**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM**

**DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA**

**(BAHAGIAN KELUARGA)**

**SAMAN PEMULA NO : BA-24F-90-04/2024**

**Dalam Perkara Prosiding di Mahkamah Keluarga di Yokohama (Jepun), Perintah bertarikh 14-07-2023;**

**Dan**

**Dalam Perkara Prosiding di Mahkamah Keluarga di Yokohama (Jepun), Perintah bertarikh 08-12-2023;**

**Dan**

**Dalam Perkara Anak-Anak Perkahwinan bernama Yunoshin Tateishi (Pasport No.: MJ1730061 dan Ikunoshin Tateishi (Pasport No.: MJ1730062);**

**Dan**

**Dalam Perkara Seksyen 89 Akta Membaharui Undang-Undang**



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**(Perkahwinan dan Perceraian) 1976;**

**Dan**

**Dalam Perkara Aturan 92 Kaedah 4 Kaedah-Kaedah Mahkamah 2012**

**ANTARA**

**HISAO TATEISHI (L)**
**(No. Pasport : TS4572220)** **...PLAINTIF**

**DAN**

**TOMOKO TATEISHI (P)**
**(No. Pasport : TR9493166)** **...DEFENDAN**

## GROUNDS OF JUDGEMENT

### Introduction

**[1]** This was an application in Encl 1 dated 17.4.2024 filed by the Plaintiff seeking to gain access and visitation rights towards the two (2) children of the marriage in the following terms:

(i) access and visitation rights once a month for one weekend in Malaysia; and

(ii) the right to have a video call with the children once a week.



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**[2]** At the conclusion of the hearing, this Court dismissed the Plaintiff's application. My reasons for that decision is found below.

## Background Facts

**[3]** The Plaintiff and the Defendant are both Japanese nationals and were legally married in Japan on 25.10.2007. They have twin sons (the Twins) born on 6.2.2014.

**[4]** Due to matrimonial differences the Plaintiff filed for a divorce in Japan on 4.2.2021.

**[5]** The Defendant asserts that the Plaintiff filed for the divorce without her knowledge and consent using the Defendant's seal as her signature.

**[6]** Upon coming to know about the divorce the Defendant proceeded to file a petition to nullify the divorce by mutual agreement at the Tokyo Family Court.

**[7]** On 9.3.20221 the Defendant reported the Plaintiff to the authorities for assaulting her. She suffered injuries as a result of the assault. Since the incident, the Defendant and the Twins left their home and moved to Yokohama to stay at her mother's house.

**[8]** The Yokohama District Court dismissed the Defendant's application for a protection order against spousal violence determining it as being assault happening after the divorce hence it could not be considered as "bodily harm caused by a spouse."



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**[9]** Meanwhile on the agreement of both parties the Plaintiff's lawyer had on 20.10.2021 drafted a settlement agreement in regard to the terms of custody, division of matrimonial assets and maintenance/child support for the Twins. The terms of the settlement agreement were court mediated. However, mediation failed and the settlement agreement was never signed nor enforced.

**[10]** Despite differences between them, the Plaintiff was given access to see the Twins until 18.12.2021 when the Twins refused to meet him.

**[11]** On 21.12.2021 the Plaintiff went to the house of the Defendant's mother in Yokohama. Dissatisfied with the outcome of that visit the Plaintiff assaulted the Defendant's mother. The Defendant sent a letter dated 22.12.2021 to the Plaintiff's lawyer to complain about the Plaintiff's conduct.

**[12]** On 7.4.2022 the Tokyo Family Court (Domestic Relations Division) granted an order to terminate the settlement agreement dated 21.10.2021 as both parties were unable to agree with the terms thereof.

**[13]** On 14.7.2023 the Yokohama Family Court issued its judgment granting an order deeming it appropriate for the Defendant to conduct indirect contact by sending photographs and videos of the Twins to the Plaintiff. This was in consideration of the conflict situation between the Defendant and the Plaintiff and also because the Defendant had informed the Court of her intention to enroll the Twins in a boarding school overseas. The Court in its judgment was of the view that direct visitation and contact by the Plaintiff was not in the best interest of the children and would only burden them.



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**[14]** Subsequently on 8.12.2023 the Yokohama Family Court dismissed the Plaintiff's application to vary and change the terms of parental authority (custody care and control of the Twins) from the Defendant to himself. The Yokohama Family Court did not agree with the Plaintiff's argument that the Defendant's move to Malaysia with the Twins was made with the intention to make visitation and contact between him and the Twins difficult.

**[15]** In its grounds of judgment, the Yokohama Family Court held as follows:

(1) the Defendant has the right to move the Twins to study abroad;

(2) the only access given to the Plaintiff was by way of the Defendant sending photographs and videos of the Twins to the Plaintiff once in every 6 months;

(3) no particular problems were found in regard to the Defendant's custody of the Twins after the parties divorced by mutual agreement.

**[16]** The Yokohama Family Court made this finding in its decision:

> *"…It is not recognized that the Counterparty moved abroad with the minors with the intention of making it difficult to achieve visitation and contact between the Petitioner and the minors".*

**[17]** Upon the order being granted the Defendant enrolled the Twins in Epsom College, a private school in Malaysia. This school was chosen for its reputation of being the best tennis academy in the world for elementary schools.



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**[18]** On 8.5.2024 the Tokyo High Court dismissed the Plaintiff's appeal against the decision of the Yokohama High Court**.** Hence the decision of the Yokohama High Court is affirmed and parental authority of the Twins shall remain with the Defendant.

**[19]** It is not in dispute that the Twins will graduate from elementary school in May 2025. After graduation the Defendant and the Twins intend to return to Japan in order for the Twins to continue their studies in the junior high school in Japan. In her affidavit in support the Defendant has affirmed her intention to maintain domicile in Japan.

**[20]** The Plaintiff who remained in Japan contacted the school by email on 9.10.2023 requesting to be allowed to visit the Twins at the school premises. In addition, the Plaintiff informed the Headmaster of the school that the Defendant left Japan with the Twins without his consent and that they were still in the midst of a legal dispute over custody of the Twins in a Japanese court. The school then contacted the Defendant by email informing the Defendant of the fact that the Plaintiff had reached out to the school and of his intention to visit the Twins during his visit to Malaysia.

**[21]** The Defendant responded to the email to her from the school on 11.10.2023 stating that the Defendant understood the Plaintiff's request for wanting to meet the Twins and the Defendant will make positive arrangements for the same. The Defendant also informed that she intended to work with her attorney to arrange an appropriate time for the Plaintiff to visit the school. At all material times the Plaintiff did not personally call or text the Defendant to make arrangements to meet with the Twins in Malaysia.



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**[22]** The Plaintiff has not seen or been in contact with the Twins since 18.12.2021.

**Plaintiff's Contentions**

**[23]** The Plaintiff's main contention is that he has been denied access to the Twins by the Defendant. He contended that he has not been able to see the Twins since they left Japan to go to Malaysia.

**[24]** According to the Plaintiff both he and the Defendant had by agreement filed for divorce on 4.2.2021 but they continued to live together until the incident of assault on 9.3.2021. The Defendant and the Twins left the matrimonial home shortly after this incident.

**[25]** After the Defendant and the Twins moved to Yokohama the Plaintiff had obtained her consent to visit the Twins at her mother's house. He first visited the Children on 18.3.2021 and again a few days after on 21.3.2021. The Plaintiff contended that the Twins also stayed at the Plaintiff's home on one of those occasions. However, the Plaintiff was unable to directly contact the Children through their mobile phones after those occasions. Undeterred he stated that he went to their school on 16.4.2021 in order to meet them after classes. Thereafter the Plaintiff alleged that the Defendant prevented him from meeting the Twins again because he had not obtained her prior consent when he visited the Twins at the school premises on 16.4.2021.

**[26]** The Plaintiff has contended that both he and the Defendant had pursuant to the agreement on 20.10.2021 agreed that the Plaintiff would be the parent having parental authority over the Twins with custody to remain with the Defendant.



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**[27]** The Plaintiff contended that he was allowed to resume visitation and contact with the Twins after the said agreement was prepared. However due to the disagreement between him and the Defendant's mother the access and contact with the Twins was suspended. Furthermore, there were legal disputes between the Defendant and the Plaintiff still pending in several courts at the material time. According to the Plaintiff the agreement dated 20.10.2021 was subsisting at all material time until it was terminated on 7.4.2022.

**[28]** The Plaintiff has in his Affidavit in Support (Encl 2) conceded that the Yokohama Family Court by its order dated 8.1.2023 did not agree with his argument that the decision of the Defendant to move to Malaysia with the Twins was with the intention to make visitation and contact between him and the Twins difficult. The Plaintiff also conceded that the Defendant only moved to Malaysia after the judgement of the Yokohama Family Court was handed down.

**[29]** The Plaintiff did not deny that he wrote to the Headmaster of Epsom College on 9.10.2023 informing the school that the Defendant had left Japan with the Twins without his consent and that the parties are in the middle of a legal dispute over custody of the Twins in the court in Japan. In the same letter the Plaintiff requested for permission to be allowed to meet the Twins on his visit to Malaysia.

**[30]** The Plaintiff has contended that the Defendant had not taken any steps since then to make the arrangements as promised in her email addressed to the school. In addition, the Defendant had made no effort to contact the Plaintiff's solicitors to arrange for an appropriate time for the



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Plaintiff to visit the Twins at the school. As such the Plaintiff claimed that he has not seen nor had any contact with the Twins since 16.12.2021.

**[31]** While the Plaintiff acknowledged that the Japanese Court had ordered for him to only receive photographs and videos of the Twins he has nevertheless contended that the Court did not prohibit him from having physical access to the Twins.

**[32]** The Plaintiff accused the Defendant of having failed to comply with the requirements in Japanese law in regard to his rights of visitation as a father, in particular the Plaintiff claimed that the Defendant refused to allow a court appointed investigator access to the Twins in order to ascertain the wishes of the Twins whether they agreed to see the Plaintiff or not. The Plaintiff argued that the Japanese Court Order was made without the benefit of the findings of the court appointed investigator.

**[33]** The Plaintiff wanted this Court to be appraised of the fact that he cared and missed the Twins and had always maintained a good relationship with the them. He argued that any allegations by the Defendant regarding spousal violence were baseless and irrelevant to and had nothing to do with his relationship with the Twins and should not be considered. In disputing the version put by the Defendant, the Plaintiff claimed he had informed the Defendant on 16.4.2021 that he was going to pick up the Children from school on that day and that the Twins were very happy to see him.

**[34]** The Plaintiff denied the incident of assaulting the Defendant's mother and complained that the Defendant often denied his request to



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meet with the Twins because he did not comply with her request for money. He also alleged that she badmouthed him to the Twins.

**[35]** Lastly the Plaintiff submitted that the Law Reform (Marriage & Divorce) Act 1976 is applicable in this case as both the Defendant and the Twins are now residing in Malaysia.

**[36]** In any event the Plaintiff has stated that he is ready and willing to travel from Japan to Malaysia in order to meet the Children so as not to inconvenience the Children or the Defendant.

**Defendant's Contentions**

**[37]** The Defendant has strongly opposed the Plaintiff's application for a number of reasons.

**[38]** The Defendant has argued that both parties are not domiciled, resident or citizens of Malaysia and therefore the courts in Malaysia have no locus standi to adjudicate on this issue.

**[39]** The Defendant has contended that the Plaintiff who is a citizen of Japan and domiciled there is subject to the jurisdiction of the Japanese family Court and therefore he is barred from filing this application in Malaysia.

**[40]** It was argued that the matter is res judicata as the High Court and Supreme Court of Japan had handed down its judgment on visitation rights of the Plaintiff whereby it was decided that visitation was denied to the Plaintiff due to the violent behavior he exhibited towards the Defendant and the children. Nevertheless the Supreme Court of Japan had allowed



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the Plaintiff to receive photographs and videos of the Twins once every 6 months.

**[41]** The Defendant alleged that the Plaintiff had dishonestly used her seal to sign the divorce papers and their divorce petition was filed without her knowledge and consent.

**[42]** The Defendant has alleged that the Plaintiff had been physically abusive in that he had assaulted her resulting in injuries sustained to her face and body. She alleged that the Defendant also physically attacked her mother when he came to her house. The Defendant stated that although the Yokohama District Court dismissed her petition for a protection order, it had nevertheless recognized the assault.

**[43]** The Defendant referred to the judgment of the Yokohama District Court dated 14.7.2023 whereby the said court had explicitly made reference to the conflict between the Plaintiff and the Defendant and held that if the Twins were to have visitation and contact with the Plaintiff it may further involve them in the conflict.

**[44]** The Defendant averred that the Twins were afraid of the Plaintiff due to his history of domestic violence and they had told her that they did not want the Plaintiff to visit them again.

**[45]** The Defendant claimed that she attempted a number of times to contact the Plaintiff before moving to Malaysia. She had also left him a voice message informing him of the impending move to Malaysia. However, the Plaintiff did not respond or return her calls to him.



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**[46]** The Defendant stated that she attempted to contact the Plaintiff's lawyers to arrange for the Plaintiff to meet the Twins before they left. However the lawyers refused to take the Defendant's calls.

**[47]** In any event the Defendant has contended that the matter has been finally determined when the Plaintiff's appeal to the Tokyo High Court was dismissed and it was affirmed that parental authority remain with the Defendant. The Tokyo High Court had given its decision in regard to the Plaintiff's rights of access and the matter is now res judicata.

## Decision of the Court

**[48]** The key issue to be determined via this application is firstly whether this Court is the appropriate forum to hear and decide the reliefs claimed by the Plaintiff.

**[49]** The other remaining issue has to do with whether the Plaintiff has the right to access, visitation and to make video calls with the Twins.

### ***Whether the Malaysian court is the appropriate forum to hear and determine the Plaintiff's application***

**[50]** It cannot be disputed that the proceedings in the instant case involve citizens of Japan. The Plaintiff and the Defendant are both Japanese citizens. From their evidence through their respective affidavits, they have confirmed that their place of domicile is in Japan. Their permanent place of residence is in Japan. They were married under the law of Japan and their Twins were born and raised in Japan. The divorce took place in Japan and all their matrimonial disputes in regard to custody, access, visitation and division of matrimonial property were heard and determined by a court of competent jurisdiction in Japan.



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**[51]** Even after the divorce was granted, the parties underwent various matrimonial disputes and applications in Japan, one of pertinence was the application for visitation and contact with the Twins (Petition for visitation). The said Petition for visitation was filed by the Plaintiff at the Yokohama Family Court. In that petition the Plaintiff had proposed a guideline for visitation and contact for the times when the Twins reside in Japan and when they reside outside of Japan.

**[52]** It is significant that the decision of the Yokohama Family Court dated 8.1.2023 was handed down after a full trial was concluded. In its decision the Yokohama Family Court held as follows:-

> *"(3) However, taking into account all the circumstances presented in this case, it can be inferred that the Minors, who are now nine years old, are aware to a certain extent that their parents are in a conflict situation, and the existence of a video in which the Minor state that they are reluctant to appear in court suggests that they have a strong sense of rejection of things that make them aware of their parents' conflict. When conducting visitation and contact, it is necessary for the children to be able to interact with the separated parents without any burden. Yet, according to Record, there are some videos of Minors submitted by the Counterparty in which they verbally abuse the father in the presence of the mother. Under such a situation where the conflict between the parents is expected to continue in the future, if the Minors have visitation and contact with the father, it may further involve the Minors in the conflict and create a burden.*
>
> *(4) Furthermore, according to the Record, it is recognized that there is a possibility that the living conditions of the Minors may change in the future by their entering a boarding school overseas. Taking this into consideration, at this juncture,* ***it should be appropriate for the Counterparty to conduct indirect contact by sending photographs and videos of the Minors to the Petitioner.***



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…

*Additionally, even if the future living conditions of the Minors do not immediately change as planned by the Counterparty, under the conflict situation between the parties and current situation in which the Minors are involved in said conflict as cited in the above findings,* ***it should be appropriate to conduct indirect contact by sending photographs and videos."*** (emphasis added)

**[53]** It is all too clear that the Yokohama Family Court had applied its mind and considered the factual situation in particular for the time when the Twins are enrolled in a boarding school overseas. In this situation the court determined that physical access was to be avoided and that any access is to be conducted only by way of indirect contact. The court decided that the Plaintiff was only allowed to receive photographs and videos of the Twins from the Defendant once every 6 months.

**[54]** Having examined and read the decision of the Yokohama Family Court, it is my conclusion that the said court had considered and evaluated the situation and had made particular reference to the situation where the Twins are enrolled in a boarding school overseas. Having taken into consideration the fact that the Twins are enrolled in a school here in Malaysia, the Order of the Court expressly stated that the Plaintiff is expected to conduct indirect contact only by way of receiving photographs and videos of the Twins once every 6 months.

**[55]** Reference is made to Exhibit E attached to the Plaintiff's Affidavit in Support (Encl 2) dated 17.4.2024 which contains the Order of the Yokohama Family Court. The said Order dated 14.7.2023 is reproduced below for ease of reference:



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The final order made by the Yokohama Family Court is as follows:

> *"Order*
>
> *The Counterparty shall send to the Petitioner, directly or through the following address, photographs and videos of the Minors once every six months after this trial becomes final and binding.*

**[56]** It ought to be noted that on 8.12.2023, the Yokohama Family Court dismissed the Plaintiff's petition to vary the earlier order giving the Defendant parental authority over the Twins. In its decision the court was of the view that the Defendant had the right to send the Twins overseas for their education and that the Defendant's decision to relocate to Malaysia was not made in order to cause hardship to the Plaintiff or to prevent the Plaintiff from exercising access rights to the Twins.

**[57]** On a broader aspect of the matter it is indisputable that the issues had already been decided by the Japanese court. The Yokohama Family Court is a competent court and one that had the jurisdiction to hear and adjudicate on the matter. The Yokohama Family Court was of the view that the children's welfare would be better served with the access that was chosen. This court is persuaded by the argument of the Defendant that any contrary order by this court would invite the effect of a Malaysian court making an order that is contrary to an order that is already in place.

**[58]** Furthermore, the matter had been put to rest when on 8.5.2024 the Tokyo High Court decided that the Plaintiff's appeal against the decision of the Yokohama Family Court be dismissed. The matter is thus res judicata and the Plaintiff must refrain from relitigating the issue. This reasoning is consistent with the views expressed in the case of ***Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2012] 6 CLJ***



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***673*** where the Federal Court reiterated that the re-litigation of a regularly and properly concluded matter as determined by the court is prohibited by the wide doctrine of res judicata and that the judicial process rests on the twin pillars of certainty and finality. Having given careful consideration to the matter, this court is constrained to hold that the Plaintiff is not allowed to have a second bite of the cherry and try his luck in another jurisdiction.

**[59]** If the Plaintiff wished to, he may return to the Japanese courts to seek his remedies.

**[60]** My attention was drawn to the case of ***Herbert Thomas Small v Elizabeth Mary Small (Kerajaan Malaysia & Anor, interveners) [2006] 6 MLJ 372*** where the Learned Judge Faiza Thamby Chik held:

> *"[5] I am of the opinion that the significant facts or circumstances to note in these proceedings before me are that:*
>
> *(i)The daughter's Australian passport had been cancelled by the Australian government in April 2003 pursuant to the Australian order dated 17 April 2003. The daughter does not have a valid Australian passport. The daughter purportedly has been issued with a social visit pass, which on the face of it only appears to be valid for one year. Hence, the daughter cannot remain permanently in Malaysia. She has no right of permanent residence in this country and her connection to this country is tenuous and uncertain.*
>
> *(ii)The Plaintiff herein, the defendant herein and the daughter who is the subject of these proceedings are all Australian citizens and had been residing in Australia prior to the plaintiff's abduction of the daughter*
>
> *(iii)The daughter was well-settled in Australia, was schooling in Australia and hence has close cultural connections with and affinity for*



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*the cultural and societal environment which the Australian forum serves;*

*(iv)The defendant wife had instituted custody proceedings in Australia of which the plaintiff was at all material times aware and had in fact participated in via the filing of two affidavits in the Australian courts;*

*(v)The defendant wife had obtained a final Australian residency (equivalent to 'custody, care and control') order for the daughter;*

*(vi)The plaintiff husband himself has only a tenuous connection with Malaysia under the 'Malaysia My Second Home Program' and hence there is lack of certainty even as to his continued residence in Malaysia whether now or later, the daughter being an Australian, must return to Australia, her home country;*

*(vii)Issues raised by the plaintiff in his affidavits in these Malaysian proceedings regarding the daughter's health and relationship with the mother (defendant) involves matters that occurred when the plaintiff, the defendant and the said child were in Australia or are otherwise connected with Australia and these matters are therefore best evidenced in the Australian court.*

*It is thus my conclusion that given the aforesaid legal principles and the circumstances of these proceedings before me, it is overwhelmingly clear that* ***Australia is the forum with the most real and substantial connections with these proceedings involving Australian citizens and an Australian child who have no real and substantial connection with Malaysia and that accordingly, the Australian court would be the more appropriate or natural forum to hear the matter, being distinctly more suitably for the ends of justice in this particular matter than the Malaysian court."***

**[61]** Applying the principles in the above case to the present case, I completely agree with the Defendant that the proper forum with the most real and substantial connections with the proceedings is Japan.



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**[62]** It must be conceded that the Plaintiff, the Defendant and the Twins who are the subject of the instant proceeding are all Japanese citizens and had been residing in Japan prior to travelling to Malaysia for the purpose of studying.

**[63]** Their stay here in Malaysia is transient and precise. The Defendant has confirmed via her affidavit that the Twins will only stay in Malaysia until July 2025 and will return to Japan after that to continue with junior high school. The only purpose of moving to Malaysia was to enroll them in Epsom College which has a very good tennis academy.

**[64]** The Defendant's intention is not to remain indefinitely in Malaysia with the Twins. There is no evidence adduced by the Plaintiff that the Defendant had chosen or changed her domicile to Malaysia. In her affidavit the Defendant had affirmed intention and firm commitment to maintain domicile in Japan.

**[65]** Therefore, although it is conceded that Section 3(1) of the Law Reform (Marriage & Divorce) Act 1976 would apply to all persons physically present in Malaysia, unless the Act otherwise provides, this Court would still have to consider the different facts attached to each case especially here where the parties and the Children are not Malaysian citizens. The parties had submitted to the jurisdiction of the Japanese court for their matrimonial, custody and access disputes. It is pertinent to highlight that the Plaintiff had himself submitted to the jurisdiction of the Japanese court when he filed the application for access and visitation rights.



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**[66]** More importantly the Plaintiff had instituted visitation and contact/access petition in Japan and both parties had participated in all the trials until the Japanese Court concluded with delivering its decision. The Court's decision after parties had the opportunity to ventilate their submissions and positions is for the Defendant to send photographs and videos to the Plaintiff once in every 6 months during the children's stay in Malaysia.

**[67]** The Plaintiff is enjoined to respect the final decision of the Japanese Court order granting the Defendant the sole custody care and control of the Twins. The Plaintiff's attempt to obtain a different order here in Malaysia than that already decided by the Japanese court is a serious error to say the least. This Court has taken into account the events and facts that arose in Japan prior to the instant application which led to the legal action in the Japanese courts. Those events have been judicially determined by the court of competent jurisdiction in Japan where the parties had their place of residence at the time. This Court finds it pertinent in its consideration the decision of the Japanese court in relation to the dispute there and now flowing over to Malaysia. It is also pertinent to mention that the findings of the Japanese Court orders are valid and hence must be fully enforceable. This Court is not at liberty to overstep its boundaries.

**[68]** In any event this Court finds that the plaintiff through his Affidavit in Support in Encl 2 and his Affidavit in Reply in Encl 7 had failed to show any exceptions to the general rule on *forum non conveniens* except that there was intentional mala fide in his attempts to obtain a different order here in Malaysia. It is akin to forum shopping. If that is so then it amounts to a potential misuse of court process.



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**[69]** On this issue it will be helpful to refer to page 382 of the ***Herbert Small*** case where the Learned Judge there held:

> *"[6] Where there is one forum that is more appropriate for the hearing of the matter than another forum, the only occasions where the court would not remit the matter to the more appropriate forum would be where: (i) It would be unjust to confine the plaintiff to the remedies elsewhere (American Express v Mohamed Toufic aforesaid); or (ii) There are 'special circumstances' why the trial should nevertheless take place in the less appropriate forum (Brinkerhoff Maritime Drilling Corp & Anor v PT Airfast Services Indonesia aforesaid); or (iii) The additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required, can only be justified if they would be plaintiff can establish objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the action in the less appropriate forum that is of such importance that it would cause injustice to him to deprive him of it.' (The Abidin Daver [1984] 1 AC 398 aforesaid). It is observed that, in these proceedings, the plaintiff has not shown this court that any of the above exceptions (to the general rule on forum non conveniens) on 'injustice; 'special circumstances; or 'personal or juridical advantage' exists in these proceedings, save and except that he could attempt to get a different order here than that already decided by the Australian court. Indeed, it must be borne in mind that the Australian court had already adjudicated and decided the matter."*

**[70]** In examining the Plaintiff's affidavits in Encl 2 and 7, it is crucial to note that there was failure to show exceptions to the general rule on forum *non conveniens*. The Plaintiff did not satisfy the requirements to justify the hearing of his current application in the Malaysian courts. He failed to show through his affidavits or documents the existence of 'special



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circumstances' or 'injustice' to justify his application before this Court save and except that he could attempt to get a different order here than that already decided by the Japanese court.

**[71]** It would surely be inequitable to now allow the Plaintiff to attempt to get a different decision from what was handed down by the Japanese court and where the Japanese court had made specific findings on the same issues. It must be emphasized that at p. 386 of the same judgement the Learned Judge explained as follows:

> *"[17] No doubt the plaintiff, had a decision favourable to him been arrived at by the Australian courts after consideration of his affidavits dated 6 October 2003, would 30 have taken advantage of such a decision. It would be inequitable to now allow him to attempt to escape the jurisdiction of the Australian courts because he did not succeed in his attempted defence. It is thus my conclusion that the plaintiff had clearly submitted to the jurisdiction of the Australian courts by the filing of not one, but two, detailed affidavits of the plaintiffs both affirmed on 6 October 2003, and by also sending the courts in the Australian proceedings the affidavit of Dr Nor Hamidah Mohd Salleh affirmed on 3 October 2003, and the affidavit of Jaswant Kaur a/p Banta Singh affirmed on 2 October 2003 and should therefore be stopped from inequitably taking a second bite at the cherry by instituting these Malaysian proceedings before me which I hereby do." Applying the above principles to the present case, it is my finding that the Plaintiff is attempting to take a second bite at the cherry by instituting this proceedings in this Court. Knowing that he had failed in his previous attempt in the Japanese court the Plaintiff now wants to try his luck in this Court. This cannot be allowed to happen as the Plaintiff had already submitted to the jurisdiction of the Japanese courts when he himself field the application for access and visitation rights in Japan.".*



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**[72]** In addition, the Japanese Court orders were made premised on knowledge that the Defendant had made her intentions clear that she was going to enroll the Twins in a Malaysian school for a fixed period of time before returning to Japan. Therefore, the Plaintiff had every avenue to ventilate his objections and submissions on the matter.

**[73]** It is especially pertinent to note that the Plaintiff had not appealed against the decision on his limited visitation rights.

**[74]** Hence, I have to agree with learned counsel for the Defendant's contention that bringing the same issue to be litigated before this Court is wasting the Court's valuable time in litigating a matter which has already been litigated in Japan. This Courts must resist the temptation to review the decision of the Japanese Courts for to do so would be to put this Court in an awkward position of having to review or relitigate the matter which has already been litigated. It will be a waste of court's valuable time and resources.

**[75]** At the risk of repetition, it is relevant to emphasize here that the Defendant and the 2 children in coming to stay in Malaysia for the purpose of enrolling the Twins in Epsom College was not meant to be a long term situation. The Defendant never had any intention to settle down here or make her home permanently in Malaysia. She and the Twins are expatriates preferring to remain as Japanese citizens. Therefore, since the parties and the children are Japanese citizens, it is suggested that they should refer and settle their issues in regard to the children to the court in Japan and abide by its decision.



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**Conclusion**

**[76]** Having considered all the relevant factors, including the nature of the proceedings, the convenience of the parties and in order to avoid any potential misuse of court process, this Court is of the opinion that the proper forum for the Plaintiff is to return to the Japanese courts for his remedy or wait for the Defendant and the Children to return to Japan in a matter of a couple of months to seek redress.

**[77]** In any event in just under two months this issue will no longer be relevant as it would be overtaken by subsequent events.

**[78]** For the reasons above, the application is dismissed with costs of RM2000.

Dated 29 March 2025.

**(JULIE LACK)**
**Judge**
**High Court of Malaya**
**Shah Alam, Selangor Darul Ehsan**



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