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KHOO KAY PENG

v.

PAULINE CHAI SIEW PHIN

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HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[ORIGINATING SUMMONS NO: F24-49-02-2013]
28 NOVEMBER 2014

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FAMILY LAW: *Divorce - Domicile - Husband and wife married in Malaysia - Wife living in England and petitioning for divorce in England - Husband petitioning for divorce in Malaysia - Whether wife domiciled in Malaysia - Burden to prove domicile - Whether common law of England applicable to determine domicile - Whether wife's domicile is dependent on husband's domicile - Whether domicile in Malaysia renounced - Whether*

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domicile dependent upon citizenship or residence - Law Reform (Marriage and Divorce) Act 1976, ss. 3(2), 48(1)(a), (c) - Civil Law Act 1956, s. 3(1)(a)

FAMILY LAW: *Divorce - Jurisdiction - Husband and wife married in Malaysia - Wife living in England and petitioning for divorce in England -*

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Husband petitioning for divorce in Malaysia - Whether Malaysian courts had jurisdiction to hear divorce petition - Whether wife domiciled in Malaysia - Law Reform (Marriage and Divorce) Act 1976, ss. 3(2), 48(1)(a), (c)

FAMILY LAW: *Divorce - Reference to reconciliatory body - Application to be exempted from requirement for reference to conciliatory body - Whether*

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exceptional circumstances shown making reference impracticable - Meaning of "exceptional circumstances which render it impracticable" - Whether application allowed - Law Reform (Marriage and Divorce) Act 1976, s. 106

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The plaintiff ('husband') filed this application on the same day that he was served with the petition for divorce issued by the defendant ('wife') in the High Court of Justice in England and Wales, Family Division ('English High Court'). In the present application, the husband sought orders that he be exempted from the requirement for reference to a conciliatory body under s. 106(1) of the Law Reform (Marriage and Divorce) Act 1976 ('LRA') and that he be at liberty to petition for a

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divorce under s. 53 of the LRA without first having to refer the matrimonial difficulty to a conciliatory body. The parties were lawfully married in Malaysia on 5 December 1970 and had five children. In 1982, the family, namely the wife and the first three children, moved to Australia. The husband continued to live in Malaysia and travelled

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between Perth and Malaysia. In 1989/1990 the family, namely the wife and the children moved from Australia to Canada while the husband

travelled between Malaysia and Canada. Since 2012, the wife and their last child lived in England. On 17 October 2014, the English High Court held that the wife's habitual residence was in the English jurisdiction in the twelve months preceding the issue of her petition for divorce and as such, that the English High Court had jurisdiction over the wife's petition. The English proceedings in effect had decided that the English High Court was the appropriate forum for the divorce proceedings between the parties. The issues to be tried in the present proceedings were as follows: (i) whether the wife was domiciled in Malaysia; (ii) whether this court had jurisdiction to try the matter; and (iii) whether this application should be allowed under s. 106(1)(vi) of the LRA.

Held (allowing the husband's application):

(1) Section 48(1)(c) of the LRA requires both parties to be domiciled in Malaysia at the time when the petition was presented. The burden of proof was on the husband to prove that both he and the wife were domiciled in Malaysia. The husband was never permanently in England. He was still living in Malaysia. Since the husband was a citizen of Malaysia, he was deemed under s. 3(2) of the LRA to be domiciled in Malaysia. (paras 39 & 42)

(2) By virtue of s. 3(1)(a) of the Civil Law Act 1956, the common law of England and rules of equity as administered in England on 7 April 1956 apply to Peninsular Malaysia. From 7 April 1956 until the time when the LRA came into force on 1 March 1982, the common law rule on a wife's dependent domicile applied in Malaysia. It meant that a wife's domicile is a domicile by dependence, and it automatically follows that of the husband's domicile upon marriage. When the LRA was enacted in 1976, Parliament did not deem it fit to introduce new law in Malaysia to abolish the common law rule on a wife's dependent domicile. Hence, the Malaysian courts have continued to apply the common law rule that a wife's domicile is dependent on her husband's domicile. The common law rule on a wife's dependent domicile operates so long as the marriage subsists. (paras 54-56)

(3) As long as the marriage was subsisting, the wife in the present case had no legal right to choose her own domicile independent from her husband's domicile. Even if the wife's renunciation of her citizenship was accepted by the Malaysian Government under art. 23 of the Federal Constitution, the fact that the wife was no longer a Malaysian citizen made no difference to the law regarding her domicile of dependence. Domicile is not the same as nationality or citizenship, or residence. (paras 86 & 93)

(4) Since both parties were domiciled in Malaysia, and they fulfilled the requirements of s. 48(1)(a) and s. 48(1)(c) of the LRA, the Malaysian Court therefore had jurisdiction to hear any petition for divorce filed by the husband. (para 120)

(5) From s. 106(1)(vi) of the LRA, the criteria to grant the exemption is "where the court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable". The words "exceptional circumstances which render it impracticable" are wide enough to cover the practical or even logistical aspects *eg*, whether it is too costly, too inconvenient, or not practical to be carried out. It can also cover situations, as in the present case, where both parties confirm that there is an irretrievable breakdown of the marriage and it would be a failure, and therefore "not able to be done or put into practice successfully" the conciliatory process required by s. 106(1) of the LRA. There were exceptional circumstances here which made reference to a conciliatory body impracticable. (paras 123, 127 & 135)

Obiter dicta:

(1) The present application was under s. 106(1)(vi) of the LRA for which there was no parallel or concurrent or equivalent proceedings on the same matter of exemption from reference to a conciliatory body in the English High Court. The question of *res judicata* and/or judicial comity did not arise here. As such, there was no question of having to strike out these proceedings. Furthermore, *res judicata* can only apply where the judgment in question is a final judgment on the question in dispute. The English High Court decision was not final, but pending appeal. (paras 141 & 142)

(2) *Forum non conveniens* was not an issue for the purpose of this application. The matter of *forum non conveniens* is only relevant when there are concurrent proceedings in Malaysia and another jurisdiction regarding the same matter between the parties. (para 149)

Case(s) referred to:

Air Asia Bhd v. Rafizah Shima Mohamed Aris [2014] 1 LNS 1176 CA ***(refd)***
Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd [2007] 6 CLJ 93 FC ***(refd)***
Bato Bagi & Ors v. Kerajaan Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***
Charnley v. Charnley And Betty [1959] 1 LNS 12 HC ***(refd)***
Gray (Formosa) v. Formosa [1963] P 259 ***(refd)***
Hung Hing Nam Hegel v. Kong Choy Peng [2011] 1 LNS 916 HC ***(refd)***
Kanmani v. Sundarampillai [1957] 1 LNS 30 HC ***(refd)***
Kiranjit Kaur Kalwant Singh v. Chandok Narinderpal Singh [2010] 3 CLJ 724 HC ***(refd)***

Nanthivarman Pichamuthu Mookiah v. Sharmini Pillai [2011] 1 LNS 1835 HC ***(refd)***
Neduncheliyan Balasubramaniam v. Kohila Bhanmugam [1997] 4 CLJ 676 CA ***(refd)***
Re Ding Do Ca, Deceased [1966] 1 LNS 157 FC ***(refd)***
Re Prasert Wongphattarakul & Anor [1997] 3 CLJ 87 HC ***(refd)***
Siah Teong Woei v. Janet Traynor [2010] 3 CLJ 361 HC ***(refd)***
Teo Ka Fook v. Loo Chiat Hui [2011] 1 CLJ 247 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 3(1)(a), (2)
Federal Constitution, arts. 8(1), (2), (5), 23
Law Reform (Marriage and Divorce) Act 1976, ss. 3(1), (2), 48(1)(a), (b), (c), 49(1), 53, 76, 77, 78, 79, 80, 81, 87, 106(1)(ii), (vi), (5)(b), 109
Rules of Court 2012, O. 67

Other source(s) referred to:
Dr Zaleha Kamaruddin, *Divorce Laws in Malaysia*, (Lexis Nexis, 2005), p 70
Halsbury's Laws of England, 4th edn, para 43, p 35; para 54, p 41
Halsbury's Laws of England, 4th edn, Reissue on Conflict of Laws, pp 31-42
Halsbury's Laws of England, vol 8, pp 140-147
Indian Constitutional Law, 5th edn 2003, vol 3, p 989
Marriage & Dissolution Handbook, 2nd edn (Lexis Nexis, 2007), p 17

For the plaintiff - Cyrus Das (Romesh Abraham, Goh Siu Lin, Lim Qiu Jin, Jescelynn Ng Lay Hun & Bong Ying Wei with him); M/s Shook Lin & Bok
For the defendant - Edmund Bon (New Sin Yew & Jane Tai Le Qian with him); M/s Bon Advocates

Reported by Amutha Suppayah

JUDGMENT

Yeoh Wee Siam J:

Introduction

[1] This judgment is in respect of the above originating summons (encl. 1) given after a full trial had been conducted on 3 November 2014, 4 November 2014, 6 November 2014 and 7 November 2014 pursuant to the order of the Court of Appeal dated 22 April 2014 (see judgment of the Court of Appeal dated 22 April 2014).

[2] The plaintiff ("husband"), aged 75, filed encl. 1 in the Malaysian High Court on 27 February 2013 on the same day that he was served with the petition for divorce issued by the defendant, his wife, aged 68 ("wife") in the High Court of Justice in England and Wales, Family Division ("English High Court") on 14 February 2013.

[3] By this originating summons, the husband is basically affirming the jurisdiction of this court over his divorce proceedings against the wife, and contesting the jurisdiction of the English High Court over his divorce.

Enclosure 1

[4] Enclosure 1 is the husband's application ("application") for the following orders and relief:

1. That the Plaintiff be exempted from the requirement for reference to a conciliatory body under section 106(1) of the Law Reform (Marriage and Divorce) Act 1976 (the "Act");

2. That the Plaintiff be at liberty to petition for a divorce under section 53 of the Act without first having to refer the matrimonial difficulty to a conciliatory body;

3. That the costs of this application be borne by the Plaintiff; and

4. Such further and other relief as this Honourable Court deems fit and proper to be granted.

Brief Background Facts

[5] The parties were born in Malaysia. They were lawfully married in Malaysia at St Michael's Church, Ipoh, Perak on 5 December 1970.

[6] They have five children from the marriage, all of whom are now over the age of 18 years, namely:

(i) A, a son aged 43, who lives in Canada;

(ii) B, a son aged 42, who is married with two children and lives in Singapore;

(iii) C, a daughter aged 33, who previously lived in Argentina, but now lives in Canada;

(iv) D, a daughter aged 31, who is married with no children and lives in London with her husband; and

(v) E, a son aged 28, who previously lived in Canada but since September 2012 has been living at Rossway Park Estate, Hertfordshire, England ("Rossway Estate" or "Rossway") with his mother.

[7] The first three children were born in Malaysia while the last two were born in Perth, Australia.

[8] In 1982, the family, namely the wife and the first three children, moved to Perth, Australia. The husband continued to live in Malaysia and travelled between Perth and Malaysia.

[9] In 1989/1990 the family, namely the wife and the five children, moved from Australia to Canada. The wife remained with the children in Canada while the husband travelled between Malaysia and Canada to take care of his business connections in Malaysia. The wife and children continued to return to Malaysia and when they did they stayed in their house at No. 10 Ukay Heights, Jalan Tebrau, 68000 Ampang, Selangor Darul Ehsan ("10 Ukay Heights").

[10] The marriage was going through difficult times in 1993 resulting in attempts being made to resolve their differences in Malaysia.

[11] In 1997, the husband's company, Malaysia United Industries Berhad "(MUI)", bought a substantial share in Laura Ashley PLC ("Laura Ashley") in England. This acquisition resulted in the husband being a frequent traveller to England for which the wife had accompanied him on many of these trips.

[12] In 2000, one of the husband's companies purchased Rossway Park Estate, a country estate in England of about 1,000 acres of land with various houses. This property was purchased as an investment and as a residence for the trips to England.

[13] On 12 December 2008 the husband suffered a stroke. The wife asserts that she returned to Malaysia to look after him for a few months. The husband asserts that he was immediately healed by God and he did not need the wife to look after him.

[14] In October 2012, the parties went to England. After a week, the husband left for Malaysia, but the wife remained in England. Since then she has been residing in England.

[15] The wife is a citizen of Australia and Canada. She used to travel on an Australian passport, but now mostly on her Canadian passport.

[16] On 14 February 2013 the wife filed a petition for divorce in the English High Court ie, case no. FD13D007401 (exh. KKP01 of husband's affidavit in support). This took the husband completely by surprise.

[17] Additionally, the wife has on 18 February 2013 applied for and obtained *ex parte* injunctive orders in the English High Court under case no. FD13F00136 (exh. KKP2 of husband's affidavit in support which are the occupation order dated 18 February 2013 and the non-molestation order dated 18 February 2013). The occupation order gave

A the wife occupation of the big home at Rossway, ie, the Rossway House, which has 15 bedrooms. The husband has been relegated to the Old Rossway house, which has five bedrooms. Under the non-molestation order, the husband is also prevented from going within 50 metres of the Rossway House or using its main drive.

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[18] On 1 May 2014, the English High Court dismissed the wife's February 2013 petition at her request on the basis that she would then issue a fresh petition.

[19] On 7 May 2014 the wife issued her fresh petition in the English C High Court which is her current petition for divorce in the English jurisdiction.

[20] For the purposes of this originating summons, since all the five children are over the age of 18 years, they are not children of the marriage who are covered by the Law Reform (Marriage and Divorce) D Act 1976 ("the LRA") (see s. 87 of the LRA).

The Malaysian High Court Decision

[21] On 8 November 2013 the High Court of Malaya in Kuala E Lumpur ("Malaysian High Court") heard encl. 1 together with encl. 6. Enclosure 6 is the wife's application for all proceedings in encl. 1 to be stayed pending the hearing and decision for the wife's petition for divorce ie, petition for Divorce Case No. FD13D00747 by the English High Court.

F **[22]** On 11 December 2013 the Malaysian High Court dismissed encl. 6, but allowed encl. 1.

Court Of Appeal Decision

[23] On 22 April 2014, after hearing the wife's appeals on encl. 6 G and encl. 1, the Court of Appeal ordered as follows:

1. Enclosure (6);

   (a) The appeal is dismissed.

H (b) The finding of the learned High Court Judge on the issue of jurisdiction and domicile is set aside.

2. Enclosure (1);

   (a) The appeal is allowed.

I (b) Enclosure 1 be remitted to the High Court before another Judge to be tried by way of a full trial.

3. No order as to cost of this appeal; and

4. Deposit is refunded.

[24] The Court of Appeal did not express any views on the common law rule of a domicile of dependence for the wife and stated that it would "leave it to the appropriate courts to determine this legal issue" [see para. 52 at p. 24 of its judgment in civil appeal No. W-02(IM)2764-12-2013].

The Federal Court Decision

[25] The husband then filed a notice of motion for leave to appeal to the Federal Court regarding the decision of the Court of Appeal dated 22 April 2014.

[26] On 4 August 2014, the Federal Court ordered as follows:

(a) the Applicant's Notice of Motion for leave to appeal to the Federal Court is dismissed with costs to be borne by the respective parties; and

(b) the Enclosure 1, in Originating Summons in Kuala Lumpur High Court Originating Summons No. F24-49-02/2013 on the issue of jurisdiction and domicile be heard on an expedited basis.

The English High Court Decision

[27] On 17 October 2014 the English High Court gave its decision on the wife's divorce proceedings. Justice Bodey in his approved judgment No. 2 regarding jurisdiction and forum conveniens made findings that the wife's habitual residence is in the English jurisdiction in the 12 months preceding the issue of her petition for divorce on 7 May 2014. The English High Court determined that it has jurisdiction over the wife's petition.

[28] The English High Court further considered the issue of forum conveniens when the husband asked that the English proceedings be stayed on the basis that the Courts of Malaysia are the preferable jurisdiction. Justice Bodey held "that the husband has not succeeded in establishing his case for a stay of these proceedings". Without saying it expressly, Justice Bodey by not allowing the husband a stay of the English proceedings, in effect has decided that the English High Court is the appropriate forum for the divorce proceedings of the husband and wife.

Reasons For A Full Trial

[29] The Court of Appeal ordered a full trial for this originating summons which was originally heard in chambers by the learned judge of the Malaysian High Court.

[30] I now cite the relevant parts of the judgment of the Court of Appeal dated 22 April 2014 which serve as a guide to me in conducting the full trial:

> 43. With that we revert to the reasons why we say that a full trial is necessary to determine the issues of jurisdiction and domicile. From the outset, we wish to say that as a general rule unless it is crystal clear that the factual matrix required for determination of an issue or issues at hand is undisputed, the Court must not resolve the dispute by affidavit evidence and must embark on a full trial with opportunities to both side to cross-examine the witnesses' averments in the affidavits.;
>
> 45. With respect to the learned Judge, had she critically analyzed the affidavit evidence, she would have in our view easily concluded that there is abundance of disputes between the averments of parties in their respective affidavits. We can do no better than refer to Schedule 2 of the wife's Outline Submission dated 5th March 2014 where the learned counsel sets out the various disputes.
>
> 46. There is dispute as to the reason why the parties moved to Australia with the husband saying that it was due to fear of kidnapping and education reasons, while the wife says that they migrated in 'reaction to the cultural shift which had taken place in Malaysia away from its Anglocentric roots'.
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> 47. There is also dispute as to which is the matrimonial home – Rossway Park Estate, Berkhamsted, Herfordshire, England or at 10 Ukay Heights. The husband says that Rossway Park Estate is an investment, while the wife says that they had sometime in 2008 searched for a home in England and hence bought the Rossway Park Estate.
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> 48. As for seeking marriage counselling to save the marriage, there is also dispute as to the correct version of events. There is also the contention by the wife that she is not a Malaysian by virtue of her citizenship of Australia and Canada, even though she had not expressly renounced the same.
>
> 49. The just mentioned disputes are part of the many disputes from the respective affidavit evidence and in our view the determination of those disputes is pivotal to the determination of the issues of jurisdiction and domicile. As stated earlier, the only way to resolve the disputes is simply to embark on a full trial.
>
> 50. Apart from the factual disputes there are also few legal issues which merit comprehensive considerations by counsel and court. The one which is at the forefront is the submission of learned counsel for the husband on the issue of domicile of the wife.

Issues

[31] The English High Court decided on the wife's petition for divorce on the issue of her habitual residence in England in the 12 months prior to the issue of her petition. The matter of domicile, which was initially an issue, was later abandoned by the wife for reasons of her own and she decided to proceed on the basis of her habitual residence there.

[32] The issues to be tried in the present proceedings are as follows:

(1) Whether the wife is domiciled in Malaysia.

(2) Whether this court has jurisdiction to try this matter.

(3) Whether this application should be allowed under s. 106(1)(vi) of the Law Reform (Marriage and Divorce) Act 1976 ("LRA").

(1) Whether The Wife Is Domiciled In Malaysia

(2) Whether This Court Has Jurisdiction To Try This Matter

[33] This application is made by the husband under s. 106(1) of the LRA, which section provides as follows:

> 106. Requirement of reference to conciliatory body before petition for divorce.
>
> (1) No person shall petition for divorce, except under sections 51 and 52, unless he or she has first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties:
>
> Provided that this requirement shall not apply in any case:
>
> (i) ... ;
>
> (ii) where the respondent is residing abroad and it is unlikely that he or she will enter the jurisdiction within six months next ensuing after the date of the petition;
>
> (iii) ... ;
>
> (iv) ... ;
>
> (v) ... ; or
>
> (vi) where the court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable.

[34] Section 106(1) of the LRA makes no requirement for both parties to be domiciled in Malaysia. However, the husband is now applying to be exempted from the requirement of reference to a conciliatory body in order to be able to petition for divorce. Should this court grant him such an exemption, the husband can then petition for divorce under s. 53 of the LRA on the ground that the marriage has irretrievably broken down.

[35] Before the husband can petition for divorce under s. 53 of the LRA, he has to fulfil the requirements of s. 48(1) of the LRA.

[36] Section 48(1) of the LRA provides as follows:

> 48. Extent of power to grant relief.
>
> (1) Nothing in this Act shall authorise the court to make any decree of divorce except:
>
> (a) where the marriage has been registered or deemed to be registered under this Act; or
>
> (b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and
>
> (c) where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.

[37] Section 48(1)(a) or s. 48(1)(b) of the LRA must be read conjunctively with s. 48(1)(c) in view of the connecting word "and" used between s. 48(1)(b) and s. 48(1)(c).

[38] In the present case, the husband and wife were married in Malaysia. So the marriage has been registered under the LRA, or deemed to be registered under the LRA. Therefore the requirement in s. 48(1)(a) of the LRA has been fulfilled.

[39] However, the question now is whether the next requirement in s. 48(1)(c) of the LRA for both parties to be domiciled in Malaysia at the time when the petition is presented can be fulfilled. This is in view of the wife's assertion that she is now not domiciled in Malaysia, but in England. The burden of proof is on the husband to prove that both he and the wife are domiciled in Malaysia.

[40] The wife asserts that her petition for divorce should be heard in England, and the husband should not be allowed to file the petition in Malaysia since she is not domiciled here.

The Husband's Domicile Is In Malaysia

[41] The husband's domicile should not be an issue here. He asserts that he is a Malaysian citizen and lives in Malaysia. He has a Malaysian Identity Card and travels on a Malaysian passport. He has international business interests, but he has his home and office in Malaysia. To him, the matrimonial home has always been and still is at 10 Ukay Heights. The husband has stayed with the wife at their home at Rossway Park Estate, England. He calls it "our England Home". However, after his business trips and times spent in England, the husband would always come back to Malaysia and live at 10 Ukay Heights. From October 2012 onwards, after their trip to England, the wife remained at their England Home, but the husband came back and continued living in Malaysia.

[42] Even though the wife asserts that after the husband's stroke in December 2012, the parties had agreed to make the England Home their permanent home, it is clear from the evidence that the husband was never permanent there. He is now still living in Malaysia at 10 Ukay Heights. He informed the court that he wishes to be buried in Malaysia.

[43] Sections 3(1) and (2) of the LRA provide as follows:

> 3. Application.
>
> (1) Except as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia.
>
> (2) For the purposes of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia.

[44] Since the husband is a citizen of Malaysia, he is deemed under s. 3(2) of the LRA to be domiciled in Malaysia. The husband does not wish to prove to the contrary that he is not domiciled here. Furthermore, he does not even claim to be domiciled in England.

[45] Section 3(2) of the LRA can only apply to the wife if she is still a Malaysian citizen. I shall deal with the matter of their citizenship later on.

[46] The husband can file the petition for divorce here if not only he, but also the wife, are domiciled in Malaysia.

The Law In Malaysia Regarding A Wife's Domicile

[47] There are three types of domicile, namely, a domicile of origin, a domicile of dependence and a domicile of choice. A person can have only one domicile at any one time even though the person can have or

A can acquire more than one nationality or citizenship. A person can have more than one home, but only one domicile (see *Halsbury's Laws of England* 4th edn. Reissue on Conflict of Laws at pp. 31-42).

[48] The question now is whether the wife is domiciled in Malaysia. At the time when the originating summons was filed the wife was then
B a Malaysian citizen, and having a Malaysian birth certificate and a Malaysian Identity Card with old and new numbers (even though she asserts that she had never applied for her new identity card number). She became an Australian citizen and later a Canadian citizen. She used to travel on her Australian passport, but now travels on her Canadian
C passport. She asserts that she no longer has a Malaysian passport.

[49] The wife's case is that she has abandoned her domicile in Malaysia and has now made England her domicile of choice.

D **[50]** The critical consideration is whether as a wife, the wife's domicile is a domicile of dependence, or whether she can have her own domicile of choice.

[51] I shall now consider the law in Malaysia regarding the wife's domicile to determine whether she is governed by the common law rule
E on a wife's dependent domicile or otherwise.

[52] Sections 3(1) and (2) of the Civil Law Act 1956 ("CLA") provide as follows:

> Application of U.K. common law, rules of equity and certain statutes:
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> F
>
> 3. (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
>
> (a) in Peninsular Malaysia or any part thereof, apply the
> G common law of England and the rules of equity as administered in England on the 7 April 1956;
>
> (b) ... ;
>
> (c) ... ;
>
> H Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.
>
> I (2) Subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

[53] This originating summons was filed in the High Court in Kuala Lumpur, Peninsular Malaysia. A

[54] By virtue of s. 3(1)(a) of the CLA, the common law of England and rules of equity as administered in England on 7 April 1956 apply to Peninsular Malaysia. B

[55] From 7 April 1956 until the time when the LRA came into force on 1 March 1982, the common law rule on a wife's dependent domicile applies in Malaysia. It means that a wife's domicile is a domicile by dependence, and it automatically follows that of the husband's domicile upon marriage (see *Charnley v. Charnley And Betty* [1959] 1 LNS 12; C [1960] MLJ 29, and *Kanmani v. Sundarampillai* [1957] 1 LNS 30; [1957] MLJ 172, at p. 174).

[56] With respect, contrary to what learned counsel for the wife submits, when the LRA was enacted in 1976, Parliament did not deem D it fit to introduce new law in Malaysia to abolish the common law rule on a wife's dependent domicile. This is in contrast with the United Kingdom ("UK") Domicile and Matrimonial Proceedings Act 1973 ("DMPA"), and even the Singapore Women's Charter Amendment Act 1980 which had abolished, by introducing express statutory provisions, the common law rule of a domicile of dependence for a wife. The E position in England with regard to a wife's dependent domicile had therefore changed since 1974 when the DMPA came into force.

[57] Section 1 of the DMPA [Tab. 57 DBOA, vol. 5] provides: F

> Section 1 Abolition of wife's dependent domicile
>
> (1) Subject to subsection (2) below, the domicile of a married woman as at any time after the coming into force of this section shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile. G
>
> (2) Where immediately before this section came into force a woman was married and then had her husband's domicile by dependence, she is to be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin) unless H and until it is changed by acquisition or revival of another domicile either on or after the coming into force of this section.
>
> (3) This section extends to England and Wales, Scotland and Northern Ireland. I

[58] Learned counsel for the wife submits that s. 47 of the LRA obliges the Malaysian High Court to give recognition to the principles by which the English High Court acts and gives relief in matrimonial proceedings. To impose a domicile of dependence on the wife would run counter to the clear language of the provision which reads:

> 47. Principles of law to be applied.
>
> Subject to the provisions contained in this Part, the court shall in all suits and proceedings hereunder act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings.

[59] With respect to learned counsel for the wife, I am of the view that the cases decided in England based on the DMPA cannot be applied here for the reason that Malaysia currently has not enacted a statute with similar provisions as s. 1 of the DMPA. Section 47 of the LRA only allows the Malaysian Courts to act and give reliefs on principles with are conformable or consistent with English principles.

[60] With respect to learned counsel for the wife, I observe that nowhere in the Hansard of Parliament did the minister, when tabling the bill for the LRA to be passed, inform the House that the common law rule on a wife's dependent domicile would be abolished by the LRA.

[61] Again with respect to learned counsel for the wife, the Married Women Act 1957 declared a married woman to be *feme sole*. Henceforth, married women are allowed, *inter alia*, to sue and be sued and to hold property in their own name. Nowhere in this statute does it state that the common law rule on a wife's dependent domicile has been abolished.

[62] At this point, without an Act of Parliament in Malaysia similar to the English DMPA, all cases decided in the English High Court based on the DMPA cannot be applied by the Malaysian Courts. If at all our courts choose to follow the principles of the English courts, it would be the common law principles on a wife's domicile of dependence which is the law in England before the DMPA came into force there.

[63] The legal position in Malaysia is well explained in *Halsbury's Laws of England* vol. 8 at pp. 140-147:

> The law of domicile applicable in Malaysia is the common law and according to common law, the domicile of a married woman is that of her husband while the marriage subsists, even though the parties may be living apart: see *Charnley v. Charnley and Betty* [1960] MLJ 29. In England however, the Domicile and Matrimonial Proceedings Act

> 1973 (UK) allows a wife to hold on to her own domicile without taking on the domicile of her husband upon marriage. In Singapore, by virtue of the Women's Charter (Cap 47) s. 45A, the domicile of a married woman as at any time on or after the commencement of the Women's Charter (Amendment) Act 1980 (Singapore) will instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile.

[64] In the book, *Divorce Laws in Malaysia* (Lexis Nexis, 2005), by Dr. Zaleha Kamaruddin (TAB 5 PBOA), the learned author made the following observation at p. 70:

> The most important change made in England has been the abolition of the Common law rule that a woman acquires the domicile of her husband on marriage. The Domicile and Matrimonial Proceedings Act 1973, section 1 abolished the wife's dependent domicile and provides for a married woman's domicile to be ascertained independently.
>
> However, the situation in Malaysia is different. One of the most glaring flaws in the LRA flowed from the wife's inability to acquire a separate domicile, and because of that, even though she had always been resident in Malaysia, she could not obtain relief in Malaysia if her husband was domiciled abroad.

[65] In *Marriage & Dissolution Handbook* 2nd edn. (Lexis Nexis, 2007) (TAB 6 PBOA) at p.17 it is stated:

> However where married women are concerned, Malaysia remains distinct from other jurisdictions in that the old common law principle that a woman who marries retains the domicile of her husband while the marriage subsists even if they are living apart, applies.

[66] Learned counsel for the wife also submits that s. 3(1)(a) of the CLA only applies to the application of the common law of England on or before 7 April 1956. However, after 7 April 1956, the Malaysian Courts are entitled to create their own common law through the guidance of English decisions post 1956.

[67] I do agree that post 7 April 1956, the Malaysian Courts have the discretion to do that. The question is whether the Malaysian Courts have done so. It is observed that there are not many cases decided post 7 April 1956 on a wife's domicile. Of the few cases that have been decided, the majority of them adopted the common law rule that a wife's domicile is dependent on her husband's domicile. This is illustrated in the following cases:

[68] In *Re Prasert Wongphattarakul & Anor* [1997] 3 CLJ 87, in 1997 Selventhiranathan J (as he then was) spoke of the common law rule being given statutory recognition in s. 48(1)(c), and that s. 49(1) was enacted to give relief to a deserted wife from the possible harshness of the rule in certain circumstances. The learned judge observed as follows (at pp. 97-98):

> At common law, a married woman acquires her husband's domicile during the subsistence of the marriage. **This common-law position is given statutory recognition in s. 48(1)(c) of the Act** by the requirement for the domicile of the parties to be in Malaysia (emphasis added) before the Court can entertain proceedings for a decree of divorce ...
>
> It is because of this reference to the single or common Malaysia domicile of the parties, which is predicated upon the wife having or acquiring the Malaysia domicile of the husband, that the parliament had found it necessary to enact s. 49(1) to the Act to grant relief to a wife who has been deserted or abandoned wife who by her husband ... In my view s. 49(1) of the Act was specifically enacted to give relief to the deserted or abandoned wife who by virtue of her marriage had acquired a domicile of dependence in Malaysia or had her domicile or origin in Malaysia transformed into a domicile of dependence because of her marriage.

[69] In the same year, the Court of Appeal made the following observation in *Neduncheliyan Balasubramaniam v. Kohila Bhanmugam* [1997] 4 CLJ 676 at p. 690:

> On the uncontested material before us **we are of the opinion any Malaysian woman upon marriage will acquire her husband's domicile and until that marriage is lawfully dissolved** she will retain the domicile of her husband. See *Halsbury's Laws of England* 4th Edn, vol. 8 para. 431 at p. 323. Also *Kanmani v. Sundarampilla* [1957] MLJ 172. (emphasis added).

[70] In *Siah Teong Woei v. Janet Traynor* [2010] 3 CLJ 361; [2010] 2 MLJ 820 Suraya Othman J dealt with the same issue and held as follows:

> **In Malaysia, the law on domicile is similar to common law.** As regard to a domicile of dependence, a woman takes the domicile of her husband upon marriage. In another word a married woman cannot acquire a domicile separate from that of her husband. A married couple have therefore, only one domicile and that is the domicile of the husband. The logic for this dependence is because under common law, a husband and a wife are viewed as one entity. The woman takes her husband's domicile upon marriage and she retains it. She can abandon her husband's domicile but she has to prove and satisfy the court that the abandonment is permanent and unequivocal before the court can take cognisance of it. (emphasis added)

[71] The learned High Court Judge went on to deal with the exceptions to the common law rule on a wife's dependent domicile, namely s. 49, which seeks to reduce any injustice the rule may cause:

> Other than s.48 of the LRA 1976, the High Court is also conferred with additional jurisdiction. Section 49 of the LRA 1976 provide exceptions to the 'domicile test'. These exceptions are granted to a wife to avoid the injustices contingent upon the strict adherence to the application of the principle that a wife do not have and cannot acquire a separate domicile of choice. This is provided in cases where the proceedings for divorce are commenced by a wife and not by a husband.

[72] I fully concurred with the above rationale when I gave my decision dated 17 August 2011 in *Hung Hing Nam Hegel v. Kong Choy Peng* [2011] 1 LNS 916; (unreported) (TAB 13 PBOA) where I had said, *inter alia*, at p. 6, "I am in total agreement with what Suraya Othman J stated".

[73] Again in 2011, when I made the decision in *Nanthivarman Pichamuthu Mookiah v. Sharmini Pillai* [2011] 1 LNS 1835, at p. 6, I took the same position and stated, *inter alia*:

> The law in Malaysia regarding domicile is still based on common law.

[74] An appeal from my above decision was dismissed by the Court of Appeal on 8 December 2011 (Civil Appeal No. W-02(IM)-1787-2011).

[75] It deserves mention here that in *Teo Ka Fook v. Loo Chiat Hui* [2011] 1 CLJ 247, Rhodzariah Bujang JC (as she then was) in her decision dated 17 May 2010 in the High Court Sabah and Sarawak, Kuching ruled in favour of a wife who had abandoned her domicile of dependence and recognised that she had chosen her own domicile of choice. This is what the learned Judicial Commissioner held at p. 248:

> (2) The domicile of a woman, once she marries, follows that of her husband. The law recognises that a domicile of dependence can be abandoned in favour of a domicile of choice, giving recognition, in so far as women are concerned, their independent right as a person. (para 6)
>
> (4) Malaysia, unlike England and Singapore, does not have any legislation to abrogate a domicile of dependence acquired by a woman upon marriage but the absence of such legislation does not shackle Malaysian women to an archaic and ancient concept of dependence. As other countries have moved on to liberalise the position of their women on the issue of domicile, the

A evidence required to discharge the legal burden on a woman to show that she has abandoned her domicile of dependence must necessarily be lighter to reflect the growing recognition that society has for a woman's identity as a person in her own right – married or otherwise. (para 11)

B (5) The wife had been residing in Australia since 2003. Her children have been largely brought up in Australia with the youngest finishing her tertiary education there. There was a matrimonial home in Australia where she lived and she only came back here for holidays with her children. In support of her divorce petition in Australia, she had sworn an affidavit that she intended to
C reside permanently in Australia. On the above evidence and her acquisition of permanent residence status in Australia, she had discharged the burden of proof to show an abandonment of her domicile of dependence in Malaysia.

[76] With respect, I do not agree with the above decision which I
D think is a departure from settled law and the long line of cases before this which affirm that currently the common law rule of a wife's dependent domicile still applies in Malaysia, unless there is abolition of the same by new statutory provisions. This court is not bound by the above Kuching High Court decision. Instead, I would abide by the
E decision of the Court of Appeal in *Neduncheliyan v. Kohila* (*supra*).

[77] Thus, apart from that one case of *Teo Ka Fook* (*supra*), it can be clearly seen that the Malaysian Courts have continued to apply the common law rule and decided that a wife's domicile is dependent on her husband's domicile.
F

[78] The common law rule on a wife's dependent domicile operates so long as the marriage subsists. A clear statement to this effect is found in *Garthwaite v. Garthwaite* [1964] p. 356 where at p. 379 Wilmer LJ stated:
G

> It is well established that a wife upon her marriage acquires by operation of law the domicile of her husband, **which she retains so long as the marriage subsists**: *Harvey (orse. Farnie) v. Farnie*; Attorney-General for *Alberta v. Cook*. She retains this domicile though deserted by her husband (*Yelverton v. Yelverton*), and even though she
> H may have obtained a decree of judicial separation: Attorney-General for *Alberta v. Cook*. It is not possible to have more than one domicile at one and the same time. (emphasis added).

[79] *Halbury's Laws of Malaysia* (*supra*) captured the position correctly in Malaysia when it stated that it applies "while the marriage subsists".
I

[80] The use of the term "parties" in s. 48(1)(c) of the LRA does not imply that the wife has the legal right to assert a new domicile of choice that is independent of her husband's domicile while the marriage subsists.

[81] In *Gray (Formosa) v. Formosa* [1963] P 259 CA Probate Division, Lord Denning declare that the common law rule on a wife's domicile is "the last barbarous relic of a wife's servitude" and "Yet sitting in this court we must still observe it". This is what he said:

> Now what is the reason for that rule, you may ask. It is the old notion that in English law a husband and wife are one: and the husband is that one. That rules has been swept away in nearly all branches of the law. At this very moment Parliament is sweeping away one of the remaining relics: it is allowing a husband and wife to sue one another in tort. **The one relic which remains is the rule that a wife takes her husband's domicile; it is the last barbarous relic of a wife's servitude. Yet sitting in this court we must still observe it**. It is the very foundation of the jurisdiction of the Maltese courts that the wife takes the husband's domicile. (emphasis added)

[82] Lord Denning made the above statements in 1963. It was only ten years later in 1973 that the DMPA was enacted to abolish the wife's dependent domicile in the UK. However, Malaysia did not introduce similar legislation to abolish the same. So now sitting in this court, we must still observe the common law rule on the wife's domicile being dependent on that of her husband's domicile.

[83] Thus, the legal position in Malaysia now is the same as the common law in England before the DMPA came into force on 1 January 1974. *Halsbury's Laws of England* 4th edn. (*supra*) at para. 54 p. 41 states the following:

> In considering the domicile of a married woman as at any date before 1 January 1974, it is necessary to apply the earlier rule, which stated that she acquired her husband's domicile on marriage and that during the existence of the marriage her domicile followed that of her husband. This rule applied despite the existence of a decree of judicial separation, or of a decree of divorce not recognised as valid in England. On the dissolution of the marriage by her husband's death, or by divorce, the wife became free to change her domicile, but until she did so she retained the domicile of the husband at the time the marriage was dissolved.

[84] I further take judicial notice of the fact that even the Minister in charge of legal affairs in the Prime Minister's Department, Malaysia has recently expressed her views in the media that our patriarchal law, which does not allow a wife to choose her domicile, should be amended (see also the Malay Mail Online articles on these proceedings and related articles on 3 November 2014 and 4 November 2014).

[85] It is my firm belief that the cause that the wife is now fighting for, that she can choose her own domicile as a wife, can only be resolved by legislative changes to our law on a wife's domicile. When the ministry charged with the responsibility for the matter decides to introduce those new laws, they should also re-look the provisions of s. 48(1) of the LRA. Currently, only if both the husband and wife are domiciled in Malaysia, then they are entitled to petition for divorce. Assuming that a wife is not domiciled here, a husband can never get his marriage dissolved in Malaysia. A husband cannot invoke the exception given in s. 49 of the LRA to a deserted wife.

Whether The Wife Is Domiciled In Malaysia. Alternatively, Whether The Wife's Domicile Is Not Malaysia

[86] In view of my earlier legal findings that the common law rule on a wife's dependent domicile still applies to Peninsular Malaysia after the LRA came into force, and even with the provisions of s. 47 of the LRA, for as long as the marriage is subsisting, the wife in the present case has no legal right to choose her own domicile which is independent from her husband's domicile.

[87] Be that as it may, since the wife in this case has adduced extensive evidence to show that England is now her domicile of choice, I shall now consider whether in fact she is domiciled in England.

[88] The wife has left Malaysia since 1980. She has acquired Australian and Canadian citizenships and travels on the passports of both countries. The wife assumed that she had lost her Malaysian citizenship when she acquired her Australian citizenship. But that is not the case. Two months ago, in September 2014, she applied to the Malaysian High Commission to renounce her Malaysian citizenship (CBOD3 Pt B p. 405).

[89] The Malaysian High Commission has replied the wife on 30 September 2014 (exh. D1, CBOD3 Tab 48) to inform her that they are processing her application and the registration process would take six months. It must be noted here that the wife's application for renunciation of her citizenship was made post or after the filing of the present proceedings. The wife never took steps to file it earlier. She gave the reason that she was told by the husband that her Malaysian citizenship was automatically revoked after she had obtained her Australian citizenship. As the traditional legal maxim goes, ignorance of the law is no excuse. It is a fair inference that the wife had never intended to give up her Malaysian citizenship over the years until now for the purposes of these proceedings. At the time where this case was heard before me, the wife was still a Malaysian citizen.

[90] Unless and until the wife's renunciation of her citizenship is registered by the Federal Government under art. 23 of the Federal Constitution, the wife would remain as a Malaysian citizen.

[91] After the hearing on 7 November 2014, I had fixed the date, 28 November 2014, to deliver my decision after the full trial.

[92] On 25 November 2014, I received a copy of the letter of the solicitor for the wife dated the same date addressed to the solicitor for the husband informing them that Puan Normila bte Mohd Noor ("Puan Normila") from the National Registration Department, Malaysia has confirmed approval of the wife's application for renunciation of her Malaysian citizenship. Puan Normila in her e-mail dated 19 November 2014 to the wife's solicitor, Vardags, in England further informed that the Form K (the approved application form) would be sent to Wisma Putra, Putrajaya (ie, the Ministry of Foreign Affairs) which would then send it to the Malaysian High Commission in London for collection by the applicant (ie, the wife).

[93] I am of the view that even if the wife's renunciation of her citizenship has been accepted by the Malaysian Government under art. 23 of the Federal Constitution, the fact that the wife is no longer a Malaysian citizen makes no difference to the law regarding a wife's domicile of dependence. Domicile is not the same as nationality or citizenship, or residence.

[94] In *Halsbury's Laws of England* 4th edn. (*supra*) at para. 43 p. 35 it is stated:

> A person can change his domicile without changing his nationality; conversely a change of nationality does not necessarily involve a change of domicile.

[95] For as long as the wife has a domicile that is dependent on the husband's domicile, whether the wife is a Malaysian citizen or otherwise is not material, and it makes no difference to the wife's case herein. In this country, it is very common for husbands to marry foreign wives. Such wives, before acquiring Malaysian citizenship, are considered as being domiciled in Malaysia pursuant to their domicile of dependence, which is the husband's domicile here.

[96] It is not disputed that after the last trip that the husband and wife made to England in October 2012, the wife stayed on at Rossway but the husband came back to Malaysia.

[97] It is the wife's case that from mid-2009, the wife and husband had come to an understanding that Rossway Estate in England would be the family's permanent base. The husband disputes this. The wife

maintains that the decision to make Rossway Estate their permanent home is in line with the plan for the husband to slow down, after his stroke in December 2008, on his work responsibilities and take advantage of the fact that Corus Hotels Limited has its headquarters there. The children were asked to move there. The wife asserts that each child has a room in Rossway House, but not in 10 Ukay Heights. At this juncture, I observe that currently only one of the five children, E, is living with the wife at Rossway Estate. E suffers from Asperger's syndrome or autism. Both the husband and the wife made the decision to bring E to England from Canada to live with the wife at Rossway Estate and since 12 September 2012, E has been living there.

[98] The wife attended church in London's Kensington temple until 2001 with the husband. She has been an active church member in King's Road Church since 2001 again with the husband. She attends a small gathering of other church goers at one of their homes every Wednesday night. The wife's personal wellbeing care services, and her medical and healthcare services, such as her primary doctor, gynaecologist, dentist, physiotherapist, masseur, naturopathic doctor, hairdresser, colourist, salon, beautician, and doctor for her cosmetic laser treatment are all in London. The wife enjoys gardening and in Rossway Estate she has a rose garden and a topiary garden. She is a member of several societies in England including the Royal Horticultural Society, Gardeners' World, Gardening Club and the Hillier Gardening Club. However, no evidence is adduced as to the dates when she became a member, whether it was only recently or a long time before this. The wife further asserts that she enjoys the Chelsea Flower Show and other English gardening events. She claims that she has established a weekly routine for the child, E, which includes driving lessons, folk dancing, autism social group classes, psychiatric appointments with his doctor, Befriender sessions, and cooking and serving food project for disabled people. The husband has not challenged the wife's evidence that she has a well-settled life and routine in England. However, he asserts that E is only mildly autistic, and E could drive well in Canada.

[99] Learned counsel for the wife submits that prior to the husband's stroke in December 2008, the wife's old Australian passport, which she travelled with solely during that period, shows that between 3 April 1998 and 3 April 2008, the wife spent only about 60 days in Malaysia. This means that the wife only spent 1.6% of her time in ten years between 1998 and 2008. From 2 December 2003 till 29 November 2007, the wife did not spend any time in Malaysia. However, as pointed out by learned counsel for the husband, the question is how much time did the wife spend in England and in Malaysia from 2009 onwards, and not before that, since the wife asserts that from 2009 she has been residing in England.

[100] The wife maintains that after the husband's stroke in December 2008, she came back to Malaysia only for the purpose of taking care of him. Subsequently, she was travelling with him also to take care of him. A

[101] The evidence shows that between 2009 and 2014, the wife spent 957 days in England, 469 days in Canada, 439 days in Malaysia and 250 days in other countries. In other words, 45.25% of the wife's time was spent in England, 22.17% spent in Canada, 20.76% spent in Malaysia and 11.82% spent in other countries. B

[102] The wife further asserts that she has no plans to be buried in Malaysia. In fact, she has already chosen her burial plot at King's Hill Cemetery in Berkhamsted, England, where she drives past everyday. However, no documentary evidence is adduced on this. C

[103] The family spent three out of the last five Christmases in Rossway ie, in 2009, 2012 and 2013. They flew to Rossway on Boxing day to enjoy much of the Christmas period there in 2011. D

[104] There was a plan to move all of the family's belonging in Victoria, Canada to Rossway, England. The husband had in fact asked his daughter, D, to get quotations for the shipping of their belongings from Victoria to London. E

[105] Around 516 e-mails were sent between 2011 and 2012 by the wife to various staff members on the management of the English, Canadian and Australian properties.

[106] On the other hand, the husband adduced evidence that at all times, despite living abroad, the wife maintained a Malaysian home as well. The medical bills and the daily household routine of managing the home at 10 Ukay Heights belie her story that she was merely a visitor at 10 Ukay Heights whenever she returned to Malaysia. All her medical bills and bills for her medical supplies were sent to No. 189, Jalan Ampang, Selangor which is the office of the husband's headquarters for the MUI group of companies. F G

[107] The wife sent several e-mails about management of the household at 10 Ukay Heights. Even though the wife asserts that she was managing the household here on the instructions of the husband and she was only here to take care of him after his stroke, however, the set of the wife's e-mails, their contents, and her commanding tone of the instructions contained in them to the employees/ or domestic staff show the wife as a person who is very much in management of the household in Malaysia (CBOD1 Pt B pp. 251-257). H I

[108] Furthermore, the retention of a wardrobe full of clothes (though some were wrapped in plastic sheets and which the wife asserts are only unused old clothes), shoes, and toiletries (CBOD1 Pt B pp. 260-261) belie the fact that the wife had in fact abandoned 10 Ukay Heights as a home.

[109] The uncertain and ambiguous status of the wife's position to remain in England can be illustrated by reference to my previous decision in *Nanthivarman Pichamuthu Mookiah v. Sharmini Pillai* [2011] 1 LNS 1835 (*supra*), where I had held that the fact of a party applying and obtaining even permanent residence status in the UK was not conclusive of domicile in that State. At p. 8 of that judgment, I had stated as follows:

> Being a British PR does not equate the PH to being a British citizen. Should the PH ever breach the conditions of his British PR, he would lose the privilege to live there and has to come back to his domicile of origin in Malaysia.

[110] In the same judgment, I had further observed:

> I *do not think that having a UK address since 2000, not being able to understand the Malay language, being employed in the UK, having his own company in the UK since 2003, having bank accounts, credit cards and life insurance policies there, and paying British council taxes conclusively prove that the PH has given up his domicile in Malaysia*. From all these factors, it is clear that the PH is living and working in the UK, and he has to be subject to the tax laws there. However, what is paramount is the PH's intention, that he will not give up his domicile in Malaysia. **For as long as the PH is not a British citizen, but is merely a PR in the UK, and he has not relinquished his Malaysian citizenship, it proves that the PH has not cut off his roots to his domicile of origin in Malaysia**. (emphasis added).

[111] Even though the wife attempted to show that after the husband's stroke in 2008, in 2009 the husband has agreed to make his permanent home in Rossway Estate, the evidence shows clearly that the husband has always stayed put in Malaysia and lived here despite his frequent travels overseas, including England. It is my finding that over the years, the husband and wife had/have a few other homes in addition to their first matrimonial home at 10 Ukay Heights, Malaysia, such as the home in Australia, in Canada and in England respectively. The issue here is where is the domicile of the wife, and not where the matrimonial home is. A matrimonial home can shed some light on where the wife's domicile is, but a matrimonial home, or a second home such as the England home which is intended to be a new permanent home by the wife cannot be the sole characteristic or criterion to determine the wife's domicile, more so when the husband never lived in the England home permanently.

[112] The wife has also adduced extensive evidence on the major part of the husband's business and financial interests being in England (see Q & A 28-30 at pp. 26-29 of the wife's Further Revised Witness Statement in DW1-WS filed on 6 November 2014). She asserts that the total of the husband's three major asserts in the UK, namely interest in Laura Ashley, Corus Hotels and Rossway Estate, amount to £171.4 million. That represents 89% of the Forbes estimate of £193 million for the husband's total wealth, and they are all UK-centred assets. She further asserts that the bulk of the husband's remaining assets are not in Malaysia, but rather in Canada, Australia and the USA.

[113] I do not think that the UK-based assets of the husband prove that the wife's domicile is in England. The husband asserts repeatedly that his home and office are in Malaysia. He controls his international business and financial interests from Malaysia, and he will continue to live here in Malaysia.

[114] From the totality of the evidence adduced in the present case, I find that the wife is now a habitual resident in England.

[115] Going by the wife's evidence, I am not able to make any finding that the wife is currently domiciled in England. This is mainly because the wife is neither a permanent resident nor a citizen of the UK. She is now residing in England on a visitor's pass, ie, a tourist visa, which may be renewed every six months. She does not own a British passport. She does have her home in Rossway Estate in England, and is very much settled and happy there. It is without doubt she has every intention to make England her permanent home. However, by her own evidence, the wife has plans to apply for a Tier 1 visa in England that will enable her to live there permanently, but that requires her to invest about £2 million (previously £1 million). The wife says that she has all her application papers ready, and will put in her application for the Tier 1 visa once she has the money from the divorce settlement.

[116] It is clear therefore that at this point with a visitor's pass, the wife is not guaranteed of being able to live permanently in England. She has no financial ability to put in the investment of £2 million now for the Tier 1 visa. It is an undisputed fact that throughout the marriage, the wife has always been a housewife, and has never worked before. Though she is a nominee director for several of the husband's companies, the husband has also appointed alternate directors to act on the wife's behalf. There is no evidence that the wife is able to raise the £2 million on her own to apply for her Tier 1 visa.

[117] Finally, the wife has to fall back on the husband's financial means in order to finance her proposed application for the Tier 1 visa. From the highly contentious nature of the divorce proceedings here and

in England, it is obvious that it would take quite some time before the wife can be paid her share of the divorce settlement. Thus, there is no concrete evidence to prove conclusively that currently the wife's domicile of choice is England.

[118] In view of the fact that the wife still does not have a Tier 1 visa to live in England, and legally has no capacity to be domiciled in England, the wife's domicile has to be decided by reference to her husband's domicile.

[119] As I have stated earlier in this judgment, based on the common law rule, the wife's domicile is dependent on her husband's domicile, which is Malaysia, and not England. Accordingly, I now hold that the wife's domicile of dependence is Malaysia.

[120] Since both parties have been found to be domiciled in Malaysia, and they fulfil the requirements of s. 48(1)(a) and s. 48(1)(c) of the LRA, the Malaysian Court therefore has jurisdiction to hear any petition for divorce to be filed or has been filed by the husband, and has the authority to make a decree of divorce and grant other reliefs connected thereto.

(3) Whether This Application Should Be Allowed Under S. 106(1)(vi) Of The LRA

[121] The husband in his affidavit in support is basically relying on s. 106(1)(vi) of the LRA to apply for exemption from the requirement of reference to a conciliatory body for a petition for divorce.

[122] The husband did not plead that he is relying on s. 106(1)(ii) of the LRA for this application. Therefore, with respect to learned counsel for the wife, it is not for him to suggest that the husband should invoke s. 106(1)(ii) for this application.

[123] From s. 106(1)(vi) of the LRA, the criteria to grant the exemption is "where the court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable".

[124] Over the years, the family division of the High Court in Malaya has granted countless exemptions under s. 106(1)(vi) of the LRA where in view of an irretrievable breakdown of a marriage and the parties can no longer be reconciled to each other in the marriage, the court has held that that those are exceptional circumstances which render it impracticable to refer the marriage difficulty to a conciliatory body (see eg, *Kiranjit Kaur Kalwant Singh v. Chandok Narinderpal Singh* [2010] 3 CLJ 724).

[125] Learned counsel for the wife submits that for the invocation of s. 106(1)(vi) of the LRA, the husband is required to show "out-of-the ordinary" or "highly special" reasons why the process of conciliation through a conciliatory body should not be followed. With regard to the meaning of "impracticable", he submits that the exceptional circumstances may mean that it would be too costly, too inconvenient or impossible for the wife/husband to attend the conciliatory process. He further submits that "impracticable" cannot mean that the process would most likely fail even if that is true, which is unknown at this juncture.

[126] The word "practicable" according to the *Oxford Compact English Dictionary* 2nd edn. means "able to be done or put into practice successfully". Thus, the word "impracticable" would the opposite of the dictionary meaning.

[127] I am of the view that the words "exceptional circumstances which render it impracticable" are wide enough to cover not only the situations mentioned by learned counsel for the wife ie, the practical or even logistical aspects eg, whether it is too costly, too inconvenient, or not practical to be carried out, but it can also cover situations, as in the present case, where both parties confirm that there is an irretrievable breakdown of the marriage and it would be a failure, and therefore "not able to be done or put into practice successfully" the conciliatory process required by s. 106(1) of the LRA.

[128] The husband has testified that over the years many attempts have been made to resolve their marriage difficulties, including but not limited to the following:

(a) As both the husband and the wife are Christians, about 15-20 years ago sought counselling from a senior pastor in their local church in Malaysia.

(b) About eight to ten years ago, they again sought marriage counselling from a senior pastor and his wife in their church in Canada.

(c) About three to four years ago, they again sought counselling from the church, from a senior pastor in their Singapore church.

(d) More recently, over the past 18 months, through a mutual friend for counselling and mediation, for joint and separate sessions (see husband's affidavit in support paras. 12 and 13).

[129] Even though the husband does not wish to have a divorce, he says that too much water has flowed under the bridge for them to now reconcile as a couple. He says that he is not sure if the wife would pull

out a knife at him at night. To him, the wife is a very difficult woman, always getting angry and yelling at every small thing.

[130] On the other hand, the wife alleges that the husband had been unfaithful to her, is a domineering personality who likes to control her and the children to the extent of what she is allowed to eat. She required the occupation order and the non-molestation order because the husband has recently been physically violent towards her [see wife's affidavit in reply ("AIR") affirmed on 2 May 2013 in Tab 1 of IA paras. 13 and 14].

[131] When the wife was questioned by me, after her re-examination, as to whether she is prepared to go to the conciliatory body in Malaysia for conciliation proceedings, she answered that she would do everything as is required by law and help to smoothen the process for an amicable settlement. However, she maintains that the marriage is over and cannot be saved. She is not prepared to withdraw her petition for divorce in England.

[132] From the totality of the evidence adduced, there is no doubt that both parties no longer wish to continue with the marriage and they both want a dissolution of their marriage by divorce. This is evident from the fact that the wife has filed divorce proceedings in England and the husband is now seeking an exemption under s. 106(1)(vi) of the LRA so that they do not have to go before the conciliatory body to attempt at conciliation, but instead he can proceed with his petition for divorce in Malaysia. It would therefore be futile to compel the parties to go through conciliation proceedings under the LRA knowing that the marriage is over.

[133] I am mindful of s. 106(5)(b) of the LRA which provides as follows:

> If the conciliatory body is unable to resolve the matrimonial difficulty to the satisfaction of the parties and to persuade them to resume married life together, it shall issue a certificate to that effect and may append to its certificate such recommendations as it thinks fit regarding maintenance, division of matrimonial property and the custody of the minor children, if any, of the marriage.

[134] In this case, both the husband and wife have testified that reconciliation would not be possible. Thus, it would not be necessary for their marriage difficulty to be referred to the conciliatory body. Going by the current mindset of both parties, even if the matter is referred to the conciliatory body, there would be no reconciliation. It therefore serves no useful purpose, and in fact would cause unnecessary delay and additional expenses for both parties to go before the conciliatory

body merely to confirm that they are unable to resolve their marriage difficulty, and then to get a certificate of recommendations on maintenance and division of matrimonial property. Should this court decide to grant the husband the exemption under s. 106(1)(vi) of the LRA, then s. 106(5)(b) would no longer be invoked or be relevant. In any case, the matter of a wife's maintenance is governed by s. 77 to 81 of the LRA, whilst the division of matrimonial assets by s. 76 of the same Act. Such matters would finally have to be decided by the court, irrespective of whether there is a certificate of recommendations under s. 106(5)(b) of the LRA, during the full trial of the petition for divorce if the husband is given the exemption sought in this application.

[135] In view of the above considerations, in accordance with s. 106(1)(vi) of the LRA, I am satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable in this case.

Matters Which Are Not Issues To Be Tried But Raised By The Wife, Without The Agreement Of The Husband

[136] I have already considered the above three issues to be tried and there is no necessity for me to go further than that. Regrettably, despite my case management directions for both parties to adhere to the above agreed issues to be tried, learned counsel for the wife raised additional issues which have not been agreed to by learned counsel for the husband, and which to the husband are not relevant for the purposes of these proceedings.

[137] The following are the wife's own issues ("wife's issues"):

> 2. Given the decision of Justice Bodey in the English High Court (Family Division) in Case No. FD13D00747 between *Pauline Siew Phin Chai v. Tan Sri Dr Khoo Kay Peng* on 17.10.2014, whether the matter herein should be stayed or struck out on grounds of *res judicata* and/or judicial comity.
>
> 3. Whether the High Court of Malaya is the more appropriate forum (*vis-à-vis* the English High Court) to determine the matter herein.

[138] With regard to above non-agreed issues, I agree with the submissions made under protest by learned counsel for the husband that the wife's issues cannot be raised by way of her written submissions filed after this full trial. I am of the firm view that to apply for a stay of these proceedings or to strike out the proceedings, as the case may be, in compliance with the Rules of Court 2012, the wife is required file a notice of application with the necessary affidavit in support of the

application eg, in the case of a stay, the wife should show the court the special circumstances to justify a stay. The husband should be given the opportunity to file his affidavit in reply. The court would then hear the submissions of both parties and decide on the application separately.

[139] For the above reasons, in the absence of a proper written notice of application filed by the wife on the wife's issues, it is not incumbent upon this court to determine such issues.

[140] Be that as it may, I would now still consider the wife's issues raised.

Given The Decision Of Justice Bodey In The English High Court (Family Division) In Case No. FD13D00747 Between The Wife And The Husband On 17 October 2014, Whether This Matter Should Be Stayed Or Struck Out On Grounds Of Res Judicata And/Or Judicial Comity

[141] I have to stress here that this is an originating summons where the husband's application is under s. 106(1)(vi) of the LRA for which there is no parallel or concurrent or equivalent proceedings on the same matter of exemption from reference to a conciliatory body in the English High Court. As such, the question of *res judicata* and/or judicial comity does not even arise here. So there is no question of having to strike out these proceedings. In any case, there is no written notice of application with the supporting affidavit filed for the purpose of the above question by the wife. There is no legal basis for this court to strike out this originating summons.

[142] Furthermore, it is a fundamental principle that *res judicata* can only apply where the judgment in question is a final judgment on the question in dispute (see the Federal Court decision in *Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd* [2007] 6 CLJ 93; [2007] 5 MLJ 697). The English High Court decision is not final, but pending appeal.

[143] I note that Justice Bodey in judgment 2 dated 17 October 2014 gave his key conclusions from both his judgments as follows:

(a) that the wife is not estopped by the Malaysian Court's decision on forum conveniens from pursuing her case here and thus seeking to establish jurisdiction here;

(b) that the wife has succeeded in establishing habitual residence here for twelve months prior to the issue of her petition in May 2014;

(c) that this court therefore has jurisdiction over divorce and consequential financial matters;

(d) that the husband has not succeeded in establishing his case for a stay of these proceedings.

[144] I further observe that the English High Court went ahead to hear the proceedings before it even though it had knowledge of the husband's proceedings here which are about to be heard by the Malaysian High Court. It did not consider the matter of judicial comity nor stay the proceedings before it pending the outcome of these proceedings. Therefore, I am not persuaded by learned counsel for the wife that in deference to the principle of judicial comity, I should stay these proceedings and wait for the English High Court to decide the wife's petition for divorce.

[145] In my opinion, the above judgment of the English High Court does not contain any order for enforcement and which impacts on these proceedings or necessitates these proceedings to be stayed.

[146] As submitted by learned counsel for the husband, the English High Court went at great length to accept and recognize that the instant proceedings would proceed in Malaysia in November 2014, as is evident from the following passages in Justice Bodey's judgment dated 17 October 2014 at para. 33:

> I observe that the Malaysian Court of Appeal said nothing about the husband's petition being a nullity. In the particular unusual circumstances which have risen here, it seems to me still to exist (unless or until dismissed) awaiting the Malaysian court's determination next month as to jurisdiction and to dispensation of the requirement for a conciliation appointment. If those decisions go well for the husband, then his petition will proceed to trial.

And:

> Absent some sensible and pragmatic compromise between parties, it follows that the two jurisdictions may well find themselves exercising concurrent jurisdictions until one jurisdiction or the other recognizes and gives effect to an earlier decision of the other. That will arise if the husband establishes jurisdiction in Malaysia, either by upholding the concept of 'domicile of dependence', or by showing the wife's domicile to be there as well as his, which proposition the wife denies. I recognize that a concurrent jurisdiction outcome would be most regrettable and, for want of a better word, invidious.

[147] Therefore, it is misconceived for the wife to rest her entire contention of a stay/striking out based on Justice Bodey's judgment which does not bear out any such premise.

[148] It is now entirely up to the parties to decide whether they can agree on which jurisdiction should determine their divorce proceedings. Otherwise, for as long as there is no judgment of the English High

A Court registered under O. 67 of the Rules of Court 2012 to be enforced in this jurisdiction under the Reciprocal Enforcement of Judgments Act 1958, there is no legal basis or good reason for these proceedings to be stayed or struck out.

B **Forum Non Conveniens**

Whether The High Court Of Malaya Is The More Appropriate Forum (Vis-à-vis The English High Court) To Determine The Matter Herein

[149] With respect, I do not think that forum non conveniens is an C issue for the purpose of this application. The matter of forum non conveniens is only relevant when there are concurrent proceedings in Malaysia and another jurisdiction regarding the same matter between the parties.

[150] The application here is merely the first step taken by the D husband to apply for exemption from having to refer his matrimonial difficulty with his wife to a conciliatory body. The husband has not been given the exemption by this court yet.

[151] I reiterate here that there are no parallel, concurrent or equivalent E proceedings in the English High Court by the wife for an exemption similar to the one being sought by the husband in this application. Thus, there is no necessity nor good reason for me, in considering this application under s. 106(1) of the LRA, to decide on forum non conveniens, as requested by the wife.

F **[152]** I do not see how the English High Court can be an appropriate forum for these proceedings when in the first place there are no pending proceedings there for the same reliefs sought by the husband in this application (see the prayers in encl. 1).

G **[153]** At all times, it must be borne in mind that this is an originating summons, and not a petition for divorce. For the purpose of these proceedings regarding the originating summons, this court is clearly the appropriate forum.

[154] The Court of Appeal, in its decision on 22 April 2014, applied H the Australian test of "clearly inappropriate forum" and decided that the Malaysian High Court is not a clearly inappropriate forum for these proceedings. At p. 15, para. 36 of its judgment, this is what the Court of Appeal held:

I > We, after having heard the respective submissions ... Find that the wife has not discharged the burden of proving that the Malaysian Court is not "a clearly inappropriate forum" ...

[155] With the above decision of the Court of Appeal, it is without doubt and beyond question that this court is clearly the appropriate forum for these proceedings. Since the matter has already been decided by the Court of Appeal, it follows that the issue of forum non conveniens should not be reopened and relitigated here.

Other Matters

The CEDAW Provisions, The Bangalore Principles, And Arts. 8(1) And 8(2) Of The Federal Constitution

CEDAW

[156] Learned counsel for the wife further raised the above matters for the court's consideration in regard to the wife's choice of domicile.

[157] The convention on the elimination of all forms of discrimination against women ("CEDAW") entered into force on 3 September 1981, and was ratified by Malaysia in 1996.

The following provisions of CEDAW should be noted:

> Article 15
>
> 4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile;
>
> Article 2
>
> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
>
> (a) ... ;
>
> (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women.

[158] I agree with the submission of learned counsel for the husband that there can be no automatic incorporation of an international treaty unless it is incorporated into our municipal or domestic legislation.

[159] Very recently, the Court of Appeal in *Air Asia Bhd v. Rafizah Shima Mohamed Aris* [2014] 1 LNS 1176; [2014] 5 MLJ 318 CA dealt specifically with the provisions of CEDAW and held that it cannot be treated as part of domestic law unless it is expressly incorporated by way of statute. At para. 49, this is what the Court of Appeal observed:

A In other words, without express incorporation into domestic law by an act of parliament following ratification of CEDAW, the provisions of the international obligations in the said convention do not have any binding effect.

[160] In the Federal Court decision in *Bato Bagi & Ors v. Kerajaan* B *Sarawak & Another Appeal* [2011] 8 CLJ 766 Raus Shariff PCA observed at para. [180]:

International treaties do not form part of our law unless these provisions have been incorporated into our law.

C **[161]** Based on the provisions of CEDAW, and in particular the above provisions, it is the legislature which should now decide whether to introduce new legislation in Malaysia to allow a wife to choose her own domicile. Without domestic law being enacted to provide for the matter, CEDAW provisions *per se* cannot be used by the Malaysian Courts to D create new law on a wife's domicile.

Bangalore Principles

[162] The Bangalore Principles have recommended, *inter alia*, that the national courts have regard to international norms for the purpose of E deciding cases where domestic law – whether constitutional, statute or common law – is uncertain or incomplete.

163. Article 8 of the Bangalore Principles states as follows:

8. However, where national law is clear and inconsistent with F the international obligations of the State concerned in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation, which G is undertaken by a country.

[163] Similarly, unless the Bangalore Principles are incorporated into our domestic law, they remain as an exhortation or a guideline to apply in areas where the law is uncertain. However, I am of the opinion that there is no uncertainty in our law regarding a wife's dependent domicile H in Malaysia.

[164] The ministry charged with the responsibility for marriage and divorce matters is the appropriate authority to undertake legislative reforms, in the interest of a married woman, to enable a wife to choose I her domicile.

Article 8 Of The Federal Constitution

[165] Article 8(1) of the Federal Constitution provides for the equality of all persons before the law and entitlement to equal protection of the law. Article 8(2) goes on to prohibit discrimination against any citizen on the grounds stated therein including "gender". Article 8(5) provides that art. 8 "does not invalidate or prohibit any provision regulating personal law".

[166] There is no definition of "personal law" provided in the Federal Constitution.

[167] Learned counsel for the husband cited *Black's Law Dictionary* which defines "personal law" as "The law that governs a person's family matters, usu. regardless of where the person goes. In common law systems, personal law refers to the law of the person's domicile".

[168] The online version definition states that "portion of law which constitutes all matters related to any individual or their familia".

[169] In *Re Ding Do Ca, Deceased* [1966] 1 LNS 157; [1966] 2 MLJ 229 it was held that "personal law" would refer to and includes "questions of marriage, divorce and succession".

[170] Learned counsel for the husband then submits that it follows that the LRA, as the governing law for non-Muslims on matters of marriage and divorce, states their "personal law" on the subject. In the result, the argument that art. 8 has been violated cannot be sustained in view of art. 8(5).

[171] Regarding what is the meaning of personal law and whether the LRA is personal law, learned counsel for the wife cites Professor MP Jain in his book *Indian Constitutional Law* 5th edn. 2003, vol. 3 at p. 989 where he observed:

> There prevail in India several personal laws, such as, Hindu Law, Muslim Law, Parsi Law, Christian Law of marriage and divorce. These are by and large non-statutory, traditional systems of law having affinity with the concerned religion. Being ancient systems of law there are several aspects of these systems of laws which are out of time with modern thinking and even be incompatible with some Fundamental Rights.

[172] Learned counsel for the wife then submits that the Indian position is persuasive in so far as the Malaysian situation is concerned. He further refers to "personal law" in item 4(k) of List 1, Ninth Schedule, and item 1 of List 11, Ninth Schedule of the Federal Constitution and submits that in both these provisions the context points to the terms

being used to refer to religious or customary law. He also refers to items 4(e)(i) and (ii) of List 1, Ninth Schedule. He submits that by item 4(e)(i), Parliament may enact laws as to "marriage, divorce and legitimacy" etc. The phrase "personal law" is not used to refer to laws relating to these subject matters. Item 4(e)(ii) then caveats that the matters mentioned in para. (i) do not include "Islamic personal law relating to marriage, divorce, guardianship, maintenance etc,". If "personal law" meant family law, then the enumeration of different aspects of family law would be otiose and unnecessary.

[173] From the above Submissions of both parties, I am of the opinion that "personal law" means the religious or customary law of a person. It can extend to cover matters of divorce, marriage, and succession. However, in modern times many areas of personal law have been incorporated into statute. Whatever has not been incorporated into statute still exists as personal law.

[174] The LRA is a reform statute enacted to regulate marriage and divorce matters of the non-Muslims which matters were previously covered by various outdated legislation which have now been repealed (see s. 109 of the LRA and the Schedule). However, other than marriage and divorce, there are still other matters in the personal law of the non-Muslims which exist outside the LRA.

[175] I am therefore of the view that the LRA, being a statute, is not the "personal law" as envisaged by art. 8(5) of the Federal Constitution. As such, art. 8(2) which prohibits discrimination on ground of gender would still apply to the LRA.

[176] Learned counsel for the wife, by bringing in art. 8 of the Federal Constitution is endeavouring to convince this court that the LRA, including s. 48, should not discriminate against a wife on ground of gender, which means a wife is entitled to choose her own domicile. To hold that the wife's domicile is dependent on her husband's domicile would be discrimination against her on ground of gender and that would be unconstitutional.

[177] I bear in mind that the wife has not instituted a separate action to challenge the constitutionality of the LRA including s. 48 thereof. From the time that the LRA was passed by Parliament until now, the LRA or any of its provisions have never been declared unconstitutional by any court. It is on that basis that I interpret and apply the provisions of the LRA to the present case.

[178] In the course of determining what is the wife's domicile for the purpose of s. 48 and s. 106(1) of the LRA, I find that the common law rule on a wife's dependent domicile still applies in view of the fact

that the LRA did not abolish that rule as the UK, and even Singapore, had done. This finding by the court in no way renders the LRA or this court's application of the common law rule on a wife's dependent domicile to be in breach of art. 8(2) of the Federal Constitution on the ground of discrimination against the wife based on gender.

[179] However, in accordance with the spirit and intent of arts. 8(1) and 8(2) of the Federal Constitution, the LRA or the law on a wife's dependent domicile can in the future be changed by Parliament to allow a wife to have her domicile of choice. Until that day comes, the common law rule that a wife's domicile is dependent on her husband's domicile is still the law in Malaysia.

Conclusion

[180] In conclusion, my main findings are as follows:

(1) The Husband is a Malaysian citizen and he is domiciled in Malaysia.

(2) Unlike the position in the UK, and even in Singapore, there has been no legislation enacted in Malaysia to abolish the common law rule governing a wife's domicile of dependence. Therefore, under Malaysian law now, which still applies the common law rule, the wife's domicile is dependent on her husband's domicile. Since it is indisputable that the husband's domicile is in Malaysia, it follows that the wife, even if she is no longer a Malaysian citizen now, is also domiciled in Malaysia.

(3) A person can have only one domicile at a time. Since the wife has a domicile of dependence, legally she is not allowed to have her domicile of choice.

(4) The wife's habitual residence is in England, but she is not domiciled there. She is not a British citizen. She is on a visitor's pass, or a tourist pass, in England. It is renewable after every six months. The wife is not guaranteed of permanent residence in England even though she has the intention to be domiciled there.

(5) Having found that both parties are domiciled in Malaysia, this court therefore has jurisdiction to hear the originating summons.

(6) This court is clearly the appropriate forum to hear this matter.

(7) For the purpose of s. 106(1)(vi) of the LRA, in view of the irretrievable breakdown of the marriage, and the fact that the wife already has ongoing divorce proceedings in England, I am satisfied that there are exceptional circumstances in this case which make reference to a conciliatory body impracticable.

A

Decision

[181] Based on the foregoing considerations, on a balance of probabilities, I am satisfied that the husband has succeeded in establishing his case for this application.

B

[182] Accordingly, I allow the husband's application in the terms prayed for. The husband has applied to bear the costs of this application. I allow that and fix the costs at RM15,000.

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