Lian Hwee Choo, Phebe *v* Tan Seng Ong
[2013] SGCA 37

Case Number	: Civil Appeal No 136 of 2012
Decision Date	: 03 July 2013
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Judith Prakash J
Counsel Name(s)	: Narayanan Sreenivasan S.C., Stuart Andrew Palmer and Judy Ang Pei Xia (Straits Law Practice LLC) for the appellant; Lim Kheng Yan Molly S.C., Koh Sunanda Swee Hiong, and Lim Rui Cong Roy (Wong Tan & Molly Lim LLC) for the respondent.
Parties	: Lian Hwee Choo, Phebe — Tan Seng Ong

FAMILY LAW – Husband and wife – Agreements between

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2012] SGHC 255.]

3 July 2013

Judith Prakash J (delivering the judgment of the court):

Introduction

1 The appellant and respondent in this appeal were formerly wife and husband respectively. In the course of the ancillary matters consequent upon their divorce, a preliminary question arose. This was determined by the Judge dealing with the ancillary matters ("the Judge") after the parties were cross-examined on their affidavits. The determination led to the sole issue in this appeal, namely, whether the parties had come to an agreement on the matrimonial assets that could be categorised as one "made in contemplation of divorce" within the meaning of s 112(2)(e) of the Women's Charter (Cap 353, 2009 Rev Ed) ("the Charter").

2 At first instance, the Judge essentially held that such an agreement could be implied from all the relevant circumstances. The wife appealed against this determination. We allowed the appeal and held that there was no such agreement. We now set out the detailed grounds for our decision.

Facts

Procedural history

3 The parties married in August 1974, and have four adult children. Three of the children were born before 1985. In December 2010, the wife commenced divorce proceedings. In April 2011, the husband consented to interim judgment on the basis that the parties had lived apart for a continuous period of at least three years immediately preceding the filing of the writ of divorce.

4 In October 2011, the wife filed and served a request for discovery and interrogatories on the husband, in which she asked for the audited reports and lists of assets of companies which the husband had an interest in. The husband refused to accede to the request on the ground that the parties had agreed in 1985 to divide their matrimonial assets and cease community of assets, with

both parties thereafter having no claim to future assets acquired by the other during marriage ("the Agreement"). This was the first time that the husband had alleged the existence of the Agreement. The husband then made a similar request for information relating to the wife's companies. His request was denied on the basis that the companies concerned were not matrimonial assets.

5 Subsequently, the husband filed a summons for the determination of the preliminary issue of whether the Agreement had indeed been made in 1985.

Background facts

6 By November 1985 when the Agreement was allegedly made, the parties had already engaged in a number of property transactions. At that time, the husband was working full-time with the Public Utilities Board ("the PUB") whilst the wife was a housewife, but they worked together to purchase and re-sell real estate.

7 In 1980, the parties entered into their biggest transaction. This was the purchase of a plot of land at Jalan Pasir Ria ("the Jalan Pasir Ria Land"). The transaction was carried out in the wife's name because the husband's employment with the PUB made it less convenient for the transaction to be carried out in his name. In November 1982, they sold the Jalan Pasir Ria Land for a profit of $4.018m. The husband and the wife were entitled to half of the profits each, but they deposited their respective shares into a joint bank account.

8 In 1982, the parties became joint owners of a Housing and Development Board flat. Due to regulations extant then, the parties were not allowed to purchase private property in their own names thereafter. Thus, when they subsequently went on to purchase several other private properties using profits from the sale of the Jalan Pasir Ria Land, they placed the same in the names of the wife's mother and sister to be held on trust for them ("the Properties"). The parties also acquired a property in London which was placed in the wife's name alone.

9 In January 1984, the Inland Revenue Authority of Singapore enquired into the sale of the Jalan Pasir Ria Land. As the Jalan Pasir Ria Land was held in the wife's name, she would have been fully liable for income tax at a rate of approximately 33.3% (*ie*, about $1m) if the profits earned on the re-sale were found to be liable to be taxed as income. The wife alleged that she received no assurances from the husband that he would contribute his share of the tax and that there had been substantial withdrawals from the funds in the joint bank account. She was therefore concerned about her ability to pay any outstanding taxes.

10 At around the same time, the wife discovered that the husband was involved in an affair. In anger, she unilaterally cancelled a line of credit which the parties had obtained. This cancellation had a detrimental effect on the cash flow of the husband's property development business. In early November 1985, the wife left the matrimonial home with their three children, then aged nine, seven and one, with the intention of relocating to London.

11 The husband immediately engaged solicitors from Shook Lin & Bok ("Shook Lin") and on 13 November 1985 successfully obtained an injunction preventing the wife from leaving Singapore with the three children. The husband also lodged caveats against the Properties. In turn, the wife engaged solicitors from Harold Seet & Co ("Harold Seet"). The parties, and their respective solicitors, met at Harold Seet's office on 19 November 1985 in an attempt to resolve the impasse ("the 19 November Meeting"). The husband wanted the Properties transferred to him immediately and he was also very concerned with the welfare of the three children.

12 Subsequently, Shook Lin hand-delivered a letter dated 22 November 1985 to Harold Seet ("the 22 November Letter"). The contents of this letter were directly pertinent to the appeal and the letter is discussed in further detail below (see [31], [32] and [41] below). On 23 November 1985, the wife returned to the matrimonial home with the three children and the parties resumed cohabitation. Meanwhile, the parties, through their solicitors, continued to have discussions regarding the transfer of the Properties and the income tax liabilities. In July 1986, the parties' relationship broke down again when the wife left. However, she returned subsequently and the parties then continued living together for more than 20 years.

13 The issues relating to the transfer of the Properties and the income tax liabilities were finally resolved in February or March 1987. Three properties in Singapore were transferred to the husband whilst the wife retained cash in an English account and an apartment in Pepys Hill. It was not disputed that the couple, despite their apparent reconciliation, had thereafter conducted their financial affairs separately. The husband and wife operated their respective property development businesses independently of each other, and did not pool their assets. The only exception was a joint venture regarding the redevelopment of one plot of land, in which each party was entitled to half of the profits. In 1991, the parties had their fourth and youngest child.

The decision below

14 In his grounds of decision (cited at [2012] SGHC 255) ("the GD"), the Judge first noted that there was no signed agreement between the parties setting out all the terms of the Agreement (at [49] of the GD). He then cited *Cooperative Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 ("*Raiffeisen*") for the proposition that an agreement could nevertheless still be implied from a course of conduct or dealings between the parties or from correspondence or from all relevant circumstances (*ibid.*).

15 The Judge found that the negotiations between the parties "bore the hallmarks of a couple contemplating the possibility of divorce in the future" (at [51] of the GD) because:

(a) The wife had left in a fit of anger at discovering the husband's infidelity, rather than because of concern over the tax liabilities (at [50] of the GD);

(b) Despite the Properties taking centre stage, there were also discussions about access to the children and a personal allowance for the wife (at [51] of the GD);

(c) The negotiations were not made in a spirit of reconciliation and renewal of vows; they transformed the marital relationship into a business-like relationship (*ibid.*);

(d) The transfers of the Properties were final, and were done neither for love nor for tax planning purposes (*ibid.*);

(e) After the transfers, the parties took care of their respective assets. They made their own capital and maintenance-related payments, and had unilateral control over rental and sale. This was despite the fact that three of their units were in the same condominium (at [52] of the GD);

(f) The husband had to offer for sale a half-share of the matrimonial home to the wife. The wife had also offered a half-share in another property to the husband. The parties were dealing with their own business affairs (and tax matters) without the need for consent from the other party (at [53] of the GD);

(g) The wife's conduct during discovery also underscored the parties' understanding that there was to be no more community of assets. She had claimed that certain companies that were set up and run as businesses during the subsistence of the marriage were not matrimonial assets (at [54] of the GD).

Our decision

The law

16 Section 112 of the Charter governs the division of matrimonial assets. It deals, amongst other things, with agreements for the division of these assets. The material portions of this statutory provision are reproduced below:

> **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:
>
> …
>
> (e) any *agreement* between the parties with respect to the ownership and division of the matrimonial assets *made in contemplation of divorce*;
>
> …
>
> [emphasis added]

It bears mention that if in any particular divorce proceedings it is established that an agreement falling within s 112(2)(e) exists, that agreement is only one of the factors the court has to consider when deciding how the matrimonial assets are to be divided. Depending on the circumstances, this may not be the main factor in the division. The parties and the Judge were fully aware of this aspect and the Judge noted at [55] of his judgment that his finding on the existence of the Agreement was not the end of the inquiry and the court would have to look at all the circumstances to determine how much weight to give to the Agreement.

17 To determine whether an agreement of the type specified in s 112(2)(e) of the Charter exists, two elements must be met: first, there must have been an agreement with respect to the ownership and division of matrimonial assets; and second, the aforesaid agreement must have been "made in contemplation of divorce".

18 With regard to the first element, it is uncontroversial that agreements pertaining to the ownership and division of matrimonial assets ought generally to comply with the various legal doctrines and requirements that are an integral part of the common law of contract (see *TQ v TR and another appeal* [2009] 2 SLR(R) 961 ("*TQ v TR*") at [94], where this comment was made *vis-à-vis* prenuptial agreements within the framework of s 112 of the Women's Charter (Cap 353, 1997 Rev Ed)

("the 1997 Charter") which is *in pari materia* with s 112 of the edition of the Charter currently in force, and *Wong Kien Keong v Khoo Hoon Eng* [2012] SGHC 127 at [20] where this principle was extended to postnuptial agreements within the framework of the current edition of the Charter).

19 Turning to the second element, the arrangements that the agreement makes for the ownership and division of assets must be intended to apply in the event of a dissolution of the marriage, since s 112 is wholly concerned with the distribution of assets upon divorce. The paradigm case is an agreement reached between feuding spouses who want a clean break. This is illustrated by the decision in the High Court case of *Wong Kam Fong Anne v Ang Ann Liang* [1992] 3 SLR(R) 902 ("*Wong Kam Fong Anne*") in the context of s 112 of the 1997 Charter. The parties in that case were married in 1958 and had two children. They had led separate lives since 1980, and did not cohabit as husband and wife. In May 1984, they entered into a deed of separation, wherein the husband agreed that the wife was to be sole legal and beneficial owner of the matrimonial home. The deed went on to state that, in the event of a divorce suit, the deed shall be submitted to the court by either party and may be incorporated in the judgment of the court. The deed was not to be invalidated by a temporary reconciliation (save for a written statement signed by both parties cancelling the deed), and was also not to be invalidated by any judgement made by the court. Michael Hwang JC held that the deed was made at a time when the parties had already been separated, and divorce was viewed as a real possibility (though not necessarily in the immediate future). The deed was therefore intended as a comprehensive financial and property settlement between the parties.

20 It is not, however, necessary that to fall within s 112(2)(e) the agreement has to have been made between parties who are already married and contemplating an imminent divorce. It is clear from the decision of this court in *TQ v TR*, which dealt with a prenuptial agreement made shortly before the marriage and some 13 years before the wife filed for divorce, that the divorce need not be imminent or even desired at the time of the agreement. Rather, what is required is that in making the agreement, the parties must have addressed their minds to the issue of how property should be divided in the eventuality of a divorce, notwithstanding the possibility that at the time of making the agreement they had hoped that this eventuality would not arise. Thus, the intention that must be found by the court is that the parties intended for the agreement to exhaustively govern the allocation of matrimonial assets upon the *contingency* of divorce, whenever that might actually happen.

21 It follows from the foregoing that there can be two types of agreement within the meaning of s 112(2)(e) of the Charter:

(a) If an agreement is entered into for the purpose of dividing the assets in the context of a specifically contemplated divorce, that will be an agreement within the meaning of s 112(2)(e) for the purpose of that divorce; but, if for some reason the divorce does not ensue at that time and the parties reconcile and carry on, then that agreement can have no relevance in the event of a later divorce.

(b) On the other hand, if an agreement is a definitive one for the division of assets in the event of a divorce (whenever that might happen and even though it may not be specifically envisaged at the time of the agreement (as is the case in a prenuptial agreement)), the evidence must show that the agreement was intended to have such an effect. If such intention is proven, as it was in *TQ v TR*, then that agreement would be admissible under s 112(2)(e).

22 The necessary intention envisaged in [21(b)] above may be explicitly stated in a written agreement signed by the parties or clearly inferable from the language of such agreement (as was the case in *Wong Kam Fong Anne*). An express clause stating that the agreement pertaining to the

division of matrimonial assets is to be binding upon divorce would generally be sufficient to prove the requisite intention. Of course, the requisite intention is to be objectively ascertained; no party should be allowed to renege on an ostensibly binding agreement simply because of unobservable subjective reservations (see *Aircharter World Pte Ltd v Kontena Nasional Bhd* [1999] 2 SLR(R) 440 at [30]). The ostensible or expressed intention could, however, be negated by proof of undue influence or incomplete disclosure of assets or other such behaviour on the part of one party which could have had an effect on the other party's decision to enter the agreement.

23 On the other hand, specific reference to divorce may not have been made in the written agreement. In such a case, a detailed analysis of the facts would have to be undertaken by the court to determine whether the agreement arrived at by the parties was intended to govern what would happen to the matrimonial assets in the event of a divorce.

2 4 *Wong Ser Wan v Ng Cheong Ling* [2006] 1 SLR(R) 416 ("*Wong Ser Wan*") is an example of a case where scrutiny of the circumstances showed that no agreement falling within s 112(2)(e) of the 1997 Charter existed. The parties in that case were married in January 1976 and had three children. The marriage broke down over a prolonged period, during which the parties had dealings and negotiations culminating in a consent maintenance order and various written agreements drafted by lawyers. Pursuant to the terms agreed, the wife withdrew the divorce petition she had filed in 1996. In 1999, however, she filed another divorce petition which eventually led to the issue of a decree of divorce. The gist of the earlier arrangements was that the husband agreed to pay maintenance and irrevocably made certain gifts to the wife. In the divorce that eventuated, the question that arose was whether those earlier arrangements constituted agreements between the parties with respect to the ownership and division of the matrimonial assets. It was held that the arrangements were not concluded in contemplation of divorce. They were entered into on the husband's part to prevent a divorce from taking place at that time and on the wife's part in order to reduce her financial dependence on the husband. Whilst the wife argued that the arrangements had been made in contemplation of divorce (a position that would have been in her favour since the husband was a bankrupt at the time of the ancillary hearing), it was not submitted on behalf of the wife that she had intended that the assets transferred to her pursuant to the arrangements would, in the event of a divorce, constitute her share of the matrimonial assets. To put it another way, the wife had not agreed that she would not make any further claim to a share in the matrimonial assets. The bottom line was that the arrangements were not intended to set out the regime for the division of assets in the event of a divorce.

25 In essence, therefore, the difference between *Wong Ser Wan* and *Wong Kam Fong Anne* was that in the former case the circumstances did not disclose a mutual intention on the part of the spouses that their agreement should conclusively settle the division of matrimonial assets should a divorce eventuate, whilst in the latter such an intention was manifested or inferred.

26 An agreement on the disposition of property in the event of divorce does not, *stricto sensu*, oust the jurisdiction of the court because the court grants its imprimatur to such agreements, which are not enforced directly *ex debito justitiae* but indirectly via s 112. Nevertheless, a stringent standard is required because the parties are in effect inviting the courts to place at least some weight on such agreements, and courts could accord significant, or even conclusive weight to such agreements (see *TQ v TR* at [86] and [91]). The courts must thus ensure that the parties had truly intended for the agreement to be binding in the event of a divorce. The phrase "in contemplation of divorce" must be given due weight and act as a filtering device.

27 Where there is no written document and no clear evidence of parties having verbally concluded an agreement, can an agreement falling within s 112(2)(e) nevertheless be implied? The Judge had

held that *Raiffeisen* stood for the proposition that in such a situation, an agreement could be implied from a course of conduct or dealings between the parties or from correspondence or from all relevant circumstances. With respect, the Judge misconstrued *Raiffeisen* and had utilised an overly-broad approach. The exact quote from *Raiffeisen* reads (at [46]):

> Contracts *may in certain cases* be implied from a course of conduct or dealings between the parties or from correspondence or all relevant circumstances. [emphasis added]

28 The following passage from Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) at para 4-021 cited by the judge in Raiffeisen at [46] is apposite:

> The question of contractual intention is, in the last resort, one of fact. In deciding it, a distinction must be drawn between implied and express agreements. Claims based on *implied* agreements are approached on the basis that ***'contracts are not lightly to be implied'*** and that the court must therefore be able 'to conclude with confidence that ... the parties intended to create contractual relations'. The burden of proof on this issue is on the proponent of the implied contract, and in a number of cases claims or defences based on implied contracts have been rejected precisely on the ground that contractual intention had not been shown by that party to exist. [emphasis in original in italics, emphasis added in bold italics]

The judge in *Raiffeisen* (*ibid.*) also went on to cite the *locus classicus* on implied contracts, *viz, Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195 at 1202F:

> I readily accept that *contracts are not to be lightly implied*. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and ***that the agreement was to the effect contended for*** . It must also, in most cases, be able to answer the question posed by Mustill L.J. in *Hispanica de Petroles S.A. v. Vencedora Oceanica Navegacion S.A. (No. 2) (Note)* [1987] 2 Lloyd's Rep. 321, 331: '*What was the mechanism for offer and acceptance*? [emphasis in original in italics, emphasis added in bold italics]

29 It is evident from the authorities cited above that two substantial hurdles must be crossed for an agreement to be implied for the purposes of s 112(2)(e). First, the burden lies on the party alleging that the agreement exists to adduce proof that an agreement ought to be implied based on all the relevant circumstances. Clear and cogent proof inexorably pointing towards *consensus ad idem* and an intention to create legal relations is required because of the fundamental proposition that contracts should not be lightly implied. Second, the agreement must be to the effect contended for. In other words, the agreement must have been intended to exhaustively govern the post-divorce allocation of matrimonial assets. This is over and above the question of whether an agreement *simplicter* exists. Even if an agreement pertaining to matrimonial assets is implied, this is not conclusive (or indicative) of the further issue of whether the agreement is meant to exhaustively govern the post-divorce allocation of the said assets.

30 Due to these hurdles, it would be extremely unlikely for a court to find that an agreement intended to exhaustively govern the post-divorce allocation of matrimonial assets ought to be implied from the behaviour of spouses. Married couples redistribute the ownership of matrimonial assets for all sorts of reasons, oftentimes without intending for the ownership of the same to be cast in stone *vis-à-vis* each other. The mere fact of inter-spousal transfer of ownership is normally equivocal, and could be construed to have been done for various reasons that have nothing to do with divorce or a severing of the marital connection. As VK Rajah JA observed in *Wan Lai Cheng v Quek Seow Kee and another appeal and another matter* [2012] 4 SLR 405 at [108]:

... Undoubtedly, there are many couples who hold all or most of the assets which they acquire during the marriage in just one name, without having had any serious prior discussion or agreement as to how those assets ought to be divided in the event that the marriage fails. *Transfers can also take place for any number of legitimate reasons, sometimes purely for convenience, and either with or without any intention by the donor spouse to permanently renounce his or her entire beneficial interest in the asset concerned* ... [emphasis added]

For these reasons, there will normally be no justification to prefer the possibility that the transfers *per se* evince an intention for the parties to be bound by the post-transfer allocation upon divorce, over other equally plausible reasons (for instance, tax or estate planning or ring-fencing assets against third party claims).

Analysis of the facts

31 Having considered the evidence and the parties' submissions before us, we came to a different conclusion on the facts than that drawn by the Judge. Whilst we did not have the advantage of seeing the parties, much of the evidence was contained in contemporaneous documentary correspondence and, in this respect, we were in no worse a position than the Judge to assess how such correspondence supported the positions taken by the parties when they came to court some 25 years later. It was firstly notable that there was no express mention of division of the assets in the correspondence between the parties. On the wife's part, the correspondence showed that she was concerned mainly about her tax liability as she had been the sole registered owner of the Jalan Pasir Ria Land. In general, the correspondence supported the wife's stand that the Agreement simply concerned a re-arrangement of the legal ownership of various properties (beneficially owned by the parties) which re-arrangement had been demanded by the husband who was concerned that none of his properties were in his name. The letters also indicated that the wife was agreeable to the husband's demands as long as he was willing to bear his share of the tax liabilities.

32 The 22 November Letter, which followed the 19 November Meeting, stated that "the following matters were discussed and agreed upon at the meeting". Several matters were referred to, namely the transfer of the legal ownership of the Properties, the issue of an option to purchase, the payment of income tax liabilities, and custody of and access to the children. Based on this letter alone, there was undoubtedly an agreement between the parties evidenced in writing. There were nine further pieces of corroborative correspondence which pertained to the exact mechanism of the transfers (with some also pertaining to custody). Thus there was no need to resort to *Raiffeisen* in order to imply an agreement.

33 Taken as a whole, the contemporaneous documentary evidence showed that the parties did not have any intention for the Agreement to exhaustively govern the post-divorce allocation of matrimonial assets:

(a) The 22 November Letter stated that "The issues and solutions have largely been agreed upon and the outstanding issues remaining concern the provision of security to your client for our client's tax liability, if any, and the details of custody and access to our client and *the terms of reconciliation.*" [emphasis added]

(b) In two pieces of correspondence, first a telex from Harold Seet to Shook Lin dated 6 October 1986, and secondly a letter from Shook Lin to Harold Seet dated 23 October 1986, the subject heading reads "RE: MADAM LIAN HWEE CHOO MATRIMONIAL DISPUTE". This subject heading indicates that in so far as the parties' legal advisers were concerned, at that time (which was nearly a year after the Agreement in November 1985), there was only a dispute between the

parties which was then in the course of resolution. They were not contemplating divorce proceedings. In fact, the dispute was finally resolved in early 1987 when the property transfers took place.

(c) None of the correspondence mentioned what either party's rights would be in the event of a divorce or what the parties' respective contributions to the marriage had been (as a basis for division) or any consideration of the value of the assets (an important factor when negotiating the division of assets).

34 The husband's evidence given during cross-examination was also consistent with what the documentary evidence suggested:

Q: The purpose of those arrangements was with either the express intent or the hope that she will come back with the children and the family will stay together.

A: At that time, children were still young, I disagree.

Q: No, the idea of you and your wife was to get her back with the children and stay as a family. That was the purpose of all these arrangements?

A: Yes.

Q: The purpose was not in contemplation of a divorce, am I right? Do you agree?

A: *At that time, we did not mention about divorce*, yes, but she -- we already said it very clearly -- we have already divided the assets very clearly, so she told me in future if there is any issue in the marriage, then we will separate our ways.

Q: Meaning she told you that if you were not faithful again, she would divorce you, am I right?

A: She once said that.

Q: Yes. But try and understand my question, Mr Tan, it's not a trick question. These arrangements that were made by you, in your mind, *the purpose was to get her back with the children to the house.* Am I right?

A: *Yes.* Because the children are still young, I have already told you.

…

Q: Mr Tan, I think you really have to understand my question. Listen very carefully. This arrangement regarding the property, was it made in your mind -- forget about her mind -- was it made in your mind with a divorce being contemplated? Or was it made to bring her back with the children or was it made for some other reason?

A: I have already said yesterday, let's say in 1985 I have already filed a summons and told her *if we did not divide the assets, then I'll bring her to court and subsequently it would be a divorce.*

[emphasis added]

35 Additionally, the husband had stated in his affidavit of evidence-in-chief filed on 8 June 2012

that:

> I realized that in order for the Plaintiff and I, to continue with our marriage, it would be necessary and appropriate to put into perspective, the children's affairs and interests, as well as the financial aspects, of our marriage.

36 Thus, to the husband, the Agreement was concluded with the * purpose of reconciliation, and not divorce. The husband even went so far to say that he would have filed for divorce but for the Agreement. As the husband himself did not have the requisite intention, *a fortiori*, the parties did not come to a consensus *ad idem* and certainly did not have a common intention for the Agreement to exhaustively govern the post-divorce allocation of matrimonial assets.

37 As for the wife's intentions at that time, the Judge had found as a fact that the wife had left the matrimonial home in a fit of anger at discovering the husband's infidelity rather than because of fears or concerns over tax, and that she had wanted to punish the husband for his infidelity by causing him to be without assets, without any credit line, and without a family ([50] of the GD). With respect, this finding was not pertinent to the question of whether the wife had intended for the Agreement to be exhaustive of the *post*-divorce allocation of assets.

38 The sole shred of documentary evidence that could perhaps be used to support the husband's position that the Agreement was made in contemplation of divorce was a telex from Harold Seet to Shook Lin dated 6 December 1985, where the subject reference read "RE: DIVORCE". There was, however, no mention of divorce in the body of the telex. Furthermore, the telex was sent in response to two earlier letters from Shook Lin dated 22 November and 28 November 1985, where no mention whatsoever had been made of divorce. For these reasons, we were of the view that little weight should be placed on the subject reference in the 6 December 1985 telex.

39 The husband also sought to rely on the fact that the wife had held 48% (with him holding the remaining 52%) of the matrimonial assets post-transfer as evidence of the fact that there had been a division of assets made pursuant to an agreement made in contemplation of divorce. In our view, however, no weight should be placed on the net effect of the transfers because the husband had admitted on the stand that this was an *ex post facto* rationalisation:

> Q: When you discussed with your wife on 19 November. Was a 48 per cent, 52 per cent figures [*sic*] ever discussed, you take 48 per cent, I take 52 per cent, was that ever discussed? Yes or no?
>
> A: This at that time – okay, I answer your question. At that time, she did not mention this 48/52.
>
> Q: You mentioned it?
>
> A: Because – yes, but for the purpose of this court, I must tell the truth to the court.
>
> Q: Did you mention 48/52 in 19 November 1985?
>
> A: No.

In our view, if the transfers were indeed meant to be binding upon divorce, the parties would surely have discussed the proportion of the matrimonial assets that each of them would be entitled to and the value of those assets at the 19 November Meeting and/or in later correspondence. The fact that

they never undertook such an exercise, even in a rudimentary form, certainly strengthens the inference that such a division was not on their minds at that time.

40 Even if we were to disregard the objective documentary evidence, there was, with respect, a *non sequitur* in the Judge's reasoning as set out in [15] above. The fact that community of assets had ceased during marriage did not necessarily mean that the parties had agreed not to redistribute the assets upon divorce. To put it another way, the mere fact that the parties had arranged their financial affairs in a certain way during the subsistence of the marriage does not, without more, lead to the necessary conclusion that the parties had intended for the post-divorce distribution of assets to be governed exhaustively by the Agreement.

41 The fact that the parties were both legally represented at all material times was yet another factor that militated against the possibility that the parties had the requisite intention. In the absence of any basis to believe otherwise, it would be safe to assume that the parties' solicitors would have duly advised them as to their respective rights and liabilities. Their solicitors had also gone to the trouble of documenting the terms of the parties' agreement in the 22 November Letter. If it had been the parties' intention for the Agreement to exhaustively govern the post-divorce allocation of assets, this intention would surely have been expressly reflected in either the 22 November Letter or at least one of the subsequent pieces of correspondence. It was improbable that not just one, but two solicitors each representing the interests of a different client would have omitted to document such an important term.

42 Further, *Raiffeisen* should only be invoked when the very existence of the contract is in dispute because of a lack of documentation and/or a lack of a clear-cut offer and acceptance, in which case all the relevant circumstances would be taken into account to determine both the existence and terms of the contract. Where some of the terms have been explicitly documented in writing, the court is engaged in the exercise of the *implication of terms*, which proceeds on the basis of the absence of express terms. In this situation, the governing principles would be those enunciated in the Court of Appeal case of *Foo Jong Peng and others v Phua Kiah Mai and another* [2012] 4 SLR 1267. Of course, the foregoing does not rule out the situation where reliance is placed on *Raiffeisen* to find a collateral contract which varies an extant written contract, but this is not the case before us.

Conclusion

43 We found that there was no agreement for the disposition of assets made in contemplation of divorce within the meaning of s 112(2)(e) of the Charter. We thus allowed the wife's appeal and awarded her the costs of the appeal and the hearing below, to be taxed, if not agreed.