AYM *v* AYL
[2012] SGCA 68

Case Number	: Civil Appeal No 21 of 2012
Decision Date	: 23 November 2012
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Engelin Teh SC, Joyce Fernando, Linda Ong and Lee Leann (Engelin Teh Practice LLC) for the appellant; Kee Lay Lian and Nigel Pereira (Rajah and Tann LLP) for the respondent.
Parties	: AYM — AYL

Family Law – Matrimonial assets – Division

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2012] SGHC 64.]

23 November 2012

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

1 This was an appeal by the Husband against the decision of the High Court Judge ("the Judge") in *AYL v AYM* [2012] SGHC 64 ("the GD") dismissing his appeal against the decision of the District Court. The District Court had dismissed his application to vary a consent order entered into between the parties *vis-à-vis* ancillary matters on the divorce of the two parties. The Husband had sought to rely on business failure to vary the consent order to a more favourable division of the matrimonial asset (a piece of landed property) ("the Property") and for a lump sum maintenance for the Wife to be paid out of her share and for the monthly payments to accordingly cease. The Judge refused the variation of the consent order as far as the division of the Property was concerned, but ordered a lump sum maintenance of $750,000 to be paid to the Wife out of the Husband's share of the sale proceeds. We dismissed the appeal with regard to the former issue and allowed it with regard to the latter issue. We now set out the detailed grounds of our decision.

The factual background

2 This case concerned a consent order entered into between the parties in respect of ancillary matters arising out of divorce proceedings. The parties were married for 23 years. A writ for divorce was filed on the ground of irretrievable breakdown, relying on the fact of at least four years' separation, and interim judgment was granted on 13 July 2010. At the time leading to the interim judgment, discussions took place between the parties with a view to reaching an agreement on the ancillary matters which arose out of the divorce. By 13 July 2010, the parties reached an agreement in relation to ancillary matters relating to custody and care and control of the children, division of assets, and the maintenance of the Wife and children. The terms of the agreement were recorded in the interim judgment as a consent order and the interim judgment was made final on 13 October 2010. The consent order provided, *inter alia*, that the Husband was to pay $2,670 per month per child as maintenance for each of the three children, the children's school fees, $3,990 per month as maintenance for the Wife, and that the Property be sold within six years and for the proceeds to be divided in the proportions of 80% to the Wife and 20% to the Husband if the sale price was equal to or less than $2.5m or 70% to the Wife and 30% to the Husband should the sale price be more than

$2.5m. The result of the consent order was that the Husband was paying $19,000 a month for the maintenance of the Wife and the children.

3 According to the Husband, in November 2010, his financial situation changed – his business, which was during the period leading up to the making of the consent order only just starting, saw its investors withdraw and that led to its failure, the eventual result of which was that he no longer received any income. He claimed to have tried to find a new job but was unable to and this was so even up until the appeal was heard before us. On 14 June 2011, the Husband, relying on these changes in his circumstances, applied to the District Court to vary the terms of the consent order pursuant to ss 112(4) and 118 of the Women's Charter (Cap 353, 2009 Rev Ed) ("the Act"). By this point in time, the value of the Property had risen from $2.5m to an estimated $5.5m. The Husband sought, *inter alia*, to have the Property sold within three months and for the order as to the division of the matrimonial assets to be varied to an equal division, with a $750,000 lump sum payment for the Wife's maintenance to be paid out of her 50% share. The District Judge ordered a variation to the extent that the Property was to be sold within six months, but refused to vary the terms of either the division of the matrimonial assets or the maintenance payments for the Wife.

Decision of the High Court

4 On appeal to the High Court on 23 March 2012, the Judge upheld the District Court's decision not to vary the terms of the division of the matrimonial assets pursuant to s 112(4) of the Act ("s 112(4)"). The Judge reasoned that it did not follow as of course from business failure that the court would allow a variation. The Judge emphasised that "[a] consent order is a contract endorsed with the approval of the court" and that "[i]t is not an order to be lightly varied or set aside" (see the GD at [6]). It was also observed that "[w]hen a contract has been made or a consent order has been recorded the parties must part with a mind at peace that the matter is at an end" and that "[t]hey should not go on living with the anxiety of a return to court when the asset value changes" (see the GD at [6]). The Judge then proceeded to order that a lump sum maintenance of $750,000 be paid to the Wife from the Husband's share of the proceeds of sale of the Property, on the basis that the parties had agreed to this $750,000 lump sum maintenance (see the GD at [4]).

5 The Property was sold on 8 June 2012 for $5.1m.

The issues on appeal

6 The two issues which arose before this court were as follows:

(a) Whether the Judge was correct in refusing to, pursuant to s 112(4), vary the terms of division of the matrimonial assets in the consent order despite the alleged change in circumstances of the Husband ("Issue 1").

(b) Whether the Judge was correct in ordering a lump sum maintenance of $750,000 be paid to the Wife out of the Husband's share of the sale proceeds of the Property ("Issue 2").

The parties' respective arguments on appeal

7 Counsel for the Husband, Ms Engelin Teh SC ("Ms Teh"), argued that, under s 112(4), a "material change in the circumstances" after an order with regard to the division of matrimonial assets was made constitutes sufficient grounds for varying the order. Ms Teh relied on the Singapore High Court decision of *Nalini d/o Ramachandran v Saseedaran Nair s/o Krishnan* [2010] SGHC 98 ("*Nalini*"), where the learned judge expressed (at [14]) the view that a "material change in the circumstances"

was sufficient for the court to invoke s 112(4). The learned judge there came to that view because he thought s 112(4) was more broadly framed than ss 118 and 119 (which apply to the variation of orders and agreements for the maintenance of an ex-wife, respectively), and therefore s 112(4) must encompass a "material change in the circumstances" as a sufficient ground, such ground being expressly specified in ss 118 and 119. Ms Teh thus argued that the Husband's business failure and loss of income constituted such "material change in the circumstances" to warrant the variation of the consent order with regard to the terms of the division of the Property. She further relied on the decision of this court in *Tan Sue-Ann Melissa v Lim Siang Bok Dennis* [2004] 3 SLR(R) 376 where it was held that, where a consent order as to maintenance was entered into on a certain mutual assumption shared by the parties, the failure of that assumption constitutes a material change in the circumstances sufficient to warrant its variation. She thus argued that, in the present case, there was a mutual assumption between the parties at the time of the making of the consent order that the Husband's business would take off and it having failed, the consent order could be varied.

8 In response, counsel for the Wife, Ms Kee Lay Lian ("Ms Kee"), submitted that the test applicable for the variation of an order in respect of the division of matrimonial assets is not a "material change in the circumstances" but instead one of "unworkability". She further relied on the proposition that a consent order is a contract to be upheld and should not be varied save in exceptional circumstances. She also argued that even if a "material change in the circumstances" was a sufficient ground, the Husband had not satisfied it as it was self-induced and he had not sufficiently proved it. Lastly, Ms Kee denied the existence of any mutual assumption as asserted by Ms Teh.

Our decision

Issue 1

9 The division of the pool of matrimonial assets between the parties is governed by s 112 of the Act ("s 112"), which reads as follows:

> **Power of court to order division of matrimonial assets**
>
> **112** – (1) The court shall have power, when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportions as the court thinks just and equitable.
>
> (2) It shall be the duty of the court in deciding whether to exercise its powers under subsection (1) and, if so, in what manner, to have regard to all the circumstances of the case, including the following matters:
>
> (*a*) the extent of the contributions made by each party in money, property or work towards acquiring, improving or maintaining the matrimonial assets;
>
> (*b*) any debt owing or obligation incurred or undertaken by either party for their joint benefit or for the benefit of any child of the marriage;
>
> (*c*) the needs of the children (if any) of the marriage;
>
> (*d*) the extent of the contributions made by each party to the welfare of the family, including looking after the home or caring for the family or any aged or infirm relative or

dependant of either party;

(*e*) any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce;

(*f*) any period of rent-free occupation or other benefit enjoyed by one party in the matrimonial home to the exclusion of the other party;

(*g*) the giving of assistance or support by one party to the other party (whether or not of a material kind), including the giving of assistance or support which aids the other party in the carrying on of his or her occupation or business; and

(*h*) the matters referred to in section 114(1) so far as they are relevant.

(3) The court may make all such other orders and give such directions as may be necessary or expedient to give effect to any order made under this section.

(*4*) *The court may*, ***at any time it thinks fit*** ,*extend*, ***vary*** ,*revoke or discharge* ***any order made under this section*** ,*and may vary any term or condition upon or subject to which any such order has been made.*

(5) In particular, but without limiting the generality of subsections (3) and (4), the court may make any one or more of the following orders:

(*a*) an order for the sale of any matrimonial asset or any part thereof, and for the division, vesting or settlement of the proceeds;

(*b*) an order vesting any matrimonial asset owned by both parties jointly in both the parties in common in such shares as the court considers just and equitable;

(*c*) an order vesting any matrimonial asset or any part thereof in either party;

(*d*) an order for any matrimonial asset, or the sale proceeds thereof, to be vested in any person (including either party) to be held on trust for such period and on such terms as may be specified in the order;

(*e*) an order postponing the sale or vesting of any share in any matrimonial asset, or any part of such share, until such future date or until the occurrence of such future event or until the fulfilment of such condition as may be specified in the order;

(*f*) an order granting to either party, for such period and on such terms as the court thinks fit, the right personally to occupy the matrimonial home to the exclusion of the other party; and

(*g*) an order for the payment of a sum of money by one party to the other party.

(6) Where under any order made under this section one party is or may become liable to pay to the other party a sum of money, the court may direct that it shall be paid either in one sum or in instalments, and either with or without security, and otherwise in such manner and subject to such conditions (including a condition requiring the payment of interest) as the court thinks fit.

(7) Where, pursuant to this section, the court makes an order for the sale of any matrimonial

asset and for the division, application or settlement of the proceeds, the court may appoint a person to sell the asset and divide, apply or settle the proceeds accordingly; and the execution of any instrument by the person so appointed shall have the same force and validity as if it had been executed by the person in whom the asset is vested.

(8) Any order under this section may be made upon such terms and subject to such conditions (if any) as the court thinks fit.

(9) Where the court, by any order under this section, appoints a person (including the Registrar or other officer of the court) to act as a trustee or to sell any matrimonial asset and to divide, apply and settle the proceeds thereof, the court may make provision in that order for the payment of remuneration to that person and for the reimbursement of his costs and expenses.

(10) In this section, "matrimonial asset" means —

(*a*) any asset acquired before the marriage by one party or both parties to the marriage —

(i) ordinarily used or enjoyed by both parties or one or more of their children while the parties are residing together for shelter or transportation or for household, education, recreational, social or aesthetic purposes; or

(ii) which has been substantially improved during the marriage by the other party or by both parties to the marriage; and

(*b*) any other asset of any nature acquired during the marriage by one party or both parties to the marriage,

but does not include any asset (not being a matrimonial home) that has been acquired by one party at any time by gift or inheritance and that has not been substantially improved during the marriage by the other party or by both parties to the marriage.

[emphasis added in italics and bold italics]

10 The focus in this appeal is on s 112(4), which has been italicised in s 112 in the preceding paragraph (for the less than clear background, including the relevant case law, prior to the enactment of this particular provision, see Leong Wai Kum, *Elements of Family Law in Singapore* (LexisNexis, 2007) ("*Leong*") at p 585).

11 The language of s 112(4) appears, on its face, to be very broad. However, it must, in our view, be interpreted having regard to its legal context, factual application as well as commonsense generally. What is clear, in our view, is that this provision does not furnish the court concerned with a *carte blanche* to, *inter alia*, vary an order it has made. Indeed, a threshold question that arises is the ambit within which s 112(4) ought to operate. In a related vein, regardless of the scope within which, *inter alia*, variation by the court can be effected, there must nevertheless be exceptional reasons before such variation can be effected. Before proceeding to consider this important issue, it is important, as already mentioned, to note the context in which s 112(4) operates.

12 This sub-section operates within the context of *the division of matrimonial assets*. Such division is not, colloquially put, "a moving target" (unlike, for example, the issue of maintenance). In other words, there must be some *finality* once the matrimonial assets have been divided between the parties (assuming either that neither of the parties has filed an appeal or, if an appeal has been filed,

the final appellate tribunal has rendered its decision). This is only logical as well as commonsensical. After all, a division effected pursuant to s 112 is, *ex hypothesi*, premised on the fact that the parties would each go their own separate ways and want to have nothing more to do with each other thereafter. Hence, to allow the court to re-open the distribution already made is to undermine the very finality which is one of the *raisons d'être* of s 112 itself. Indeed, it is not insignificant to note that in her paper to the Select Committee, Prof Leong Wai Kum ("Prof Leong") was of the view that s 112(4) ought to be *deleted* altogether for reasons which were, in the main, very similar to those just mentioned; as she put it (see *Report of the Select Committee on the Women's Charter (Amendment) Bill (Bill No 5/96)* (Parl 3 of 1996, 15 August 1996) ("*Report of the Select Committee*") at p B28):

> The proposed subsection (4) allows an order made to be changed "at any time". This is *inappropriate*.
>
> (i) An order for division of matrimonial assets ***is a "one-off" order in contrast with*** *a maintenance order which is usually of a continuing nature.* ***A "one-off" order can only be changed before it has been executed. Once executed there is nothing to "extend, vary, revoke or discharge" any longer. Before execution, the parties have their usual right of appeal. It is unnecessary to provide additionally.***
>
> (ii) *To so provide may come to discourage compliance of the order by the parties with all due haste. This will also be undesirable. The parties are divorced. They should comply with the orders made and get on with their separate lives.* ***I suggest subsection (4) be deleted.***
>
> [emphasis added in italics and bold italics]

13 We note that, in its paper, the Singapore Association of Women Lawyers advocated a somewhat less drastic modification (which was not adopted by the Select Committee), as follows (see the *Report of the Select Committee* at p B46):

> In relation to the proposed section 106 (4) [the current s 112(4)], we recommend that the court's power to vary the order on division of matrimonial assets be *limited to two years after the date of the divorce. While it is useful that the court has the power to vary the order in appropriate circumstances*,*there should be certainty and finality to litigation.* [emphasis added]

14 The Council of the Law Society of Singapore ("the Law Society") also expressed the datum concern with the need for finality *vis-à-vis* the division of matrimonial assets but nevertheless suggested alternative wording which would confer upon the court some flexibility. This suggestion was not, it should be noted, adopted when the equivalent of s 112(4) was ultimately enacted. In this regard, the suggestion by the Law Society was as follows (see the *Report of the Select Committee* at pp B72–B73):

> **D. Matrimonial assets: Clause 19 of the Bill**
>
> 1. Clause 19 of the Bill propose[s] to substitute a new section 106 ("the new section") [the present s 112] for the present section 106 ("the present section"). The objective is to widen the courts' powers to give it the flexibility to effect a more just and equitable division of matrimonial assets after taking into consideration all the circumstances of the case.
>
> As such, many significant changes to the power of the court to order a division of

matrimonial asset will be introduced if the new section is enacted.

2. One significant change is that the court shall have power ***subsequent*** to the grant of a decree of divorce, judicial separation or nullity of marriage, to order a division of matrimonial assets. While the present section allows the court to defer the exercise of the court's power to a later date, it does not give the court the power to divide matrimonial assets if matrimonial proceedings have been finally completed without the court's power under section 106 being invoked or exercised, eg if the parties themselves do not ask the court to exercise its powers.

3. ***This change is connected to a second significant change, namely the proposed section 106 (4) where it is proposed to give the court the power to extend, vary, revoke or discharge any order made under the section, and may vary any term or condition upon or subject to which any such order has been made.***

4. ***These two proposed changes are significant because they depart substantially from the policy of the present section which is to give finality to the issue of the division of matrimonial assets unless the court has expressly deferred the exercise of the power and, it should follow logically, where the court has made orders which are not intended to establish a fixed state of affairs. An example is where the court orders that the matrimonial home not be sold until all the children reach the age of 21 years and/or the issue of the division of the matrimonial home only be decided when all the children are of that age. In such a case, if both parties feel that the matrimonial home should be sold earlier, there is no reason why the court cannot so order.***

5. The present policy is desirable because in relation to assets, the parties should be entitled to re-order their affairs in accordance with what the court has ordered or not ordered. ***It is respectfully submitted that it is undesirable to reopen the issue of how the assets were previously divided (or not divided, if the court did not previously avail itself of the power) years after the matrimonial proceedings have been concluded.***

6 ***Of course, the courts are likely to be aware of the desirability of not upsetting the reasonable expectations of the parties that there should be finality. It may be that the proposed change to give the court power subsequent to the close of matrimonial proceedings to order a division of matrimonial assets (where it did not do so previously) is only intended to be exercised in exceptional circumstances, eg where one party has materially misrepresented his or her net worth leading the other party not to rely on section 106. Similarly, the power to extend, vary, revoke or discharge any order already made might be intended to be exercised only in exceptional circumstances, eg in cases of material non-disclosures leading to consent orders.***

7. ***The courts are likely to be sensitive to these considerations but perhaps the proposed legislation should make this more explicit by amending the proposed sections 106 (1) and (4) in the following manner*** :

   "(1) The court shall have power,when granting <u>or, where the circumstances render it just</u> ,subsequent to the grant of a decree of divorce,judicial separation or nullity or marriage,to order the division between the parties of any matrimonial asset…"

   "(4) *The court may, <u>where there are such circumstances as may render it just and equitable</u> ,extend revoke or discharge any order made under this section…"*

[emphasis in italics and underlined italics in original; emphasis added in bold italics]

15 Notwithstanding the persuasive arguments by Prof Leong referred to above (at [12]), s 112(4) was enacted – probably with the view that there is a need to mediate the perennial (as well as universal) tension between certainty (including finality) on the one hand and flexibility (and justice) on the other, with the consequent need to accord (*via* s 112(4) itself) the court some legal leeway in, *inter alia*, varying an order already made in order to ensure that the former does not completely overwhelm the latter. However, the latter must surely be the exception and ought not to be permitted to "colonise" the former, lest the exception become the rule and uncertainty become the key motif instead. Put simply, s 112(4) must have *a limited operation only*. This would, in our view, be, *a fortiori*, the case when the order of court made pursuant to s 112 is *itself* premised upon *a consent order entered into between the parties themselves* (*cf* also *Leong*, especially at p 585). Indeed (and in this last mentioned regard), in addition to the desideratum of finality embodied within s 112 itself, there is a *yet further* policy objective which ought to be given effect to (as far as is possible) by the court – *freedom of contract and the (related) concept of sanctity of contract*. We do note, however, that, in the uniquely *matrimonial* context, the ideas of freedom as well as sanctity of contract cannot be taken too far (*cf*, for example, in the context of pre-nuptial agreements, the decision of this court in *TQ v TR and another appeal* [2009] 2 SLR(R) 961). Indeed, even in the *commercial* sphere, the courts recognise that specific *vitiating factors* (such as misrepresentation, mistake, duress, undue influence, unconscionability as well as illegality and public policy) may operate to unravel an otherwise binding contract or agreement entered into between the parties concerned. For present purposes, however, it will suffice to note that, in *addition to* the vitiating factors just briefly alluded to, there is some local as well as English case law which considers the circumstances under which courts may be justified in varying orders already made in relation to consent orders between the parties concerned (see the decision of this court in *AOO v AON* [2011] 4 SLR 1169 ("*AOO*") at [13]–[22]). Of course, as explained by this court in *AOO* (at [14]), the legal effect of a consent order in the *matrimonial* context is not derived from the agreement made between the parties, but, instead, from the court order itself. It was thus suggested by the Singapore High Court in *Lee Hong Choon v Ng Cheo Hwee* [1995] 1 SLR(R) 92 (at [32] and [35]) that consent orders ought to be treated and dealt with as far as possible in the same way as non-consensual orders. As those issues are not before us in this appeal, we will say no more about the precise application (if at all) of each of the vitiating factors to consent orders made in the matrimonial context. For the purposes of the present appeal, however, it is important to note that s 112(4) applies, *regardless of* whether or not the order for division of matrimonial assets pursuant to s 112 has its source in a consent order between the parties.

16 Unfortunately, there appears to be no substantive legislative background which would aid us in construing the true ambit and purpose of s 112(4). All we know is that the Singapore legislature did not accept any of the suggestions proffered to the Select Committee (see generally above at [12]–[14]). The *Explanatory Statement* to the Women's Charter (Amendment) Bill (Bill No 5/96) is silent in so far as s 112(4) is concerned, as are the relevant parliamentary debates (see the Second Reading of the Women's Charter (Amendment) Bill in *Singapore Parliamentary Debates*, vol 66, especially at col 68 (2 May 1996)). Additionally, one commentator has observed that s 112(4) "is entirely new" (see Chan Wing Cheong, "Latest Improvements to the Women's Charter" [1996] SJLS 553 ("*Chan*") at p 581).

17 The leading decision which considers the general operation of s 112(4) (also in the context of a consent order) is *Nalini* (affirmed by this court in *Saseedaran Nair s/o Krishnan (now known as K Saseedaran Nair) v Nalini d/o K N Ramachandran* [2012] 2 SLR 365 ("*Nalini (CA)*"), but without consideration of this particular point). In *Nalini*, it was observed thus (at [13]–[14]):

13 Both parties accepted that s 112(4) leaves the court with the discretion to vary the consent order and the court may vary the terms of a consent order *in the event that there was material change in circumstances. In my view,this is correct. It is true that an order of division is usually a one-off order and,subject to appeal,is not of a continuing nature as to permit variation* (Leong Wai Kum, *Principles of Family Law in Singapore*, Butterworths Asia 1997 Ed at page 910; cited in *Lee Kok Yong v Lee Guek Hua (alias Li Yuehua)* [2007] SGHC 26 at [16]). *However,this does not mean that the court cannot vary an order where it is appropriate to do so,as is the case here where the Property has not been sold or otherwise dealt with yet.* In a District Court decision, *CT v CU* [2004] SGDC 164, the District Judge held that parties would be able to apply to the court for a variation of a court order under s 112(4) of the Charter *at least in those situations where the court order was unworkable or did not provide for a particular situation or contingency which had subsequently arisen. I agree.*

1 4 *A consent order for division of matrimonial assets should not be as easily revised as an order made without incorporating the spouses' prior agreement* (see Leong Wai Kum, *Elements of Family Law in Singapore*, LexisNexis 2007 Ed at p 585; see also *Lee Min Jai v Chua Cheow Koon* [2005] 1 SLR(R) 548 (which dealt with the setting aside of a consent order relating to matrimonial assets ("*Lee Min Jai*") at [5]). From the wording of s 112(4), the court retains the power to interfere on just and equitable grounds (*Lee Min Jai* at [6]). *I also observe that,as a matter of comparison,while s 119 of the Charter provides that the court may vary agreements for maintenance where there has been a material change in the circumstances,the court is not so limited under s 112(4). Likewise,s 118 of the Charter provides specific situations in which the court has the power to vary orders for maintenance at any time,one of which is where there has been material change in the circumstances. The circumstances giving rise to the court's decision to vary an order under section 112(4),being a more broadly framed provision,could therefore include a situation as envisaged by s 118 or s 119,i.e. where there has been material change in the circumstances after the order was made.*

[emphasis added]

18 The learned judge proceeded to outline the parties' respective arguments as follows (at [15]–[16]):

15 The Wife contended that there was no material change in the circumstances. This was because even though the Husband was certified to be legally blind subsequently, he had already been suffering acute vision loss prior to the making of the consent order. Furthermore, given the Husband's condition, it was only a matter of time before an application was made to the CPF Board for a payout to discharge the outstanding mortgage loan under the HPIS. Based on the terms of the Husband's HPIS policy, the mortgage would be fully discharged as a result. Therefore, his visual impairment and its consequential impact had already been taken into consideration when entering the consent order and was not a development occurring after the consent order.

16 The Husband contended that the material change in circumstances arose from three events, namely (a) his blindness; (b) the consequent HPIS payout; and (c) the total discharge of the outstanding mortgage loan. He explained that he depended on the rental proceeds from the Property to pay for his expenses as he was unable to work due to his blindness. He submitted that at the time the consent order was entered, he was not yet considered to be 'legally blind' and neither he nor the Wife envisaged that he would be entitled to a claim under the HPIS and that the CPF Board would approve full payout of the assured sum under the HPIS.

He then proceeded to arrive at his decision thus (at [17]):

> I agreed with the District Judge's decision to vary the consent order and was satisfied that there was material change in the circumstances after the consent order was made. Although the Husband had experienced visual loss prior to the consent order, it was uncertain at that time that there would be a payout by the CPF Board under the HPIS. A variation of the consent order to allow the Husband to purchase the Wife's share in the Property would not prejudice the interest of the Wife, given that she still retains the benefit of 60% of the value of the Property. This was unlike a case where a variation may affect the proportionate division of assets.

Although this court did not, as alluded to above, expressly consider s 112(4) itself, it did affirm this decision (see generally *Nalini (CA)*).

19 It should also be noted that the above approach by the court in *Nalini* was referred to in the (also) Singapore High Court decision of *Teh Siew Hua v Tan Kim Chiong* [2010] 4 SLR 123 ("*Teh Siew Hua*") (at [10]). Whilst *Teh Siew Hua* did emphasise (at [11]) the words "at any time" in s 112(4), this was (as the learned judge himself emphasised in the very paragraph referred to) in the more specific context of whether or not time-bars under ss 6(3) and 9(1) of the Limitation Act (Cap 163, 1996 Rev Ed) or the equitable defences of acquiescence or laches applied.

20 The following observation in the (also) Singapore High Court decision of *Lee Min Jai v Chua Cheow Koon* [2005] 1 SLR(R) 548 (at [5]) in the context of a consent order may also be noted:

> But [s 112(4)]… should not be construed as an invitation to revise the terms of a settlement merely so that they appear more equitable or will be, in fact, more equitable in the objective opinion of the court.

21 What, then, should be the scope of s 112(4)? Given the focal importance of this particular provision in the context of the present appeal, it is set out again as follows:

> The court may, *at any time it thinks fit*, extend, *vary*, revoke, or discharge *any order made under this section*, *and* may vary any term or condition upon or subject to which any such order has been made. [emphasis added]

22 In our view, although the language utilised in s 112(4) appears very broad (see, in particular, the phrase "at any time it thinks fit"), we reiterate the point made above (at [15]) that this provision must *have a limited operation only.* In this regard, notwithstanding (and perhaps even because of) the dearth of legislative background, the *context* in which s 112(4) has been enacted is of the first importance. In particular, a close analysis of s 112 as a whole leads us to the conclusion that s 112(4) was *not* intended to confer upon the court a jurisdiction writ large. Indeed, it was, in our view, intended to confer upon the court a *limited* flexibility to adjust, so to speak, an order for the division of matrimonial assets already made. Looked at in this light, it is our view that there ought to be *an outer limit* to the jurisdiction conferred under s 112(4): *In particular*,*once the order of court with respect to the division of matrimonial assets has been completely implemented or spent inasmuch as everything that is required to be done has been effected and the assets concerned have in fact been distributed to the parties concerned*,*the court does not have the power to revisit or reopen the order.* In this regard, although we have noted the *ostensibly* wide import of the phrase "at any time it thinks fit" in s 112(4) itself, the ambit of this phrase is *qualified by the phrase "any order made under this section"*. Put simply, the phrase "at any time it thinks fit" *itself* has *a timeframe*, *inasmuch as the court can*, inter alia,*vary an order for the division of matrimonial assets only in so far as the "order made" has not been implemented (and*,*therefore*,*is not spent).* In our

view, it could not have been the intention of the Singapore legislature to permit the court to interfere beyond this particular point. Indeed, s 112(4) appears to us to have been included to give, *inter alia*, *administrative* flexibility to the court so long as the order it has made has not been completely effected or implemented. To interpret s 112(4) in any broader fashion would be (as already observed above at [15]) to undermine the very finality which is one of the *raisons d'être* of s 112 itself. Indeed, we must assume that the various suggestions proffered to the Select Committee (see generally above at [12]–[14]) were in fact considered by the Committee, who nevertheless included s 112(4) in its final proposal to the Singapore legislature. Given the seriousness of the suggestions because of the perceived seriousness of the effect a wide interpretation of s 112(4) could have, we cannot imagine that the Select Committee would not have explained its decision to nevertheless include s 112(4) if it had thought that it would indeed have had such a serious effect. Indeed, as we have noted above (at [12]), Prof Leong thought the effect of s 112(4) so serious that she suggested deletion of that provision altogether.

23 However, even assuming that the order for the division of matrimonial assets made by the court has not been completely effected or implemented, there still remains the issue as to the *grounds* on which the court would vary an order already made. In our view, the fundamental importance of finality in the context of the division of matrimonial assets would also apply here. To this end, we are of the view that the court would make, *inter alia*, the necessary variations to an order for the division of matrimonial assets *only* where the order was *unworkable* or *has become unworkable* (*but before* it has been fully effected or implemented). We would however, point out, parenthetically, that the courts would not look favourably upon frivolous applications that would constitute an abuse of the process of court, which applications would be subject, *inter alia*, to the appropriate costs orders.

24 At this juncture, we note that the decisions in *Nalini* and *Nalini (CA)* are wholly consistent with the approach just enunciated. Indeed, it is significant, in this regard, to observe that the learned judge in *Nalini* noted (at [13]) that the property concerned "[had] *not been sold or otherwise dealt with yet*" [emphasis added]. In other words, the order of court had *not* yet been fully implemented or spent. As importantly, *the specific illustrations* referred to by the learned judge in *Nalini* (in agreement with the Singapore District Court decision in *CT v CU* [2004] SGDC 164 ("*CT*")) are instructive inasmuch as he noted that "the District Judge [in *CT*] held that parties would be able to apply to the court for a variation of a court order under s 112(4) of the Charter *at least in those situations where the court order was unworkable or did not provide for a particular situation or contingency which had subsequently arisen*" [emphasis added] (see also *Teh Siew Hua* (at [10] and [49])*.* In this regard, the invocation of s 112(4) is justified where a court order *is unworkable to begin with*, *or has become unworkable* as a result of new circumstances which have arisen.

25 We deal first with the situation where a court order has become unworkable as a result of new circumstances which have arisen. Where an order becomes unworkable in the literal sense of the word, *ie*, that it is a matter of practical impossibility to even implement it, it is fair and reasonable that the court is empowered under s 112(4) to make, *inter alia*, the necessary variations. In our view, however, "unworkability" in this context cannot be confined to its literal meaning, and there will be (albeit extremely limited) circumstances in which unworkability, understood in a substantive as well as purposive sense, will justify, *inter alia*, a variation of the order concerned by the court. Indeed, in *CT*, the variation to the order concerned was necessary and practical, given the delay in the sale of the matrimonial flat and the fact that, in the meantime, the value of that property had become so low that the sale proceeds would almost certainly not have been sufficient to pay off the outstanding housing loan, to refund both parties' Central Provident Fund accounts in full, as well as to pay the costs and expenses of the sale. As the original consent order did not provide for this contingency, a variation (as requested by the husband) was necessary, even though the order was not, literally speaking, unworkable and impossible to implement. We are of the view that where new circumstances

have emerged since the order was made which *so radically change* the situation so that to implement the order as originally made would be to implement something which is radically different from what was originally intended, this would amount to unworkability, and the court would make, *inter alia*, the necessary variations to deal with such unworkability.

26 The House of Lords decision of *Barder v Caluori* [1988] 1 AC 20 ("*Barder*") provides a useful illustration of the requisite level of radical change in circumstances which can amount to unworkability justifying the court's intervention pursuant to s 112(4). In *Barder*, the husband and wife in divorce proceedings came to an agreement on the terms of a consent order for ancillary relief under the Matrimonial Causes Act 1973 (c 18) (UK) and this was approved and recorded by a registrar of the court. In full and final settlement of all claims capable of being made against each other, the consent order provided, *inter alia*, that the husband was to transfer his interest in a house (which the wife and children had continued to live in after he had left them) to the wife. Just little over one month later, the most tragic of circumstances occurred – the wife unlawfully killed the two children and then committed suicide. At the time of the deaths, the consent order recorded by the registrar remained executory. The husband applied for the order to be set aside on the grounds (at 30) that "[t]he basis upon which the order was made has been fundamentally and unforeseeably altered by the circumstances of the death of the [wife] and of the two children". The House of Lords allowed the consent order to be set aside, and Lord Brandon of Oakbrook in delivering the leading speech explained their decision thus (at 40):

> The assumption was that for an indefinite period, to be measured in years rather than months or weeks, the wife and the two children of the family would require a suitable home in which to reside. That assumption was totally invalidated by the deaths of the children and the wife within five weeks of the order being made.

We would only emphasise – in no uncertain terms – that the possible instances under which a subsequent change in the circumstances can be considered radical enough to constitute unworkability must be very rare and very extreme, because as we have explained (see above at [15]), the nature of an order for the division of matrimonial assets demands that finality and certainty are of paramount importance.

27 Another instance (and a much less tragic one) of a radical change in circumstances amounting to unworkability may arise after the court makes an order under s 112 which is of a continuing nature. Section 112(3) of the Act empowers the court to "make all such other orders and give such directions as may be necessary or expedient to give effect to any order made under [s 112]", and it is conceivable that some of these orders or directions are of a continuing nature and may not be as quickly spent as an order for the sale of certain property and the distribution of the proceeds thereof. That such continuing orders are capable of, *inter alia*, variation is not inconsistent with our view that s 112(4) may be invoked only where the order in question has not been fully effected and implemented and thus spent. As an example, s 112(5)(*e*) of the Act empowers the court to postpone the sale of a property "until such future date or until the occurrence of such future event…". In this regard, a court may, for instance, in the interest of the needs of a child of the marriage of having a place to live in, order that a property not be sold until the passing of a certain number of years. If, however, the child moves out of the property before the said period has elapsed and no longer requires it as a place to live in, it may be expedient for the court to invoke s 112(4) to, *inter alia*, vary the order to permit the property to be sold forthwith. Where, in other words, there has been a change in circumstances *invalidating the very basis on which the court made a continuing order*, we are of the view that this amounts to a radical change in circumstances amounting to unworkability, and the court will be empowered to make the necessary variation (or indeed, extension, revocation or discharge) under s 112(4) to deal with such a change.

28 However, the learned judge's observation in *Nalini* (at [13]) to the effect that the court can invoke its power pursuant to s 112(4) in situations where the court order "did not provide for a particular situation or contingency which had subsequently arisen" cannot, with respect, justify the invocation of such power by the court – at least *in and of itself*; as we have emphasised above, such a subsequent event must so radically change the situation, such that to implement the order as originally made would be to implement something which is radically different from what was originally intended, in order for it to be considered as having become unworkable. On a related note, we should also add that, in light of (and consistently with) the analysis just set out, the learned judge's view in *Nalini* (at [14]) to the effect that a "material change in the circumstances" (which is the statutory ground for the variation of an order to pay maintenance) would suffice to trigger, *inter alia*, a variation pursuant to s 112(4) sets, with respect, too low a threshold. Whilst it is true that a radical change in circumstances sufficient to cause an order to become unworkable would necessarily entail a "material change in the circumstances", the converse does not necessarily follow.

29 We now deal with the situation where the court order is unworkable *ab initio*. As we have stated above (at [23]), s 112(4) may also be justifiably invoked to, *inter alia*, vary an order for the division of matrimonial assets where such order was unworkable to begin with. In *CT* itself, the learned District Judge did observe (at [12]) that "[t]here must surely be a way for the court to *plug any gap or lacuna* in the ancillary matters order" [emphasis added]. This is also consistent with the view (expressed above at [22]) that s 112(4) was also intended to provide for what are, in substance, purely administrative matters. Such administrative matters may include the functionality or, more accurately, lack of functionality, or the literal unworkability of the order concerned to begin with (*cf* the decision of this court in *Chia Chew Gek v Tan Boon Hiang and another appeal* [1997] 1 SLR(R) 383, which was, however, decided prior to the enactment of s 112(4)). Such unworkability might be relatively minor, but would still give good reason to the court to, *inter alia*, vary the court order to ensure it can be implemented. Likewise, where an order is substantively unworkable *ab initio* because of a *fundamental* misunderstanding at the time the order was made, this will justify the invocation of the court's powers. This, however, should not be taken as an invitation to re-open the merits of the case; any such *ab initio* substantive unworkability must be as a result of a fundamental misunderstanding apparent on the face of the order.

30 One other situation which *might* justify the court in, *inter alia*, varying an order for the division of matrimonial assets is fraud. Indeed, this might justify action on the part of the court even after the order concerned has been implemented. However, it bears emphasising that the standard of proof for fraud is a very high one and is, *ex hypothesi*, not easy to satisfy. More importantly, applications which amount to an abuse of the process of court will not be tolerated and will be the subject of the appropriate costs orders. We note, further, that this court (in *Nalini (CA)*) also emphasised (at [18]) that the invocation of s 112(4) should be balanced against the fundamental need for finality in so far as the division of matrimonial assets is concerned; in this regard, it was observed thus (*ibid*):

> Parties should not be allowed to continue to make claims indefinitely for benefits received by the other party after the division of matrimonial assets has been completed. *There is a need for finality*,*unless fraud is shown.* [emphasis added]

31 We also take the opportunity to note, in a related vein, that, in so far as *consent orders* are concerned, this court in *AOO* observed (especially at [13]–[14]) not only the fact that the legal effect of such orders is derived from the relevant court order but also (at [17]) that an absence of full and frank disclosure of material facts by one of the parties might result in a consent order being set aside by the court – although whether or not a consent order could be set aside on other grounds was a point left open by the court in *AOO* (see at [22]). Interestingly, this court also cited (at [17]) – in the context of the court setting aside a consent order on the ground of there being an absence

of full and frank disclosure – the view expressed by Lord Brandon of Oakbrook in the House of Lords decision of *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424 (at 445) to the effect that "it will only be in cases when the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is *substantially different* from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good" [emphasis added]. Looked at in this light, there is some correlation (and *overlap*) with the approach centring on the principle of a radical change in circumstances amounting to unworkability (set out above at [25]) that do not concern fraud as such (although we would note that most cases of material non-disclosure would typically involve an element of fraud) in so far as a high threshold has to be met before the court should intervene and thus deviate from the very important consideration of finality in litigation. Finally, we have already noted that this court left open (in *AOO* (at [22])) the issue as to whether or not a consent order could be set aside on grounds other than the absence of full and frank disclosure of material facts by one of the parties. As this particular issue has not arisen directly for decision by the court in this appeal, we also decline to say any more about it.

32 In a *yet further* context, the very recent Singapore High Court decision, in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng,deceased) and another* [2012] SGHC 197 ("*Wee Chiaw Sek Anna*"), considered (and rejected), *inter alia*, allegations of fraudulent misrepresentations purportedly made by the (deceased) husband to his wife even *before* the parties were divorced (which is not, of course, the situation before this court). We pause to also observe – parenthetically – that the more general issue (which is also not before this court and which did not appear to be considered expressly in *Wee Chiaw Sek Anna*) as to when the court can exercise its power to make an order with regard to the division of matrimonial assets appears to still be a subject of some controversy (see, for example, *Chan* at pp 581–582, and the authorities cited and discussed therein).

33 Turning to the facts of the present appeal, we agree with the Judge's decision. It is clear, in our view, that the change in circumstances which the Husband prayed in aid fell far short of the radical change in circumstances referred to above (at [25]) and did not amount to the order becoming unworkable. Even if business failure and a loss of income amounted to a "material change in the circumstances" sufficient to justify a variation of an order for maintenance, they did not suffice in the present case to justify the invocation of s 112(4) in so far as the division of matrimonial assets was concerned. It should also be noted that the order concerned was the result of a *consent order* between the Husband and the Wife (and see generally above at [15]). Indeed, the Husband was, in the final analysis, merely attempting to obtain a further amount because the matrimonial asset concerned was now worth more than what the parties had originally thought (see above at [3]). Such attempts to undermine the finality of orders with regard to the division of matrimonial assets are wholly undesirable as well as unmeritorious and are, indeed, the very antithesis of the rationale underlying such orders in the first place, and aptly demonstrate the dangers of a wide interpretation of s 112(4). If, indeed, he had suffered a loss of income which amounted to a material change of circumstances, his proper course should have been to seek to vary the order for the payment of maintenance, rather than to seek to reopen the order with regard to the division of matrimonial assets.

34 In the circumstances, we affirmed the Judge's decision on this particular issue.

Issue 2

35 The second issue in this appeal between the parties concerned the question of whether there was any agreement to have the Wife's maintenance varied to a lump sum of $750,000 which justified

the Judge ordering the same to be paid out of the Husband's share of the sale proceeds of the Property on that basis. We found that there was – in point of fact and having regard to the available evidence – no such agreement. The Wife's argument on appeal was that the figure of $750,000 was proposed by the Husband and repeated throughout the proceedings below, and so it could be inferred that there was an agreement to give the Wife a lump sum maintenance of $750,000 for herself. Upon a perusal of the relevant portions of the Record of Appeal, however, we did not find this argument convincing. In the proceedings below, the Husband had prayed for a variation of the order for the division of assets to a proportion more favourable to himself and at the same time for a sum of $750,000 *to be paid out of the Wife's share* as lump sum maintenance. There was *nothing* to suggest that the Husband had *agreed* to the lump sum payment of maintenance being ordered against him *to be paid from his share* of the proceeds. In the circumstances, we allowed the appeal on this particular issue. We also note that the confusion in this case was caused by the solicitors' failure to appreciate that the division of matrimonial assets and an order to pay maintenance are two distinct powers of the court. By conflating what should have been two separate applications to vary the two orders into one composite application, it became difficult to comprehend what was actually being sought.

36 This however, left the question of the appropriate amount of maintenance payable to the Wife as regards the Husband's application for variation unanswered. We therefore ordered that the issue be remitted to the High Court to be decided by the Judge in light of our decision on the division of the matrimonial assets. We made this order rather than to leave the Husband to make a fresh application to vary in the District Court as a matter of practicality, as the Judge was already familiar with the facts of this case. We also ordered a stay on the payment by the Husband of the maintenance for the Wife and the children, except with regard to the payment of the children's basic school fees during the interim period (which fees are to be borne by the parties on an equal basis).

37 After the hearing before this court, the parties wrote in to seek directions over the remit of the Judge to deal with issues relating to the appropriate order for maintenance. In 2011, the Wife had, before this appeal, taken out a summons in the District Court applying to vary the order for maintenance for herself and for the children. The Wife took the sensible view of having all these matters heard together before the Judge in the High Court. The Husband disagreed, and took the position that the Wife's application should be separately heard in the District Court. We were of the view that it would be inexpedient to have the two applications heard separately, especially when they both relate to the same issue, *viz*, the appropriate amount of maintenance the Husband should pay for the Wife and the children. The evidence with regard to both applications would largely be similar if not the same, *ie*, demonstrating whether or not there had been a "material change in the circumstances" as required under s 118 of the Act. We accordingly directed that the summons taken out by the Wife be heard together with the Husband's application before the Judge in the High Court.

Conclusion

38 For the reasons set out above, we dismissed the Husband's appeal against the Judge's decision refusing the variation of the terms of division of the matrimonial assets in the consent order between him and the Wife, but allowed the Husband's appeal against the Judge's order of a lump sum maintenance of $750,000 to be paid to the Wife out of the Husband's share of the sale proceeds. We also lifted any stay on the distribution of the sale proceeds of the Property, ordering that all sale proceeds be released to the parties in accordance with the division made under the consent order entered into between the parties. In the circumstances, we were also of the view that there be no order as to costs both here and in the court below. The usual consequential orders would apply.

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