ADP
v
ADQ

[2012] SGCA 6

Court of Appeal — Civil Appeal No 62 of 2011
Chao Hick Tin JA, Andrew Phang Boon Leong JA and Tan Lee Meng J
18 October 2011; 19 January 2012

Family Law *— Void marriage — Division of matrimonial assets — Husband and wife married at time when wife's prior marriage was subsisting — Marriage void due to bigamy — Whether court had power to order division of matrimonial assets in void marriage — Section 112(1) Women's Charter (Cap 353, 2009 Rev Ed)*

Family Law *— Void marriage — Maintenance — Husband and wife married at time when wife's prior marriage was subsisting — Marriage void due to bigamy — Whether court had power to order maintenance in void marriage — Section 113(*b*) Women's Charter (Cap 353, 2009 Rev Ed)*

Res Judicata *— Issue estoppel — Husband and wife married at time when wife's prior marriage was subsisting — Marriage void due to bigamy — Parties initially terminated marriage through divorce — Later realised that marriage was void — Sought rescission of decree* nisi *— In rescission proceedings husband sought declaration that marriage void — District judge refused declaration — One reason for refusing declaration was nullity more appropriate avenue because of availability of ancillary relief — Decision appealed to High Court — High Court dismissed appeal — In nullity proceedings issue of whether wife entitled to ancillary relief was raised — Whether issues of whether wife was entitled to maintenance or division of matrimonial assets were* res judicata *as between the parties*

Facts

The appellant ("the Appellant") married the respondent ("the Respondent") at a time when the Appellant's prior marriage was subsisting. This meant that the parties' marriage was void due to bigamy.

The parties had initially sought to terminate their marriage through a divorce and had obtained a decree *nisi*. The parties later found out that their marriage was void. The Respondent then filed an application seeking, *inter alia*, to set aside the decree *nisi* and to declare that his marriage to the Appellant was void ("the Rescission Proceedings"). The Appellant also took out a nullity petition. The district judge hearing the Rescission Proceedings ("the first District Judge") rescinded the decree *nisi* but she refused to grant a declaration for various reasons. One of her reasons was that an application for nullity was a more appropriate avenue because of the availability of ancillary relief in those proceedings. The first District Judge's decision was appealed to a High Court judge who dismissed the appeal.

The Family Court later declared in the nullity petition that the parties' marriage was void. The court then directed that ancillary matters were to be decided in a further hearing. At that hearing, another district judge ruled that the court did not have the power to order the payment of maintenance or the division of matrimonial assets because the judgment for nullity had been granted on the ground that the marriage was void.

The Appellant appealed that decision to the High Court. The High Court judge dismissed the appeal.

Three issues arose in the appeal:

(a) Were the issues of whether the court had jurisdiction to order maintenance and division of matrimonial assets in a void marriage *res judicata* as between the parties because they were decided by the first District Judge?

(b) Do Singapore courts have jurisdiction under s 112 of the Women's Charter (Cap 353, 2009 Rev Ed) ("the Act") to order the division of matrimonial assets in a void marriage?

(c) Do Singapore courts have jurisdiction under s 113 of the Act to order maintenance in a void marriage?

Held, allowing the appeal:

(1) There was no *res judicata* in respect of the second and third issues. Although the parties to the Rescission Proceedings and the present proceedings (an appeal against a Judge's determination on ancillary matters) were identical and the decisions of the first District Judge (and the High Court judge on appeal) were made by courts of competent jurisdiction, the other requirements for issue estoppel (*viz*, the need for a final and conclusive judgment on the merits of the issue allegedly estopped and the need for the subject matter of the two actions to be identical) were not satisfied. This was because, in the Rescission Proceedings, the first District Judge was asked to rescind the decree *nisi* and declare that the Hong Kong Marriage was void. She gave three reasons why it was inappropriate to grant a declaration. In explaining just one of her reasons, she expressed a view on the availability of ancillary relief. In contrast, the present proceedings raised squarely for decision the issue of whether ancillary relief is available. For the same reasons, the first District Judge (and the High Court judge on appeal) did not conclusively decide on the issues raised in this appeal. The first District Judge was merely expressing a view on the issues in order to bolster her conclusions on the matter that was before her (which was different from the subject matter of this appeal): at [21], [24], [25] and [26].

(2) The phrase "nullity of marriage" in ss 112 and 113 of the Act encompassed both void and voidable marriages for the following reasons:

> (a) The Judge seemed to take the view that there ought to be read into the phrase "nullity of marriage" a reference *only* to a *voidable* (as opposed to a void) marriage. This was inconsistent with the manner in which the phrase "nullity of marriage" had been utilised by the Singapore Parliament in the Act itself. Indeed, this very phrase constituted the heading which helmed the preceding chapter of Pt X of the Act, which related to *both*

void *and* voidable marriages. If Parliament had intended the phrase "nullity of marriage" in ss 112 and 113 of the Act to refer to *voidable* marriages *only*, it would have stated so *expressly*: at [30].

(b) When the Bill in which the legislative precursors to ss 112 and 113 were first introduced (via the Women's Charter (Amendment) Act 1980 (Act 26 of 1980) ("the 1980 Amendment Act")) was first presented to Parliament, *both* clauses concerned did *not* contain the phrase "nullity of marriage". The respective provisions were based, as the *Comparative Table* attached to the Bill (*ie*, the Women's Charter (Amendment) Bill (Bill No 23/79) ("the 1980 Bill")) clearly stated, on the corresponding provisions in the *Malaysian* Law Reform (Marriage and Divorce) Act 1976 (Act 164 of 1976) (Malaysia) ("the Malaysian Act"). The relevant provisions in the Malaysian Act did *not* contain the phrase "nullity of marriage". It was therefore clear that the Malaysian Parliament *intended* to *exclude nullity of marriage (whether involving void or voidable marriages) from the purview of the relevant provisions of the Malaysian Act*. This was also the *original intention* which was *embodied within the 1980 Bill in the Singapore context*. By *subsequently inserting* the phrase "nullity of marriage" into the corresponding provisions in the Act, the Singapore Parliament had to have not only intended to *reverse* its previous decision to adopt the Malaysian position but had to have also *intended to include nullity of marriage in all its forms* (*viz*, as encompassing both void as well as voidable marriages): at [34].

(c) The proceedings before the Select Committee, which took place between the promulgation of the 1980 Bill and the ultimate enactment of the 1980 Amendment Act by the Singapore Parliament, lent *further support* to the construction adopted of the phrase "nullity of marriage" in both ss 112 and 113 of the Act. The transcript of the proceedings demonstrated that the committee had inserted the phrase "nullity of marriage" into the relevant clauses and had intended the phrase to allow the courts the *discretion* to order the division of matrimonial assets and maintenance in void marriages as well. During the third reading of the Bill, the amendments recommended by the Select Committee were accepted by Parliament without any debate. There was only an introductory speech. Although there is no express mention in that speech of the deliberations of the Select Committee concerning the introduction of the words "nullity of marriage" in the relevant clauses, these deliberations were nevertheless valuable in furnishing the relevant background that confirmed the interpretation adopted with regard to the phrase "nullity of marriage" in ss 112 and 113 of the Act. More importantly, it was both logical as well as reasonable to assume, in these circumstances, that the Singapore Parliament had to have *accepted* the changes proposed by the Select Committee: at [35], [44] and [45].

(d) Distinguishing between void and voidable marriages did have *legal* significance, especially where *third parties* were concerned. In so far as *void* marriages were concerned, *third parties* who *had a proper interest in the matter* could rely on the fact that the marriage concerned was void in order to help make out their case against the other party or parties.

Where, however, the marriage was only *voidable*, the right to raise the fact that the marriage concerned was voidable was *personal* to the parties *only* and could only be raised *during the lifetime of the other spouse*. However, the historical background to the law on nullity of marriages told us that, despite the difference in *legal consequences* between void and voidable marriages, there was in fact nothing in the origins of the concept of nullity of marriages that justified – in point of general principle and/or logic – the conclusion that, in construing s 112 of the Act, a division of matrimonial assets ought only to be effected in relation to voidable marriages, but not in relation to void marriages. The historical background to the law on nullity of marriages told us that the distinction between void and voidable marriages was historical and arose as a result of a tussle, so to speak, between the royal courts on the one hand and the ecclesiastical courts on the other: at [48] to [51] and [59].

(e) From the perspective of the general policy underlying the division of matrimonial assets and the ordering of maintenance, there was nothing in the historical development of the law relating to nullity of marriage which militated against the courts being granted the powers in these specific areas. It was therefore not surprising that the Singapore Parliament intentionally conferred these powers, which were in fact absent in the 1980 Bill, by the insertion of references to "nullity of marriage" in the respective provisions: at [64].

(f) From the perspective of principle, in so far as the division of matrimonial assets was concerned, there was – having regard to the broad brush approach which had been well-established by the relevant local case law – a strong case to be made out in favour of treating s 112 of the Act as covering the entire spectrum of nullity (*viz*, both voidable *as well as* void marriages). Put simply, there was sufficient flexibility within the broad brush approach so that, in the situation of a *void* marriage in which the factual circumstances were such as to make it just and equitable that a particular spouse be given a low or (in extreme circumstances such as where the marriage was an exceedingly short one) little or no proportion of the matrimonial assets. This was, of course, wholly consistent with the broad brush approach. Secondly, if the approach of the Judge in the court below was adopted, there was nothing precluding the spouse in a *void* marriage to nevertheless have recourse to *the general law*. This did not improve either the efficiency or quality of justice on both a general level and as between the parties. From the perspective of principle, the broad brush approach adopted in s 112 of the Act with a view towards the attainment of a just and equitable distribution of matrimonial assets between the parties was the most appropriate one, particularly when viewed in the matrimonial context, and (more importantly for the purposes of this appeal) was eminently suitable with respect to *void* marriages as well as voidable marriages: at [65] and [66].

[Observation: A similar approach had been adopted in England in so far as the phrase "nullity of marriage" was concerned. In so far as the *division of matrimonial assets* was concerned, there was no direct UK equivalent of s 112 of the Act. However, it bore noting that the UK provisions dealing with the

division of matrimonial assets throughout the years *had always encompassed situations relating to nullity of marriage as well*. More importantly, English case law had consistently recognised the availability of ancillary relief even in the context of *void* marriages. In so far as *maintenance for the wife* was concerned, s 1(1) of the UK Matrimonial Causes Act 1907 (c 12) (UK) ("the 1907 UK Act") permitted the court to make an order for such maintenance in situations of *nullity of marriage* as well. The English courts had also interpreted the phrase "nullity of marriage" in s 1 of the 1907 UK Act as referring to *both* void *and* voidable marriages: at [31] to [33].

Although the distinction between void and voidable marriages arose from a *historical* tussle which resulted, in turn, in a "division" between civil and canonical jurisdictions (a "division" that was no longer relevant today), the rationale for, as well as the result of, such a "division" was not an incoherent one. In particular, *civil* impediments were those which went to *the very formation* of the marriage itself and, from the perspective of a "division" of jurisdiction, were appropriate for the *civil* sphere as they related (in the main) to impediments that were more *formal* in nature. And, from the perspective of *legal result*, treating marriages that did not comply with the requirements for solemnisation as *void* (as opposed to *being* voidable) was also both logical and commonsensical. Hence, where the very *ceremony* itself was flawed, there was justification in treating the marriage itself as being *void ab initio* – as being fatally flawed, so to speak, right from *its outset*. So, also, there was similar justification in treating the marriage concerned as being *void ab initio* where one of the parties was *already married* at the time the marriage purportedly took place. In *contrast*, however, the *canonical* impediments, whilst impacting the status of the marriage concerned, were nevertheless of a somewhat different cast. In particular, none would be *necessarily* known at the time the parties entered into their marriage and therefore would *not necessarily* go towards the *formation* of the marriage as such. Looked at in this light, such impediments were, understandably, "allotted" to the ecclesiastical courts (as opposed to the royal courts): at [60] and [61].]

Case(s) referred to

A v B (1868) LR 1 P & D 559 (refd)

Adams v Adams [1941] 1 KB 536 (refd)

ADP v ADQ [2009] SGDC 489 (refd)

De Reneville v De Reneville [1948] P 100 (refd)

Eaves, Re [1940] Ch 109 (refd)

Fowke v Fowke [1938] Ch 774 (refd)

George Hubert Powell v Viola M Cockburn [1977] 2 SCR 218 (refd)

Goh Nellie v Goh Lian Teck [2007] 1 SLR(R) 453; [2007] 1 SLR 453 (folld)

Joseph Mathew v Singh Chiranjeev [2010] 1 SLR 338 (refd)

L v C [2007] 3 HKLRD 819 (refd)

Lee Tat Development Pte Ltd v MCST Plan No 301 [2005] 3 SLR(R) 157; [2005] 3 SLR 157 (folld)

PP v Low Kok Heng [2007] 4 SLR(R) 183; [2007] 4 SLR 183 (refd)

Rampal v Rampal (No 2) [2002] Fam 85 (refd)

Ramsay v Ramsay (otherwise Beer) [1913] 108 LT 382 (refd)

Roberts, deceased, Re [1978] 1 WLR 653 (refd)

Ross Smith v Ross Smith [1963] AC 280 (refd)

Tan Ah Thee v Lim Soo Foong [2009] 3 SLR(R) 957; [2009] 3 SLR 957 (refd)

Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd [2009] 2 SLR(R) 814; [2009] 2 SLR 814 (refd)

Legislation referred to

Interpretation Act (Cap 1, 2002 Rev Ed) s 9A

Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 57 r 18(2)

Statutes (Miscellaneous Amendments) (No 2) Act 2005 (Act 42 of 2005)

Straits Settlements Divorce Ordinance 1910 (SS Ord No 25 of 1910) s 14

Straits Settlements Divorce (Amendment No 2) Ordinance 1941 (SS Ord No 25 of 1941) s 6

Women's Charter (Cap 47, 1970 Rev Ed) ss 91, 107(1)

Women's Charter (Cap 353, 1985 Rev Ed) s 106

Women's Charter (Cap 353, 2009 Rev Ed) ss 105, 106, 112(1), 113(*b*) (consd); ss 2, 69, 112, 113

Women's Charter (Amendment) Act 1980 (Act 26 of 1980)

Women's Charter (Amendment) Act 1996 (Act 30 of 1996)

Divorce Act (Act 4 of 1869) (India) s 19

Law Reform (Marriage and Divorce) Act 1976 (Act 164) (M'sia) ss 76, 77

Marriage Act 1835 (c 54) (UK)

Matrimonial Causes Act, RSO 1970, c 265 (Can) s 1

Matrimonial Causes Act 1857 (c 85) (UK)

Matrimonial Causes Act 1907 (c 12) (UK) ss 1, 1(1)

Matrimonial Causes Act 1937 (c 57) (UK) s 7

Matrimonial Causes Act 1973 (c 18) (UK) ss 23, 24

Matrimonial Proceedings and Property Ordinance (Cap 192) (HK) s 6

Nullity of Marriage Act 1971 (c 44) (UK)

Tan Cheng Han SC (instructed), Lim Kim Hong and Rafidah Binte Abdul Wahid (Kim & Co) for the appellant;
The respondent absent.

[Editorial note: The decision from which this appeal arose is reported at [2011] 3 SLR 370.]

19 January 2012

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

Introduction

1 This appeal raised the novel issue of whether the Singapore courts have the jurisdiction under the Women's Charter (Cap 353, 2009 Rev Ed) ("the Act") to order the division of matrimonial assets and maintenance if the marriage between the parties is found to be void. The High Court judge ("the Judge") held that the Singapore courts have neither jurisdiction (see *ADP v ADQ* [2011] 3 SLR 370 ("the Judgment")). We allowed the appeal after hearing arguments from the appellant ("the Appellant") (as we explain below, the respondent ("the Respondent") was not present at the hearing). We now provide the detailed grounds for our decision.

Background

The parties and the void marriage

2 The Appellant, a Philippines national, had married the Respondent, a United Kingdom ("UK") national, in Hong Kong on 26 October 1995 ("the Hong Kong Marriage").

3 The Appellant had previously married a Japanese man on 1 December 1989 ("the Japanese Marriage"). The Japanese Marriage resulted in a divorce, which was finalised in Japan only on 7 December 1995. It should be noted that the Hong Kong Marriage was contracted *before* the Japanese Marriage was terminated. This meant that the Hong Kong Marriage was void due to bigamy.

4 The Appellant filed a petition for divorce on 25 March 2003. The divorce proceedings resulted in an uncontested hearing on 26 August 2003 at which a decree *nisi* was granted.

5 The parties later found out that the Hong Kong Marriage was void. The Respondent then filed an application (Summons-in-chambers No 651299 of 2004) on 11 August 2004 seeking, *inter alia*, to set aside the decree *nisi* and to declare that the Hong Kong Marriage was void ("the Rescission Proceedings"). The Appellant also took out a nullity petition on 15 October 2004.

The Rescission Proceedings

6 The Rescission Proceedings were heard by a district judge ("the first District Judge"). In a written judgment, the first District Judge rescinded the decree *nisi*. She declined, however, to grant the declaration (to the effect that the Hong Kong marriage was void) sought by the Husband for three reasons:

(a) The Family Court did not have the jurisdiction to make the declaration.

(b) The application for a declaration should be heard by the High Court through an originating summons and not through an application within the divorce proceedings.

(c) Even if the correct procedures were followed and the Family Court was the correct forum to hear the application for a declaration, it was more appropriate for the validity of the Hong Kong Marriage to be determined in a nullity petition. Importantly, the first District Judge proceeded to elaborate that one of the reasons why she thought a nullity petition was more appropriate was that *ancillary relief is available to parties to a void and voidable marriage*. She noted, however, that there might be an issue of whether maintenance may be ordered to a wife in a void marriage because she was, arguably, never a "wife". She did not elaborate because she thought that the availability of maintenance was an issue that she did not have to decide at that point.

The third reason is important because, as will be seen below, it has given rise to an argument of *res judicata*.

7 The Respondent appealed the first District Judge's decision to the High Court. The High Court judge dismissed the appeal without issuing written grounds.

The present proceedings

8 The Family Court later declared in the nullity petition that the Hong Kong Marriage was void. The court then directed that ancillary matters were to be adjourned for a further hearing.

9 The ancillary matters came before another district judge ("the second District Judge") who ruled, *inter alia*, that the court did not have the power to order the payment of maintenance or the division of matrimonial assets because the judgment for nullity had been granted on the ground that the marriage was void (see *ADP v ADQ* [2009] SGDC 489).

10 The Appellant appealed that decision to the High Court. The High Court's decision with regard to the particular issue set out in the preceding paragraph is the subject of the present appeal (as for the issue that was not appealed, see below at [14]).

Decision below

11 The Judge began his analysis by examining the wording of the relevant provisions of the Act, *viz*, ss 112(1) and 113 of the Act. It would be useful, in this regard, to set out these provisions in full:

> **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.
>
> …
>
> **Power of court to order maintenance**
>
> **113.** The court may order a man to pay maintenance to his wife or former wife —
>
> (*a*) during the course of any matrimonial proceedings; or
>
> (*b*) when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage.

The Judge noted that the use of the phrase "nullity of marriage" in s 112(1) of the Act has caused uncertainty because it encompasses two types of marriages, *viz*, void and voidable marriages (see the Judgment at [8]). The Judge explained that under the Act, a judgment of nullity may be obtained for both void and voidable marriages (see the Judgment at [9]). He then briefly described the differences between void and voidable marriages (see the Judgment at [10]–[12]). He concluded that the wording of s 112(1) does not offer any indication as to whether "nullity of marriage" refers to both void and voidable marriages. He was, however, prepared to take the view that the court has the power to divide matrimonial assets in the context of a *voidable* marriage on the ground that assets acquired up to the point of dissolution are matrimonial assets (see the Judgment at [12]).

12 The Judge proceeded to express his view that it is not appropriate for a court to determine the effects of a void marriage (see the Judgment at [14]). This is because a marriage may be found to be void for various reasons. For example, a party may have acted in good faith or he/she might have been deceptive. These different factual situations would require different treatment and would require a consideration of "legal, sociological and public policy considerations" (see the Judgment at [14]).

13 The Judge nevertheless proceeded to rule that a division of matrimonial assets is not possible where the marriage is void. He reasoned that a void marriage is not a marriage and so there are no "matrimonial assets" to divide. Assets acquired in the course of the marriage will have to be divided according to property, contract, trust or other relevant principles of law (see the Judgment at [15]). Similarly, the Judge ruled that it was not possible to order maintenance because s 113 of the Act refers to maintenance of a "wife or former wife". A claimant in a void marriage is neither (see the Judgment at [16]). The Judge further commented that it might have been argued that there is another basis for seeking maintenance

if the parties had maintained their relationship in the belief that they had a legal marriage. The Judge observed, however, that this possibility "must remain as food for thought" because the Appellant did not raise such a possibility (see the Judgment at [18]).

14 It should be noted that the decision below also addressed an issue of maintenance for the Appellant's child from a previous relationship. The Judge's decision on this issue was not appealed.

The arguments

15 The Appellant raised a preliminary argument that the issues of whether the court has jurisdiction under the Act to order the division of matrimonial assets and maintenance are *res judicata* as between the parties because they were conclusively decided by the first District Judge whose decision was upheld on appeal ("the *Res Judicata* Argument"). Incidentally, it should be noted that the Appellant's counsel had raised the *Res Judicata* Argument at the hearing before the Judge. The Judge did not, however, address the argument in the Judgment.

16 The Appellant raised the following arguments on the substance of the appeal in her Appellant's Case:

(a) The Judge erred in holding that the phrase "nullity of marriage" under s 112 of the Act refers only to a voidable marriage and not to a void marriage.

(b) The Judge erred in adopting an unduly restrictive interpretation of s 112 of the Act.

(c) Recognising that the court has the jurisdiction to order the division of matrimonial assets and maintenance would accord the court the discretion to take into account the particular facts of the case in order to arrive at a fair decision. In this case, the fact that the Appellant was unaware of her legal impediment to marriage could be taken into account.

(d) On the issue as to whether the court has the power to order maintenance, the Appellant should be accorded all rights that she would have had if the marriage was legal because she did not deceive the Respondent and the parties lived together for a long time believing themselves to be husband and wife. The Appellant argued that, in this regard, the English cases which take the view that a wife should be entitled to ancillary relief under the English equivalent of the Act if she had no *mens rea* for the crime of bigamy should be followed. The English cases should be followed because the Act is adapted from English law.

(e) On the issue as to whether the court has the power to divide matrimonial assets, whatever issues there may be with the ordering of

maintenance in a void marriage, the court should have the power to order the division of matrimonial assets because the same issues and problems that the parties need to resolve in relation to their property arise whether or not their marriage is void or voidable.

(f) The parties lived as husband and wife for the duration of the marriage. The Appellant made substantial contributions towards the marriage and the acquisition of the matrimonial assets. The needs of the children also have to be considered.

(g) The wording of s 112 of the Act does not distinguish between void and voidable marriages.

(h) Any claim by the Appellant under property law would not take into account her indirect contributions.

17 At the hearing before us, counsel for the Appellant, Prof Tan Cheng Han SC ("Prof Tan"), raised the following additional arguments:

(a) The fact that s 113 of the Act uses the words "wife" or "former wife" does not mean that maintenance may not be ordered in favour of the female party to a void marriage. This is apparent from s 104 of the Act which provides that any "husband or wife" may file a writ claiming a judgment of nullity in respect of his or her marriage. This suggests that the words "wife" or "former wife" in s 113 of the Act are simply labels used to denote the female party to the void marriage.

(b) It may be argued (in this instance, *contrary* to the Appellant's case) that interpreting s 113 of the Act as allowing an award of maintenance even if a marriage is found to be void will render s 113 of the Act incongruous with s 69 of the Act. Section 69 of the Act concerns an order for maintenance to a "married woman" while the marriage is still subsisting. The phrase "married woman" is defined in s 2 of the Act as a woman "validly married under any law, religion, custom or usage". In other words, a woman in a void marriage is not a "married woman" and, hence, would not be able to claim maintenance under s 69 of the Act. An argument could be made that it would be incongruous to say that a woman is not entitled to maintenance while a void marriage is "subsisting" but yet is entitled to maintenance under s 113 of the Act after she obtains a judgment of nullity. Prof Tan submitted that this incongruity may be explained away by the fact that s 113 of the Act uses the words "wife or former wife", a phrase which is not defined in the Act, whereas s 69 of the Act uses the phrase "married woman", which, as just mentioned, is defined in s 2 of the Act.

(c) The court has the power to take into account all the relevant circumstances of the case in deciding on the division of matrimonial assets and in ordering maintenance. This means that the court may

take into consideration any egregious conduct on the part of one of the parties to the marriage.

(d) The Women's Charter (Cap 47, 1970 Rev Ed) ("the 1970 Rev Ed") did not draw a distinction between void and voidable marriages. Section 91 of the 1970 Rev Ed simply provided for the grounds for seeking a decree of nullity, including the ground "that the former husband or wife of either party was living at the time of the marriage and the marriage with such former husband or wife was then in force". Significantly, s 107(1) of the 1970 Rev Ed provided, *inter alia*, that on any decree for nullity of marriage, "the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her life". Prof Tan submitted that the effect of these provisions was that under the 1970 Rev Ed, the court could order maintenance even in the context of an annulled marriage. Prof Tan argued that Parliament could not have intended to change the legal position when the distinction between void and voidable marriages was later introduced. It would be unusual for Parliament to have made such a drastic change in the law without expressly saying so.

18 The Respondent did not file his case for the present proceedings. Incidentally, his solicitors at the proceedings below had applied to discharge themselves (in Summons No 3258 of 2011) on the ground that they have not been able to contact him for instructions on the conduct of the appeal. A High Court judge had granted leave to the Respondent's solicitors to discharge themselves. The appeal papers were then served on the Respondent at his last known e-mail address pursuant to an order of court for substituted service.

19 The Respondent also did not appear at the hearing of the appeal. At the hearing itself, one of the Respondent's previous solicitors, Mr Imran Hamid Khwaja ("Mr Khwaja"), who was present in the public gallery at the hearing before us, informed us that the Respondent had been informed via e-mail of the week in which the appeal was fixed to be heard. Mr Khwaja added that he had previously communicated with the Respondent via that particular e-mail address. Counsel for the Appellant then advised the court that his instructing solicitor had communicated with the Respondent through the same e-mail address without any response. The Appellant's solicitors have not received any notification that their e-mails had not been delivered to the Respondent. We proceeded with the hearing (it should be noted, in this regard, that this court may proceed with an appeal in the absence of a respondent unless it, for any sufficient reason, sees it fit to adjourn the hearing (see O 57 r 18(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed))).

Issues before this court

20 Three issues arose for this court's consideration in view of the Appellant's arguments:

(a) Are the issues of whether the court has jurisdiction to order maintenance and division of matrimonial assets in a void marriage *res judicata* as between the parties because they were decided by the first District Judge?

(b) Do Singapore courts have jurisdiction under s 112 of the Act to order the division of matrimonial assets in a void marriage?

(c) Do Singapore courts have jurisdiction under s 113 of the Act to order maintenance in a void marriage?

Our decision

Res judicata

The applicable law

21 *Res judicata* comprises cause of action estoppel, issue estoppel and abuse of process (see the decision of this court in *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd* [2009] 2 SLR(R) 814 ("*Wing Joo Loong Ginseng Hong*") at [165]). Of relevance in the present appeal is the question of issue estoppel, which requires the following elements to be shown (*ibid*, citing *Lee Tat Development Pte Ltd v MCST Plan No 301* [2005] 3 SLR(R) 157 at [14]–[15]):

(a) a final and conclusive judgment on the merits of the issue allegedly estopped;

(b) the judgment was made by a court of competent jurisdiction;

(c) the parties in the two actions are identical; and

(d) the subject matter of the two actions are identical.

22 In relation to the requirement of identical subject matter, three matters ought to be borne in mind (see *Wing Joo Loong Ginseng Hong* at [167] citing *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 at [34]–[35], [38]). First, the prior decision must "traverse the same ground". Second, the determination of the issue allegedly estopped "must have been fundamental and not merely collateral to the previous decision". Third, the issue allegedly estopped should have been raised and argued.

Our view

23 It would be helpful to explain the context of the *Res Judicata* Argument. According to the Appellant, in the Rescission Proceedings, both

the first District Judge and the High Court judge on appeal considered the parties' detailed submissions and held that the courts have the power to make ancillary orders under Pt X of the Act even for void marriages. As noted above, one of the reasons for the first District Judge's refusal to grant a declaration that the Hong Kong Marriage was void was that she thought that a nullity petition would be a more appropriate avenue for making such a determination (see [6(c)] above). In elaborating on this reason, the first District Judge opined that ancillary relief may be obtained for void as well as voidable marriages.

24 Our view was that the second and third elements of issue estoppel are certainly satisfied. The parties to the Rescission Proceedings and the present proceedings (an appeal against a Judge's determination on ancillary matters) are identical and the decisions of the first District Judge (and the High Court judge on appeal) were made by courts of competent jurisdiction. The issue is with the first and final elements.

25 We did not think, however, that the first and final elements were satisfied. In respect of the final element, there was no identity in the subject matter of the Rescission Proceedings and the present proceedings. In the Rescission Proceedings, the first District Judge was asked to rescind the decree *nisi* and declare that the Hong Kong Marriage was void. The first District Judge gave three reasons why it was inappropriate to grant a declaration. In explaining just one of her reasons, she expressed a view on the availability of ancillary relief. In contrast, the present proceedings raised squarely for decision the issue of whether ancillary relief is available. In other words, the first District Judge's view that ancillary relief is available in void marriages was *collateral* to the issue that she had to decide. She was not required to express such a view. In fact, the first District Judge herself appeared to recognise that it was not her role to decide on whether ancillary relief is available for void marriages. On the issue as to whether maintenance is available in void marriages, the first District Judge qualified her observation with a comment that the possibility of obtaining maintenance was an issue that she "[did] not have to decide now". For the same reasons, the first District Judge (and the High Court judge on appeal) did not conclusively decide on the issues raised in this appeal and the first element was not satisfied. The first District Judge was merely expressing a view on the issues in order to bolster her conclusions on the matter that was before her (which was different from the subject matter of this appeal).

26 We therefore found that there was no *res judicata* in respect of the remaining two issues before us.

Do Singapore courts have the power to divide matrimonial assets and order maintenance in the context of a void marriage?

27 It would be convenient to consider the second and third issues together.

28 Since these two issues are, essentially, issues of statutory interpretation, we will begin our analysis with an examination of the wording of the relevant provisions. We will then test our interpretation of the provisions against the legislative and historical background. Finally, general policy and principle will be considered.

The statutory language

29 It is now axiomatic that a *purposive* approach ought to be taken in the context of statutory construction (see, for example, s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) as well as the decision of this court in *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [32] and that of the Singapore High Court in *PP v Low Kok Heng* [2007] 4 SLR(R) 183). In this regard, the first port of call ought to be the statutory language of the provision or provisions being construed. If the meaning of the statutory language is plain and clear, then the court ought to give effect to that meaning. What the court ought *not* to do is to *superimpose* what *it* feels *ought* to be the meaning of the statutory provision concerned, *notwithstanding* the plain meaning of the statutory language.

30 Turning to the statutory language of both ss 112(1) and 113(*b*) of the Act, the critical reference is the presence in both provisions of the phrase "nullity of marriage". The Judge seemed to take the view that there ought to be read into this phrase a reference *only* to a *voidable* (as opposed to a void) marriage. With respect, this is inconsistent with the manner in which the phrase "nullity of marriage" has been utilised by the Singapore Parliament in the Act itself. Indeed, this very phrase constitutes the heading which helms the preceding chapter of Pt X of the Act, which relates to *both* void *and* voidable marriages. In our view, if Parliament had intended the phrase "nullity of marriage" in the aforementioned provisions to refer to *voidable* marriages *only*, it would have stated so *expressly*. Lest it be thought that such a plain reading of both provisions would militate against the tenor and spirit of the Act in general and the specific provisions therein in particular, we elaborate on the legislative background in more detail below (at [34]–[45]). Nevertheless, even if we look only at the provisions themselves, it is clear, in our view, that Parliament *intended*, in no uncertain terms, that the courts exercise their powers pursuant to ss 112(1) and 113(*b*) in all cases relating to nullity of marriage (which, as already noted above in this paragraph, includes both void as well as voidable marriages). That is the *plain and unambiguous* meaning of the phrase "nullity of marriage", read *both* literally *as well as* in the context alluded to briefly above. Further, no absurdity results from such a construction. Whilst courts have long discarded a dogmatic as well as mechanistic approach towards statutory interpretation, they simultaneously ought *not* to swing to the other extreme as well. Put simply, courts are not – and ought to not act as if they are – "mini-legislatures". With respect, the Judge should have tried to discern Parliament's intention from the provisions as a whole and

their context instead of focusing on other parts of the same provisions (see the Judgment at [15]–[16]). In so doing, the Judge had *superimposed* a meaning on the relevant statutory language which Parliament had never intended. That having been said, the *legislative* intention or purpose that the phrase "nullity of marriage" encompasses *both* void *and* voidable marriages is made *even clearer* by, *inter alia*, the *legislative background* as well. And it is to that background that our attention now turns.

31 However, before proceeding to do so, we should observe that a similar approach has been adopted in England in so far as the phrase "nullity of marriage" is concerned. Put simply, *no* distinction is read into this phrase between void marriages on the one hand and voidable marriages on the other.

32 We note first that, in so far as the *division of matrimonial assets* is concerned, there is no direct UK equivalent of s 112 of the Act. However, it bears noting that the UK provisions dealing with the division of matrimonial assets throughout the years (the latest of which are ss 23 and 24 of the Matrimonial Causes Act 1973 (c 18) (UK) ("the 1973 UK Act")) *have always encompassed situations relating to nullity of marriage as well*. More importantly, English case law has consistently recognised the availability of ancillary relief even in the context of *void* marriages (see, for example, the English Court of Appeal decision of *Rampal v Rampal (No 2)* [2002] Fam 85 ("*Rampal*") which was, in fact, cited to this court by counsel for the Appellant (we note, parenthetically, that *Rampal* was also followed in the Hong Kong Court of Appeal decision of *L v C* [2007] 3 HKLRD 819, a case involving bigamy, where the court held that, under s 6 of the Hong Kong Matrimonial Proceedings and Property Ordinance (Cap 192) (HK), the same right to ancillary relief as applies in a divorce applies where a decree of nullity is obtained (at [96])). Incidentally, the court in *Rampal* was primarily concerned with whether the doctrine of *ex turpi causa non oritur actio* precluded a bigamist from seeking ancillary relief under the 1973 UK Act. The court held that there was no blanket rule that precludes a bigamist from being entitled to seek ancillary relief (*Rampal* at [27]). We express no opinion on this aspect of the decision, which is beyond the scope of the present appeal.

33 In so far as *maintenance for the wife* is concerned, we note that s 1(1) of the UK Matrimonial Causes Act 1907 (c 12) (UK) ("the 1907 UK Act") permitted the court to make an order for such maintenance in situations of *nullity of marriage* as well. As a learned author observed (correctly in our view), this particular provision manifested "[t]he same tendency to treat void and voidable marriages as if they were valid marriages that had been dissolved" (see E J Cohn, "The Nullity of Marriage – A Study in Comparative Law and Legal Reform" (1948) 64 LQR 324 at 327). This is significant in the local context because s 1 of the 1907 UK Act is *in pari materia* with s 113 of the Act. Indeed, the English courts have also

interpreted the phrase "nullity of marriage" in s 1 of the 1907 UK Act as referring to *both* void *and* voidable marriages (see *Ramsay v Ramsay (otherwise Beer)* [1913] 108 LT 382; reference may also be made to *Rampal*, cited in the preceding paragraph, as well as the Royal Commission on Marriage and Divorce, *Report 1951–1955* (Cmd 9678, 1956) ("the *1951–1955 Report*"), especially at para 516 ("[w]here the marriage is ended by divorce *or annulment* we think that the court should have *the widest possible discretion* as to the kind of financial provision it can order one spouse to make for the other" [emphasis added]). Incidentally, the Supreme Court of Canada in *George Hubert Powell v Viola M Cockburn* [1977] 2 SCR 218 has also held (at 236–237) that a party to a void marriage was entitled to seek maintenance under s 1 of the Matrimonial Causes Act, RSO 1970, c 265 (Can) (this provision also used the phrase "nullity of marriage").

The legislative background

(1) The background to the original Bill

34 It is interesting to note that when the Bill in which the legislative precursors to ss 112 and 113 were first introduced (via the Women's Charter (Amendment) Act 1980 (Act 26 of 1980) ("the 1980 Amendment Act")) was first presented to Parliament, *both* clauses concerned did *not* contain the phrase "nullity of marriage". Indeed, a perusal of the *Comparative Table* attached to the Bill reveals why this was so (see the Women's Charter (Amendment) Bill (Bill No 23/79) ("the 1980 Bill") at p 45 as well as the *Explanatory Statement* at pp 39–40). In particular, the respective provisions were based, as the *Comparative Table* clearly states, on the corresponding provisions in the *Malaysian* Law Reform (Marriage and Divorce) Act 1976 (Act 164) (Malaysia) ("the Malaysian Act"). An excellent account of the history of the Malaysian Act has been given elsewhere (see B C Crown, "Property Division on Dissolution of Marriage" (1988) 30 Mal LR 34 ("*Crown*") at 37–41). What is crucial for the purposes of the present judgment, however, is the fact that the relevant provisions in the Malaysian Act did *not* contain the phrase "nullity of marriage" (see ss 76 and 77 of the Malaysian Act which relate to the division of matrimonial assets and the power for the court to order maintenance of a spouse, respectively) and that this was *also reflected* in the 1980 Bill which, as just noted, drew upon the aforementioned provisions of the Malaysian Act. It is clear, in our view, that the Malaysian Parliament *intended* to *exclude nullity of marriage (whether involving void or voidable marriages) from the purview of ss 76 and 77 of the Malaysian Act* (see also the *Report of the Royal Commission on Non-Muslim Marriage and Divorce Laws* (Kuala Lumpur, 1971) ("the *Malaysian Royal Commission Report*") at p 57 and Ahmad Ibrahim, "The Law Reform (Marriage and Divorce) Bill, 1975" [1975] JMCL 354 at 360 (also published in [1975] 2 MLJ lxix at lxxi); though *cf* Mimi Kamariah Majid, *Family Law in Malaysia* (Malayan Law Journal Sdn

Bhd, 1999) at pp 329–330 (adopting an approach that is not dissimilar to that adopted by the Judge in the court below in relation to the issue of maintenance pursuant to s 77 of the Malaysian Act, but which, with respect, is erroneous because, as explained above, it superimposes an additional meaning that was not intended by the clear and unambiguous statutory language)). *More importantly*, this was also the *original intention* which was *embodied within the 1980 Bill in the Singapore context*. On a related note, the fact that the Malaysian Parliament clearly intended – particularly when viewed in *context* – to exclude *all* forms of *nullity of marriage* from the purview of ss 76 and 77 of the Malaysian Act buttresses our view (set out above and based on the clear and unambiguous statutory language) that, by *subsequently inserting* the phrase "nullity of marriage" into the corresponding provisions in the Act, the Singapore Parliament must have not only intended to *reverse* its previous decision to adopt the Malaysian position but must have also *intended to include nullity of marriage in all its forms* (*viz*, as encompassing both void as well as voidable marriages).

35 Indeed, the relevant background as to why the Singapore Parliament ultimately inserted, *contrary* to its original intention as reflected in the 1980 Bill (which followed the Malaysian position in excluding nullity of marriage from the scope of both the division of matrimonial assets as well as the power of the court to order maintenance for the wife), the phrase "nullity of marriage" in the relevant Singapore provisions lends *further support* to the construction we have adopted of this phrase with regard to both ss 112 and 113 of the Act. We refer, in particular, to *the proceedings before the Select Committee*, which took place between the promulgation of the 1980 Bill and the ultimate enactment of the 1980 Amendment Act by the Singapore Parliament. The 1980 Amendment Act adopted the suggestions of the Select Committee.

36 Before turning to consider the Select Committee proceedings, we pause to note – parenthetically – that the provisions that were introduced via the 1980 Amendment Act were (at least in so far as *the division of matrimonial assets* was concerned) *not the same as* the *current* provisions. In particular, the 1980 Amendment Act introduced s 106 of the Women's Charter (Cap 353, 1985 Rev Ed) ("the 1985 Rev Ed"). That particular provision was subsequently amended via the Women's Charter (Amendment) Act 1996 (Act 30 of 1996), which came into effect on 1 May 1997, and the resultant provision is (including some very minor amendments pursuant to the Statutes (Miscellaneous Amendments) (No 2) Act 2005 (Act 42 of 2005)) identical in all respects to the provision that is the subject of the present appeal in so far as the division of matrimonial assets is concerned, *viz*, s 112 of the Act. However, what *is* the same (and this is crucial for the purposes of the present appeal) is that *both* s 106 of the 1985 Rev Ed *as well as* s 112 of the (present) Act contain the phrase "nullity

of marriage". Hence, the analysis contained in the present judgment would apply *equally* to *both* these provisions.

(2) Proceedings before the Select Committee

(A) Prof Leong's paper

37 It is useful to begin our consideration of the Select Committee proceedings with a paper that was presented to the Select Committee by a leading academic in the field. In this paper, a number of points were raised by Prof Leong Wai Kum ("Prof Leong"). The one that is germane to the present appeal relates to her suggestions with regard to the omission in the 1980 Bill of petitions of nullity in relation to the clauses pertaining to the division of matrimonial assets as well as financial provision for the wife (a point noted above at [34]). In her view (see *Report of the Select Committee on the Women's Charter (Amendment) Bill [Bill No 23/79]* (Parl 1 of 1980, 25 February 1980) ("the *Select Committee Report*") at pp A7–A8):

> 1. These sections [relating to the division of matrimonial assets and financial provision for the wife (presently ss 112 and 113 of the Act)] do not include petitions for nullity. This omission is *unfortunate because the existing statute in Sections 107 and 114 clearly allow* [*sic*] *the court to order financial provision for the 'wife' in a nullity petition. And, although there is not an existing section on the division of matrimonial assets, there is no reason to believe that our courts would not follow the English practice of giving her an interest in the matrimonial assets whenever they have felt it just. The Bill would thus be taking away the right of a 'wife' of an annulled marriage to financial provision and a share of the family property.*
>
> 2. *As a matter of principle, on the question whether she ought to be given part of the family property and/or ought to be given financial provision, there is no reason why a woman who is incapable of consummating her marriage (for which her husband can obtain a decree of nullity) should be treated any differently from a woman with whom her husband finds intolerable to live (for which he may obtain a decree of divorce). Thus it is submitted that the present law empowering the court to make such orders is to be preferred.*
>
> [emphasis added]

38 In a similar vein, Prof Leong observed thus (in a legislative comment on the 1980 Bill in Leong Wai Kum, "A *Turning Point* in Singapore Family Law: Women's Charter (Amendment) Bill 1979" (1979) 21 Mal LR 327 at 339):

> A *grave omission* of the Bill is that the grant of decrees of *nullity* is *not* included in these provisions which empower the court to divide family assets and to order support payments for the wife's benefit. The Act allows the court to do so; it is most undesirable that this power be removed. *Whether the family unit is disintegrated pursuant to the grant of a decree of divorce or a decree of nullity the spouses have to attend to the same concerns* viz. *dividing up the family assets and arranging the maintenance of the wife and children*

> *and custody of the children.* … [emphasis in original omitted; emphasis added in italics]

Reference may also be made to *Crown* ([34] *supra*) at 37.

39 The point made by the learned author is even clearer in the passage just quoted. Indeed, her focus is – rightly, if we may say so – on the substance (as opposed to the form) of the matter. And it is that the family unit can disintegrate in at least two main ways, *viz*, by divorce or through a petition for nullity. The main point of substance, however, is *precisely* that the family unit has in fact *disintegrated*, and *that* constitutes the *commonality* between the parties, *which ought (in fairness) to be addressed*. Once this is admitted, it is clear, in our view, that the Singapore Parliament *had appropriately added the phrase "nullity of marriage" (although absent in the 1980 Bill)*, inter alia, *into ss 112 and 113 of the Act.* Indeed, we would add that, to achieve the full purpose of providing for *all* concerned in the event of the *disintegration of the family unit* (for *whatever reason*), the phrase "nullity of marriage" which was ultimately inserted into ss 112 and 113 of the Act *must* be given *its plain meaning* (*viz*, that *both* void *as well as* voidable marriages are encompassed within the meaning of, *inter alia*, ss 112 and 113 of the Act).

40 The views by the same author in her textbook ought also to be noted. Consistent with her views set out above, the learned author argues that *ancillary relief* ought to be available with regard to *void* marriages (see Leong Wai Kum, *Elements of Family Law in Singapore* (LexisNexis, 2007) ("*Leong Wai Kum*") at p 76). She explains that although a judgment of nullity is conceptually meaningless where a marriage is void *ab initio*, obtaining such a judgment is useful in practice because it allows the parties access to the court's jurisdiction to order ancillary relief (*ibid*). Prof Leong also points out that there is no case law discussing whether the court's exercise of its ancillary powers should be "attenuated" where a marriage is void, as compared to the more conventional situation of a termination by divorce (*ibid*).

41 Although the reason for Prof Leong's view in her textbook is not immediately apparent in this particular portion of her work, another part of the book may, however, provide an explanation as to why parties to a void marriage should, in her view, be entitled to ancillary relief (see *Leong Wai Kum* at pp 40–44). Prof Leong explains that a distinction should be drawn between a "non-marriage" and a "void marriage" (see also Joseph Jackson, *The Formation and Annulment of Marriage* (Butterworths, 2nd Ed, 1969) ("*Jackson*") at pp 85–86). She uses the term "non-marriage" to refer to a situation where the parties have no marital relationship *whatsoever* (the example Prof Leong gives is a stranger coming up to a person and claiming that he is married to her). In contrast, parties to a void marriage may have conducted themselves as if the marriage was valid. Prof Leong proceeds to argue that a workable distinction between "void marriages" and

"non-marriages" is that the former category of marriages fulfils the fundamental contractual requirements of marriage: *viz*, there must be credible evidence of an exchange of a mutual intention to marry (see *Leong Wai Kum* at p 41). In our view, Prof Leong's argument is persuasive and constitutes an answer to any conceptual difficulties that may arise in holding that a void marriage has legal consequences.

(B) THE SELECT COMMITTEE PROCEEDINGS

42 We would observe at the outset that the relevant part of the Select Committee proceedings confirms in no uncertain terms the construction we have adopted with regard to both ss 112 and 113 of the Act.

43 The relevant part of the *Select Committee Report* is to be found at pp C6–C10, with the following extract from pp C8–C10 being of especial significance (which therefore merits setting out in full):

Dr Ahmad Mattar:	Mr Chairman, Sir, we are now at amendment (10) which deals with the new section 101(1). This section states that: 'The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.' In my amendment, *I am suggesting that we should add the words 'or nullity of marriage'*.
Mr Selvadurai:	*So if the marriage is null and void, there cannot be any question of marital property, can it*?
Dr Ahmad Mattar:	*We are talking about the assets acquired by them during the marriage. So if the marriage is nullified later on, should not the assets be so divided also?*
Mr Selvadurai:	If acquired through their joint efforts.
Dr Augustine Tan:	Mr Chairman, I think the implication of this amendment goes beyond the immediate application in section 101, because sections 102 and 103 go further and talk about maintenance. And if the court is empowered to deal with division of assets under section 101, then the law could easily be extended by the courts to cover sections 102 and 103. I am not a legal man on this but perhaps the Member for Kuo Chuan could tell us whether such a thing could happen.
The Chairman:	At the moment, we are dealing with amendment (10). You are going forward to amendment (11) now.

Dr Augustine Tan: No. I am not trying to be ahead of the Committee, Sir. I am just drawing the Committee's attention to a possible implication and the consequence of amending section 101.

Dr Ahmad Mattar: We are not amending the existing section 102 of the Bill. We are only amending the existing section 101 by adding the words 'or nullity of marriage'.

Mr Selvadurai: I think it is all right, Mr Chairman. The opening words of section 102 merely say, 'The court may order …'. It is not a mandatory provision at all. In other words, if the court feels that maintenance is not allowed then it would not allow it. It has the discretion anyway.

Dr Augustine Tan: It has the discretion. *But what I am asking is: What is the legal implication on sections 102 and 103 by amending section 101 to include the words 'or nullity of marriage'?* What is the court likely to interpret sections 102 and 103? Logically, to my mind, if the court is empowered to divide the assets on grounds of nullity of marriage as well as the other two grounds of divorce or judicial separation, by the same token, maintenance can also be required —

Mr Selvadurai: *You are thinking of nullity of marriage as one being null and void ab initio, i.e. right from the word 'go'.* There have been cases in the past where a couple after having been married for two to three years discovered that something has gone wrong. Finally they go to court and get an order and the court makes an order saying that the marriage is null and void for various reasons. It means that in the process, for about two to three years, they had lived as man and wife and acquired marital property by joint efforts.

Dr Augustine Tan: *I see the point in respect of assets acquired in the course of marriage.* My point relates to the maintenance.

Mr Selvadurai: *Even on the question of maintenance, for example, it says, 'The court may order maintenance.' It does not say 'shall'.*

Dr Augustine Tan: Here again, you are leaving so much discretion to the court.

Mr Selvadurai: Oh, yes. You must leave it to the court.

The Chairman: He wants to control the court!

Mr Selvadurai: You cannot. *You will shackle the court.*

Amendment agreed to.

Dr Ahmad Mattar: Sir, I beg to move,

In page 19, line 4, to leave out 'or judicial separation', and insert ', judicial separation or nullity of marriage'.

Sir, this amendment is consequential to the one proposed and discussed earlier.

Amendment agreed to.

4.30 p.m.

Dr Ahmad Mattar: Sir, I beg to move,

In page 19, to leave out lines 32 to 40 inclusive and insert —

'Power of court to order maintenance

101. The court may order a man to pay maintenance to his wife or former wife —

(*a*) during the course of any matrimonial proceedings; or

(*b*) when granting or subsequent to the grant of a decree of divorce, judicial separation or nullity of marriage.'.

Sir, in this particular instance I agree that paragraph (c) of 102 of the Bill be deleted. Now, if a wife who is presumed to be dead is found to be alive, then she is entitled to apply for maintenance under paragraph (*b*) of section 102 of the Bill.

Dr Augustine Tan: I notice that under the proposed amendment of section 101, paragraph (*b*), the words 'nullity of marriage' have been included, whereas in the original amendment there were no such words. *I think it is this particular section here which causes me concern, thus the objection which I lodged earlier on when I drew the attention of the Committee to this particular section.*

Mr Selvadurai: The same reasoning applies. The same consideration applies. I thought we discussed it a few minutes ago.

Dr Augustine Tan: *Let us take the case of a woman who comes from Malaysia. She is already married to somebody there, but she goes to the Registrar and declares that she is single. Subsequently she is found out. Are you going to make the man responsible for her financially?*

Mr Selvadurai: The court has the discretion.

Dr Ahmad Mattar: The court will decide.

Dr Augustine Tan: I am not sufficiently convinced. If the Committee wishes to proceed, it can carry on.

> The Chairman: Well, leave it to the court. The Member for Whampoa does not believe in that!
>
> ***Amendment agreed to.***
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

44 The above extract demonstrates that the committee had intended the phrase "nullity of marriage" in the predecessor provisions to both ss 112 and 113 of the Act to allow the courts the *discretion* to order division of matrimonial assets and maintenance in void marriages as well. In particular:

(a) In relation to the division of matrimonial assets, the members appear to have been persuaded by Dr Ahmad Mattar's response (immediately after Mr Selvadurai's reference to a "null and *void* marriage" [emphasis added]) that assets may have been acquired in a nullified marriage. It should be noted that it does not appear that the members were using the word "void" loosely. The members seem to have appreciated that a void marriage is one that is void *ab initio*. Indeed, Mr Selvadurai used the phrase "void *ab initio*" in one of his comments in the extract above.

(b) In so far as the issue of maintenance is concerned, it appears that the majority of the committee were satisfied with Mr Selvadurai's explanation that the court should have the discretion to order maintenance in void marriages. Again, the members do not appear to be using the word "void" loosely. In fact, Dr Augustine Tan (the sole dissenter) referred to a situation of *bigamy* in his attempt to convince the members that a man should not be responsible for maintaining a bigamous wife.

45 During the third reading of the Bill, the amendments recommended by the Select Committee were accepted by Parliament without any debate. There was only an introductory speech by Dr Ahmad Mattar (see *Singapore Parliamentary Debates, Official Report* (25 June 1980) at cols 1458–1462, *per* Dr Ahmad Mattar, Acting Minister for Social Affairs). Although there is no express mention in Dr Ahmad Mattar's speech of the deliberations of the Select Committee concerning the introduction of the words "nullity of marriage" in the clauses that would become the predecessor provisions to ss 112 and 113 of the Act, these deliberations are nevertheless valuable in furnishing us with the relevant background that confirms the interpretation we have adopted with regard to the phrase "nullity of marriage" in ss 112 and 113 of the Act. More importantly, it is both logical as well as reasonable to assume, in these circumstances, that the Singapore Parliament must have *accepted* the changes proposed by the Select Committee.

The historical background

46 We turn now to consider the historical background to the distinction between void and voidable marriages. The purpose of this exercise is to ascertain whether or not our interpretation of the term "nullity of marriage" in ss 112 and 113 of the Act is inconsistent with the historical rationales for the distinction between void and voidable marriages.

(1) The origins of the distinction between void and voidable marriages in English law

47 The basic concept of nullity of marriage in general and its specific elements of void and voidable marriages in particular can in fact be traced historically back to the ecclesiastical courts in England (see *per* Lord Morris of Borth-y-Gest in the House of Lords decision of *Ross Smith v Ross Smith* [1963] AC 280 ("*Ross Smith*") at 313–314 and 317 as well as *Jackson* ([41] *supra*), especially at p 72). Indeed, the concept of nullity of marriage arose as a result of the fact that the courts in England could not then grant decrees of divorce because marriage was (at that particular point in time) considered a sacrament, which (in turn) resulted in the indissolubility of marriage (see, for example, N V Lowe and G Douglas, *Bromley's Family Law* (Oxford University Press, 10th Ed, 2007) ("*Lowe & Douglas*") at pp 67–68). However, in addition to divorces *a mensa et thoro* (or judicial separation), the courts could grant decrees of nullity instead in order to mitigate the hardships engendered by the indissolubility of marriage (see, for example, the English Court of Appeal decision of *Adams v Adams* [1941] 1 KB 536 at 541, *per* Scott LJ and the Royal Commission on Divorce and Matrimonial Causes, *Report of the Royal Commission on Divorce and Matrimonial Causes* (Cd 6478, 1912) ("the *1912 Report*") at para 13) – one practical (and desirable) result of which was that remarriage was permitted during the lifetime of a spouse. As a leading legal historian aptly put it, the ecclesiastical courts "could not break the chains, but they could declare that the chains were never there" (see J H Baker, *An Introduction to English Legal History* (Butterworths, 4th Ed, 2002) at p 491).

48 How, then, did the distinction between void and voidable marriages arise? The reasons for such a distinction are not wholly clear, but it would appear that they were *historical* and arose as a result of a *tussle*, so to speak, between the royal courts on the one hand and the ecclesiastical courts on the other. The following extract from a leading English textbook on family law concisely explains this conflict (see *Lowe & Douglas* at p 68):

> By the beginning of the seventeenth century, however, the royal courts were becoming concerned at the ease with which marriages could be set aside and the issue bastardised. This was more likely to work injustice after the parties' death, when relevant evidence might no longer be available. Accordingly, they ***cut down*** the ecclesiastical courts' jurisdiction by forbidding them to annul marriages in certain cases after the death of either party. ***This had the***

> ***result of dividing impediments into two kinds: civil and canonical.*** If the impediment was ***civil*** – for example, the fact that one of the parties was married to a third person at the time of the ceremony – the marriage was still ***void ab initio and its validity could be put in issue by anyone at any time, whether or not the parties were still alive.*** If the impediment was ***canonical*** – for example, the fact that one of the parties was impotent – ***the validity of the marriage could not be questioned after either party had died. The rule thus developed that such a marriage must be regarded as valid unless it was annulled during the lifetime of both parties. Until that time it had the capacity to be turned into a void marriage: in other words, it was*** *voidable*. [emphasis in original in italics; emphasis added in bold italics]

Reference may also be made to Paul J Goda, "The Historical Evolution Of The Concepts of Void And Voidable Marriages" (1967) 7 J Fam L 297 (where the learned author was of the view that the distinction between void and voidable marriages turned on whether or not the main issue was property – in which case the temporal courts would have jurisdiction in the context of a void (as opposed to a voidable) marriage; this view is not, we note, inconsistent with the observations of *Lowe & Douglas* which have just been quoted above) and D Tolstoy, "Void and Voidable Marriages" (1964) 27 MLR 385 ("*Tolstoy*") at 387, n 14 (where the learned author furnished two reasons as to why the royal courts interfered with the ecclesiastical courts' power to declare some marriages to be void: first, to protect the issue from being bastardised and disinherited because they (*ie*, the issue) might not be able to defend the marriage as well as the parties might have if they were both alive; and second, the ecclesiastical courts were permitted to separate parties to marriages suffering from canonical disabilities because such marriages were considered to be sinful; however, after the death of one of the parties, the royal courts would not permit the ecclesiastical courts to interfere because any separation "could no longer contribute to the good of their [*ie*, the parties'] souls").

49 After the passing of the Matrimonial Causes Act 1857 (c 85) (UK) ("the 1857 UK Act"), the concept of judicial divorce was introduced. However, the concept of nullity of marriage as well as the distinction between void and voidable marriages remained. Indeed, even prior to the 1857 UK Act, the distinction between void and voidable marriages occasionally appeared even in statutes (see, for example, the Marriage Act 1835 (c 54) (UK), as well as the observations by Lord Morris in *Ross Smith* (at 316)). What is clear, however, is that the distinction between void and voidable marriages was more a *historical* one.

(2) The legal significance of the distinction between void and voidable marriages

50 That having been said, it cannot be doubted that, in so far as *consequences* are concerned, distinguishing between void and voidable marriages does have *legal* significance, especially where *third parties* are

concerned (see also *Lowe & Douglas* at pp 70–71). As, for example, Lord Greene put it in the following (and oft-cited) passage in the English Court of Appeal decision of *De Reneville v De Reneville* [1948] P 100 (at 111):

> … [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. …

51 What this means is that, in so far as *void* marriages are concerned, *third parties* who *have a proper interest in the matter* can rely on the fact that the marriage concerned is void in order to help make out their case against the other party or parties. Where, however, the marriage is only *voidable*, the right to raise the fact that the marriage concerned is voidable is *personal* to the parties *only* and can only be raised *during the lifetime of the other spouse* (see, for example, the English High Court decisions of *A v B* (1868) LR 1 P & D 559 at 561–562, *per* Sir J P Wilde and *Fowke v Fowke* [1938] Ch 774 at 781, *per* Farwell J; the English Court of Appeal decisions of *In re Eaves; Eaves v Eaves* [1940] Ch 109 at 119, *per* Goddard LJ and *In re Roberts, decd; Roberts v Roberts* [1978] 1 WLR 653 at 655–657, *per* Walton J (at first instance) and 663, *per* Goff LJ; and *Ross Smith* ([47] *supra*) at 306, *per* Lord Reid); put simply, *third parties* would have *no* operative rights in so far as *voidable* marriages are concerned. Reference can also be made to the significant Singapore High Court decision of *Tan Ah Thee v Lim Soo Foong* [2009] 3 SLR(R) 957 (see also the valuable commentary in Leong Wai Kum, "Clarity in the Law of Valid, Void and Voidable Non-Muslim Marriages" (2009) 21 SAcLJ 575 ("*Leong*") and Debbie Ong, "Marriages Produces A Husband and A Wife – The Law on Void and Voidable Marriages and the Legal Regulation of the Husband and Wife Relationship" in *SAL Conference 2011: Developments in Singapore Law Between 2006 and 2010 – Trends and Perspectives* (Yeo Tiong Min, Hans Tjio and Tang Hang Wu gen eds) (Academy Publishing, 2011) pp 272–301 ("*Ong*") at pp 272–283).

(3) The origins of the grounds for nullity

52 It would be useful to note the historical origins of the grounds for nullity. It appears that the grounds upon which a decree of nullity could be granted after the 1857 UK Act were already relatively satisfactory. However, further grounds were added, statutorily, via s 7 of the Matrimonial Causes Act 1937 (c 57) (UK) ("the 1937 UK Act"), giving effect to the recommendations of the *1912 Report* (these grounds rendering the marriage voidable (see also *Jackson* ([41] *supra*) at pp 75 and 97–98 as well as the *1951–1955 Report*, especially at para 25)). These grounds also comprise, in the *Singapore* context, what is presently ss 106(*b*), 106(*c*) (as

modified after the 1971 UK developments, see below at [57]–[58]), 106(*e*) and 106(*f*) of the Act (see below at [61]). Indeed, and returning to the English position, although there was a further landmark statutory amendment in 1971, the *statutory grounds* as we know them today (in Singapore as well) were – subject to one significant exception which will be discussed in a moment – settled, in the main, circa 1937.

53 It is also interesting to note that statutory grounds *for nullity of marriage* existed in the *local* context *as far back as 1910*. In particular, s 14 of the Straits Settlements Divorce Ordinance 1910 (SS Ord No 25 of 1910) ("the 1910 Ordinance") read as follows:

> **14.** Such decree [of nullity of marriage] may be made on any of the following grounds:–
>
> (*a*) that the respondent was impotent at the time of the marriage, and at the time of the institution of the suit;
>
> (*b*) that the parties are within the prohibited degrees of consanguinity or affinity whether natural or legal;
>
> (*c*) that either party was a lunatic or idiot at the time of the marriage;
>
> (*d*) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force;
>
> (*e*) that the consent of either party to the marriage was obtained by force or fraud in any case in which the marriage might be annulled on this ground by the law of England;
>
> (*f*) that the marriage is invalid by the law of the place in which it was celebrated.

54 The provision just quoted was, presumably, based on the then English law, although there was no indication – unlike the present law in Singapore – as to which grounds rendered the marriage void and which rendered the marriage voidable (for the present law, see ss 105 and 106, respectively (also, referred to below at [60] and [61], respectively)). That the provision was based on the then English law is confirmed by the *Objects and Reasons* to the Bill upon which the 1910 Ordinance was based, where it was stated thus (see the *Straits Settlements Government Gazette*, 17 June 1910 at p 1369):

> The object of this Bill is to confer upon the Supreme Court a jurisdiction in divorce and matrimonial causes *similar to that exercised by the High Court of Justice in England, subject to* the limitations, relating to the religion, domicile and residence of the parties and the place of celebration of the marriage …
>
> Appended to the Bill, but not forming part of it, is a Table of Reference to provisions of the English Acts and of Indian and East African Acts analogous to the provisions contained in the various clauses of the Bill.
>
> [emphasis added]

55 The relevant proceedings of the Legislative Council of the Straits Settlements are also instructive. As the then Attorney-General observed at the first reading of the Bill (see *Proceedings of the Legislative Council of the Straits Settlements 1910* at p B82 (19 August 1910)):

> … The bill is really by way of supplying what appears to be a gap or hiatus in the legislation of this Colony, and I submit that it is not to be regarded as in any way a controversial measure, but that the justice and propriety of introducing a measure on this subject will be admitted by all members of this Council. In the United Kingdom and other parts of the Empire and in most other civilised countries some provision of this kind is found necessary and has long existed. … It appears to be an anomaly that for some persons in this Colony there should be no way of relief by divorce from the difficulties of an unhappy marriage. …
>
> This history of this measure is that in 1907, when the measure now known as 'The Courts Ordinance 1907' was before this Council, the hon'ble and learned member who sits on the other side of the table (Mr. FORT) observed that it contained no provision for jurisdiction in divorce cases being exercised by the Supreme Court. … The remarks of the hon'ble member on that occasion received the consideration of the Government, with the result that in the following year a bill was drafted by Mr. MAXWELL, who was then performing the duties of Attorney-General. *He took as his guide the principles of divorce law as established in England and he also had recourse to a measure in force in the Protectorate of East Africa, and to the Divorce Act of British India*. …
>
> Reference to the terms of the bill will show that no novelties are intended to be introduced here and that *the principles proposed to be introduced correspond to principles established in England*. …
>
> [emphasis added]

56 The Indian Act referred to above appears to be the Divorce Act (Act 4 of 1869) (India), in particular, s 19 (with which s 14 of the 1910 Ordinance (reproduced above at [53]) appears to be identical save that s 19 omits the grounds for nullity found in ss 14(*e*) and 14(*f*) of the 1910 Ordinance). Of relevance, too, is the annotation to this Act in *The Unrepealed General Acts of the Governor General in Council – From 1868 to 1878, both inclusive*, vol II (Calcutta, Superintendent Government Printing, India, 4th Ed, 1909) at p 5, n 1, which reads as follows:

> This Act extends to India the principal provisions of the [UK] Matrimonial Causes Act, 1857 …, as amended by the [UK] Matrimonial Causes Act, 1859 …, the Matrimonial Causes Act, 1860 …, and the Matrimonial Causes Act, 1866 … It also embodies many rulings of Sir Cresswell Cresswell and Lord Penzance.

57 There were, in fact, *further* amendments in the *local* context to the 1910 Ordinance. Section 6 of the Straits Settlements Divorce (Amendment No 2) Ordinance 1941 (SS Ord No 25 of 1941), for example, amended s 14 (then numbered as s 13) of the 1910 Ordinance (reproduced above at [53])

to incorporate the new grounds of nullity of marriage that were introduced in the English context by the 1937 UK Act (see above at [52]). The law in Singapore in relation to the various grounds of nullity remained the same thereafter as those in the English context and were, in fact, re-enacted in the Women's Charter when that statute was first promulgated (see the *Explanatory Statement* to the Women's Charter Bill (Bill No 67 of 1960) in the *State of Singapore Government Gazette Supplement 1960* (17 March 1960) at p 361), which remained the law in Singapore until the 1980 Amendment Act which, whilst ostensibly based on the Malaysian Act, was in substance based on the English position after the enactment of the Nullity of Marriage Act 1971 (c 44) (UK) ("the 1971 UK Act"). Indeed, it is clear that the relevant provisions in the Malaysian Act themselves had "[adopted] the recommendations of the England and Wales Law Commission's Report on Nullity of Marriage" (see the *Malaysian Royal Commission Report* at p 56). It is to these developments in the English context that our attention now briefly turns.

58 There was, as mentioned above, a major review undertaken by the Law Commission for England and Wales that resulted in the 1971 UK Act (see generally the Law Commission, *Working Paper – Nullity of Marriage* (Working Paper No 20, 1968) and the Law Commission, *Family Law – Report on Nullity of Marriage* (Law Com No 33, 1970) ("the *1970 Report*"), as well as the helpful commentaries (on the latter) by Stephen Cretney, "The Nullity of Marriage Act 1971" (1972) 35 MLR 57 and J C Hall, "The Nullity of Marriage Act 1971" [1971] CLJ 208). The relevant provisions (later consolidated as part of the 1973 UK Act) do form, in fact, the basis of our current provisions in the Act on nullity of marriage. The 1971 UK Act also clarified the law pursuant to suggestions in the *1970 Report – inter alia*, by making it clear that a lack of consent ought to render the marriage concerned voidable as well as making it clear that the effect of a decree of nullity of marriage was to be prospective inasmuch as the marriage concerned would end as from the date of the decree absolute.

(4) Our interpretation of ss 112 and 113 of the Act is not inconsistent with the historical rationale for the distinction between void and voidable marriages

59 The historical background to the law on nullity of marriages tells us that despite the difference in *legal consequences* between void and voidable marriages, there is in fact nothing in the origins of the concept of nullity of marriages that justifies – in point of general principle and/or logic – the conclusion that, in construing s 112 of the Act, a division of matrimonial assets ought only to be effected in relation to voidable marriages, but not in relation to void marriages. In this regard, we find persuasive the analysis and logic of Prof Leong set out above (at [41]). We also note the observation of Lord Hodson in *Ross Smith* ([47] *supra* at 329) that

"[w]hether the marriage is void or voidable the question to be determined is always the same, that is to say, was it or was it not a valid marriage".

60 As we have noted above (at [48]), the distinction between void and voidable marriages arose from a *historical* tussle which resulted, in turn, in a "division" between civil and canonical jurisdictions – a "division" that is no longer relevant today. *However*, the rationale for, as well as the result of, such a "division" was not an incoherent one. In particular, *civil* impediments were those which went to *the very formation* of the marriage itself and, from the perspective of a "division" of jurisdiction, were appropriate for the *civil* sphere as they related (in the main) to impediments that were more *formal* in nature (see also the observation in a leading work that "[t]he real distinction is not so much between a void marriage and a voidable marriage as between a void *ceremony* and a voidable marriage" (see *Jackson* ([41] *supra*) at pp 84–85 [emphasis added]; see also *Tolstoy* ([48] *supra*) at pp 385–386). Reference may also be made to *Leong* ([51] *supra*) at 588 ("The law of ***solemnisation*** of marriage would not be complete if there were no sanctions for its breach. The most serious sanction is that the result is a void marriage, *ie*, a union that lacks legal validity. It will not be possible to ensure due compliance with the statutory requirements of the law of ***solemnisation*** if not for this most serious sanction for breach" [emphasis added in bold italics]) and *Ong* ([51] *supra*) at p 278). And, from the perspective of *legal result*, treating marriages that do not comply with the requirements for solemnisation as *void* (as opposed to *being* voidable) was also both logical and commonsensical. Hence, where the very *ceremony* itself was flawed, there was justification in treating the marriage itself as being *void ab initio* – as being fatally flawed, so to speak, right from *its outset*. So, also, there was similar justification in treating the marriage concerned as being *void ab initio* where one of the parties was *already married* at the time the marriage purportedly took place. Indeed, legal impediments of this nature *are now embodied, statutorily, within s 105 of the Act* (which encompasses not only invalid ceremonies of marriage but also other formal matters such as non-age and prohibited degrees). Section 105 of the Act itself reads as follows:

> **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; or
>
> (*b*) where the marriage was celebrated outside Singapore, that the marriage is invalid —
>
> (i) for lack of capacity; or
>
> (ii) by the law of the place in which it was celebrated.

61 In *contrast*, however, the *canonical* impediments, whilst impacting the status of the marriage concerned, were nevertheless of a somewhat different cast. In particular, none would be *necessarily* known at the time the parties entered into their marriage and therefore would *not necessarily* go towards the *formation* of the marriage as such (as a learned author observed, "the grounds on which a marriage is voidable may even be supervening causes, and none affect the validity of the marriage at its inception" (see *Ong* at p 278)). Looked at in this light, such impediments were, understandably, "allotted" to the ecclesiastical courts (as opposed to the royal courts). Hence, for example, where the marriage cannot be consummated owing to the incapacity of one party or to the refusal by one party to consummate the marriage, or where there is some other incapacity on the part of one of the parties (such as the absence of valid consent, the presence of mental disorder or venereal disease of a communicable nature, or being pregnant by some person other than the petitioner), the marriage concerned is rendered null and void *only at the option of the petitioner once he or she is aware of the impediment concerned*, not least because, as just mentioned, these impediments will *not necessarily* go towards the *formation* of the marriage. Significantly, once again, this particular situation is *in fact embodied, statutorily, within s 106 of the Act*. Section 106 of the Act reads as follows:

> **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*) that the marriage has not been consummated owing to the wilful refusal of the defendant to consummate it;
>
> (*c*) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, mental disorder or otherwise;
>
> (*d*) that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health (Care and Treatment) Act 2008 of such a kind or to such an extent as to be unfit for marriage;
>
> (*e*) that at the time of the marriage the defendant was suffering from venereal disease in a communicable form;
>
> (*f*) that at the time of the marriage the defendant was pregnant by some person other than the plaintiff.

62 However, it is important to emphasise a point alluded to earlier – that there is nothing in the analysis in the preceding two paragraphs which militates against permitting the court to divide the matrimonial assets

between the parties in the situation of a *void* marriage (as opposed to a *voidable* marriage). Hence, *even the historical background* does *not* detract from the construction of s 112 of the Act that we have adopted in the present judgment. And we would add that there is *also* no reason in principle why the court should not be given the power (pursuant to s 113 of the Act) to award the wife maintenance even in the situation of a *void* marriage (again, as opposed to a *voidable* marriage).

63 We now turn to consider – in the briefest of fashions – why general policy and principle *also support* the construction that we have adopted with regard to ss 112 and 113 of the Act.

General policy and principle

64 We have, in fact, already touched on why the construction we have adopted is consistent with the general policy underlying the division of matrimonial assets as well as of maintenance to the wife pursuant to ss 112 and 113, respectively, of the Act. To recapitulate, there is nothing in the historical development of the law relating to nullity of marriage which militates against the courts being granted the powers in these specific areas. It is therefore not surprising that the Singapore Parliament intentionally conferred these powers, which were in fact absent in the 1980 Bill, by the insertion of references to "nullity of marriage" in the respective provisions. That this was a deliberate and intentional act by Parliament has already been demonstrated by reference to the relevant materials (in particular, the Select Committee proceedings).

65 Turning to the approach from *principle*, it also seems to us that, in so far as the division of matrimonial assets is concerned, there is – having regard to the broad brush approach which has been well-established by the relevant local case law – a strong case to be made out in favour of treating s 112 of the Act as covering the entire spectrum of nullity (*viz*, both voidable *as well as* void marriages). Put simply, there is sufficient flexibility within the broad brush approach so that, in the situation of a *void* marriage in which the factual circumstances are such as to make it just and equitable that a particular spouse be given a low or (in extreme circumstances such as where the marriage is an exceedingly short one) little or no proportion of the matrimonial assets. This is, of course, wholly consistent with the broad brush approach just mentioned.

66 Secondly, if the approach of the Judge in the court below is adopted, there is nothing precluding the spouse in a *void* marriage to nevertheless have recourse to *the general law* (a point that was also referred to by the Judge himself (see the Judgment at [15]). We do not see how this can improve either the efficiency or quality of justice on both a general level and as between the parties. From the perspective of principle, the broad brush approach adopted in s 112 of the Act with a view towards the attainment of a just and equitable distribution of matrimonial assets between the parties is

the most appropriate one, particularly when viewed in the matrimonial context, and (more importantly for the purposes of this appeal) is eminently suitable with respect to *void* marriages as well as voidable marriages.

Summary

67 It is clear, from *every* aspect (*viz*, legislative intention, logic, language, history as well as general policy and principle), that the phrase "nullity of marriage" in ss 112 and 113 of the Act encompasses *both* void *and* voidable marriages. It followed from our decision (and as the Appellant had submitted) that the case should be remitted to the second District Judge to decide the issues of both the division of matrimonial assets as well as that of maintenance on their merits.

Conclusion

68 For all these reasons, we allowed the appeal with costs and the usual consequential orders.

Reported by Rajaram Vikram Raja.