Tan Ah Thee And Another (administrators of the estate of Tan Kiam Poh (alias Tan Gna Chua), deceased) v Lim Soo Foong
[2009] SGHC 101

Case Number : Suit 775/2008, RA 48/2009, 49/2009

Decision Date : 27 April 2009

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Julian Tay and Alma Yong (Lee & Lee) for the plaintiffs; Nicholas Narayanan (Nicholas & Co) for the defendant

Parties : Tan Ah Thee And Another (administrators of the estate of Tan Kiam Poh (alias Tan Gna Chua), deceased) — Lim Soo Foong

Courts and Jurisdiction – High court – Power – Whether High Court possessed power to make bare declarations of right

Family Law – Void marriage – Strangers to marriage alleging that wife exercised undue influence over husband to procure marriage – Whether marriage was void

Family Law – Void marriage – Strangers to marriage alleging that wife married husband to gain share in husband's estate – Whether marriage was void

Family Law – Voidable marriage – Strangers to marriage alleging that husband and wife never consummated marriage – Husband had since passed away – Whether marriage was voidable – Whether marriage could be declared void on application by strangers to marriage

Family Law – Voidable marriage – Strangers to marriage alleging that wife exercised undue influence over husband to procure marriage – Whether marriage was voidable – Whether marriage could be declared void on application by strangers to marriage

27 April 2009 Judgment reserved.

Judith Prakash J:

1 These are appeals by both parties against a decision made by the learned Assistant Registrar, Ms Chung Yoon Joo (the "AR"), in respect of the defendant's application *vide* Summons 5225 of 2008 ("SUM 5225/2008") to strike out the plaintiffs' claim. By this action, the plaintiffs as administrators of the estate of the Tan Kiam Poh @ Tan Gna Chua ("the deceased") are seeking a declaration that there was no valid marriage between the deceased and the defendant.

Background

The plaintiffs' case

2 The following recital of the background facts is taken from the statement of claim and the affidavit filed on behalf of the plaintiffs. The defendant does not accept that all the facts are correct but her rebuttals are not relevant for present purposes. As the appeals concern a striking out application, I have to proceed on the basis that the facts as alleged by the plaintiffs are correct.

3 The deceased was married twice. His first wife was one Mdm Koh Siew Kim @ Koh Hoon Eng ("Mdm Koh"). This marriage ended with Mdm Koh's death on 20 November 1994. During their marriage, the deceased and Mdm Koh had six children ("Mdm Koh's children"). The plaintiffs, who are two of

Mdm Koh's children, portrayed the deceased's relationship with Mdm Koh as loving and the family as a close-knit one. After Mdm Koh died, the deceased became depressed and his health degenerated rapidly.

4 Unknown to the plaintiffs, the deceased had previously had an extramarital relationship with the defendant, and, as a result, the defendant had given birth to their son ("TGC") in 1952. This fact was only revealed to the plaintiffs during Mdm Koh's wake. The defendant and TGC then sought to re-establish their relationship with the deceased.

5 Some time thereafter, the defendant and TGC moved into the deceased's family home which, at that point of time, was solely occupied by the deceased. The defendant and TGC then systematically took control of the person and property of the deceased to the exclusion of Mdm Koh's children. The defendant and TGC also unduly restricted the access of Mdm Koh's children to the deceased and by the exercise of undue influence caused the deceased to transfer various properties and assets to them.

6 The plaintiffs allege that on 11 March 1996, the defendant, with the assistance of a lawyer, caused a marriage to be solemnised between herself and the deceased. At that point of time, he was 81 years old, wheel-chair bound and suffering from Parkinson's disease. On or about 5 January 2000, TGC caused the deceased to execute a will which made provision for the defendant and TGC only ("the 2000 Will"). Mdm Koh's children were entirely excluded from the 2000 Will. The deceased passed away on 25 July 2000 at the age of 85.

7 On 16 October 2003, the plaintiffs commenced legal proceedings to seek, *inter alia*, a declaration that the 2000 Will was invalid. On completion of the hearing, the High Court granted this declaration and ordered that the estate of the deceased be distributed according to the provisions of the Intestate Succession Act (Cap 146, 1985 Rev Ed) ("ISA"). It is to be noted that under s 7 of the ISA, the defendant, as spouse of the deceased, would be entitled to one-half of the deceased's estate.

8 Pursuant to the order made by the High Court, the plaintiffs then applied for and obtained Letters of Administration to administer the deceased's estate. The Grant of Letters of Administration was extracted and issued to the plaintiffs jointly on 17 January 2008.

9 In the present action, the plaintiffs pray for the following reliefs:

(a) A declaration that there was no valid and subsisting marriage between the deceased and the defendant;

(b) Further and/or in the alternative, a declaration that the marriage between the deceased and the defendant is null and void.

As the plaintiffs' counsel candidly admitted in his oral submissions before the AR, the "[w]hole purpose of [the] action is to invalidate the marriage so that [the] defendant would have no share in the estate of [the] deceased."

10 In their statement of claim, the plaintiffs provide three bases for granting the declarations as sought. First, it is asserted that the marriage was voidable under section 106(a) of the Women's Charter (Cap 353, 1997 Rev Ed) (the "Charter") as it had never been consummated. Second, the court is urged to find the marriage void because the marriage was procured by the actual or presumed undue influence of the defendant over the deceased. The third contention is that the marriage ought

to be found void for being a sham marriage against public policy as the defendant's sole or predominant motive in registering the marriage was to revoke the deceased's will.

11 By Summons 5225/2008, the defendant applied to strike out the plaintiffs' Writ of Summons and Statement of Claim, pursuant to Order 18, rule 19(1)(a) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules"), on the basis that the statement of claim disclosed no reasonable cause of action.

The AR's decision

12 After considering the arguments raised by both parties, the AR struck out the plaintiffs' action insofar as it was based on non-consummation as she was of the view that only parties to the marriage may seek to avoid a voidable marriage on the ground of non-consummation. However, she refused to strike out the other bases put forward by the plaintiffs to support their claim that the marriage was void.

13 The plaintiffs have appealed against the first part of the AR's decision while by her appeal, the defendant is seeking to strike out the whole action.

Submissions, analysis and decision

14 As is well known, O 18 r 19(1)(a) of the Rules empowers the court to, *inter alia*, strike out any pleading which discloses no reasonable cause of action or defence. The standard which must be satisfied before the court can exercise this power was clearly set out in the Court of Appeal case of *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin* [1998] 1 SLR 374. In that case, Yong Pung How CJ held as follows:

> 18 In general, it is only in plain and obvious cases that the power of striking out should be invoked. This was the view taken by Lindley MR in *Hubbuck & Sons v Wilkinson, Heywood and Clark* [1899] 1 QB 86 at p 91. It should not be exercised by a minute and protracted examination of the documents and facts of the case in order to see if the plaintiff really has a cause of action. The practice of the courts has been that, where an application for striking out involves a lengthy and serious argument, the court should decline to proceed with the argument unless, not only does it have doubts as to the soundness of the pleading but, in addition, it is satisfied that striking out will obviate the necessity for a trial or reduce the burden of preparing for a trial.
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> …
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> 21 The guiding principle in determining what a "reasonable cause of action" is under O 18 r 19(1)(a) was succinctly pronounced by Lord Pearson in *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094. A reasonable cause of action, according to his lordship, connotes a cause of action which has some chance of success when only the allegations in the pleading are considered. As long as the statement of claim discloses some cause of action, or raises some question fit to be decided at the trial, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out. Where a statement of claim is defective only in not containing particulars to which the defendant is entitled, the application should be made for particulars under O 18 r 12 and not for an order to strike out the statement.

Of course, insofar as the plaintiffs here are merely seeking declarations from the court, they, strictly speaking, do not need to plead a cause of action. They must, however, provide a legal basis on which the declarations can be made. If the legal basis suggested is so unsustainable that it is plain and obvious that the plaintiffs' case has no chance of success, the plaintiffs' statement of claim may be

struck out.

15 At this point, the preliminary issue of whether the High Court in the exercise of its general jurisdiction rather than in the exercise of its matrimonial jurisdiction possesses the power to make the declarations sought by the plaintiffs must be addressed. In *Lawrence Au Poh Weng v Annie Tan Huay Lian*, [1972] 2 M.L.J. 124, the High Court decided that it had no jurisdiction to make any of the declarations of marital status sought by the parties. The first and second plaintiffs there both sought declarations that the first plaintiff was not married to the defendant and that the plaintiffs were, instead, married to each other. The defendant, on the other hand, sought a declaration that she was married to the first plaintiff. No substantive reliefs were sought. Winslow J. was unable to pin point a statutory provision which gave him the express power to grant a bare declaration. The judge found no provision in either the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA") or the Charter, as they stood then, which gave the High Court such a jurisdiction. The earlier cases of *Then Kang Chu v Tan Kim Hoe*, [1926] SSLR 1 and *Florence Mozelle Meyer v Issac Manasseh Meyer*, [1927] SSLR 1 had come to a similar conclusion on the basis of the legislation then in force. In other cases, for example, *Moh Ah Kiu v Central Provident Fund Board* [1992] 2 SLR 569 ("*Moh Ah Kiu*"), the issue was not expressly argued and all parties took the view that the court could grant the declaration asked for.

16 The plaintiffs argued and I agree that whatever may have been the previous position, since the 1993 amendments to the SCJA, it has been plain that the High Court has the power to make declarations of right. This power is provided for in s 18, read together with the First Schedule, of the SCJA. The relevant provisions read as follows:

> **Powers of High Court**
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> 18. – (1) The High Court shall have such powers as are vested in it by any written law for the time being in force in Singapore.
>
> (2) Without prejudice to the generality of subsection (1), the High Court shall have the powers set out in the First Schedule.
>
> **FIRST SCHEDULE**
>
> **Reliefs and remedies**
>
> 14. Power to grant all reliefs and remedies at law and in equity, including damages in addition to, or in substitution for, an injunction or specific performance.

17 It was decided in *Salijah bte Ab Lateh v Mohd Irwan Abdullah*, [1996] 1 SLR 63 ("*Salijah*") (at [16]), that the above provisions allow the court to make binding declarations of right whether or not any consequential relief is or could be claimed. However, this does not mean that the court must, in all cases where a declaration is sought and the facts upon which the declaration is based are correct, grant the declaration as requested. There are several factors to be considered. In this regard, I quote *Salijah* (at [17]) as follows:

> 17 First, the jurisdiction of the court to make a declaration of right is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation. Secondly, the remedy being a discretionary one, it will not be granted to a plaintiff if it would not give him 'relief' in any real sense, ie relieve him from any liability or disadvantage or difficulty. Thirdly, the power to make a declaratory judgment is confined to matters which are justiciable in the High

Court. Finally, it has been held that there is nothing in O 15 r 16 which enables the court to make a declaration in a matter in which its jurisdiction is excluded by a statute which gives exclusive jurisdiction to another tribunal.

In *Salijah*, I held that it was not justiciable for me to make the declaration sought there as the plaintiff had already exercised her legal rights in the Syariah Court.

18 As such, the cases cited in [15] are no longer applicable today and the High Court does possess the power to make declarations of the kind sought by the plaintiffs in the present case. I am of the view, however, that the bases given by the plaintiffs to persuade the court to make the declarations are not justiciable and therefore it is plain and obvious that the plaintiffs' case has no chance of success. As such, the plaintiffs' statement of claim should be struck out pursuant to O 18, r 19(1)(a) of the Rules. My reasons are set out below.

Relevant provisions of the Charter

19 In my judgment, the Charter provides a complete code on the law applicable to marriages in Singapore apart only from Muslim marriages which have their own separate regime. Accordingly, the status of any non-Muslim marriage that has been celebrated in Singapore has to be judged solely in accordance with the provisions of the Charter and there is no room for the court to apply any other standard. This is clear from the history of matrimonial legislation in Singapore and from the way in which the Charter itself has developed. In this connection, the preamble to the Charter is relevant. It declares that the purposes of this legislation are, among other things, "to provide for monogamous marriages and for the solemnisation and registration of such marriages" and "to amend and consolidate the law relating to divorce". Thus, the intention was to cover every aspect of a monogamous marriage solemnised in Singapore.

20 My decision is based entirely on the meaning and effect of certain relevant provisions of the Charter and it is therefore convenient at this stage to set out those provisions in full. There are other relevant sections but to avoid too much citation, those will be referred to separately in the course of the judgment. The main provisions are:

Continuance of marriage

7. Every marriage solemnized in Singapore after 15th September 1961, other than a marriage which is void under the provision of this Act, shall continue until dissolved –

(a) by the death of one of the parties;

(b) by order of a court of competent jurisdiction; or

(c) by a declaration made by a court of competent jurisdiction that the marriage is null and void.

Writ for nullity of marriage

104. Any husband or wife may file a writ claiming for a judgment of nullity in respect of his or her marriage.

Grounds on which marriage is void

105. A marriage which takes place after 1st June 1981 shall be void on the following grounds only:

(a) that it is not a valid marriage by virtue of sections 3 (4), 5, 9, 10, 11, 12 and 22; …

Grounds on which marriage is voidable

106. A marriage which takes place after 1st June 1981 shall be voidable on the following grounds only:

(a) that the marriage has not been consummated owing to the incapacity of either party to consummate it;

(b) …

(c) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise.

(d) …

(e) …

Marriage governed by foreign law

108. Where, apart from this Act, any matter affecting the validity of a marriage would fall to be determined (in accordance with the rules of private international law) by reference to the law of a country outside Singapore, nothing in section 104, 105 or 106 shall –

(a) preclude the determination of the matter as aforesaid; or

Effect of judgment of nullity in case of voidable marriage

110. - …

(2) A judgment of nullity granted after 1st June 1981 on the ground that a marriage is voidable shall operate to annul the marriage only as respects any time after the judgment has been made final, and the marriage shall, notwithstanding the judgment, be treated as if it had existed up to that time.

Non-consummation

21 The plaintiffs' first basis for avoiding the marriage between the defendant and the deceased is that the marriage was never consummated since the deceased did not have the capacity to consummate it. As such, the plaintiffs argue that the marriage is voidable under s 106(a) of the Charter and should be declared void.

22 The above argument is bound to fail. First, it is important to emphasise the distinction between void and voidable marriages. The classical explanation of this distinction was given by Lord Green M.R. in *De Reneville v De Reneville*, [1948] 1 All E.R. 56 who said:

The substance, in my view, may be thus expressed: a void marriage is one that will be regarded

> by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it: a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.

Similarly, D Tolstoy in his article *Void and Voidable Marriages*, [1964] 27 MLR 385, explained:

> There is now a clear distinction between a void and a voidable marriage. A void marriage is one which, owing to the presence of an impediment at the time of the ceremony, will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it; the decree in the case of a void marriage is in essence a declaration that no marriage had come into existence and any person having sufficient interest in a declaration of nullity can petition for a decree at any time, even after the death of one or both parties. A voidable marriage is one that will be regarded by every court as a valid, subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction, which can be done only at the instigation of one of the parties during the lifetime of both parties. Thus, in the case of a void marriage, no valid marriage ever comes into existence and the parties to it never acquire the status of husband and wife, whereas in the case of a voidable marriage the parties acquire that status and the marriage is valid unless and until annulled during the joint lives of the parties at the instance of one of them. It follows, therefore, that if one party dies without a decree of nullity having been pronounced the voidable marriage cannot thereafter be questioned, but is for ever valid.

23 The ground of non-consummation is a ground for a voidable marriage under s 106 of the Charter and it is not a ground for finding a marriage void under s 105 thereof. Therefore, assuming the plaintiffs' allegation of non-consummation is true, that allegation would only render the marriage between the defendant and the deceased a voidable one.

24 Sections 104 and 110(2) of the Charter allow a voidable marriage to be declared prospectively void by the granting of a judgment of nullity via the court's matrimonial jurisdiction. They make it plain that until such judgment is granted, the marriage is valid. That would mean that a marriage that has not been consummated would have the status of a valid marriage from the time of solemnisation until such time as it is terminated by one of the methods set out in s 7 of the Charter for terminating a marriage which is not void. In the present case, however, the plaintiffs are attempting to bypass that provision by changing the status of the marriage between the deceased and the defendant from a voidable one (if it was indeed not consummated due to incapacity as one must presume for the purposes of the present proceedings) to a marriage that is void by utilising the court's declaratory jurisdiction. The argument seems to be that if you are not a party to the marriage, you need not use the matrimonial jurisdiction for the purpose of avoiding a marriage and therefore you will not be restricted by the way grounds for a void marriage and grounds for a voidable marriage are categorised by ss 105 and 106 respectively.

25 Any one having an interest in the existence or non-existence of a marriage may seek a declaration of the validity of the marriage. This is demonstrated by the case of *Moh Ah Kiu* which I referred to in [15] above. In *Moh Ah Kiu*, the declaration was sought by the Central Provident Fund Board which needed to know whether the purported marriage between Mdm Moh and her deceased "husband" was valid so that it could decide whether to allow her application to the Board to re-register the Housing and Development Board flat then registered in their joint names, in her sole name as the surviving joint owner. The court dealt with the application on the merits and no point was taken that the Central Provident Fund Board as a stranger to the marriage was not entitled to ask for

such a declaration.

26 However, while the declaratory jurisdiction of the court may be used to declare whether a marriage is valid or not, it cannot be used to *alter* the status of the marriage. Such a decision may only be made by a court acting on the petition of either party to the marriage, via its matrimonial jurisdiction. The court, pursuant to its declaratory jurisdiction, may declare that a marriage was void *ab initio* on one of the grounds provided for under section 105 of the Charter. The declaratory jurisdiction of the court allows a statement of a right only and does not extend so far as to allow the court to declare a voidable marriage prospectively void since, by doing so, the court would be altering the status of the marriage and altering a right rather than simply re-stating it.

27 Accordingly, in the present case which invokes the declaratory rather than the matrimonial jurisdiction, the court has no power to grant the plaintiffs' application for the voidable marriage between the deceased and the defendant to be made prospectively void. This case is unlike *Moh Ah Kiu* where the court was requested to ascertain the state of the marriage. Here, the court is being asked to alter the status of the marriage.

28 This leads me to the second point. The plaintiffs have taken the course that they have because they know that they cannot utilise the court's matrimonial jurisdiction to obtain a judgment of nullity. Under the Charter which is the legislation that fleshes out the court's matrimonial jurisdiction conferred by the SCJA, only parties to the marriage may have access to such jurisdiction and seek a judgment of nullity. This is plain from s 104 of the Charter. Section 104 does not permit a stranger to the marriage to seek a judgment of nullity.

29 Counsel for the plaintiffs cited three cases to "show that matrimonial proceedings for invalidation of a marriage have been maintained by persons other than the parties to the marriage". Those cases are *Re Estate of Liu Sinn Minn*, [1975-1977] SLR 81, *Re Estate of Pang Soo Ho*, [1982-1983] SLR 278 and *Arpinya Rongchotiawattana v Wee Oh Keng*, [1998] 1 SLR 520. In all those cases, however, the plaintiffs were not seeking to invalidate a marriage to which they were not parties. Rather, they were merely seeking to ascertain the validity of a certain marriage. In so doing, those strangers to the marriage were not using the matrimonial jurisdiction of the court but the court's declaratory jurisdiction. Those cases do not stand for the proposition that strangers to the marriage may have access to the court's matrimonial jurisdiction to obtain a judgment of nullity in respect of that marriage.

30 In any case, it should be noted that even if strangers to a marriage, like the plaintiffs, may utilise the court's matrimonial jurisdiction to obtain a judgment of nullity, this will not help the plaintiffs' cause at all. This is because, pursuant to s 110(2) of the Charter, a judgment of nullity in respect of a voidable marriage only operates from the time the judgment is made final. At the time of the deceased's death, no judgment of nullity existed. Thus, the defendant, as the deceased's wife immediately prior to his death, qualified as his "spouse" within the meaning of s 7 of the ISA. Hence, the defendant would still be entitled to her half share of the deceased's estate even if a judgment of nullity on the basis of a voidable marriage could be granted on the application of the plaintiffs.

31 Finally, it is undisputed that, prior to the present proceedings, the marriage between the deceased and the defendant had already been dissolved by the death of the deceased. This is provided for in s 7 (a) of the Charter which as reproduced above provides that a valid marriage continues until it is dissolved by, *inter alia*, the death of one of the parties to it. That being the case, the marriage having terminated on the deceased's death is no longer in existence and cannot, obviously, be declared to be void for the future.

Lack of valid consent by the deceased

32 On behalf of the plaintiffs, it was next argued that the deceased had never validly consented to the marriage between himself and the defendant. The plaintiffs averred that the marriage was procured by the actual or presumed undue influence of the defendant over the deceased. Hence, the marriage should be declared void.

33 As with non-consummation, lack of valid consent is, under the Charter, a ground on which a marriage may be found voidable. This is provided for by s 106(c).

34 Accordingly, the plaintiffs' submission that, because there was a lack of valid consent, the marriage was voidable and should be declared void must fail for the same reasons enumerated in respect of the non-consummation argument.

35 The plaintiffs' arguments in respect of this point did not end there, however. The plaintiffs went on to submit that the marriage between the deceased and the defendant should be declared void because the marriage was void *ab initio*, and not merely voidable, for lack of valid consent. This position, of course, does not accord with a plain reading of s 105 of the Charter. In my judgment, s 105 which sets out the grounds on which a marriage is void is an all exhaustive provision and no marriage in Singapore which has been solemnised after 1 June 1981 can be declared void on the basis of any matter which is not included in or referred to by s 105. It is particularly significant that the operative words of the section are "**shall** be void on the following grounds **only**" (emphasis added). It is also relevant in this connection that the position is different for marriages that were not solemnised here and are governed by a foreign law. In those instances as s 108 of the Charter makes plain, ss 105 and 106 do not apply and whether such a marriage is void or not must be determined in accordance with the relevant foreign law.

36 The sub-sections of s 105(a) deal with the prohibition against polygamous marriages, marriage below the minimum age, marriage of persons within prohibited degrees of relationship, marriage of persons of the same sex, the marriage of two persons of the Muslim religion under the provisions of the Charter and marriages not solemnized on the authority of a valid marriage licence. Lack of valid consent has not been made a ground for finding a marriage void under s 105(a) but has been made a ground for finding the marriage voidable under s 106(c).

37 In spite of the use of the phrase "shall be void on the following grounds only" in s 105, counsel for the plaintiffs submitted that the grounds provided for in that section are not exhaustive of the grounds on which a marriage may be found void. In support of this proposition, he cited Prof Tan Cheng Han's views as expressed in his book, *Matrimonial Law in Singapore and Malaysia*, (Butterworths Asia: 1994). There, Prof Tan discussed the proposition that two local cases may be used to demonstrate that s 105 (then numbered as s 99) is not exhaustive. The two cases are *Lim Ying v Eric Hiok*, [1992] 1 SLR 184 ("*Lim Ying*") and *Valberg Kevin Christopher v Heran binte Abdul Rahman*, unreported (Originating Summons No. 1274 of 1990) ("*Valberg*"). Prof Tan opined (at p. 57-58):

> On the current state of the law, it appears that section 99 of the Charter is not regarded as exhaustively providing for the grounds on which a marriage is null and void. This does not appear to be consistent, however, with the use of the word 'only' in section 99. It has been suggested that it is possible for the court to take the view that the exclusivity of section 99 only goes towards determining the circumstances when a decree of nullity in respect of a void marriage may be sought in Singapore. After all, section 99 follows upon section 98 which states that '[a]ny husband or wife may present a petition to the court praying for a decree of nullity in respect of

his or her marriage'. **It may be that section 99 was not intended to exhaustively provide for all the circumstances that might render a marriage void whenever the matter is put in issue in *proceedings* instituted other than by way of a petition for a decree of nullity. In other words, parties to a marriage can only petition for a decree of nullity on the grounds provided for in section 99 of the Charter. On the other hand, if only a bare declaration is being sought, section 99 would not limit the power of the court to declare a marriage void in respect of a defect, although the defect is not one which is specifically provided for in section 99**. Originating Summons No. 1274 of 1990 provides some support for this view where the learned judge granted a declaration that the marriage was null and void as the parties were both Muslims. The case of *Lim Ying v Hiok Kian Ming Eric* suggests, however, that even this qualification is unnecessary as the judge held that the petitioner was entitled to a decree of nullity on the basis that the parties were both of the female sex. It is submitted that the case is not conclusive, however, as the difficulties involved with section 99 do not appear to have been raised before his Honour.

[Emphasis added.]

Likewise, counsel for the plaintiffs argued that the court's jurisdiction to declare a marriage void is not limited to the grounds provided in s 105 of the Charter.

38 I do not accept this contention. There are two reasons for my rejection of it. First, in respect of the assertion that lack of consent can render a marriage void despite the provision that makes it voidable, it is clear that the jurisdiction of the court cannot be used to override a statutory rule that deals with the exact situation at hand, except, perhaps, in the most exceptional cases. In *Samsung Corp v Chinese Chamber Realty*, [2003] 3 SLR 656, it was suggested that the inherent jurisdiction of the High Court allowed the court to go against the clear words of the Rules. The High Court, however, disagreed and held (at [14]) as follows:

> The court undoubtedly has inherent powers to make such orders as may be necessary to prevent injustice or to prevent an abuse of the process of the court. However, where a matter of procedure is covered by the Rules of Court and those rules are clear, the court should be most circumspect in declining to follow those rules. Failure to follow the clear directions in the rules is tantamount to the court re-writing the rules to fit the "justice" of each case. Such an approach will introduce uncertainty into court procedures and is undesirable.

Similarly, in *Wellmix Organics (International) Pte Ltd v Lau Yu Man*, [2006] 2 SLR 117, Andrew Phang J stated (at 81]):

> …if there is an existing rule (whether by way of statute or subsidiary legislation or rule of court) already covering the situation at hand, the courts would generally *not* invoke its inherent powers under O 92 r 4, save perhaps in the most exceptional circumstances (see, for example, the Singapore Court of Appeal decision of *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1999] 1 SLR 737 at [27] and the Singapore High Court decision of *Tan Kok Ing v Tan Swee Meng* [2003] 1 SLR 657). It is commonsensical that O 92 r 4 was not intended to allow the courts *carte blanche* to devise any procedural remedy they think fit. That would be the very antithesis of what the rule is intended to achieve. The key criterion justifying invocation of the rule is therefore that of "need" – in order that justice be done and/or that injustice or abuse of process of the court be avoided.
>
> [Emphasis added.]

39 If that is so with regard to the provisions of the Rules, a piece of subsidiary legislation, the principle applies with even more force in respect of the Charter. Prior to 1981, lack of valid consent rendered a purported marriage void. In 1980, Parliament amended the Charter. Among other things, the amending legislation specifically changed the effect of a lack of consent. From the time the amendment came into effect in 1981, lack of valid consent rendered a marriage voidable, not void. No reasons for this rather radical change can be ascertained from the parliamentary debates on the 1980 Amendment Act. It is likely that Parliament was minded to follow the development of the law in England where the Nullity of Marriage Act 1971 made lack of valid consent a voidable ground. The legislation implemented the recommendations of the English Law Commission (No. 33 of 1970) which gave the following reasons (in summary) for their recommendation:

(i) making a marriage void for lack of valid consent would not allow the party who did not give valid consent to the marriage to rectify the defect in the marriage even if he/she wished to continue with the marriage;

(ii) whether there was lack of valid consent must be investigated by the court and this gave the marriage the character of a voidable marriage; and

(iii) parties who, although unable to give valid consent due to insanity or lack of mental capacity, went through a ceremony of marriage, would not be adversely affected by the change as nullity proceedings on their behalf could be instituted by a third party acting as their next friend.

In making a conscious choice to classify lack of valid consent as a ground to hold a marriage voidable, Parliament must be taken to have examined and accepted the consequences of doing so. The court is bound by the change in the law so wrought by Parliament and since the amendment no longer has the power to hold or declare a marriage void on the basis of lack of valid consent.

40 The English case of *In re Roberts, Decd*., [1978] 1 WLR 653 ("*re Roberts*"), supports the views I have expressed above as to the effect of the change in the law on the powers of the court. In *re Roberts*, shortly after making a will under which the defendant was a beneficiary, the deceased married the plaintiff. After the death of the deceased, the plaintiff brought an action for a grant of letters of administration of the deceased's estate under an intestacy. The defendant challenged this claim alleging that the deceased at the time of his marriage was in such a mental condition as to be unable to understand the nature of the ceremony or to consent to the marriage and that, accordingly, the marriage was void and did not revoke the deceased's will.

41 The English High Court, in a decision that was affirmed on appeal, struck out the defendant's defence as disclosing no reasonable cause of action and rejected the defendant's argument that a lack of valid consent made the marriage void. Walton J. explained why he could not declare the marriage void in the following passages of his judgment:

> One of the curiosities of the law of marriage is that, apparently, down to 1971 lack of consent or absence of consent made a marriage void and not voidable … That is how the law stood down to 1971. But in 1971, Parliament passed the Nullity of Marriage Act 1971 … What Parliament did was, first of all, to set out in section 1 the grounds on which a marriage which took place after August 1, 1971, was to be void. It is common ground that none of the grounds there set out apply in the present case. They are the only grounds now on which a marriage is void.
>
> …

So the question of consent has now been deliberately shifted from making a marriage void to making a marriage voidable.

…

Parliament has deliberately chosen to alter the law and make lack of consent, on whatever ground, a ground merely upon which a marriage is voidable.

42 *Re Roberts* was approved in a recent English Court of Appeal decision, *Westminster City Council v C* [2009] 2 WLR 185, where it was held that in England, on the basis of the changes to the law originally effected by the Nullity of Marriage Act 1971, where either party to a marriage did not validly consent to it in consequence of unsoundness of mind the marriage was voidable rather than void and remained valid unless and until it was annulled.

43 My second reason for rejecting the plaintiffs' submission is of more general application: it is that the Charter is a complete code on the law of civil marriage in Singapore and marriages celebrated in Singapore cannot therefore be declared void on any ground that is not reflected in s 105 thereof. Whilst the two cases cited by Prof Tan and also relied upon by the plaintiffs to support the view that there are grounds outside s 105 upon which a marriage may be declared void seem to contradict my view, I believe that on a deeper analysis of these cases, the decisions made can be justified in terms of s 105 even if that section (or s 99 as it then was) was not expressly referred to by the court in either case.

44 The main ground on which the marriage in *Lim Ying* was declared void was that the parties to the marriage were found to have both been female at the time the marriage took place and the court declared that under our law, there could be no valid marriage between two persons of the same gender. In *Valberg*, no reasons were given for the declaration that the marriage solemnised under the Charter was invalid and null and void but the basis on which the declaration had been applied for was that both parties to the marriage had been Muslims at the time it was solemnised. Both cases were decided in the early 1990s. It should be noted that since 1996, the Charter has been amended to include in s 105 (then s 99) these grounds (same sex/both parties Muslim) as being grounds on which a marriage is void. Thus, even if the Charter was not all encompassing before 1996, since then it has been. My view, however, is that even before the amendments the Charter provided for such marriages to be declared void.

45 My view is based on s 105 read with s 17(2) of the Charter. This latter section (previously s 16(2)) deals with the issue by the Registrar of Marriages of a marriage licence to permit the solemnisation of a marriage under the Charter. The material parts of the section read:

(2) The Registrar shall not issue a marriage licence until he has been satisfied by statutory declaration made by each of the parties to the proposed marriage –

…

(d) that there is no lawful impediment to the marriage;

…

At the time when *Valberg* and *Lim Ying* were decided, s 105 in its incarnation as s 99 of the Charter provided that one of the grounds on which a marriage would be void would be if it had not been solemnised on the authority of a valid marriage licence issued by the Registrar of Marriages. This

ground was not affected by the amendments made in 1996 and remains one of the grounds on which marriages are void. The reference to a "valid marriage licence" in s 99 must be read as meaning a marriage licence issued by the Registrar of Marriages when he was correctly satisfied that all the requirements of s 17(2) had been met. He would have been so satisfied if the statutory declaration made by each of the parties to the proposed marriage correctly stated that there was no lawful impediment to the marriage. If the deponent of the statutory declaration was wrong in declaring that there was no lawful impediment to the proposed marriage, then that wrongful declaration would, in my view, have the effect of invalidating the marriage licence because the licence would have been issued on an incorrect basis, the Registrar's satisfaction having been procured by a wrongful declaration.

46 I now turn to *Valberg*. There, the plaintiff had embraced the Islamic faith in September 1981. He subsequently married the defendant, also a Muslim, at, first, the Registry of Muslim Marriages, and, then (by holding himself out as a Catholic), at the Registry of Marriages. On both occasions, a certificate of marriage was issued. In 1988, the Muslim marriage ended and a certificate of divorce was obtained from the Syariah Court. In subsequent proceedings before the High Court, the plaintiff prayed for the marriage solemnized under the Charter to be declared void. The High Court granted the declaration but as no grounds of decision were provided the actual basis of the decision is not known.

47 In my view, the High Court's decision in *Valberg* does not imply that a marriage can be declared void on a ground that is not specified in s 105. This is because it can be justified by reference to s 17(2)(d). As the law stood in 1981 when the parties in *Valberg* procured a marriage licence under the Charter, the law clearly prohibited the solemnization or registration of marriages under the Charter between two parties who were both Muslims. The governing provision was then s 3(3) of the Charter. This law remains in place as s 3(4) of the Charter. Unfortunately, the Charter did not, prior to 1996, contain a provision which expressly stated that a marriage that was contracted in contravention of the prohibition would be void. That omission could not of itself, however, make legal what the Charter had expressly forbidden. By reason of s 3(3) there was, therefore, a "lawful impediment" to the marriage under the Charter of two Muslim parties to each other. Since the plaintiff and the defendant in *Valberg* were both Muslims when they procured the issue of a marriage licence, the statutory declaration made by the husband in which he declared that he was Catholic at that time was false. The effect of this false declaration was that the licence that was issued was invalidated. Since the marriage was not solemnised on the authority of a valid marriage licence, the marriage would have been void on a ground that was included in s 99 of the Charter.

48 I think that a similar analysis can be applied to *Lim Ying* although the grounds of that decision were different. In *Lim Ying*, the respondent was a transsexual. His birth certificate stated his gender to be female. Subsequently, he underwent surgery which removed his female sexual organs and replaced them, to the extent possible, with male sexual organs. After the surgery, the respondent had his name legally changed and the notification of his sex in his National Registration Identity Card ("NRIC") was also re-recorded as 'male'. Three years later, the respondent married the petitioner at the Registry of Marriages. The petitioner claimed that she had no knowledge, at this point in time, that the respondent was a transsexual who had undergone a sex change operation. Within a few months of the marriage, the petitioner applied for a judgment of nullity.

49 Rajah JC granted the judgment of nullity. He first decided that the sex of a person was to be determined by the sex assigned to him at birth, not by the NRIC. As such, he determined the respondent to be female for the purposes of the proceedings. The learned Judicial Commissioner then held that since both parties to the marriage were female, the marriage was void *ab initio*. I shall call this Rajah JC's "first holding". Rajah JC also decided that the petitioner's lack of knowledge of the respondent's condition and his sex change operation meant that she did not freely consent to the marriage. That being the case, he reasoned, the marriage licence issued by the Registrar was not

valid and the marriage was void. This shall be called the "second holding".

50 In his decision, Rajah JC did not expressly refer to s 99 and consider whether a judgment of nullity could be made on the basis of a ground that was not then specified in that section. However, in my opinion, he could have so justified it by holding that the fact that the parties were of the same gender was a lawful impediment to their marriage under the Charter notwithstanding the absence of a specific provision so promulgating. As Rajah JC reasoned, it is clear that the Charter was promulgated on the basis that marriage is a legal relationship that can only be entered into between a male and a female. He noted that the preamble to the Charter states that it is "[a]n Act to provide for monogamous marriages". In the Interpretation Act (Cap 1, 1985 Rev Ed), "monogamous marriage" was then, and still is, defined as "a marriage which is recognised by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage". Furthermore, there are numerous references to "husband" and "wife" in the Charter and those terms are gender specific. Hence, it is unarguable that even as it stood in 1992 when *Lim Ying* was decided, it was a fundamental assumption underlying and informing the provisions of the Charter that a marriage had to be between a male and a female. Thus, persons of the same gender could not marry under the Charter and being of the same gender constituted a "lawful impediment" to the marriage. On that basis, as in *Valberg*, the licence issued by the Registrar to marry the respondent and the petitioner in *Lim Ying* would have been invalid and the marriage would be a void marriage and capable of being declared so under s 99 of the Charter.

51 As noted above, Rajah JC did find the marriage licence to be invalid in his second holding but the basis of that finding was a different one and, with respect, I do not agree that the licence was invalidated by a lack of consent. First, it is not at all clear that a lack of knowledge of the other party having been a transsexual and having gone through a sex change operation will amount to a lack of valid consent to the marriage. When two persons decide to get married, it is not inconceivable that they may be mistaken or unaware of some aspect of the other party's life or identify. This does not mean that they did not consent to marrying each other. Second, even if there was a lack of valid consent, this is only a ground to find the marriage voidable, not void. Since Parliament clearly provided for a marriage entered into without valid consent to be valid until either party to the marriage chooses to apply to annul it, such lack of consent cannot impinge on the validity of the licence. In this regard, I agree with the position taken by Prof Leong Wai Kum at p.9 of her book *Elements of Family Law in Singapore*, (LexisNexis: 2007) as follows:

> Even if Lim Ying's consent to marry Eric Hiok were undermined because she did not know of his medical or sexual condition, the failure of consent is, by section 106 of the Women's Charter, a ground only for granting a judgment that the marriage is 'voidable'. The marriage is not void in the way that marrying with a less than valid marriage licence would be. It is weak to use a ground that renders the marriage voidable as one factor that reflects on the validity of a licence. This will unnecessarily confuse the law that regulates the issue of the marriage licence with that of when a solemnized marriage is nevertheless voidable. The areas ought to be kept separate. The licence and the resulting solemnization can and should be regarded as valid even where a ground for annulment of the marriage as being voidable can be proven.
>
> Not keeping these two areas separate fails to maintain a rational process of the solemnization of marriages. Persons who have duly obtained a marriage licence from the Registrar or a special marriage licence from the Minister and who solemnize their marriage within the licence's period of validity can still be left in doubt as to whether the licence was valid. They are entitled to be left with no doubt about this. They did obtain proper authorization by their valid licence and they have thereby complied with the first critical prescription of solemnization. Whether their marriage is voidable for cause is a separate consideration and ought not to enter into the matter of

obtaining valid authorization for the solemnization.

52 Counsel for the plaintiffs also cited an Australian case, *In the Marriage of V K and V Kapadia*, [1991] 14 Fam LR 883 ("*Kapadia*") in support of the plaintiffs' application. In that case, the same parties married twice, once in Fiji and then in Australia. In both cases, a marriage certificate was issued. The husband later attempted to dissolve both marriages. The Australian Judicial Registrar dissolved the Fijian marriage but refused to grant a decree of dissolution of the Australian marriage. On appeal, Kay J. decided that the Australian marriage was void even though there were no grounds for ordering a decree of nullity under the Australian Marriage Act. Kay J. suggested that the court had the jurisdiction to find a marriage void on grounds other than that provided by the Australian Family Law Act. I do not find *Kapadia* relevant as although that may be the position in Australia, it is not the position here on a plain reading of s 105.

Sham marriage

53 The plaintiffs' final argument is that the marriage was a sham marriage and hence against public policy. This was because the defendant's sole or predominant motive in causing the marriage to be registered was to revoke the will made by the deceased prior to the marriage. As such, the marriage should be declared void.

54 In short, the plaintiffs' argument was, once again, that the court can declare a marriage void on a ground other than those provided for in s 105 of the Charter. As explained above, with regard to the lack of valid consent, this proposition contradicts s 105 which states the grounds listed therein to be exclusive. Hence, this argument must fail for this reason alone.

55 It may be argued that, unlike the argument regarding a lack of valid consent which was a ground expressly provided for under s 106 of the Charter, marriage for improper motives is not dealt with in the Charter. This does not mean, however, that the exclusivity of s 105 can be disregarded.

56 Furthermore, the law desists from identifying what are the 'proper' motives of marriage and does not allow the parties' private motives to undermine the validity of the marriage. In *Vervaeke (formerly Messina) v Smith*, [1983] AC 145, the parties married for the sole purpose of allowing the female party to continue working in England as a prostitute. The House of Lords held that, as 'horrible and sordid' as the marriage was, the marriage was valid. The House of Lords expressed its view (at p. 152) as follows:

> …in the English law of marriage there is no room for mental reservations or private arrangements regarding the parties' personal relationships once it is established that the parties are free to marry one another, have consented to the achievement of the married state and observed the necessary formalities.

57 The above view was echoed by the Singapore Court of Appeal in *Kwong Sin Hwa v Lau Lee Yen*, [1993] 1 SLR 457, who (at [33]) approved of Punch Coomarasamy J's statement in *Ng Bee Hoon v Tan Heok Boon*, [1992] SLR 112, as follows:

> In my view, if a man and a woman (who are not barred from marrying each other) exchange consents to marry with due formality before a person lawfully authorized to solemnize a marriage under the Charter, intending to acquire the status of married persons, it is immaterial that they intend the marriage to take effect in some limited way or that one or both of them may have been mistaken about, or unaware of, some of the incidents of the status which they have created. To hold otherwise would impair the effect of the whole system of law regulating marriage

in Singapore, and gravely diminish the value of the system of registration of marriages on which so much depends. Marriage status is of great public concern.

58 Accordingly, the defendant's reasons for entering into the marriage, even if they can be proved, are irrelevant in considering whether the marriage is valid or not. In my judgment, this argument of a sham marriage is obviously unsustainable.

Conclusion

59 In these circumstances, the plaintiffs' appeal is dismissed and the defendant's appeal allowed. The plaintiffs' statement of claim is hereby struck out and the plaintiffs' claim is dismissed with costs, including the costs of the hearing before the AR and this appeal, to be taxed if not agreed.