to find in favour of the Husband as the beneficial owner of those assets involved in that case, of which the Wife will no doubt be able to use to include them as part of the Husband's assets or their matrimonial assets for the purpose of her ancillary relief application, but that would not necessarily follow that all the Husband's assets would have been identified or ascertained, or that further discovery process would no longer be necessary. I am satisfied that the Wife has demonstrated that she would indeed be deprived of such juridical advantage in PRC as she has contended, which then brings me to Stage 3 of the inquiry.

Stage 3 – The Balancing Exercise

97. On this Mr Wong submits that compared with the grave injustice which the Wife would almost certainly suffer, any inconvenience that may arise from the necessity of further PRC proceedings would be of much less juridical insignificance, as the balance of justice plainly leans in favour of the Wife.

98. Mr Wong further argues that if assets located in Hong Kong cannot be properly discovered and dealt with by the PRC Court, the fact that a PRC order may be enforced in Hong Kong would be totally meaningless, as the PRC Court would clearly not be making any order relating to such Hong Kong assets which are unknown to it in the first place. Hence he submits that the ends of justice demand that the present proceedings be heard in Hong Kong in order to ensure that proper discovery of the marital assets can be achieved, as the Husband should not be permitted to take advantage of the less developed PRC discovery procedure to conceal and put his assets beyond the reach of the Wife.

99. Ms Yip on the other hand argues that where the court is satisfied that the Wife will be deprived of such juridical advantage, substantial justice will still be done in the PRC court, as it is in the best of the parties to have only one set of proceedings to dissolve their marriage and to deal with the distribution of the family assets, hence the Hong Kong court should not exercise any jurisdiction it might have on grounds of *forum non conveniens* in favour of the Shenzhen Immediate People's Court in PRC, and should instead stay the Wife's petition and all ancillary relief proceedings.

100. Given the extent and amount of assets which the Husband has in Hong Kong, all of which were, and I stress here, discovered by the Wife and none whatsoever by the Husband himself in these proceedings, of which I agree with Mr Wong that there has indeed been a "thundering silence" in the affirmations filed by the Husband save for the disclosure of his ownership of the former matrimonial home in Shenzhen.

101. As pointed out by Mr Wong, it is plain that the only major issues between the parties in their divorce proceedings, whether in PRC or Hong Kong, must be centred around the ancillary relief application and in particular the division of the marital assets, and with almost HK\$400 million worth of them, and more according to the Wife, being located outside the Mainland and in Hong Kong, it seems clear to me that the discovery of their full extent, location and value must form the most crucial part of the ancillary relief proceedings, so that the all important Step 1 of the statutory exercise under Section 7(1) of the Matrimonial Proceedings and Property Ordinance, Cap 192, i.e. identification of assets as outlined by the Court of Final Appeal in *LKW v DD* [2010] 13 HKCFAR 537, can be properly undertaken by the court in order to achieve fairness and justice between the parties with a fair division of these assets, to which any inconvenience arising from any further PRC proceedings or more than one set of proceedings must pale by comparison.

102. Whilst I am not suggesting that the Husband will not be forthcoming with full and frank disclosure of all his financial means and resources in both the Mainland and Hong Kong if the ancillary relief proceedings is to take place in PRC, but the way he has referred to them in either of his affirmations filed in this court and the very limited information he has revealed in his application before me certainly do not help, and I can see why the Wife has absolutely no confidence that he will do so and why she sees the discovery procedure in Hong Kong as such a crucial juridical advantage to her that its deprivation is said to cause her grave injustice.

103. This balancing exercise must inevitably engage the court exercising its discretion, and the Court of Final Appeal in *SPH v SA supra*, a case where an anti-nuptial agreement was a factor involved in the first instance court's decision to stay on the ground of *forum non conveniens*, provided useful guidance to the exercise of such discretion:

“[53] The existence of an anti-nuptial or post-nuptial agreement (particularly one governed by foreign law) is plainly a factor in the exercise of the discretion to stay on the ground of *forum non conveniens*, and there have been several decisions in this area involving such agreements. The facts in one case are not, of course, a guide to the exercise of discretion in another case, and they are presented here as merely illustrative. In England the decisions arise in the context of a statutory discretion to stay on “the balance of fairness (including convenience)” (Domicile and Matrimonial Proceedings Act 1973, Sched 1, para 9), which was held in *de Dampierre v de Dampierre* [1988] AC 92 to engage the same principles as those in the *Spiliada* case. In *de Dampierre v de Dampierre* itself the agreement for *separation de biens* played no express part in the House of Lords’ reasoning that France was the appropriate forum for the divorce proceedings. In the Court of Appeal (whose decision was reversed) Dillon LJ thought it had no bearing on the appropriate forum. That approach was followed at first instance and on appeal in *Louvet v Louvet* [1990] 1 HKLR 670 (see at 6810.

[54] In *R v R (Divorce: Stay of Proceedings)* [1994] 2 FLR 1036, where there was a Swedish separation of property contract, Ewbank J held that justice demanded that a stay of English proceedings be refused because the Swedish court could do no more than apply Swedish law and enforce the marriage contract, whereas the English court could grant a property adjustment, a lump sum and periodical payments. In *S v S (Divorce: Staying Proceedings)* [1997] 2 FLR 100 Wilson J granted a stay of English proceedings in a case where the parties had entered into an ante-nuptial agreement (in the negotiation of which each of the parties was represented by a distinguished New York lawyer) which provided for the financial aspects of divorce, and which was governed by New York law, and provided that it could only be enforced in New York. In *C v C (Divorce: Stay of English Proceedings)* [2001] 1 FLR 624 Johnson J placed decisive importance on the French ante-nuptial agreement (apparently for *separation de biens*) in granting a stay of English proceedings. In *Ella v Ella* [2007] 2 FLR 35 the parties had entered into an ante-nuptial agreement, governed by Israel law, providing for separation of property and for Israeli jurisdiction (see at [38]), and it was treated as a major factor in granting a stay, even though the wife contested its validity: but the wife's lawyers had taken steps in the Israeli proceedings which were virtually a submission. In *Hong Kong, in L v H*, unreported, November 27, 2007 Rogers VP, refusing the husband's leave to appeal from Judge Chan's refusal to stay proceedings in favour of Germany, said, at [10], that the terms of an ante-nuptial agreement, if adhered to, would involve a grave injustice to the wife."

104. In almost all of those cases cited above, the importance to ensure that justice be done between the parties, or for that matter that injustice would not be caused to one of the parties, was invariably the main reason relied on by the court in the exercise of its discretion in the balancing act to either stay or refuse to stay the petition. In the present case I have no doubt that grave injustice would be caused to the Wife if she is to be deprived of the juridical advantage as she so contended, and accordingly I would not allow the stay sought by the Husband had I been able to find jurisdiction for Hong Kong courts to deal with their divorce proceedings.

Order

105. Accordingly and having found that the Husband had no substantial connection with Hong Kong at the time of the issue of the Wife's petition, I therefore order that the petition be dismissed, with costs to follow the event be to the Husband to be taxed if not agreed and with certificate for 2 counsel, which is an order nisi to be made absolute at the expiration of 14 days.

106. Last but not least, I wish to express my gratitude to counsel of both sides for their most valuable assistance provided to this court throughout the hearing.

(Bruno Chan)

District Judge

Mr. Horace Wong SC and Mr Clerk Wang instructed by M/S Henry Lo & Co for the Petitioner.

Ms Anita Yip SC and Ms Cindy KS Lee instructed by M/S Johnny KK Leung & Co for the Respondent.