FACV 11/2016

IN THE COURT OF THE FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO 11 OF 2016 (CIVIL)
(ON APPEAL FROM CACV NO 68 OF 2014)

BETWEEN

QMY	Appellant (Applicant)
and	
GSS	Respondent (Respondent)

THE APPELLANT'S CASE

Reference

BACKGROUND AND QUESTIONS ON APPEAL

Introduction

1. The nub of this appeal turns on statutory interpretation and involves a close consideration of the legislative history and intention behind sections 10 and 26 of the Guardianship of Minors Ordinance, Cap.13 ("**GMO**"), and more broadly the true ambit of the GMO regime as a whole.

Judgments below

2. On 18 June 2015, the Court of Appeal allowed the appeal by the Respondent ("**Father**") against the Ruling of Deputy Judge I Wong ("**Judge Wong**") on 27 May 2013 ("**Ruling**") dismissing his applications to challenge the Court's jurisdiction under the GMO and to stay the proceedings brought by the Applicant ("**Mother**") for their child ("**Child**") under the GMO on the ground of *forum non conveniens* ("**CA Judgment**"). **A/4** **A/43**

Questions on this appeal

3. On 29 September 2016, the Appeal Committee granted leave to the Mother to appeal to this Court on the following questions of great general or public importance:- **A/117** **A/121**

   (1) Does this Court have jurisdiction to entertain applications under the GMO in respect of a child who is neither ordinarily resident nor present in Hong Kong?

   (2) If such jurisdiction exists, does the Court have a discretion (whether by reference to the Court's inherent jurisdiction or otherwise) to decline jurisdiction other than on *forum non conveniens* principles?

(3) If it has such a discretion, what are the criteria to be considered in deciding whether such jurisdiction should be declined?

4. Leave is also granted to the Mother on the "or otherwise" ground in respect of whether Judge Wong's dismissal of the Father's *forum non conveniens* stay application should stand, being a question which ought to be dealt with by the Court of Final Appeal for the effective disposal of this appeal.

Relevant factual background

5. The factual background is set out in the Ruling (§§5-13) and the CA Judgment (§§3.1-3.12). **A/6-7** **A/44-47**

6. The following points bear particular emphasis:-

(1) Whilst the Mother and the Child have been residing across the border in China, the Child was born in Hong Kong and is a Hong Kong permanent resident having the right of abode here with her father (i.e. the Father) being a Hong Kong permanent resident.

(2) The Father voluntarily arranged and paid for the Mother to come to Hong Kong to give birth to the Child in August 2007.

(3) The Father has always been employed by a listed company in Hong Kong

(4) He has a married family and assets (the extent of which is presently unknown pending discovery) in Hong Kong.

(5) It was therefore a natural choice for the Mother to bring legal proceedings in Hong Kong for the Father to face up to his responsibilities towards the Child following his refusal to maintain or visit the Child since she was about 3 years old.

QUESTION 1: COURT'S JURISDICTION UNDER GMO

7. The position taken by the Father was that the Court has no jurisdiction under the GMO over a child who is not ordinarily resident or present in Hong Kong.

8. At §7.11 of the CA Judgment, Cheung JA considered the question but gave no definitive ruling, expressing only: **A/53-54**

> "**In the *absence of restrictions*, I am prepared to proceed on the basis that the Court has such jurisdiction. However, it is not necessary for the purpose of this appeal to give a determinative answer**…"

9. At the end, the appeal was decided against the Mother on a confined basis that the jurisdiction of the Court should not be exercised in the particular circumstances of the present case.

10. When refusing leave to appeal, the Court of Appeal at §5 of its Decision dated 28 April 2016 ("**Decision**") repeated that the Court of Appeal "*were **prepared** to accept there is jurisdiction"*. **A/92**

11. The question whether, upon a proper construction, the Family Court has jurisdiction under the GMO over a child who is not ordinarily resident nor present in Hong Kong

therefore still requires a conclusive determination by this Court.

Statutory Framework

12. The main thrust of the Father's submissions on this question (whether before Judge Wong or the Court of Appeal) was that the GMO must have some jurisdictional limit because, *unless the contrary intention appears (or is implied)*, an enactment is taken not to apply to foreigners and foreign matters outside the territory[1].

13. Whilst such comments by the learned editors of *Bennion* are always worthy of consideration, they are no more than one of the interpretative factors of statutory interpretation, and one must carefully consider, weigh and balance how they may be applicable in a particular enactment[2] relating to the welfare of children over which the Court is known to have a wide jurisdiction.

14. In reality, it can be seen that this "presumption" of territorial exclusivity is not always maintained, such as in cases involving the winding-up of insolvent companies, and for good reasons (which will be further developed below).

[1] The Father cited***, Bennion on Statutory Interpretation (6th Ed)***, section 130
[2] See ***Bennion on Statutory Interpretation, supra***, section 193

15. The starting point is therefore to look at the relevant statutory provisions having regard to their context and purpose (see ***Leung Chun Ying v Ho Chun Yan Albert*** at §12).

16. Section 19 of the Interpretation and General Clauses Ordinance, Cap 1 provides that "[a]n Ordinance shall be deemed to be remedial and shall receive such *fair, large and liberal* construction and interpretation as will best ensure the attainment of the *object* of the Ordinance according to its true intent, meaning and spirit" (our emphasis).

17. This objective of the GMO is enshrined in section 3: "[i]n relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of the income of any such property - in any proceedings before any court (whether or not a court as defined in section 2) the court… **shall regard the best interests of the minor as the first and paramount consideration**…" (our emphasis)

18. The main empowering provision of the GMO is section 10.

19. Of particular relevance to the present case is section 10(2), which provides that the court may require a parent (or parents) of a minor to make financial provisions for the benefit of the minor "*on the application of* ***a person****… **with whom custody of the minor lies** at law*".

20. Also, section 10(1) provides that the court may make orders regarding the custody or right of access in relation to a minor "*on the application of* ***either of the parents of a minor*** *(who may apply without next friend) or the Director of Social Welfare*".

21. Section 26 of the GMO further provides that:-

> "*The jurisdiction conferred on any court by this Ordinance shall be exercisable notwithstanding that any party to the proceedings is not domiciled in Hong Kong."*

Absence of restrictions

22. It is immediately apparent that the GMO does **not** contain any provision restricting the jurisdiction of the Court in a manner similar to sections 3, 4 and 5 of the Matrimonial Causes Ordinance, Cap 179 ("**MCO**"), section 6 of the Parent and Child Ordinance, Cap 429 ("**PCO**") or sections 5(6) and 20C(5) of the Adoption Ordinance, Cap 290 ("**AO**").

23. Quite the contrary, section 26 of the GMO expressly provides that the jurisdiction conferred on the Court is unaffected *notwithstanding* any party to the proceedings is not domiciled in Hong Kong.

24. The Court of Appeal was therefore entirely correct in noting "*the absence of restrictions*" in the GMO (see §7.11 of the CA Judgment). **A/53**

25. Before the Court of Appeal, a core argument raised by the Father was that the fact that the Legislature took the trouble to legislate section 26 must mean that the GMO is not without jurisdiction limits.

26. A closer examination of the wordings of section 26 in conjunction with section 10 will show that such an argument is flawed and, more importantly, will provide a clear answer to Question 1.

Legislative History

27. Section 26 of the GMO is modelled on section 17 of the Guardianship of Minors Act 1971 in the UK ("**GMA**").

28. The first point to note is that the almost identical wording was copied from section 17(1) of the GMA to become section 25 of the GMO with an almost identical title.

29. The treatment of section 17(2) of the GMA is different. It did not form part of section 25 of the GMO. Instead, it was turned into a new provision on its own under 26 of the GMO

and was given a newly created title: "**Jurisdiction over persons not domiciled in Hong Kong**".

30. Sections 15(4), (5) and (6) of the GMA concern situations where one of the parents resides in Scotland or Northern Ireland and the other resides in England or Wales, which are not applicable to Hong Kong.

31. Despite some similarities, the wordings of section 26 of the GMO do not mirror those of section 17(2) of the GMA. The effect of section 26 of the GMO is in fact completely different from that of section 17(2) of the GMA.

32. What is in common is only the use of the word "domicile".

Proper Construction of the GMO

33. Prior to the coming into force of the Domicile Ordinance, Cap.596 ("**DO**") in 2009, the determination of domicile was based on common law.

34. In the case of an adult, a domicile is acquired "if it be affirmatively shown that the person is **resident** within a territory subject to a distinctive legal system with the **intention**…of residing there indefinitely.[3] (emphasis added)

[3] ***In the Estate of Fuld, deceased (No 3)*** [1968] P 675

35. Further, every individual can only have one, and only one domicile at a given time[4]. This is the rule of single domicile.

36. In so far as a child is concerned, his/her domicile follows that of the adult parent with whom it resides[5]. This notion is known as domicile of dependency.

37. The principle of "domicile of dependency" was abolished by the DO. In its place the DO provides that the place of domicile of a child is to be that with which the child has his or her closest connection (see section 4 of the DO).

38. Two alternative presumptions are applicable in this regard pursuant to section 4 of the DO:

> "1. Where the child's parents are domiciled in the same country or territory and the child has his home with either or both of them, it is presumed that the child is most closely connected with that country or territory.
>
> 2. Where the parents are not domiciled in the same country or territory and the child has his home with one of them, but not with the other, ***it is presumed that the child is most closely connected with the country or territory in which <u>the parents with whom he or she lives is domiciled</u>***."

[4] ***Udny v Udny*** (1869) LR 1 Sc & Div 441.
[5] ***Gulbenkian v Gulbenkian*** [1937] 4 All ER 618; ***Henderson v Henderson*** [1967] P 77

39. In other words, whether before or after 2009, the position would be largely the same for a child – he/she will invariably acquire the domicile of the parent with whom he/she is residing.

40. Turning back to the GMO, section 26 provides that the jurisdiction of the Court is unaffected notwithstanding "any party to the proceedings" is not domiciled in Hong Kong.

41. A party applying under the GMO must be "*either of the parents of a minor*", "*a person with whom custody of the minor lies*" or "the Director of Social Welfare".

42. As stated above, the domicile of a child is invariably the same as that of his/ her parent(s).

43. In this light, by stipulating that the jurisdiction of the Court under the GMO is unaffected notwithstanding "any party to the proceedings" is not domiciled in Hong Kong, it means also that the jurisdiction of the Court is unaffected by where the child is domiciled.

44. As noted above, a person can only have one domicile at any one time, and actual presence/residence in another country is required for establishing a domicile there.

45. Hence, by expressly providing in section 26 that the jurisdiction under the GMO is unaffected notwithstanding

any party is "not domiciled in Hong Kong", the Legislature has clearly envisaged and made allowance for the possibility where the applicant, together with the child of whom the applicant has custody, may not be present or living in Hong Kong.

46. Crucially, section 26 of the GMO (together with the whole Ordinance) came into effect in 1977 at a time when Hong Kong had an influx of immigrants from Mainland China[6]. Judge Wong rightly observed in §46 of the Ruling: "Hong Kong and Mainland marriages are daily occurrences now. It is not uncommon for one of the parties to reside just across the border in Shenzhen or even domiciled in the Mainland with their children and the other party to be in Hong Kong. It is also not a rare occurrence that both parties together with their children are residing in the Mainland, with substantial connexion with Hong Kong." **A/17-18**

47. Apart from children residing in Mainland China, there are also many children in Hong Kong who followed their parents to emigrate in the past 3 decades, and one or both of these parents might have already moved back to Hong Kong for one reason or another.

48. Legislation (save in the exceptional case of legislation intended to be of unchanging effect) is to be construed as at the time of the action, not the time when it was passed, and

[6] The Touch-Base Policy was implemented by the Hong Kong Government in 1974.

is said to be "always speaking" and intended to be developed in meaning with developing circumstances in society[7].

49. If the Father's interpretation *were* adopted, it would lead to an absurd result where, for example, a mother would have no recourse in Hong Kong courts if the father who returns to Hong Kong before or after the breakdown of the relationship refuses to maintain their child, who currently lives in Canada with his mother. The Legislature cannot have intended to exclude these classes of children from the ambit of GMO thereby leaving them in legal limbo.

Father's interpretation of the GMO and its problems

50. The Father contended that the Court has no jurisdiction to entertain an application under the GMO unless the child is ordinarily resident or present in Hong Kong. Such a proposition is, however, unsupported by both the language of the statute or case law.

51. Worse still, the Father's proposition would render section 26 of the GMO entirely superfluous.

52. As Judge Wong rightly discerned in §48 of the Ruling, under normal circumstances and in the context of an application under section 10(2) of the GMO, the child concerned would normally be residing with the parent seeking maintenance. **A/18**

[7] See ***Bennion on Statutory Interpretation, supra***, section 288

Given that section 26 allows a parent to apply notwithstanding he or she is not domiciled in Hong Kong and bearing also in mind that there is no requirement he or she has to be a resident or present in Hong Kong, it must follow that there should equally be no jurisdictional limit against the child. Were it otherwise, section 26 would have virtually no effect.

53. The Father's proposition would also mean that either (1) illegitimate children under the regime of GMO are to be treated differently from children born within wedlock under the regime of the MCO and Matrimonial Proceedings and Property Ordinance Cap 192 or (2) the court has no jurisdiction to deal with custody or maintenance applications in respect of children born within wedlock who are not present or habitually resident in Hong Kong (e.g. those who emigrated to overseas countries with their parents earlier) notwithstanding one or both of their parents satisfy the jurisdiction threshold under section 3 of the MCO.

54. Plainly, either way, it would lead to yet another absurd result which our Legislature must not have intended, considering the way our society has developed in the past 3 decades since the GMO was enacted.

55. This contravenes the well-settled rule of statutory interpretation that the Court would seek to avoid a construction that produces absurd results.[8]

56. Further, the Father's construction of the GMO would be unconstitutional.

57. By virtue of Article 24(1) of the Basic Law, all "Chinese citizens born in Hong Kong before or after the establishments of the Hong Kong Special Administrative Region" are given the status as permanent residents of Hong Kong irrespective of their physical and habitual residence. They shall have the right of abode and are also guaranteed constitutional right under Article 25 of the Basic Law to be "equal before the law".

58. To require that a child must be domiciled or ordinarily resident in Hong Kong before the GMO jurisdiction could be invoked would mean that the GMO **discriminates** against children who are permanent residents of Hong Kong but are presently not habitually resident in Hong Kong (or are not physically present within jurisdiction). Again, this must not have been what our Legislature had intended.

59. It is a settled principle of statutory interpretation that unless the contrary intention appears, an enactment by implication imports any principle or rule of constitutional law which

[8] See ***Bennionon Statutory Interpretation***, ***supra***, Section 312

prevails in the territory to which the enactment extends and is relevant to the operation of the enactment in that territory.[9]

60. In the premises, the proposition that the GMO only applies to a child who is habitually resident or present in Hong Kong is wholly lacking in principle, logic and propriety.

Paramountcy of the minor's best interests

61. Fundamentally, the justification for adopting a wide interpretation of GMO is to be found in the overriding necessity to protect the best interests of a minor in Hong Kong as enshrined in section 3 of the GMO.

62. The flexibility inherent in a wide jurisdiction is valuable in ensuring that no children in need would be denied the effective protection of the Hong Kong Court.

63. The Legislature should not be treated as having ousted the jurisdiction of the court unless that conclusion was required by the terms or objective of the enactment. In this vein, "statutory silence" as to the limit of the GMO can only be understood as leaving the jurisdiction of the Court intact and unfettered.

[9] See ***Bennion on Statutory Interpretation***, ***supra***, section 328,

Conclusion on Question 1

64. It is therefore more than clear that the GMO does not have any territorial jurisdictional limit (such as those seen in the MCO, PCO and AO).

65. Accordingly, the Court must have jurisdiction to entertain applications under the GMO in respect of a child who is neither ordinarily resident nor present in Hong Kong.

QUESTION 2 – DECLINING JURISDICTION

The Court of Appeal's Reasoning

66. This issue of declining jurisdiction was not initially pursued by the Father and was only first raised by the Court of Appeal during the appeal hearing. At §7.11 of the CA Judgment, having indicated that the courts have a concurrent "inherent jurisdiction", the Court proceeded to question whether, even if the jurisdiction exists, it should be exercised at all. **A/53**

67. The Court of Appeal eventually came to the view that the Court has a discretion to decline jurisdiction, independent of its power to stay proceedings on the ground of *forum non conveniens* (see §8.15 of the CA Judgment). There is no justification for the Court of Appeal's conclusion.

68. Where a jurisdiction exists under the GMO, the court does not have the power and should not add a further obstacle or hurdle which an applicant must pass through in order to get such relief as he or she is so entitled by the statute. To hold otherwise would be to usurp the role of the Legislature.

69. Whilst it is always within the power of the Court to 'decline' to exercise its jurisdiction to grant the relief sought where a party has not made out a case on its merits, it is an altogether different matter from what was done in the present case where the Court having found that it had jurisdiction under a

statute, went on to decline to exercise it. In the former case, the court considers all the circumstances relevant to the exercise of its jurisdiction and comes to a decision on the merits of the application. In the latter, the court does not consider the merits of the application at all and makes its decision on whether some threshold has been met. It is only after that threshold is met that the court proceeds to consider the merits.

70. The Court of Appeal erred in reaching its conclusion by incorrectly compounding two different regimes – the exercise of the *statutory* jurisdiction under section 10 of the GMO on the one hand and the exercise of its inherent jurisdiction on the other. In particular, the Court of Appeal fell into error by conflating the considerations pertinent to the exercise of its inherent jurisdiction over children with its jurisdiction under the GMO (see §8.15 of the CA Judgment). **A/61**

71. Whilst the exercise of any inherent "long-arm" jurisdiction should, for reasons discussed below, be exercised with a greater degree of circumspection, the GMO should be given a wider contextual and purposive interpretation (see ***Leung Chun Ying v Ho Chun Yan Albert***[10] at §12).

72. The relevant context and purpose includes section 3 (best interest of the minor as first and paramount consideration), and section 26 (jurisdiction expressed to apply over parties

[10] (2013) 16 HKCFAR 735

not domiciled in Hong Kong) – they point overwhelmingly to a conclusion that the power under the GMO is intended by the Legislature to be exercisable regardless of where the minor is living.

73. In ***Redbridge London Borough Council v A***[11] at §33, Hayden J explained the very special nature of the court's "inherent jurisdiction" (as opposed to a jurisdiction conferred by statute) over children:-

> "Precisely because its power are *not based either in statute* or in the common law it requires to be used sparingly and in a way that is faithful to its evolution. It is for this reason that any application by a local authority to invoke the inherent jurisdiction may not be made as of right but must surmount the hurdle of an application for leave pursuant to section 100(4) of the 1989 Act and meet the criteria there."

74. At §6 of the Decision, the Court of Appeal said that it did not impose an additional layer of hurdle that the Mother has to go through, but merely applied it as a factor relevant for the exercise of the discretion itself. This is directly contradictory to the CA Judgment itself which indicated that the exercise of the (inherent) jurisdiction should be considered **before** any question of *forum non conveniens* (see §8.16 of the Judgment). **A/92** **A/62**

[11] [2015] Fam 335

75. This Court will no doubt appreciate that any consideration of the merits of a case (and therefore the exercise of the court's discretion to make an order one way or the other) necessarily comes **after** consideration of the issue of *forum non conveniens*.

76. The Court of Appeal, despite its assertion to the contrary, was clearly inserting an additional hurdle which the Legislature did not intend and indeed specifically removed by section 26 of the GMO.

77. For these reasons, it is submitted that the Court of Appeal was wrong in holding that they can decline jurisdiction under section 10 of the GMO before a full consideration of the merits of the case.

The safeguards

78. This, however, does not mean that the floodgates of litigation would be opened.

79. A similar concern has been considered by the Courts in the area of insolvency.

80. In ***Re Paramount Airways Ltd***[12], the English Court of Appeal was dealing with an application under section 238 of the Insolvency Act, and ultimately came to the conclusion

[12] [1993] Ch 223

that the provisions of the Insolvency Act 1986 for setting aside undervalue transactions had unlimited territorial effect.

81. There, Sir Donald Nicholls V-C (as he then was) dismissed the suggestions of implied territorial limitation as "*capricious in the extreme*" and "*riddled with such serious glaring anomalies that Parliament cannot be presumed to have intended to legislate in such terms*".[13]

82. The Vice-Chancellor pointed to two safeguards which the English Court should, in his view, apply to ensure that the English Court does not exercise such jurisdiction under the 1986 Act in an exorbitant manner: (i) the requirement for leave to serve abroad; and (ii) "*the discretion the court has under the sections as to the order it will make*" (at 239F-G).

83. Given our answer to Question 1 above, the first safeguard mentioned in *Re Paramount Airways Ltd* is, of course, not applicable in the context of proceedings brought under the GMO because ***Order 11 rule 1, Rules of High Court, Cap 4A***, provides that "[s]ervice of a writ out of jurisdiction is permissible without the leave of the Court provided that each claim made by the writ is… **a claim which by virtue of any written law the Court of First Instance has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction** of the Court…" (emphasis added)

[13] Ibid, 236B-C

84. Section 26 of the GMO is precisely such a written law[14].

85. This position is, in fact, hardly surprising. The uniquely wide jurisdiction exercisable by the Courts in children cases is known to be reflected by the noticeably less stringent rules governing service in family or matrimonial proceedings.

86. Ordinarily, jurisdiction of Hong Kong civil courts is usually founded by service within Hong Kong, the defendant's submission, or by service outside Hong Kong with leave[15]. However, it is pointed out at §3.027 of ***The Conflict of Laws in Hong Kong***[16] that the position is different in childrens cases:-

> "It should be noted at the outset that the link between service within Hong Kong and the existence of jurisdiction to ordinary *in personam* court proceedings: **service as such does not have jurisdictional significance in the types of family and insolvency proceedings…"** (emphasis added)

87. The Court is empowered under ***rule 111(1)(c) of the Matrimonial Causes Rules, Cap 179A*** and ***Order 90 rule 6(2) of the Rules of High Court, Cap 4A*** to dispense with

[14] For completeness sake, this appears not to sit well with an *obiter dictum* in ***Re S (A Minor) (Wardship: Jurisdiction)*** [1992] HKLR 39 at 41, per Barnett J. It is to be noted that Barnett J was actually dealing with the requirement for leave to serve out in relation to a wardship application (but **not** an application under the GMO) and the *obiter dictum* was expressed without the issue being properly pursued.
[15] See ***The Conflict of Laws in Hong Kong***, **supra** at §§3.004-3.007.
[16] ibid

service when necessary in matrimonial proceedings and family proceedings under the GMO respectively. The Court has no such power in respect of ordinary *in personam* court proceedings.

88. It is thus stated in ***The Conflict of Laws in Hong Kong*** at §7.128:-

> "The Hong Kong court has jurisdiction to make orders giving or withdrawing custody of, access to, guardianship of and maintenance of a child "notwithstanding that any party to the proceedings is not domiciled in Hong Kong." **The court has broad power to dispense with service, so the jurisdiction is not limited by the complex rules as to service which limit the court's jurisdiction in *in personam* actions. The limits as to the court's jurisdiction in this context are therefore, it seems, to be found in the judicious exercise of discretion rather than in absolute rules.**"[17] (emphasis added)

89. This view is shared by Judge Wong at §53 of the Ruling: "... *that the cross-border limits on this jurisdiction (i.e. the GMO) appear to lie in the* ***judicious discretion as to its practical exercise (bearing in mind enforceability)*** *rather than in absolute rules.*" (emphasis added)

[17] See also §7.143 and footnote 625.

Forum Non Conveniens procedure

90. By "*judicious discretion as to its practical exercise*", Judge Wong and the learned author of ***The Conflict of Laws in Hong Kong*** were referring to the *forum non conveniens* principles which principles are applicable to family proceedings: ***SA v SPH***.[18]

91. On the basis of these principles, the Hong Kong has broad power to stay proceedings where the matter could more appropriately be litigated in another country.

92. The question of inquiry is trite: in which court may the matter most appropriately be tried in the interests of all the parties and for the ends of justice?

93. Essentially, the approach to *forum conveniens* under RHC O.11 r.4 is the other side of the coin as to the grant of a stay where the defendant has been served within Hong Kong. The only difference rests in the burden of proof – the burden falls on the plaintiff in RHC O.11 cases, whereas for a stay application, the defendant bears the burden to show that the foreign court is a clearly and distinctly more appropriate forum.

[18] [2013] 2 HKC 130

94. This difference in burden is, however, only "occasionally definitive" of the outcome in a jurisdictional challenge in modern circumstances.[19]

95. The *forum non conveniens* principles were identified by Chadwick J in ***Re Howard Holdings Inc***[20] at 554B as a safeguard in addition to those mentioned in ***Re Paramount***.

96. The *forum non comveniens* principles have also been a long-recognised safeguard in children proceedings[21].

The overall discretion on the merits of the case

97. As to the first safeguard identified by Nicholls V-C in ***Re Paramount***, it appears at first glance that His Lordship was proposing an additional hurdle on the basis of the "*sufficient connection test*".

98. However, upon a closer examination of the judgment, what Nicholls V-C was referring to is in fact no more than an overall discretion of the Court not to make order in a particular case involving a foreign element having fully considered all the circumstances and the merits of the case.

[19] See ***Conflict of Laws in Hong Kong***, supra, §3.083
[20] [1998] BCC 549
[21] See ***Rayden and Jackson on Relationship Breakdown, Finances and Children***, Binder 2, §31.552

99. Indeed, the Vice-Chancellor made it quite clear in his judgment in *Re Paramount* at 239G-H:

> "The first lies in the discretion the court has under the sections as to the order it will make…Sections 238…provide that the court "shall" on an application under those section, make such order as it thinks fit …Despite the use of the verb "shall", the phrase "such order as it thinks fit" is apt to confer on the court an **overall discretion**. The discretion is wide enough to enable the court, if justice so requires, to make no order against the other party to the transaction or the person to whom the preference was given.." (emphasis added)

100. The Vice-Chancellor further explained this at 237G:-

> "In the end I am unable to discern any satisfactory limitation...The case for some limitation is powerful, but there is no single, simple formula which is compelling, save for one expressed in wide and loose terms (e.g., that the person, or the transaction, has a "sufficient connection" with England) that would hardly be distinguishing from the ambit of the sections being unlimited territorially and the court being left to display a judicial restraint in the exercise of the jurisdiction.

101. The decision of Evans-Lombe J in ***Jyske Bank (Gibraltar) Ltd***[22] demonstrates that the courts are prepared to be flexible and pragmatic in their approach to the "conflict of jurisdiction" problem. It also reveals a judicial recognition that a strict "sufficient connection" test is not appropriate in a world which has become increasingly globalized and where the movement of persons and trading across national boundaries has become increasingly commonplace.

102. Although these cases referred to above are concerned with insolvency proceedings, the spirit of flexibility and openness with which the "conflict of jurisdiction" issue was addressed provide valuable guidance for the considerations in this appeal.

103. Turning back to the present case, for any applications under the GMO, any exercise of the overall discretion must be, of course, subject to and carried out in accordance with, the principle of the child's best interests and welfare as the paramount consideration as enshrined in section 3 of the GMO.

104. In this light, the court's power under the GMO is not "without limit" if by that it is meant that court can make *any* order under *any* circumstances.

[22] [2000] BCC 16, 34E-F

105. The court's otherwise unfettered jurisdiction is bound by their clear duty, in loyalty to the scheme and purpose of the GMO, to permit recourse to an order under the GMO only when it becomes apparent to the Judge in a particular case that the application the court is determining with regard to the minor's upbringing or financial provision can be resolved in a way which secures the best interests of the child.

106. These well-established safeguards serve to curb the potentially limitless power conferred on the Court by the GMO and allow the court to refuse to **make an order** when such action was appropriate or where to do so would defeat the ends of justice. It also shows that the Mother's interpretation of the GMO is justifiable both in principle and in practice.

107. All in all, these safeguards reflect the right balance between the need for the court to ensure justice by applying its domestic law extraterritorially on the one hand, and the practical problems of international comity on the other.

108. The Court cannot and should not, outside of these safeguards, decline to exercise its jurisdiction under the GMO.

Re B – International comity and the best interests of the child

109. At §8.18 of the CA Judgment, the Court of Appeal mentioned "the policy consideration of comity of nations" as **A/62-63**

a supplemental reason for declining jurisdiction.

110. Apart from the fact that the considerations for exercising inherent jurisdiction are not "equal" to (see §8.16 of the CA Judgment) the considerations for exercising a statutory jurisdiction, the Court of Appeal was also wrong in deciding that respect for comity should "trump" the welfare of a child in the context of child maintenance. It is submitted that any concerns about comity of nations must whenever possible give way to a recognition that the child's best interest must always be the paramount consideration. **A/62**

111. In this connection, the Supreme Court in ***Re B***[23] recently identified the three main reasons for caution in deciding whether to exercise the nationality-based jurisdiction in respect of children residing overseas (i.e. where the children have no habitual residence at the time the proceedings began): (1) to do so may conflict with the jurisdictional scheme applicable between the countries in question; (2) it may result in conflicting decisions in those two countries; and (3) it may result in unenforceable orders[24].

112. It is submitted that those factors carry little weight in the context of the GMO regime.

[23] [2016] 2 WLR 557
[24] Ibid, 576 at § § 59– 62

113. As canvassed above, any danger of conflicting decisions or jurisdictions or unenforceable orders could well be addressed by the *forum non conveniens* considerations.

114. Further, there is no jurisdictional scheme applicable between Hong Kong and any other countries in respect of the making of the type of orders provided under section 10 of the GMO.

115. Practically speaking, there is little point for a party to seek financial/maintenance order in one jurisdiction in relation to assets held in another when there is little realistic hope of being able to enforce the order. This is precisely the reason why the Mother took out the present proceedings in Hong Kong because this is where most of the Father's assets are believed to be located.

116. In other words, in the present context, the concerns about conflict with a scheme or enforcement is non-existent.

117. What Baroness Hale of Richmond DPSC said in the same case is highly instructive:

> "… **The very object of the international framework is to protect the best interests of the child**, as the CJEU stressed in the Mercredi case [2012] Fam 22. **Considerations of comity cannot be divorced from that objective**. **If the court were to consider that the exercise of its inherent jurisdiction were necessary**

> **to avoid B's welfare being beyond all judicial oversight** (to adopt Lord Wilson JSC's expression in para 26), **we do not see that its exercise would conflict with the principle of comity or should be trammeled by some a priori classification of cases according to their extremity**". (emphasis added)

118. Indeed, a similar sentiment was expressed by Lord Brougham (the Lord Chancellor) in ***Stephens v. James***[25]**:** "… *if the Court has the power to order maintenance for infants out of the jurisdiction, it will gladly avail itself of its authority to adopt a course which is obviously, under all the circumstances, most for the benefit of the infant*"

Conclusion on Question 2

119. In the circumstances, the Court of Appeal's determination[26] that the starting point is that the jurisdiction should be "sparingly exercised" where the child is not an ordinary resident or present in Hong Kong is inconsonant with the weight of the English authorities spanning over 183 years, and also inconsonant with the paramountcy of the interests of the child as declared in section 3 of the GMO. **A/62**

120. One critical problem with the Court of Appeal's reasoning is that they adopted, without modification, the rationale of the cases involving the inherent jurisdiction of the court

[25] 1833 1 My & K 627 at 632
[26] See CA Judgment, §8.1

exercised in making children wards of court and ordering their delivery to England.

121. The traditional reticence displayed by the court regarding the exercise of its wardship jurisdiction is explicable due to the special status of a ward. By making a child a ward of court, the court assumes parental responsibility for the child. For instance, without the permission of the court a ward cannot marry, cannot leave the jurisdiction and cannot undergo serious invasive medical procedure. This exceptional status can have the effect of inhibiting the exercise of parental responsibility by the ward's natural parents or family members. This can conflict with the fundamental principle that the responsibility for the welfare of a child rests with its parents and the court should only intervene compulsorily when the well-being of the child so requires.

122. Given the special nature of wardship proceedings, it is natural that a court should and would be circumspect in exercising its wardship jurisdiction. The same considerations however do not apply in the context of GMO.

123. Accordingly, in the absence of any statutory provision to such effect, there is (and can be) no basis for finding or creating any discretion for the Court to decline jurisdiction expressly conferred by the GMO other than by reference to the *forum non conveniens* principles.

QUESTION 3 – CRITERIA FOR EXERCISING OR DECLINING JURISDICITON

124. In the event that this Court disagrees with the Mother and answers Question 2 in the affirmative, it is essential to identify with precision what criteria is to be considered in deciding when a jurisdiction under the GMO should be declined. Only then can there be legal certainty. Only then can there be a principled basis for declining jurisdiction.

125. Regrettably, the Court of Appeal never identified in the CA Judgement what these criteria might be but simply surveyed the English authorities on the exercise of wardship jurisdiction without any further analysis of whether the principles which emerged from these decisions should apply to an application under section 10 of the GMO.

126. The elusive expression of the Court of Appeal that the starting point is that the jurisdiction should be "sparingly exercised" where the child is not "ordinary resident" or "present" in Hong Kong is problematic in at least two material respects.

127. First, the "sparing exercise" is an extremely loose term and is no more than saying that the court is expected to exercise judicial restraint in the exercise of the jurisdiction.

128. Second, the inability to express with clarity the criteria for declining jurisdiction reveals a problem with the Court of Appeal's decision on a more fundamental level – there is in reality no acceptable criterion (other than what was provided under section 3 of the GMO).

129. The correct position must be that, absent other statutory criterion, the best interest of the minor should be the only governing and overriding criterion to be considered when deciding whether to decline jurisdiction.

130. Reference must also be made to Article 27(4) of the Convention on the Rights of the Child (which has been applicable to Hong Kong since 1994).

131. To suggest that the Court should nevertheless decline to exercise its jurisdiction to make a maintenance order for the benefit of a child notwithstanding her father lives and has assets within jurisdiction simply because the child lives abroad is to disregard the international obligations required under the Convention on the Rights of the Child.

"OR OTHERWISE" GROUND – *FORUM NON CONVENIENS*

Attempts to re-reamend the Summons and to introduce new evidence

132. The question arising from this ground of appeal is a narrow one, namely, whether the Judge's dismissal of the Father's *forum non conveniens* stay application should stand.

133. The background leading to this issue is somewhat convoluted. A brief description is as follows:

(1) The Mother separated with the Father in 2008.

(2) On 12 July 2012, the Mother invoked the jurisdiction of the Court under s.10 of the GMO by originating summons claiming for payment of maintenance for the Child from the Father ("**Hong Kong Proceedings**").

(3) On 6 August 2012, the Father filed an acknowledgment of service without any indication that he would dispute jurisdiction of the Court in Hong Kong.

(4) On 6 September 2012, the Father commenced proceedings in the Siming Court seeking custody as well as maintenance of the Child.

(5) On 24 September 2012, the Father applied to stay the Hong Kong Proceedings on the ground of *forum non conveniens* in favour of the Mainland Court in general.

(6) On 21 January 2013, the Siming Court dismissed the Father's claim for custody and maintenance.

(7) On 21 February 2013, the Father amended his Summons for stay by adding a paragraph to challenge the Hong Kong Proceedings on the ground of a lack of jurisdiction.

(8) On 3 March 2013, the Father appealed to the intermediate People's Court of Xiamen ("**Xiamen Court**") from the judgment of the Siming Court, seeking custody of the Child and payment of maintenance from the Mother. The Father's appeal was rejected by the Xiamen Court on 28 October 2013. The claim sought, in the alternative, a determination of the maintenance which the Father should bear for the Child.

(9) On 8 April 2013, the Father further amended the Summons in the Hong Kong Proceedings by specifying the Siming Court as the alternative court for the issue of *forum non conveniens*.

(10) The Father's Summons was heard by Judge Wong on 25 April 2013. On 27 May 2013, Judge Wong handed down the Ruling.

(11) On 10 June 2013, the Father took out a summons for leave to appeal and for leave to re-re-amend the Summons to add the Court in Guangzhou City of the PRC ("**Guangzhou Court**") as a further alternative forum. This application for leave to appeal and to re-re-amend the Summons was heard by Judge Wong on 18 March 2014, and was dismissed on 14 January 2014. But the Father subsequently obtained leave to appeal from the Court of Appeal.

(12) Not content with judgment of Siming Court and the Xiamen Courrt, the Father commenced yet another claim for custody of the child and payment of maintenance by the Father on 28 November 2013, this time in the People's Court of Tianhe District, Guangzhou City ("**Tianhe Court**").

(13) On 18 March 2014, the Tianhe Court dismissed the the Father's claim for custody of the Child, but decided that the Father should bear responsibility for the Child in the sum of RMB10,00 per month. The Father appealed against this decision to the Guangzhou Court, and his appeal was dismissed on 12 August 2014 ("**Guangzhou Intermediate Court Judgment**").

(14) On 21 November 2014, the Father took out a summons to amend his Summons for the third time by adding the Guangzhou Court as a further alternative forum.

134. After the CA judgment was handed down, the Mother applied for a rehearing of the Guangzhou Intermediate Court Judgment. Those representing the Mother will make an application shortly after the filing of this Printed Case to seek leave to produce evidence pertaining to the outcome of this rehearing application.

135. In the appeal below, the Father's sole complaint was that Judge Wong should have considered the Guangzhou Court in the comparative exercise and stayed the proceedings in Hong Kong on such alternative basis. This is notwithstanding that his summons to dismiss/stay the proceedings (i.e. the Summons) expressly specified the Siming Court as the alternative forum to be considered.

136. When applying for leave to appeal before Judge Wong, the Father sought leave to re-re-amend the Summons by adding the Guangzhou Court as a further alternative forum, and such application was dismissed by Judge Wong on 14.1.2014 ("**the Re-Re-Amendment Decisions**")[27]. The Father elected not to challenge the Re-Re Amendment Decision. No step has ever been taken by the Father to apply for leave to appeal against the Re-Re Amendment Decision out of time.

[27] §§46-48

137. It is therefore not open for the Father to now invite the Court to consider the Guangzhou Court in the comparative exercise on appeal.

138. Before the Court of Appeal, the Father issued another summons to attempt to adduce new evidence and to re-re-amend the Summons to add the Guangzhou Court as a further alternate forum on 21 November 2014.

139. The Mother is extremely surprised to note that the Order dated 18 June 2015 "records" that the Court of Appeal granted leave for this re-reamendment and for adducing new evidence. **A/39-41**

140. At the appeal hearing before the Court of Appeal on 18 June 2015, no oral argument was ever made in relation to the Father's application to re-re-amend the Summons and to adduce new evidence.

141. The Father's appeal against Judge Wong's decision was allowed on the jurisdictional point. Having reached this substantive determination, the appeal subject matter was disposed of and the Court of Appeal never proceeded to (and no scope remained for) consideration of the *forum non conveniens* stay application and whether the Father's application to re-reamend the Summons and to adduce new evidence should be allowed.

142. All that the Court of Appeal indicated during the course of the hearing was that it would read the fresh evidence adduced by the Father (together with expert evidence on Mainland law) *de bene esse*.

143. As the Court of Appeal stated in 莫炎熙 v 香港房屋委員會[28], sealed orders must accurately reflect what was actually decided by the court and matters falling outside the scope of the preceding hearing should not appear in the formal order.

144. The Order of 18 June 2015 is not an accurate reflection of what had been decided by the Court of Appeal during the appeal hearing.

145. As the Father has elected not to appeal against Judge Wong's decision refusing him leave to re-re amend the summons, his application to renew the same application before the Court of Appeal or the Court of Final Appeal is plainly an abuse of process and should be rejected.

146. In ***Hwoo Huang Linda v Fu Being San & Orsto***[29], DHCJ Reyes SC (as he then was) held that the failure to state a specific forum in the summons can of itself be a ground for refusing a stay.

[28] CACV 147/2015, unrep. 17 August 2015,§18 (Lam VP)
[29] [2013] 1 HKLRD 259

147. No mileage can be gained from the Father's previous suggestions that there was no prejudice to the Mother for the Court to consider a court in Guangzhou as the more appropriate forum. These suggestions completely overlook the fact that the Mother was deprived of the opportunity to put forward Guangzhou-specific evidence, given that up to the hearing at District Court and even after the Ruling was handed down, the Guangzhou Court was not even named in the Summons and did not form part of the Father's application before Judge Wong.

148. It follows that the Father should not be allowed to adduce new evidence to support his application to re-re-amend the Summons.

149. What the Father is seeking to do is in effect to argue a new point which was not raised in the Court below.

150. It would only be in exceptional circumstances that an appeal court would entertain an appeal notice which raised a new point which was not argued below, whether there is an application to raise a new issue in an appeal notice or not (see Civil Appeal[30]).

151. The English Court of Appeal held in ***Jones v MBNA International Bank***[31]:-

[30] 2nd Edn, Sir Michael Burton at §2-1808
[31] [2000] EWCA Civ 314 §52, per May LJ.

"… **[A] party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeed if it had been so brought** …"

152. From a wider perspective, the Father's decision to initiate multiple and overlapping proceedings in the PRC bears all the hallmarks of forum shopping.

(1) Plainly there is no reasonable excuse for this clear instance of litigation misconduct. The explanation given by the Father that he was initially unable to commence proceedings against the Mother in the Mother's place of habitual residence because he did not have evidence proving it is factually misleading. The Mother commenced proceedings in Hong Kong against the Father on as early as 12 July 2012, which was 2 months before the Father commenced proceedings in the Siming Court on 6 September 2012.

(2) The Mother's address in Guangzhou was clearly supplied in the 1st Affirmation of A dated 27 June 2012. The Father also contended before that he was only able to obtain evidence of the Mother's address when he read the Xiamen Intermediate Court judgment dated 28 October 2012 stating that the

Mother and the child "lived in Guangzhou". This is wrong as that judgment does not even state the Mother's full address.

(3) On any view, the Father's commencement of proceedings in Guangzhou was highly improper. Even the Father's own expert agrees that the Father's application seeking custody of the chid in question in the Guangzhou Court was exactly the same as his application in the Siming Court, which clearly violates the principle of "res judicata" and is a flagrant abuse of process.

153. The Father's litigation conduct was entirely unwarranted and wasteful of time and costs, and is of a type which this Court should actively discourage by registering its disapproval in the eventual costs order.

Judge Wong's dismissal of the Father's forum non conveniens stay application should be upheld

154. It must be emphasized again that this is an appeal arising from the Judgment which Judge Wong gave on the basis of the Father's application for a discretionary stay of the proceedings in Hong Kong in favour of the Siming Court.

155. Given the Siming Court was the only forum specified in the Summons[32], it is entirely inconceivable how Judge Wong can be said to have erred in any away by having not considered the Guangzhou Court in the comparative exercise below. On the contrary, Judge Wong would have taken a wholly irrelevant matter into account had he considered the Guangzhou Court

156. It is clear that the issues arising from the Guangzhou Court are irrelevant to and cannot be a subject-matter of this appeal. With the proceedings in the Siming Court having been dismissed, we respectfully submit that the Court should have no hesitation in dismissing this part of the Father's appeal.

157. Further, and without prejudice to the above submissions, any suggestion that Judge Wong did not properly carry out the comparative exercise between Hong Kong Court and the Siming Court is devoid of merits.

158. To start with, an appellate court reviewing the decision of a judge in the exercise of his discretion relating to the custody and welfare of children, was bound by the principle applicable to any appeal from the exercise of a judicial discretion, namely, that before it could intervene, it had to be satisfied, not merely that the judge had made a decision with which the court might reasonably disagree, but that his

[32] It is noteworthy that, during the hearing below, there was NO reference to the Guangzhou Court at all in the Father's Skeleton Submissions dated 18.4.2013 by his counsel, Mr Bernard Man and Mr Lincoln Cheung. A copy of the skeleton submissions will be made available for the appeal hearing if this is disputed by R.

decision was so plainly wrong that the only legitimate conclusion was that he had erred in the exercise of his discretion (see ***G v G***[33] at 651A-C)

159. The Father criticized in his written submissions for the appeal below that Judge Wong failed to take into account sufficiently: (a) the Child's interest is a matter of high importance; (b) the jurisdiction where the children habitually reside should try the matter; and (c) the Child's well-being can be conveniently dealt with in terms of the PRC Court's local knowledge and experience on the way she is to be raised and educated.

160. It is impossible to see how Judge Wong can be said to have overlooked the above 3 matters raised by the Father. Such matters were duly considered and covered in §§84 to 87 of the Ruling. . **A/29-30**

161. By an Order dated 25 September 2012, Judge Wong directed a social investigation report as well as an ISS report be called for. The Father has since voluntarily participated in the process conducted by the social welfare officer in Hong Kong (including telephone interviews with the Father and visit to Father's home). The Father even arranged for his wife and his 2 other children to see the social welfare officer. The Father also expressed his wish to seek sole custody (as opposed to joint custody) through the social investigation

[33] 1 [1985] W.L.R. 647

report. The investigation by the social welfare officer was clearly conducted with the best interest of the Child in mind, and the Father's participation in the process is inconsistent with and nullifies any effect of his submission in this regard.

162. There are a myriad of factors weighing strongly in favour of Hong Kong as the better forum. The Child was born in Hong Kong and is a permanent resident of Hong Kong having the right of abode. As Judge Wong stated in §93 of the Ruling, *"…the respondent's substantial presence in Hong Kong should not be ignored*". The Father is a permanent resident of Hong Kong and has fixed abode in Hong Kong and Guangzhou. As stated above, his wife lives in Hong Kong. He is employed by a Hong Kong company and gets his salary in Hong Kong. These were all factors considered by Judge Wong (see §§78-80 of the Ruling) and as such his decision cannot be faulted. **A/33** **A/28**

163. Judge Wong also referred to the fact that the Mother did not need to obtain leave in order to commence the present proceedings and commenced the same as of right (see §82 of the Ruling). In fact, there can be no dispute that the proceedings were properly served upon the Father within jurisdiction. In considering whether the factors raised by a defendant can show that the alternative forum is clearly or distinctively a more appropriate forum, the Court should bear in mind that if the plaintiff has founded his action as of right in this jurisdiction, such a right should not be lightly **A/29**

disturbed (see ***Shenzhen Futaihong Precision Industry Co Ltd & Anor v BYD Co Ltd & Ors***[34]).

164. Judge Wong also went on to state in §§96 to 111 of the Ruling that, even if he were satisfied that Siming is a clearly or distinctly more appropriate forum, he would have exercised his discretion in favour of the Mother because there are some entirely legitimate juridical disadvantages to be suffered by the Mother. **A/34-37**

165. Judge Wong's decision can be affirmed on an additional ground by taking into account the absence of compulsory and comprehensive discovery procedures under the PRC law. This is a point which has been widely considered by the courts in Hong Kong in previous decisions such as ***Shenzhen Futaihong Precision Industry Co., Ltd*** at §§93 and 102. It is accepted that no notice pursuant to Order 38 Rule 7 was given during the District Court hearing but it was actually the Court who referred the parties to that decision (along with 2 others on the same issue) (see §89 of the Ruling). The Court has power to dispense with notice under ***section 59(3) of the Evidence Ordinance*** and had Judge Wong been apprised of that section, he should have no hesitation in doing so. **A/31**

166. In the premises, it is submitted that Judge Wong was clearly correct in dismissing the Father's *forum non convenien* application.

[34] HCA No 2114 of 2007, unrep., 27 June 2008, at p.11.

CONCLUSION

167. In conclusion, the answers to the formulated questions are:-

(1) This Court does have jurisdiction to entertain applications under the GMO in respect of a child who is neither ordinary resident nor present in Hong Kong.

(2) When such jurisdiction exists, the Court has no jurisdiction, whether by reference to the Court's inherent jurisdiction or otherwise, to decline jurisdiction other than on *forum non conveniens principles*.

(3) If, contrary to (2) above, the Court does retain such a discretion to decline jurisdiction, the only criterion to be considered in deciding whether to decline jurisdiction should be the best interest of the child.

168. Judge Wong's exercise of his discretion on the question of *forum non conveniens* should stand.

Dated 21 day of December 2016.

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Eugene Yim

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