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A B C D E F G H I J K L M N O P Q R S T U V

CACV 98 & 125/2015

CACV 98/2015

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO. 98 OF 2015

(ON APPEAL FROM FCMC NO. 4880 of 2014)

BETWEEN

LCYP	Petitioner
and	
JEK	Respondent

[Jurisdiction for divorce : domicile and substantial connection]

AND

CACV 125/2015

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO. 125 OF 2015

(ON APPEAL FROM HCMP NO. 468 of 2015)

A B C D E F G H I J K L M N O P Q R S T U V

BETWEEN

JEK Plaintiff

and

LCYP Defendant

[Hague Convention : Habitual Residence, Retention and child's objection defence]

(Heard together)

Before: Hon Lam VP, Cheung and Kwan JJA in Court

Date of Hearing: 13 August 2015

Date of Judgment: 13 August 2015

Date of Reasons for Judgment and Decision on Costs : 27 August 2015

REASONS FOR JUDGMENT and DECISION ON COSTS

Hon Lam VP :

1. I respectfully agree with the reasons for judgment of Cheung and Kwan JJA and the orders for costs they propose.

Hon Cheung JA :

I. **The appeals**

2.1 Two appeals were heard together before us. The first, CACV 98/2015, was an appeal by LCYP, the petitioner wife ('Wife') from the judgment of H H Judge Sharon Melloy in which the Judge stayed her petition for divorce on the ground that Hong Kong has no jurisdiction over her divorce because neither she nor the respondent husband JEK ('the Husband') was domicile in Hong Kong or had a substantial connection with Hong Kong as at the date of the petition.

2.2 The other appeal, CACV 125/2015, was an appeal by the Husband from B Chu J who refused his application under the *Child Abduction and Custody Ordinance* (Cap. 512) which implemented the *Convention on the Civil Aspects of International Child Abduction* ('the *Hague Convention*') for the return of the two children of the family to USA.

2.3 The Court allowed the Wife's appeal and dismissed the Husband's appeal at the conclusion of the appeal.

2.4 I will now give the reasons for judgment of the *Hague Convention* appeal while Kwan JA will deal with that of jurisdictional appeal. I agree with the reasons for judgment given by Kwan JA and the orders for costs she proposes to

make. It is more appropriate that the *Hague Convention* appeal should be addressed first.

CACV 125/2015

II. Background of the case

3.1 I will respectfully adopt the summary of the background of the case by B Chu J and supplement it with additional facts when necessary. The background is common to both appeals.

3.2 The Wife is a Hong Kong Chinese born and grew up in Hong Kong. The Husband is an American born in Brooklyn and grew up mainly in the New Jersey area of the United States. The Husband is now 43 years of age, and the Wife is 42. They met in 1994 in Hong Kong and married in September 1997 in New Jersey. After their marriage, the Wife moved to live in New Jersey where the parties set up home. The Wife acquired US citizenship in about February 2004.

3.3 There are two children of the family, both boys, and they were born in New Jersey. The elder one P is now 14 years old (approaching 15 in October this year) and the younger one S is 10 ('the children').

3.4 The family continued to live in New Jersey until the Wife moved to Hong Kong with the children on 6 July 2013.

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3.5 After the Wife moved to Hong Kong, she entered into a lease and purchased a car in Hong Kong, and the children were enrolled into a prestigious international school here. In about December 2013, the Wife said she discovered that the Husband was having an affair and on 17 April 2014, she petitioned for divorce in the Family Court of Hong Kong, namely FCMC 4880 of 2014 ('FC Proceedings'). This was followed by the Husband issuing divorce proceedings in New Jersey on 30 May 2014.

3.6 On 9 June 2014, the Husband issued a summons in the FC Proceedings to stay the proceedings on the ground that the Hong Kong Court lacked jurisdiction, alternatively by reason of *forum non conveniens*.

3.7 The Husband's summons resulted in the judgment handed down on 16 January 2015 ('FC Judgment') by Judge Melloy.

3.8 After the FC Judgment, on 28 January 2015, the Husband's New Jersey attorneys wrote to the Wife's New Jersey attorneys stating that it was agreed between the parties that the children would remain in Hong Kong 'on a limited, temporary basis not to exceed 1 to 2 years and that the 2 year term will expire at the conclusion of the children's school year ie in June 2015', and seeking the Wife's response as to whether she intended to honour the parties' agreement to return the children to New Jersey in June 2015.

3.9 This led to the Wife issuing an application in the Family Court on 4 February 2015 under the *Guardianship of Minors Ordinance* (Cap. 13) for joint custody, sole care and control of the children and for the children not to be removed from the jurisdiction of Hong Kong save with consent or leave of the court ('*GMO* Application'). The *GMO* Application was supported by her affirmation dated 6 February 2015 ('*GMO* Affirmation').

3.10 The Husband relied on what was said by the Wife in her *GMO* Affirmation to be the Wife's wrongful retention of the children in Hong Kong. The Husband issued the *Hague Convention* application on 26 February 2015.

3.11 It was the Husband's case that the children had repeatedly expressed to him that they wanted to return to the United States, and upon his application, B Chu J directed that a Social Investigation Report be prepared in relation to the views of the children ('SIR'). The children indicated their wishes to the social worker to remain in Hong Kong.

3.12 B Chu J ruled against the Husband in the *Hague Convention* application.

III. The hearing below

1) The issues

4.1 B Chu J addressed the following issues :

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(1) Whether there was an agreement between the parties that the Wife's move to Hong Kong with the children was only for a temporary period of one to two years only?

(2) Whether the Husband's application was 'premature', in that the one to two year period of stay in Hong Kong agreed by the Husband had not yet expired when the Husband took out the application, and that his application was based on an 'anticipatory' retention?

(3) Did the Wife's affirmation dated 6 February 2015 in the *GMO* Application constitute a wrongful retention of the children with the meaning of the *Hague Convention*?

(4) Were the children habitually resident in USA within the meaning of the *Hague Convention* on 4 February 2015 when the Wife instigated the *GMO* Application?

(5) Should the Court refuse the order sought by the Husband in view of the wishes of the children not to move back to USA ('the child's objection defence')?

2) <u>B Chu J's decision</u>

4.2 There was dispute between the parties whether there was an agreement between the Husband and Wife that the Wife's move to Hong Kong with the children was only for a temporary period of one to two years only.

4.3 Judge Melloy in the earlier FC Proceedings had found that the parties had agreed for the Wife to move with the children to Hong Kong for a temporary period of one to two years.

4.4 B Chu J held that she was not bound by the finding of Judge Melloy because, this being a children's matter, she was entitled to consider the matter afresh. After reviewing the evidence she also came to the view that the parties' shared intent was for the Wife to move to Hong Kong for a limited duration of one to two years and there was no sufficient evidence for any shared intent on the part of the parties for the children to stay beyond one to two years or to complete their high school education in Hong Kong.

4.5 On the issue of pre-mature application, B Chu J held that the two-year agreed period would end around 6 July 2015. B Chu J held that the Wife's *GMO* affirmation evinced an intention not to return to New Jersey at the end of the two-year period. Further her intention was to retain the children in Hong Kong until completion of their high school education. She held that the Wife's filing of the *GMO* affirmation was an actual act of retention. She held that the Husband's *Hague Convention* application was not premature.

4.6 In respect of habitual residence of the children B Chu J held that the Husband had demonstrated that at the time of their retention, the children's habitual residence had

remained to be in New Jersey. B Chu J further held that the Wife's retention of the children in Hong Kong was wrongful and in breach of rights of custody of the Husband under the law of New Jersey.

4.7 Having considered the evidence, B Chu J was satisfied that the children's objection to return to New Jersey had been made out and in light of the age and maturity of the children, it is appropriate for her to take account of their views and the Child's Objection Defence under Article 13 of the *Hague Convention* had been established. Accordingly B Chu J refused the Husband's application for the return of the children to New Jersey.

IV. The position of the parties

5.1 In this appeal, Mr Russell Coleman SC for the Husband argued that B Chu J had erred on the Child's Objection Defence.

5.2 Ms Anita Yip SC and Mr Eugene Yim for the Wife supported B Chu J's refusal to return the children to New Jersey. By a respondent's notice, Ms Yip further submitted that that decision can further be supported on the ground that the habitual residence of the children is in fact in Hong Kong and not in New Jersey. She further argued that there was no wrongful retention by the Wife of the children in Hong Kong.

V. Objective of the *Hague Convention*

6. This Court has recently in *M v E* (CACV 75/2015) (Judgment dated 12 May 2015) reviewed the objective and operation of the *Hague Convention*. It is sufficient for the purpose of this appeal to emphasize that the objective of the *Hague Convention* is to ensure the prompt return of the children who had been wrongly removed by one parent against the wish of the other parent to another country, back to the country of the habitual residence of the children so that the courts of that country may determine the question of custody and residence of the children on the basis of a full welfare investigation. To implement this objective Article 16 of the *Hague Convention* provides that the courts of the country to which the children have been removed shall not decide on the merits of rights of custody until the determination of the question of whether the children should be returned under the *Hague Convention*.

VI. <u>Habitual residence</u>

7.1 It is logical to deal with habitual residence first because unless the children are found to be in habitual residence in New Jersey, there will be no issue on wrongful retention and the engagement of the *Hague Convention*.

1) The reasoning below

7.2 The reasons given by B Chu J that the children's habitual residence was still in the New Jersey are as follows :

> '111. It was not disputed that the Children's habitual residence was in New Jersey at the time or immediately prior to the Move. P was 13 and S was 8 at the time of the Move and they had been living in New Jersey since they were born. Their home was there and that was where they were to return during school holidays. Their roots were there. I do not find there was sufficient evidence that the Move was with a settled purpose for the Children not to return to New Jersey after 1-2 years, or to abandon New Jersey as their residence and to take up long-term residence in Hong Kong. As I have mentioned earlier, the Mother only changed her mind in early August 2013, about one month after she and the Children arrived in Hong Kong. I have also found that there was no sufficient evidence that the Father had after the 06.08.13 Email accepted or agreed to the Children living in Hong Kong beyond two years.
>
> 112. Having considered all the circumstances, I do not find that there was sufficient evidence that there was a shared intention to abandon the Children's place of habitual residence of New Jersey, nor a settled intention on the part of both parents to change the Children's habitual residence to Hong Kong by the time of the retention.'

2) Principles

7.3 This Court has reviewed the principles on habitual residence under the *Hague Convention* in *BLW v. BWL* [2007] 2 HKLRD 193 at paragraph 31 :

> ‘(1) The question whether a person is or is not habitually resident in a particular country is a question of fact: *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, 578, *C v S (A Minor) (Abduction)* [1990] 2 FLR 442, 454 per Lord Brandon. The concept of habitual residence is not an artificial legal construct.
>
> (2) While it is not necessary for a person to remain continuously present in a particular country in order for him to retain residence there, it is not possible for a person to acquire residence in one country while remaining throughout physically present in another.
>
> (3) Where both parents have joint parental responsibility, neither of them can unilaterally change the habitual residence of the child by removing the child wrongfully and in breach of the other party's rights: *Re J (A Minor) (Abduction: Custody Rights)* at pp. 572 and 449 respectively per Lord Donaldson MR.
> See: *Re M (A Minor) (Abduction: Habitual Residence)* [1996] 1 FLR 887 per Millet LJ at p. 895.
>
> (4) The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves.
>
> (5) Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration.
> All that the law requires for a ‘settled purpose’ is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.
>
> (6) Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention.
> See: *Re B (Minors) (Abduction) (No 2)* [1993] 1 FLR 993 and *LM v HTS* [2002] 1 HKC 194.’

7.4 Since the delivery of the judgment in *BLW* on 1 February 2007, there has been development both locally and

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also in the *Hague Convention* jurisprudence on habitual residence which compels this Court to take cognizance of the development since Hong Kong is a contracting state of the *Hague Convention*.

7.5 The local development came from the Court of Final Appeal's judgment of *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45 which construed 'ordinarily resident' in Article 24(2)(4) of the Basic Law. The Court of Final Appeal emphasised the purposive and contextual approach in statutory interpretation and qualified the natural and ordinary meaning approach of Lord Scarman in the earlier case of and *R v Barnet London Borough Council, ex p Nilish Shah* [1983] 2 AC 309 on ordinary residence by regarding it only as a starting point but not decisive. Lord Scarman's judgment at pages 340-344 had been adopted in the past in decisions (including *BLW*) on habitual residence :

> ' a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration. It is necessary that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.'

7.6 In respect of the *Hague Convention* jurisprudence on habitual residence, impetus for change first came from the Court of Justice of the European Union ('CJEU') in *Proceedings brought by A* (Case C-523/07) [2010] Fam 42 and *Mercredi v Chaffe* (Case C-497/10PPU) [2012] Fam 22 and recently

adopted in the United Kingdom by a series of Supreme Court judgments, namely, *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2014] AC 1; *In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] AC 1017; *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] AC 1038 and *In re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2015] 2 WLR 1583 which was also reported under the title of *AR v RN* [2015] UKSC 35. The Supreme Court also departed from the approach of Lord Scarman.

7.7 Instead of trying to discuss which of the principles in *BLW* should be modified, it will be more useful to restate the principles on habitual residence in the light of these decisions.

(1) Habitual residence is a question of fact which should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce (*In re L (A child)* paragraph 20);

(2) The factual question is : has the residence of a particular person in a particular place acquired the necessary degree of stability (permanent is the word used in the English versions of the two CJEU judgments) to become habitual? It is not a matter of intention: one does not acquire a habitual residence merely by intending to do so; nor does one fail to

acquire one merely by not intending to do so (*In re LC (Children)* paragraph 59);

(3) The concept corresponds to the place which reflects some degree of integration by the child in a social and family environment (*In re L (A child)* paragraph 20);

(4) The question is the quality of the child's residence, in which all sorts of factors may be relevant. Some of these are objective: how long is he there, what are his living conditions while there, is he at school or at work, and so on? But subjective factors are also relevant: what is the reason for his being there, and what is his perception about being there? (*In re LC (Children)* paragraph 60);

(5) There is no legal rule, akin to that in the law of domicile, that a child automatically takes the habitual residence of his parents (*In re L (A child)* paragraph 21); and

(6) Although a child could lose his habitual residence without a parent's consent, nevertheless, it is clear that parental intent does play a part in establishing or changing the habitual residence of a child: not parental intent in relation to habitual residence as a legal concept, but parental intent in relation to the reasons for a child's leaving one country and going to stay in another. This will have to be factored in, along with all the other relevant factors, in deciding whether a move from one country to another has a sufficient degree of stability to amount

to a change of habitual residence (*In re L (A child)* paragraph 23).

7.8 Mr Coleman submitted that *BLW* is binding on this Court. In my view, recognizing the rule on precedents, it is futile in this case to conduct an academic discussion on the binding effect of a previous decision of this Court on us. *BLW* correctly stated the law on habitual residence but time has moved on with the European Union (including the United Kingdom) adopting a uniform approach on the meaning of habitual residence under the *Hague Convention*. Hong Kong should move at the same pace as well.

3) <u>Application of the principles in the UK cases</u>

7.9 To see how the new jurisprudence impacted on habitual residence, it is illustrative to refer to *In re L(A Child)*. The facts are summarised in the headnote as follows : the child was born in Texas in 2006 to parents of Ghanaian heritage who had married there in 2005. Like his father, the child was a citizen of the United States of America. The mother, who had arrived in England as a small child, had indefinite leave to remain in the United Kingdom. The child and his parents lived as a family in Texas until the commencement of divorce proceedings in 2008 when his mother took him to England. They remained there until March 2010 when she was ordered by the Texan court to return the child for the purpose of completing the proceedings. In March 2010, after a custody

hearing in which both parents participated, the Texan court granted the father exclusive rights to determine the child's primary residence. On the mother's application, made on the ground that since the child had been habitually resident in the United Kingdom immediately before his return to Texas in March 2010 the father by acting on the Texan court's order had wrongfully retained him there, the United States District Court in August 2011 made an order for the child's return to the United Kingdom under Article 3 of the *Hague Convention*, pursuant to which the mother took the child with her to England where they remained. The father appealed but did not seek a stay of the return order. The United States Court of Appeals, having rejected the mother's contention that since the return order had been put into effect the appeal was moot, on 31 July 2012 allowed the appeal, holding that the mother had consented to the child's retention by agreeing to the Texan court's dealing with the case, and that he was still habitually resident in the United States. On 29 August 2012 the United States Federal District Court ordered the child's return to the United States. The father applied to the High Court in England for the child's return under the *Hague Convention* and, alternatively, under the Court's inherent jurisdiction, as permitted by Article 18 of the Convention.

7.10 One of the issues before the UK Courts was that the Husband could only succeed in his application under the *Hague Convention* if the child was habitually resident in the United

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States on either 31 July or 29 August 2012 when the mother's disobedience of the Texan order became wrongful.

7.11 The UK Supreme Court upheld the trial judge's decision that the child had become habitually resident in England by 29 August 2012. Baroness Hale stated that :

> ' 26 On the other hand, the fact that the child's residence is precarious may prevent it from acquiring the necessary quality of stability. But in this case every other factor points the other way. The mother was coming home. This was where she had lived and worked before her short-lived marriage to the father. This was where she intended to stay. This was where she had a child by another relationship, KWA, now aged two, who lives with her and K. So neither she nor K will have perceived the return here as in any way temporary. From K's point of view, this was where he had lived for some 20 months before his return to the United States in March 2010. This is where he became integrated into a social and family environment during the eleven and a half months in which he lived here before the US Court of Appeals' judgment of 31 July 2012. Against all those powerful factors in favour of the child's integration or acclimatisation, there is only his father's fervent desire, of which K may very well have been aware, that he should return to live in the United States.' (emphasis added)

7.12 *In re R (Children)* is also illustrative. The parties who lived in France agreed that the mother and children were to live in Scotland for a period of about one year from July 2013. The mother was born in Canada and prior to July 2013, the family would travel to Scotland to visit the mother's parents from time to time. On 9 November 2013 the mother discovered the father's infidelity and told him that their relationship was over. She commenced proceedings in

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Scotland seeking a residence order of the children and interdict against the father removing them from Scotland on 20 November 2013. The father made an application under the *Hague Convention* for a return of the children to France on the basis that the children were habitually resident in France immediately before the application. The first instance judge held that the children had not lost their habitual residence in France after moving to Scotland. This was reversed by the UK Supreme Court.

7.13 It held (per Lord Reed JSC) :

> '16 ... It is therefore the stability of the residence that is important, not whether it is of a permanent character. There is no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely ...
>
> 21. In determining the case on this basis, the Lord Ordinary failed to apply the guidance given in the authorities. As I have explained, parental intentions in relation to residence in the country in question are a relevant factor, but they are not the only relevant factor. The absence of a joint parental intention to live permanently in the country in question is by no means decisive. Nor, contrary to counsel's submission, is an intention to live in a country for a limited period inconsistent with becoming habitually resident there. As was explained in *A v A* [2014] AC 1, the important question is whether the residence has the necessary quality of stability, not whether it is necessarily intended to be permanent ...
>
> 23. ... In other words, following the children's move with their mother to Scotland, that was where they lived, albeit for what was intended to be a period of 12 months. Their life there had the necessary quality of stability. For the time being, their home was in Scotland. Their social life was there. Their family

> life was predominantly there. The longer time went on, the more deeply integrated they had become into their environment in Scotland. In that context, the question the Extra Division asked themselves did not indicate any error of approach. Nor did their answer: "For our part, in the whole circumstances we would view four months as sufficient" .' (emphasis added)

4) My view on habitual residence

7.14 The recent UK Supreme Court judgments were not referred to B Chu J by the parties. Ms Yip (who only appeared in this appeal) had properly referred us to the latest of these cases, namely *In re R (Children)*. Had these authorities been cited to B Chu J, I have no doubt that she would have come to a different view on the habitual residence of the children. To begin with, the couple was experiencing marital problems when the Wife left New Jersey with the children. She was coming back to Hong Kong which was her home before she joined the Husband in the USA after the marriage. The Wife had entered into a fixed term lease for two years as the residence of her and the children in Hong Kong. A family car was purchased by the Husband for the use of the Wife and the children and the Wife had purchased an uncompleted property in Hong Kong for investment purpose which was funded by the Husband. Although B Chu J found that the original agreement between the parties was that the move to Hong Kong was intended to be a temporary one, the Wife had, before the agreed time expired, changed her mind and decided to stay in Hong Kong. Looking at the position of the children, they have integrated into Hong Kong for nearly two years in terms of their full time studies here

and their social activities. Although the children's move to Hong Kong was intended to be for a temporary period of not more than two years, Hong Kong has been their home for the past 24 months. It has all the hallmarks of a stable residence. The absence of the joint parental intention to live permanently in Hong Kong is by no means decisive. Based on the evidence, my view is that the children's habitual residence is in Hong Kong and no longer in New Jersey, hence the *Hague Convention* was not engaged in the first place.

7.15 Mr Coleman stressed that the rationale of the *Hague Convention* is to ensure a prompt return of the children to New Jersey and it is for the courts of New Jersey to consider the question of custody of the children. The new approach on habitual residence effectively precludes the rationale of the *Hague Convention* from being implemented. He also argued with force that the Wife and children's presence in Hong Kong is pursuant to a temporary agreement between the parties. The new approach will deter a party from agreeing to such an agreement in the future lest it may be used against him in deciding on the habitual residence of the children. These are themes he also raised on his appeal on the 'child's objection defence'. He also relied on *BLW* where this Court stated at paragraph 36(3) that :

> ' Where the children's initial move from an established habitual residence was clearly intended to be for a specific limited duration. Most courts will find no change in habitual residence. However, a child may become habitually resident even in a place where he or she was intended to live only for a limited time if the

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> child's original habitual residence has been effectively abandoned by the shared intent of the parents.' (emphasis added)

7.16 Mr Coleman submitted that both Judge Melloy and B Chu J held that there was certainly no 'shared intention' to abandon the place of habitual residence.

7.17 As pointed out by Baroness Hale in *Re L (A Child)* at paragraph 23 that parental intent plays a part in establishing or changing the habitual residence of the child. However, this is only one of the relevant factors that had to be considered in deciding whether move from one country to another has a sufficient degree of stability to amount to a change of habitual residence. Further as pointed out by Lord Reed in *In re R (Children)* the absence of a joint parental intention to live permanently in the country in question is by no means decisive. Nor, contrary to counsel's submission, is an intention to live in a country for a limited period inconsistent with becoming habitually resident there.

5) Views of the children on habitual residence

7.18 In *In re LC (Children)*, the UK Supreme Court allowed a child to be joined as a party to the *Hague Convention* proceedings so that she could present her views on habitual residence. The Supreme Court also ordered the views of her siblings to be considered as well. This is not an issue before us. But, as will be addressed later, the children had indicated their views on where they like to live under the 'Child's

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Objection Defence'. This Court does not need to decide whether their views can be taken into account in deciding the issue of their habitual residence. In this case, the facts I have identified above are sufficient to establish the habitual residence of the children.

VII. Pre-mature application and wrongful retention

8.1 Since the habitual residence is in Hong Kong, the question of wrongful retention of the children in Hong Kong is not engaged. However if the habitual residence of the children is still New Jersey, I agree with B Chu J's view that the Wife had wrongly retained the children in Hong Kong.

8.2 This Court in *BLW*, had reviewed the authorities on wrongful retention and stated that :

> ' 55. To establish that a child has been wrongfully retained within art.3 the complaining parent must prove an event occurring on a specific occasion which constitutes the act of wrongful retention. Wrongful retention under the Hague Convention is not a continuing state of affairs: see the decision of the House of Lords in *Re H & Another (Minors) (Abduction: Custody Rights)* [1991] 2 AC 476.'

8.3 In that case the mother came to Hong Kong with her two children on a two-year employment contract. They used to live in USA. The mother's move was agreed to by the husband who initially also agreed to move to Hong Kong but later decided to remain in the USA. Before the expiration of the two-year period, the mother applied for divorce and custody

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of the two children in Hong Kong. The father applied under the *Hague Convention* for the return of the two children to the USA and alleged that the mother had wrongly retained the children in Hong Kong. He relied on the mother's application for custody of the children as the act of retention. This Court held :

> ' 58. Again in relation to wrongful retention the most significant factor in this case is that in August 2006 the children were in Hong Kong pursuant to an express agreement between the parents. Under this agreement they will remain in Hong Kong until August 2007. The mother could not have wrongfully retained the children prior to that day. The application by the father was premature. In my view the application by the mother for custody cannot be an act of retention let alone wrongful retention. The fact that the mother applied for custody does not mean that she would not return the children to USA after August 2007. She has never expressed an intention not to return to USA. On the contrary, her intention showed shortly before the hearing below was to return to USA.'

8.4 In this case B Chu J held that there was a wrongful retention. Ms Yip argued that she was wrong. She submitted that the Wife here did exactly what the mother did in *BLW* namely, simply to implement her wish to have the custody of the children by way of court proceedings. In fact, no order had been made under the *GMO* application up to date. Furthermore the two-year period agreed by the Wife and Husband had not yet lapsed as the date of the judgment below. Ms Yip also submitted that the Wife maintains her position in the Court below that she will comply with any orders made by the Court,

whether or not the same are in her favour, and will not retain the children in breach of a court order.

8.5 In my view this is ultimately a question of fact. As B Chu J had the benefit of hearing the evidence unfolded before her and observing the parties, she was entitled to come to a view that, before the lapse of the two-year period, the Wife had changed her mind about their previous arrangement of temporarily staying in Hong Kong for a period of one to two years. She made the following finding :

> ' 88. Turning back to the facts in the present case, in my view, the first "*announcement*" by the Mother of her intention of not going back to New Jersey until the Children finished high school in Hong Kong was in fact the Friday prior to the 06.08.13 Email. Then in her affirmation filed in the FC Proceedings, the Mother had said as follows:
>
> (1) *"I found it necessary to explain to the children everything that was happening. I told them that they will complete their high school education in Hong Kong and where they will pursue their further studies will be their own choice. [P] still needs to study 4 years and [S] still needs to study 8 years in HKIS, until they complete their high school";*
>
> (2) *"I specifically told my children that I would not be returning to New Jersey under any circumstance. My children told me that they would stay with me wherever I chose";*
>
> (3) *"our family would be settling permanently in Hong Kong";*
>
> (4) *"the Petitioner brought the Children with her to settle in Hong Kong"*;
> (emphasis added)
>
> 89. The Mother issued the GMO Application about 6 months before the expiry of the 1-2 year period, after

receipt of the letter from the Father's US attorney asking her whether she intended to return the Children at the end of school term in June 2015. In her GMO Affirmation, she had said as the Father had threatened to carry out legal proceedings in USA to compel the return of the Children to New Jersey, she had no choice but to make the GMO Application to protect the Children. Thus, as submitted by Mr Coleman, and which I agree, the purpose of the Mother's issue of the GMO Application was clearly to resist the return of the Children to New Jersey.

90. The Mother then went on to say, that the Children were well settled in Hong Kong and that they had expressly told her that they would finish their high school in Hong Kong. She then stated that she completely disagreed with returning the Children to New Jersey on the basis of the allegation that their stay in Hong Kong was "temporary", and that in any event, it would be extremely detrimental to the Children to remove them from Hong Kong. She said that she had made it clear to the Father and the Children that she would under no circumstance return to New Jersey because of extra-marital affairs of the Father. She had further said that the Father might consider applying for care and control of the Children in New Jersey, and that she would strongly object to care and control of the Children being granted to the Father, setting out her reasons.

91. The Mother had also applied for maintenance of the Children in her GMO Affirmation and she had set out all the monthly expenses of the Children, based on their expenses in Hong Kong.

92. In light of Article 16 of the Convention, the GMO Application would not proceed until the present proceedings had been determined. The 2 year period will end around 6 July 2015, and it is not likely that the GMO Application could be determined before then.

93. In the SIR which was prepared as recently as 14 April 2015, the Mother had also shared with the social work officer that she had changed her mind in about August 2013 and she preferred the Children completing their high school in Hong Kong before returning to New Jersey.'

8.6 While the Wife has indicated she will comply with any orders made by the Court and will not retain the children in breach of a Court order, based on the facts as found by her, B Chu J, was clearly entitled to come to the view that the Husband's application was not pre-mature and the Wife had wrongfully retained the children in Hong Kong. This is also consistent with the views of Lord Hughes JSC in *A v A* at paragraph 78 :

> ' .... It may well be that the problem identified can be resolved consistently with the effectiveness of the 1980 Hague Convention. It may well be that the correct view is that unilateral acts designed to make permanent the child's stay in state B are properly to be regarded as acts of wrongful retention, notwithstanding that the scheduled end of the child's visit has not yet arrived.....'

VIII. <u>Child's Objection Defence</u>

1) <u>Summary of the children's view</u>

9.1 This is B Chu J's summary of the evidence relating to the views of the children :

> ' 125. In the present case, it was the Father who applied for the SIR to be prepared. P will be 15 in October this year, and the Convention shall cease to apply to a child who attains the age of 16 years. S is now 10. The SWO considered that they are mature enough and age appropriate for the court to take into account their views. Anyway, it was not really disputed by the parties that the Children are of an age and degree of maturity that it is appropriate to take account of their views.
>
> 126. The Children were interviewed individually by the SWO on two occasions, on 25 March and

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1 April 2015 before their Hawaii trip with the Father from 3 to 11 April 2015.

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127. It appeared that during their 1st interview, they had asked SWO whether the Mother would stay with them wherever they chose. After the 1st interview, the SWO then asked the Mother who told the SWO that she would definitely stay with the Children wherever they chose despite that she would find it very difficult in returning to New Jersey because of lacking financial, emotional and physical support there. The SWO reported that the Mother's response was shared with the Children during the 2nd interview.

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128. When P was invited by the SWO to share his views on whether to return to New Jersey or to stay in Hong Kong, he was reported to have "*consistently and clearly*" expressed that he preferred to stay in Hong Kong and justified his views with reasons. P said that the only thing that he missed in New Jersey was his grandparents and relatives but he could visit them during his school break. P was reported to be also concerned about the emotional response of his mother.

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129. What P had told the SWO was he had already settled in Hong Kong and adapted to the new environment, and he considered moving all the things back to New Jersey now would create a lot of trouble and difficulties again. He expressed his strong wish by maintaining the status quo and living in Hong Kong continuously. He then said he preferred to stay in Hong Kong and not return to New Jersey at the present stage. (emphasis added)

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130. S was reported to be a cheerful pre-adolescent who took into serious consideration before responding to SWO about his views on returning to New Jersey or staying in Hong Kong. He was reported to have conscientiously concluded that he preferred to stay in Hong Kong. He again gave his reasons. He did say he loved the school in New Jersey more because the recess break was longer and the studying pressure was easier to face as compared with the one in Hong Kong. He was reported to be concerned the emotional response of his mother and wanted his mother to be happy by staying in Hong Kong.'

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2) **The grounds of appeal**

9.2 The Husband's appeal on the Child's Objection Defence can be summarized as follows :

(1) The Judge erred in law and fact to this defence. In respect of law, the focus of the defence should be on the objection by the children but the Judge had equated or conflated two different issues namely, first, the expression by the children of a preference to remain living with the Wife and, second, an objection to being returned to New Jersey for the courts there to resolve the marriage of any dispute as to where and with whom the children should be. In terms of fact, there was no evidence that the children had expressed any such objection to returning to New Jersey and the fact that the children had only expressed a preference in the mid to long-term for staying with the wife. This expression does not amount to an objection to being returned within the meaning and purpose of Article 13 ('the objection and preference argument').

(2) Although the expression of the children's preference was to remain with the Wife in Hong Kong this was something for the New Jersey Court to consider in deciding where the children should ultimately live and with whom. There is no prejudice to the Children's views being taken into account in making that decision ('the no prejudice argument').

(3) The essential mischief which the *Hague Convention* is designed to counter is the removal either by abduction or

wrongful retention of a child from his natural environment, that is his country or habitual residence, the means to tackle this mischief is by way of a prompt return of the child to the country of his habitual residence. If this was not done then the abducting parent will create an artificial jurisdiction in the country of refuge. In this case B Chu J had allowed the mischief to occur and she accepted the views of the children which was in fact predicated on, first, their desire to maintain friendships and the like in Hong Kong and, second, the desire to continue to live with the Wife who is their primary carer, when the evidence also shows that the former simply arose from the fact that the children had spent some time in Hong Kong but in circumstances where their place of habitual residence had not changed from New Jersey and the latter was predominantly connected to their mother being the primary carer in fact and her repeated and strongly expressed preference for saying in Hong Kong ('the mischief argument').

(4) B Chu J had failed to consider the alleged objection by the children in asking whether the children will still object to New Jersey if the mother will be in New Jersey and the father in Hong Kong. When it was clear on the evidence that the children would not then object so that their expression of objection of preference was not country related but person related ('the country and person argument').

(5) B Chu J had erred in not properly taking into account the facts that :

(i) the children have been brought up in a substantially exclusively American environment for most of their life. Such upbringing should not be lightly disturbed;

(ii) the proper jurisdiction to deal with the long-term future of the children is New Jersey and the Wife will have the chance to put her case in the New Jersey proceedings;

(iii) Because of the substantial business and work connection of the Husband in New Jersey, he would have to travel to Hong Kong especially for the purpose of seeing the children;

(iv) to permit the Wife to retain the children in Hong Kong would be against the spirit of the agreement of the parties;

(v) Some of the reasons proffered by the children are simply the natural consequences of their temporary stay in Hong Kong which had been agreed to by the Husband and Wife. By accepting this view, B Chu J had allowed the children's view to trump the agreement of the parties. This is illogical when the Judge had at that stage decided the habitual residence of the children is New Jersey and the Wife's retention of the children in Hong Kong is wrongful and the analysis was in part predicated on the terms of the original agreement between the parties and it is not the purpose of the *Hague Convention* to elevate the children's wishes above those of their parents (the 'failure to consider' argument).

(6) The Court ought to have found that the Child's Objection Defence is not made out.

3) <u>**Article 13 and applicable principles**</u>

9.3 Article 13 of the *Hague Convention* confers a power on the Court not to return the child based on the child's objection to being returned to the country of habitual residence :

> ' The judicial or administrative authority may refuse to order the return of the child <u>if it finds that the child objects to being returned</u> and has attained an age and degree of maturity at which it is appropriate to take account of its views.' (emphasis added)

9.4 In the recent case of *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as parties to appeal)* (English Court of Appeal, [2015] EWCA Civ 26, Judgment dated 27 January 2015), Black LJ summarised the approach to the child's objection exception :

> ' 18. In England and Wales, the normal approach to the child's objections exception is to break the matter down into stages. There is what is sometimes called the "gateway stage" and the discretion stage. The gateway stage has two parts in that it has to be established that (a) the child objects to being returned and (b) the child has attained an age and degree of maturity at which it is appropriate to take account of his or her views. If the gateway elements are not established, the court is bound to return the child in accordance with Article 12. If the gateway elements are established, the court may return him or her but is not obliged so to do. This approach has not been challenged before us.
>
> ……

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> 69. In the light of all of this, the position should now be, in my view, that the gateway stage is confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views. Sub-tests and technicality of all sorts should be avoided. In particular, the *Re T* approach to the gateway stage should be abandoned.'

4) <u>My view on the Husband's appeal</u>

(1) <u>The objection and preference argument</u>

9.5 A distinction between preference and objection was drawn by Bracewell J in *In re R (A Minor: Abduction)* [1992] 1 FLR 105, 107-108:

> ' The wording of the article is so phrased that I am satisfied that before the court can consider exercising discretion, there must be more than a mere preference expressed by the child. The word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute.'

9.6 However, such a distinction was expressly disapproved of by the Court of Appeal in *In Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242 where the Court of Appeal rejected a similar argument. Balcombe LJ said at 250D:–

> ' … Further, there is no warrant for importing such a gloss on the words of article 13, …
>
> Unfortunately Bracewell J was not referred to the earlier decision of Sir Stephen Brown P. in *In re M. (Minors)* (unreported), 25 July 1990, in which he

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> rightly considered this part of article 13 by reference to its literal words and without giving them any such additional gloss, as did Bracewell J in *In re R*.
>
> As was also made clear by Sir Stephen Brown P. in *In re M.*, the return to which the child objects is that which would otherwise be ordered under article 12, viz., an immediate return to the country from which it was wrongfully removed, so that the courts of that country may resolve the merits of any dispute as to where and with whom it should live: see, in particular, article 19. There is nothing in the provisions of article 13 to make it appropriate to consider whether the child objects to returning in any circumstances. Thus, to take the circumstances of the present case, it may be that S. would not object to returning to France for staying access with her father if it were established that her home and schooling are in England, but that would not be the return which would be ordered under article 12.' (emphasis added)

9.7 Fisher J in *S v S* [1999] 3 NZLR 513, after referring to the Explanatory Report on the *Hague Convention* by Professor Elisa Pérez-Vera stated at 521 (line 30):

> ' …the framers of the Hague Convention assumed that a mature child's wishes would be taken into account without distinction between a wish to remain and a wish to return'

9.8 Fisher J's view was approved by the New Zealand Court of Appeal who refused to grant leave to appeal against Fisher J's decision (page 535 paragraph 30).

9.9 In *Re M (Republic of Ireland)*, Black LJ also discussed the distinction between objection and preference and came to the view at paragraph 41, that the term preference is one way of summarising that, for reasons which will differ from case to case, the child's views fall short of an objection.

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9.10 For my part, I do not find it necessary to go into a discussion on the true purport of the words 'objection' and 'preference'. A forthcoming child may use the expression 'I object to return to New Jersey', while a child who is less forthcoming, particularly one who has concern about the feelings of both of his parents, may simply say 'I prefer to stay in Hong Kong'. What is important is the substance of the views of the child and not simply the labels to be attached to his views. In the present case B Chu J was clearly entitled to regard the views of the children as objections within the meaning of Article 13.

(2) <u>The prejudice argument</u>

9.11 As to the prejudice argument, the *Hague Convention* jurisprudence clearly allows the views of the children to be taken into account when an application is made for their return, irrespective of whether such views may also be taken into account by the court of the requesting country after the children have been returned there.

(3) <u>The mischief argument</u>

9.12 In respect of the mischief argument, one recognises the rationale behind the *Hague Convention* protocol for the prompt return of the children to their place of habitual residence. However, at the same time the Court of the requested country is also required to decide on the issue of habitual residence of the children and the Child's Objection

Defence. Inevitably, the Court will consider the factors relating to the children's presence in Hong Kong to see whether they have integrated into the local society and the issue of the Child's Objection Defence. I do not regard this as creating an artificial jurisdiction in the requested country.

(4) The country and person argument

9.13 I have difficulties with the argument that the children's views were not country related but person related. Although the Wife had said in her affirmation that 'both children understand that their mother does not want to return to New Jersey anymore and they have decided to stay with me wherever I go', at the same time, as B Chu J had pointed out, the Wife had also told the social welfare officer that she would definitely stay with the children wherever they chose despite that she would find it very difficult in returning to New Jersey. The children were aware of the Wife's response. In any event, I do not find the distinction drawn by Mr Coleman to be helpful because the children's preference to stay in Hong Kong is inevitably tied up with their love and concern for the Wife. As Balcombe LJ in *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716, at 729, held that :

> ' ... there may be cases....where the two factors are so inevitably and inextricably linked that they cannot be separated.'

9.14 Butler Sloss LJ said in *Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390 :

> ‘ It is true that article 12 requires the return of the child wrongfully removed or retained to the State of habitual residence and not to the person requesting the return. In many cases the abducting parent returns with the child and retains the child until the court has made a decision as to the child’s future. The problem arises when the mother decides not to return with the child. It would be artificial to dissociate the country from the carer in the latter case and to refuse to listen to the child on so technical a ground. I disagree with the contrary interpretation given by Johnson J in *B v K (Child Abduction)* [1993] Fam Law 17. Such an approach would be incompatible with the recognition by the Contracting States signing the Convention that there are cases where the welfare of the child requires the court to listen to him. It would also fail to take into account article 12 of the United Nations Convention on the Rights of the Child 1989. From the child’s point of view the place and the person in those circumstances become the same ... .I am satisfied that the wording of article 13 does not inhibit a court from considering the objections of a child to returning to a parent.’

9.15 These cases were cited with approval by Black LJ in *Re M (Republic of Ireland)* paragraph 43 and 44.

9.16 B Chu J had clearly recognised the issue when she said :

> ' 138. No doubt the Children love both their parents and their grandparents. The evidence, however, showed that in the past few years, with the Father busy at work and travelling (although the days of travel may be disputed), the Children would have spent more time with their mother, and unsurprisingly they would be close to their mother emotionally. The Mother had produced an email she sent to P and a reply from P on 27 June 2014 to show the love and bond between them.
>
> 139. The Mother's views and feelings over any return to New Jersey could not have been lost on them. Equally, the Father's views and feelings in this respect could not have been lost on them either, nor indeed the Grandmother's.'

(5) <u>The failure to consider argument</u>

9.17 As to the matters that Mr Coleman complained B Chu J had not taken into account, in my view, this is ultimately a matter of discretion. B Chu J observed :

> ' 145. Having considered the SIR, I am satisfied that the Children's objections to forthwith return to New Jersey have been made out, and in light of the age and maturity of the Children, it is appropriate for this court to take account of their views and in my view the "child objection defence" under Article 13 has been established. By now the Children have settled in Hong Kong as they have been here for almost two years. P will be promoted to high school section of his present school in the coming semester and has

> made many friends here. Even though S seems to love his school in New Jersey more, he has made improvements in the present school the last semester, and he has also made some close friends in Hong Kong. Having considered all the circumstances of this case, I exercise my discretion in favour of the Children remaining in Hong Kong at the present stage.'

9.18 I do not consider that B Chu J's discretion had been wrongly exercised in the circumstances of the case.

IX. Conclusion

10. Accordingly the Husband's appeal was dismissed.

X. Costs of CACV 125/2015

11. I would grant the Wife the costs of the appeal and below with certificate for two counsel.

Hon Kwan JA :

12. I agree with the reasons for judgment of Cheung JA in CACV 125/2015 and the order for costs he proposes to make in that appeal.

CACV 125/2015

13. The Wife contended in this appeal that HH Judge Melloy was wrong to hold in the judgment of 16 January 2015 ('the Jurisdiction Judgment') that the court of Hong Kong has no jurisdiction over the divorce proceedings on the basis that

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neither of the requirements the Wife relied on in section 3 of the *Matrimonial Causes Ordinance*, Cap. 179 is satisfied, namely, that either of the parties to the marriage was domiciled in Hong Kong at the date of the petition for divorce (section 3(a)), or that either of the parties to the marriage had a substantial connection with Hong Kong at the date of the petition (section 3(c)).

14. On the question of domicile, Judge Melloy went through a long list of factors identified by HH Judge B Chu (as she then was) in *Y v W (Domicile)* [2012] 2 HKC 455 at §36 that may be taken into account in determining a person's intention for the purpose of domicile (and approved of by the Court of Appeal in *W v C (Divorce: Jurisdiction)* [2013] 2 HKLRD 602 at §20 and in *ZC v CN* [2014] 5 HKLRD 43 at §7.6) and came to this conclusion at §31 of the Jurisdiction Judgment:

> ' Bearing in mind all of the above it does not seem to me that the wife's domicile changed again when she came to Hong Kong on a temporary basis in June 2013 with the two children of the family. There was no intent originally to reside in Hong Kong on a permanent or indefinite period. This may have changed from the wife's perspective in December 2013, but this is not something that the husband ever agreed to. Further from a factual perspective – the wife's permanent home in April 2014 remained the family home in New Jersey. She was only living in a rental property in Hong Kong. Her whole married and family life up until that point had been conducted in the United States. Thus in my view she remained domiciled in the United States when she issued her divorce petition in April last year.'

15. On the issue of substantial connection, Judge Melloy quoted in extenso the guidance given by the Court of Appeal in *ZC v CN* at §§9.1 to 9.9. She then set out these factors which she regarded as important in §33 of the Jurisdiction Judgment:

> ' a) Is the wife physically present in Hong Kong?
>
> b) Is that presence of a transitory nature?
>
> c) Have the parties substantially conducted their matrimonial life in Hong Kong? Is their matrimonial home in Hong Kong? Do they regard Hong Kong as their home – at least for the time being? Where are the children studying?
>
> d) Does the wife have residency status? What was the party's past pattern of life? What as the frequency of her visits to Hong Kong and for what purpose? Does the wife have business or work here? Is the family home in Hong Kong and where are the children being schooled?
>
> e) In the event that the context of the family is not Hong Kong, are there other material factors which would enable the wife to claim that she had a substantial connection with the Territory?'

16. By this reasoning in §34, the judge concluded that the Wife did not have a substantial connection with Hong Kong when she issued the divorce petition in April 2014:

> ' In this case, although the wife is presently in Hong Kong, the parties have never lived in Hong Kong as man and wife or as a family. There is no matrimonial home here and there is no question that their past pattern of life was in New Jersey. Further this is not a typical expatriate scenario where the parties were required to relocate to different countries on a regular basis. The wife and children are here because the wife has chosen to remain in Hong Kong following the breakdown of her marriage to the respondent. Although the wife and children would visit Hong Kong

> frequently, there was never any suggestion that this was for anything other than a holiday, so that the wife could catch up with family and friends etc. It is true that the wife has recently set up home here and that the children are attending school. But this is in the context of the fact that the original intention was that this would be a temporary move of 1-2 years. It is clear that wife does have a connection with Hong Kong, but given the recent guidance provided by the Court of Appeal above, it does not appear that the connection is sufficient to afford her the jurisdiction to issue divorce proceedings here. …'

17. The judge then made a declaration that the court in Hong Kong has no jurisdiction over the Wife's divorce suit. Having concluded that the court has no jurisdiction, the judge did not deal with the alternative basis in the husband's summons that if the court does have jurisdiction, the court should not exercise that jurisdiction in the circumstances of this case and should grant a stay of proceedings on grounds of *forum non conveniens* in favour of the divorce proceedings brought by the husband in the state of New Jersey.

18. By this appeal, the Wife sought to set aside the declaration and an order be made that the alternative basis of the husband's summons be remitted to the Family Court for determination.

19. Mr Coleman, SC reminded this court of these principles in approaching this appeal. Where the contest is the correctness or otherwise of an inference drawn by the trial judge in respect of a person's relevant intentions, the appeal court should make proper allowances for any advantages that the

judge would have had and the appeal court would not have and should not interfere with inferences which the judge could reasonably have made (*Cyganik v Agulian* [2006] 1 FCR 406 at §12). Where conclusions of fact are not conclusions of primary fact but involve an assessment of a number of different factors to be weighed against each other – sometimes called an evaluation of the facts and often a matter of degree upon which different judges can legitimately differ – such cases may be closely analogous to the exercise of a discretion and the appeal court should approach them in a similar way (*Assicuriazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 557 at §[16], cited in *Henwood v Barlow Clowes International Ltd (in liquidation) & Ors* [2008] EWCA Civ 577 at §4).

20. I note another relevant passage in the judgment of Arden LJ in *Henwood v Barlow Clowes* at §6:

> '…If an appellate court considers that the judge has come to a conclusion that is plainly wrong and outside the ambit within which reasonable disagreement is possible, it is bound to intervene, even though the question is one of fact. This standard does not apply if the judge has misdirected himself in law as to the correct approach to the evidence. If he has made an error of law in this way, there is no further requirement that the judge's finding should be plainly wrong or outside the ambit within which reasonable disagreement is possible.'

21. With the above, I turn to consider the two issues in this appeal.

Domicile

22. One starts with the *Domicile Ordinance*, Cap. 596, which was enacted to consolidate and reform the law for determining the domicile of individuals. The relevant provisions are as follows:

> ' **3. General rules**
>
> (1) Every individual has a domicile.
>
> (2) No individual has, at the same time and for the same purpose, more than one domicile.
>
> (3) Where the domicile of an individual is in issue before any court in Hong Kong, that court shall determine the issue in accordance with the law of Hong Kong.'
>
> ' **5. Domicile of adults**
>
> (1) On becoming an adult, an individual retains (subject to subsection (2)) the domicile that he had immediately before he becomes an adult.
>
> (2) Subject to sections 6, 7 and 8, an adult acquires a new domicile in a country or territory if:
>
> (a) he is present there; and
>
> (b) he intends to make a home there for an indefinite period."
>
> ' **6. Acquiring a domicile in Hong Kon**g
>
> (1) An adult does not acquire a domicile in Hong Kong under section 5(2) unless he is lawfully present in Hong Kong.
>
> (2) An adult's presence in Hong Kong shall be presumed to be lawful unless the contrary is proved. ...'

> ‘ **12. Standard of proof**
>
> Any fact that needs to be proved for the purposes of this Ordinance shall be proved on a balance of probabilities.’

23. These findings of the judge are not challenged on appeal. The Wife’s original domicile was in Hong Kong. She was born and grew up in Hong Kong. In 1997, she acquired a domicile of choice in the United States when she moved to New Jersey following her marriage to the husband that year. She lived in the United States for nearly 16 years following her marriage, until she moved with the children to Hong Kong in the summer of 2013. As at the date she filed her divorce petition, she had lived in Hong Kong for less than ten months[1].

24. The Wife accepted before the judge that when she moved to Hong Kong with the children in the summer of 2013, the initial intention had been that this would be a temporary arrangement for one to two years. She termed this a ‘trial’ period and alleged that as the move became more imminent, it was accepted by the Husband that she and the children would stay in Hong Kong until at least the children finished high school and in any event the understanding had always been that if all went reasonably well during the trial period, the children would continue and complete at least their high school education in Hong Kong[2].

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[1] Jurisdiction Judgment, §§2, 8, 12

[2] Jurisdiction Judgment, §§12, 13

25. The husband denied he had ever accepted that the Wife and children were to stay in Hong Kong until the children finished high school or that the period of one to two years' stay was intended to be a 'trial' period[3].

26. The judge found in favour of the Husband the original intention was that the move to Hong Kong in 2013 was to be a temporary move of one to two years and it was not originally categorised as a move for a trial period[4]. There was no intent originally to reside in Hong Kong for an indefinite period and the Husband did not ever agree to the Wife residing here with the children for an indefinite period[5].

27. The judge posed these questions in §11 as the issue for determination: did the Wife's domicile change again when she moved to Hong Kong with the boys in June 2013? As at the time the divorce petition was filed on 16 April 2014, could it be said that the Wife intended to make Hong Kong her home for an indefinite period at that time?

28. What then was the evidence regarding the Wife's intention of residing in Hong Kong for an indefinite period as in April 2014? I think the evidence is clear. Most of it was set out in the Jurisdiction Judgment. The relevant assertion in the Wife's affirmation was supported by contemporaneous correspondence and based on matters not in dispute.

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[3] Jurisdiction Judgment, §14
[4] Jurisdiction Judgment, §22
[5] Jurisdiction Judgment, §31

29. In chronological sequence, there was the Husband's email to the Wife dated 6 August 2013 in which he mentioned that the Wife told him a few days ago that there was nothing for her in New Jersey and she would not consider living there until after the children are off to college and that hit the Husband really hard and made him really sad[6]. In December 2013, the Wife discovered the Husband was having an affair. She deposed in her affirmation that after her discovery she found it necessary to explain to the children everything that was happening and she told them they will complete their high school education in Hong Kong and she would not be returning to New Jersey under any circumstance. The children told her they would stay with her wherever she chose[7]. Lastly, there was the Wife's email replying to the message of the Husband's mother on 23 September 2014, in which the latter brought up the Wife's earlier assurance to her in-laws that the move to Hong Kong was only a temporary move for two years. The Wife's reply, as summed up by the judge, was that everything changed from her perspective once she discovered the Husband's infidelity in December 2013[8].

30. In her ruling on 25 March 2015 refusing leave to the Wife to appeal against the Jurisdiction Judgment, the judge stated in §6 she did not make a finding of fact that the Wife decided to make Hong Kong her permanent home after the

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[6] Jurisdiction Judgment, §17
[7] Affirmation of the wife in FCMC 4880/2014 filed on 3 October 2014, §§45 and 46
[8] Jurisdiction Judgment, §§20 to 22

discovery of the Husband's infidelity in December 2013 and that she was very careful not to jump to that conclusion.

31. In light of the clear evidence mentioned above, when according to the judge 'everything changed from [the Wife's] perspective once she discovered the Husband's infidelity', I think the judge was plainly in error in declining to find that the Wife had failed to establish she intended to reside in Hong Kong for an indefinite period after her discovery in December 2013 and that such an intention persisted when she presented her divorce petition in April 2014. As submitted by Ms Yip, SC, this discovery changed the whole complexion and the agreement (disputed by the Wife) to live in Hong Kong for one to two years was overtaken by the change of a failed marriage. In this connection, given the clear evidence on the then intention of the Wife, I cannot accept Mr Coleman's submission that she still intended to return to New Jersey if the Husband would succeed in procuring the return of the children there. There was no evidence that this was probable at the time of petition.

32. It seems to me the judge's error might have been due to the manner in which the Wife's case was put in the court below. The Wife advanced a case that the Husband had reluctantly agreed to her and the children residing in Hong Kong until at least the children finished high school education. In rejecting the Wife's case of an alleged agreement to relocate, the judge failed to have proper regard to material evidence of the change from the Wife's perspective in December 2013, and

wrongly attached significance to the absence of consent from the Husband to any change of plans to live in Hong Kong for an indefinite period. In the particular circumstances here, where there was a failed marriage, the Husband's lack of consent was quite simply irrelevant for determining the domicile of the Wife for the purpose of section 3(a) of Cap. 179.

33. The judge duly went through the list of factors in *Y v W* before arriving at her conclusion in §31. Mr Coleman submitted that the judge had gone through these factors and had taken them into account as well as other matters relied on by the Wife to establish her change in domicile in 2013. He argued that weighing up and balancing the various factors were matters for the judge and the appeal court should not interfere with the inference the judge had drawn reasonably on the Wife's intention.

34. The list of factors in *Y v W* was meant as guidance regarding matters that may be taken into account in determining whether an individual has formed an intention of residing in a place indefinitely. As rightly pointed out by Ms Yip, they are not meant to be exhaustive or determinative. In a given situation, not all the factors are relevant to the exercise, and, even if relevant, the weight to be given to a particular factor would vary depending on the particular circumstances.

35. Ms Yip said the judge had applied the *Y v W* factors mechanically. I am inclined to agree with her. It is not

helpful to go through the list of factors without indicating their relevance and without stating what weight, if any, is to be attached to them. I take as an example the first factor, length of residence in Hong Kong. The judge found in §22 that the Wife's move to Hong Kong was originally meant to be temporary for one to two years after which she and the children would return to New Jersey and this changed from the Wife's perspective in December 2013. This finding was repeated in her conclusion at §31, qualified by the statement that the change was not something that the Husband ever agreed to. It is not entirely clear what weight the judge had attached to her finding in §22. I think there is substance in Ms Yip's complaint that the judge had failed to consider how the *Y v W* factors would apply in the circumstances peculiar to this case, namely, that the Wife's change of domicile to the United States in 1997 was because of her marriage and that the discovery of the Husband's infidelity led to a change in her perspective and fortified her decision to remain in Hong Kong.

36. Other factors in *Y v W* considered by the judge would be of little significance in the particular circumstances here, such as the business interests of the Husband, the whereabouts of personal belongings, the whereabouts of property and investments of the Husband and the Wife, the place of work of the Husband.

37. On the basis of the *Y v W* factors, the judge concluded in §31 that up till April 2014, the Wife's whole married and

family life had been conducted in the United States and hence her domicile remained in the United States. It does not appear to me that the judge had approached the evidence correctly, nor was there proper weighing up of the factors against each other. The judge had failed to assess the factors in light of the Wife's decision to remain in Hong Kong as a result of her failed marriage. She had attached excessive weight to factors relating to how the parties had conducted their marriage in the past. Quite apart from misdirecting herself on the evidence, the judge's conclusion on the Wife's domicile was plainly wrong. On this ground alone, the Wife's appeal that the court of Hong Kong has no jurisdiction to entertain the divorce suit must be allowed.

<u>A substantial connection</u>

38. The phrase 'a substantial connection with Hong Kong' in section 3(c) of Cap. 179 is not a term of art and should be given its ordinary meaning *(B v A* [2007] 4 HKC 610 at §18; *ZC v CN* at §9.1). Although a wider meaning is to be given to this phrase than the requirement of domicile in section 3(a) or three years ordinary residence in section 3(b) of Cap. 179, this is not intended to be interpreted so loosely as to encourage residence of passage or divorce of convenience, as it was not the legislative intent to create a 'fly in and fly out' divorce jurisdiction (*Savournin v Lau Yat Fu*ng [1971] HKLR 180 at 184; *S v S* [2006] 3 HKLRD 751 at §17; *B v A* at §26; *ZC v CN* at §9.9).

39. Unlike domicile which a person cannot have more than one at the same time and for the same purpose, one can have a substantial connection with more than one jurisdiction at a time. Hence, it is not necessary for the Wife to demonstrate her connection with Hong Kong is the only substantial connection or the most substantial connection she has with any jurisdiction. It is sufficient if she demonstrates among others that she has 'a' substantial connection with Hong Kong (*S v S* at §13).

40. It is unnecessary to repeat the guidance given by the Court of Appeal in *ZC v CN*. As in the case of the guidance given regarding factors relevant to domicile, I emphasise again that whether a party to a marriage would have a substantial connection with Hong Kong is a question of fact, so the factors to be taken into consideration and the weight to be given to each relevant factor would vary according to the particular circumstances of each case (*S v S* at §18).

41. It is apparent from those parts of §§9.5 and 9.8 in *ZC v CN* emphasised by the judge in §32 of the Jurisdiction Judgment that she placed significant weight on the past pattern of life of the Husband and Wife and the fact that their matrimonial home was in New Jersey (see also §34). She accepted in §34 that the Wife does have a connection with Hong Kong but does not think it is sufficient connection, given the guidance provided in *ZC v CN* as emphasised by the judge (see also §9 of the judge's ruling on 25 March 2015).

42. I think the judge has fallen into error here. The fact that the parties have not lived here as man and Wife is not necessarily determinative (*S v S* at §18). Section 3(c) of Cap. 179 requires only either, not both, of the parties to the marriage to have a substantial connection with Hong Kong. And as stated in *ZC v CN* at §9.9, it will be unduly restrictive if one confines the connecting factors solely to that of a family context (matrimonial home and 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 may be exceptional situations where a party is in Hong Kong without the presence of his family and nonetheless has a substantial connection here.

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.

44. By April 2014, the Wife had been living in Hong Kong with the children for close to ten months, with the intention that they should continue to do so, at least until the children have completed their high school education here. A person who has come to live in Hong Kong for a limited period of time is not, by that fact alone, incapable of establishing a substantial connection with Hong Kong. It would depend on the particular circumstances (*B v A* at §§26 to 28).

45. The judge had failed to have regard to the particular circumstances of the Wife on the breakdown of her marriage and is plainly wrong in finding that she does not have a sufficient connection with Hong Kong at the time of presentation of the petition. On this ground as well, I would allow the Wife's appeal.

Disposition and costs

46. For the above reasons, I have allowed the Wife's appeal in CACV 98/2015 and set aside the declaration that the court of Hong Kong has no jurisdiction in her divorce suit as well as the order *nisi* on costs.

47. Having heard the submissions of counsel, I made an order to remit the remainder of the Husband's summons on *forum non conveniens* to a different judge of the Family Court for determination. I did so purely out of abundance of caution, to allay any possible concern that the judge might have formed

any view as to the appropriate forum for adjudicating any issues relating to the pre nuptial agreement.

48. I have heard arguments on costs and reserved our decision.

49. Ms Yip sought costs for the Wife on appeal and below. I would order the Husband to pay the Wife's costs of this appeal with a certificate for two counsel, as she is the successful party.

50. The judge had awarded the costs below to the Husband, on the basis that costs should follow event. Mr Coleman submitted before us that notwithstanding the Wife's appeal is allowed, given the way her case was conducted below, the Husband should not be penalised in costs and it would be fairer in the particular circumstances to make no order as to costs for the hearing below.

51. I agree with Mr Coleman up to a point. I do not think it fair to award all the costs of the proceedings below to the Wife, in view of the way her case was conducted, which might have led to the judge missing the focus of the change from the Wife's perspective in December 2013. Nevertheless, the Wife should have succeeded in resisting the summons on lack of jurisdiction, as demonstrated in this appeal. In the circumstances, I think justice would be served by awarding her half of the costs below, with a certificate for two counsel, and I would so order.

(M. H. Lam)	(Peter Cheung)	(Susan Kwan)
Vice-President	Justice of Appeal	Justice of Appeal

Ms Anita Yip SC and Mr Eugene Yim, instructed by Chaine Chow & Barbara Hung, for the petitioner in CACV 98/2015 and the defendant in CACV 125/2015

Mr Russell Coleman SC, instructed by Withers, for the respondent in CACV 98/2015 and the plaintiff in CACV 125/2015