Surindar Singh s/o Jaswant Singh *v* Sita Jaswant Kaur
[2014] SGCA 37

Case Number	: Civil Appeal No 129 of 2013
Decision Date	: 07 July 2014
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Judith Prakash J
Counsel Name(s)	: Yap Teong Liang (TL Yap & Associates) for the appellant; Suchitra Ragupathy, Yingtse Chen Ouw (Rodyk & Davidson LLP) for the respondent.
Parties	: Surindar Singh s/o Jaswant Singh — Sita Jaswant Kaur

Family Law – Matrimonial assets – Division

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 4 SLR 838.]

7 July 2014 Judgment reserved.

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

Introduction

1 The parties to this appeal, formerly husband and wife, were divorced by an interim judgment of divorce issued in November 2007 ("the Interim Judgment"). The parties then commenced the process of settling the ancillary matters. As by then the children of the marriage were adults, the process focussed on the issues of maintenance and division of matrimonial property. Each party filed substantial affidavits in support of their respective claims; the marriage having lasted some 35 years and the parties having been successful in business, there were many documents and factual allegations to be explored.

2 After some two years of this process, the parties decided to go for mediation. The mediation took place on 11 May 2011. It resulted in a document, signed by both husband and wife, which has in this appeal been referred to as the "Settlement Agreement". The Settlement Agreement was intended to settle all disputes and be translated into an order of court. This did not happen, unfortunately; towards the end of 2011, the wife's lawyers informed the husband's lawyers that the wife did not wish to be bound by the Settlement Agreement.

3 In January 2012, the husband filed a summons before the Family Court for the terms of the Settlement Agreement to be recorded as an order of court. No order was made on this application as the District Judge took the view that it was for the judge hearing the ancillary matters to decide whether the Settlement Agreement was binding. The ancillary matters then came on before the High Court Judge ("the Judge"). The Judge decided not to give effect to the Settlement Agreement and, instead, carried out a division exercise pursuant to which the assets were divided differently than provided for in the Settlement Agreement. The Judge's grounds can be found at *Sita Jaswant Kaur v Surindar Singh s/o Jaswant Singh* [2013] SGHC 176 ("the Judgment").

4 The husband has appealed against the Judgment and the main issue before this court is what weight should be given to the Settlement Agreement.

Further background information

5 This was a long marriage: the husband (the appellant herein) and the wife (the respondent herein) were married in 1972 and lived together until 2001. Divorce proceedings were commenced in February 2007. By the time the ancillary matters came on for hearing, both parties were in their late sixties.

6 In 2010, the parties agreed to resolve the ancillary matters through mediation. Mr Amolat Singh, a senior lawyer, was appointed as the mediator. At the mediation both husband and wife were represented by counsel: Mr RS Bajwa of M/s Bajwa & Co and Mr Kelvin Lee of Sankar Ow & Partners LLP for the wife, and Mr George Lim SC for the husband.

7 On 11 May 2011, after the parties had gone through the mediation process for the whole day, the Settlement Agreement was drafted by the mediator in his handwriting and signed by the parties in the presence of their lawyers. The Settlement Agreement provided that:

(a) The wife was to retain the apartment located at City Towers ("the City Towers Property").

(b) The husband was to retain the apartment unit located at Jalan Mat Jambol ("the Jalan Mat Jambol Property").

(c) The husband was to give up his claim to the wife's jewellery.

(d) The wife was to give up her claim to the property at Villa Aman, Malaysia ("the Villa Aman Property").

(e) The Malaysian company, Suritas Sdn Bhd ("Suritas"), would be voluntarily wound up, and the proceeds distributed to the parties in accordance with their respective shareholdings.

(f) Liability for the overdraft account would be shared equally by the parties subject to the wife accounting for the sum of $40,000 which she had withdrawn.

(g) In the event of an *en bloc* sale of the City Towers Property, any proceeds above $1.25 m would be shared in the ratio of 60:40 between the husband and wife respectively.

(h) In the event of an *en bloc* sale of the Jalan Mat Jambol Property, any proceeds above $1.9m would be shared equally by the husband and wife.

(i) The wife agreed to maintain herself because the husband was already 68, and the wife was running her own business.

8 The Settlement Agreement also provided that the settlement was subject to the approval of the court. However, a consent order from the court was never obtained because the parties could not agree on the terms of a draft consent order. Both parties wanted to make amendments to the draft consent order in respect of matters not stated in the Settlement Agreement.

9 The Judge found, and the parties did not dispute, that the pool of matrimonial assets available for division consists of the following:

(a) Assets in joint names:

(i) The Jalan Mat Jambol Property valued at $3,500,000.

(ii) The Villa Aman Property valued at $800,000.

(b) Assets in the husband's name:

(i) 5% of shares in Suritas valued at $35,000.

(ii) Bank accounts containing $132,465.

(iii) AIA insurance policy with a surrender value of $37,425.

(iv) CPF funds worth $137,648.

(v) Shares worth $15,144.67.

(c) Assets in the wife's name:

(i) The City Towers Property valued at $2,500,000.

(ii) 25% of shares in Suritas valued at $175,000.

(iii) Bank accounts containing $7,722.88.

(iv) AIA insurance policy with surrender value of $14,556.07.

(v) CPF funds worth $45,652.32.

10 Suritas is a Malaysian company which owns a property at Villa Bukit Tunku, Malaysia.

The decision in the court below

11 The Judge held that the Settlement Agreement was binding at the point at which it was signed because the terms were certain and the parties were *ad idem*, and the wife had no basis to claim that she was not bound because she did not fully understand the terms.

12 The Judge further held, however, that the Settlement Agreement was only one of the factors that the court should take into account under s 112(2) of the Women's Charter (Cap 353, 2009 Rev Ed) ("the Charter") in determining what division would be just and equitable. The Judge found that the division proposed in the Settlement Agreement was not just and equitable because the husband would receive 68% of the assets while the wife would only receive 32% of them, and this proportion did not include the other assets disclosed by the husband and wife, which were not provided for in the Settlement Agreement. Accordingly, the Judge declined to give the Settlement Agreement conclusive weight and, having considered the submissions, he awarded an equal share of the assets to each party.

13 The reasons of the Judge for this division are as follows:

(a) There was a long marriage of almost 30 years prior to the date on which the wife left the matrimonial home.

(b) The documentary and circumstantial evidence demonstrated that the wife had made

significant financial contributions to the acquisition of the City Towers and the Jalan Mat Jambol properties.

(c) The involvement of both parties was not restricted to either the financial or domestic spheres.

The parties' respective cases on appeal

The husband's case

14 The husband argued that agreements reached after divorce proceedings have commenced are not caught by s 112(2)(*e*) of the Charter because that sub-section only catches agreements "made in contemplation of divorce". Hence, the Settlement Agreement was not merely a factor to be taken into account in the court's exercise of its power to order a division of matrimonial assets under s 112, but should be upheld by the court in its totality.

15 In the alternative, the husband argued that the Singapore assets ought to be apportioned 60:40 in his favour. Regarding the Malaysian assets, the wife should retain her 25% share in Suritas but all other assets should be retained by the husband.

The wife's case

16 The wife asserted that the argument that the Settlement Agreement was binding was no longer available to the husband as he had re-negotiated the terms of the Settlement Agreement and had been the first to contend that the terms agreed to at the mediation had not been correctly set out in that document.

17 The Judge was correct to classify the Settlement Agreement as an agreement caught by s 112(2)(*e*) of the Charter and therefore the court had the power to redesign it to achieve a fair and equitable division. There was no reason to interfere with the Judge's decision. The letter dated 12 July 1999 which shows that the wife agreed with the husband that $75,000 was full and final settlement of the wife's share in all the Malaysian assets was manufactured for the proceedings.

The issues

18 The issues are:

(a) whether there was a binding settlement agreement;

(b) whether the court is bound to give full effect to the Settlement Agreement; and, if not,

(c) what weight should be given to the Settlement Agreement.

Our decision

Issue 1: Whether there was a binding settlement agreement

19 This issue arose because, although the husband did not quarrel with the Judge's finding that the Settlement Agreement is valid and binding, the fact that he appealed against the whole of the decision below gave the wife the opportunity to resuscitate her challenge to the validity of that agreement notwithstanding she did not lodge her own appeal.

20 In this judgment, we use the phrase "binding agreement" (or "binding settlement agreement") to mean a settlement contract that is validly formed in accordance with the legal requirements of the common law of contract, but it should be noted that if such a contract is caught by s 112(2) of the Charter, it will not be directly enforceable (see below at [43]). If there is a binding agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce, that will be a relevant factor in the court's determination of what is a just and equitable division of matrimonial assets under the Charter. In determining whether a binding agreement between husband and wife to settle their disputes over property and maintenance exists, the court must be guided by the legal requirements of the common law of contract because such agreements are contracts to begin with (see *TQ v TR and another appeal* [2009] 2 SLR(R) 961 ("*TQ v TR*") at [94]). Here, we have a contract for a legal purpose entered into by two mentally capable adults, legally advised, after long negotiations. On the face of it, the Settlement Agreement is binding.

21 The Judge found (at [4] of the Judgment) that the Settlement Agreement was binding. The wife's challenge to this finding did not rest on assertions of duress or non-disclosure or other vitiating factor. Instead, she submitted that the husband was not permitted to argue that the Settlement Agreement was binding because he had "re-negotiated" its terms and had renounced his obligation, as provided therein, to pay half the outstanding overdraft.

22 In view of the wife's arguments, a closer scrutiny of the facts is required. On 31 May 2011, the wife's solicitors sent the husband a draft consent order for his endorsement. The draft contained the following clause:

> That the [wife] shall retain [the City Towers Property]. The [husband] agrees to bear half the outstanding overdraft with Hong Leong Bank secured upon the City Towers Property. The [wife] shall account for the sum of S$40,000.00 withdrawn from the said overdraft subject to proof that the said sum or any other lesser sum thereof was used for repairs for the property. The [wife] agrees to refund any such sums that are not supported by documentary evidence for the repairs. In the event of an enbloc sale, the additional sum received above the price of S$1,250,000.00 (agreed valuation as at March 2009) shall be shared in the proportion of 60% and 40% in favour of the [wife];

23 On 13 June 2011, the husband's solicitors replied with amendments to the clause. They deleted the second sentence of the clause (underlined in the quotation above), and added the following:

> Subject to [the wife accounting for the sum of S$40,000.00 withdrawn from the overdraft], the [husband] agrees to bear half the outstanding overdraft with Hong Leong Bank secured upon the City Towers Property as at 11 May 2011, and the [wife] shall be responsible in servicing the overdraft after 11 May 2011. The [husband] shall pay his half of the outstanding overdraft from the sales proceeds after the City Tower Property has been sold pursuant to an enbloc sale.

24 On 22 June 2011, the wife's solicitors replied that the wife was not agreeable to the amendment proposed and she had "never agreed to defer the payment for half of the outstanding overdraft over the City Towers Property".

25 On 31 August 2011, the husband's solicitors replied:

> (1) At the mediation session before Mr Amolat Singh, the fact that the City Towers property was undergoing an en-bloc sale exercise was discussed. In this connection, you will remember that our client handed over to your client some documents relating to the en-bloc exercise.

(2) As our client did not have available spare funds, it was agreed that his half share of the outstanding overdraft with Hong Leong would be paid from the proceeds of the en-bloc sale. In the meantime, your client would continue to service the overdraft using the rental proceeds.

(3) Needless to say, if the en-bloc exercise fails, our client will, at that stage settle his half share of the overdraft.

(4) Unfortunately, because of the lateness of the day, the above terms were not expressly stated in the Agreement drafted by Mr Amolat Singh.

26 On 6 October 2011, the wife's solicitors replied with a revised draft consent order, essentially incorporating the amendments proposed by the husband's solicitors on 13 June 2011, except that it did not state that the husband was only liable for his share of the outstanding overdraft as at 11 May 2011, and that the wife shall be responsible for servicing the overdraft after 11 May 2011:

> Subject to [the wife accounting for the sum of S$40,000.00 withdrawn from the overdraft], the [husband] agrees to bear half the outstanding overdraft with Hong Leong Bank secured upon the City Towers Property. The [husband] shall pay his half of the outstanding overdraft from the sales proceeds after the City Tower Property has been sold pursuant to an enbloc sale.

The wife's solicitors also added the clarification that should the *en bloc* sale for the City Towers Property not go through, the husband was to pay his share of the outstanding overdraft within one month:

> If there is no valid and binding agreement between the subsidiary proprietors of the City Towers Property and the purchasers / developers for the enbloc sale within 6 months of the date of this Order of Court, or if the enbloc sale is aborted or is otherwise not completed within 12 months from the date of this Order of Court, then the [husband] shall bear half the outstanding overdraft within 1 month thereafter.

27 Subsequently, the husband's solicitors amended the draft consent order by adding the cut-off date of the husband's liability for the outstanding overdraft as being 11 May 2011. However, the wife's solicitors replied on 28 October 2011 that she was not agreeable to this cut-off date:

> Our client's position is that there was never any agreement that the amount of overdraft (of which your client would be paying for half), would be pegged as at 11 May 2011. If your client intends to make our client wait for up to a year before making payment, it would be unfair for our client to bear the continuing instalment payments for the overdraft, especially since the instalments and outgoings for the City Towers Property are in excess of the rental revenue for the same.

28 In the same letter, the wife's solicitors proposed that both the City Towers Property and the Jalan Mat Jambol Property be sold within one year if there was no *en bloc* sale in respect of either or both of the properties, and that the proceeds of the sales be divided in the same manner as that agreed for *en bloc* sales of the properties:

> In addition, our client instructs that there is currently no en-bloc sale slated for the Mat Jambol Property, whereas the potential en-bloc sale for the City Towers Property is still pending. It would also be unfair for your client to hold on to the Mat Jambol Property indefinitely, especially if the City Towers Property were to be sold en-bloc and the proceeds shared accordingly. In the circumstances, our client proposes that both parties sell the City Towers Property and the Mat

Jambol Property within 1 year if there is no en-bloc sale and the proceeds shall be divided in the same manner as set out in the Draft Consent Order for an en-bloc sale.

29 Returning to the arguments made before us, as stated earlier, the wife's position was that the husband was not permitted to argue that the Settlement Agreement was binding because he "re-negotiated" the terms of the Settlement Agreement and he was the first to claim that the terms agreed at mediation had not been correctly set out in the document by proposing amendments to the draft consent order on 13 June 2011. We cannot accept this argument. If the parties had concluded a binding agreement and the husband had indeed attempted to re-negotiate its terms thereafter, that in itself would not have discharged or terminated such agreement. Instead, the agreement would have remained binding and its terms would have remained in force. Once formed, the Settlement Agreement was binding and could only be varied or discharged with the consent of the wife.

30 In the same vein, the wife argued that the husband had renounced his obligation to pay half the outstanding overdraft under the Settlement Agreement by adding a new clause that he would only be liable for the same if the City Towers Property went *en bloc*. We do not agree that this was the effect of the husband's proposal.

31 The test for renunciation is to ascertain whether the "renouncing" party has indicated by his words or conduct that he is unwilling, or will be unable, to perform his material obligations under the contract. This appears from the following passage in *San International Pte Ltd (formerly known as San Ho Huat Construction Pte Ltd) v Keppel Engineering Pte Ltd* [1998] 3 SLR(R) 447 at [20]:

> … A renunciation of contract occurs when one party by words or conduct evinces an intention not to perform or expressly declares that he is or will be unable to perform his obligations in some material respect. Short of an express refusal or declaration *the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions*. The party in default may intend in fact to fulfil the contract but may be determined to do so only in a manner substantially inconsistent with his obligations, or may refuse to perform the contract unless the other party complies with certain conditions not required by its terms … [emphasis in original]

32 In the present case, the husband cannot reasonably be said to have expressly refused to perform his obligation to pay because the husband's proposed amendment acknowledged his liability. The refinement was it specified the time when payment would be made, *ie*, when the City Towers Property went *en bloc*, and further specified that the extent of his liability for his share of the outstanding overdraft was as at 11 May 2011, which is the date the Settlement Agreement was entered into. In view of the context of the husband proposing amendments to the draft consent order, the husband's act of specifying the time and extent of his obligation cannot be taken to have shown his intention not to perform his obligation under the Settlement Agreement to pay his share of the outstanding overdraft in a material respect. The husband's proposed amendment would also not lead a reasonable person to conclude that he no longer intended to be bound by the Settlement Agreement.

33 The husband's conduct after he submitted his proposed amendments is consistent with the finding that he did not evince an intention not to perform his obligation under the Settlement Agreement to pay his share of the outstanding overdraft. The husband explained in his letter dated 31 August 2011 that the parties had agreed that his half share of the outstanding overdraft would be paid from the proceeds of the *en bloc* sale, and that if the *en bloc* exercise failed, he would make payment at that stage. Although the wife's solicitors replied on 22 June 2011 that the wife was not agreeable to the amendment proposed and she had "never agreed to defer the payment for half of

the outstanding overdraft over the City Towers Property", the wife's solicitors subsequently accepted the husband's proposed amendment that the he would pay his half of the outstanding overdraft from the sales proceeds after the City Tower property had been sold pursuant to an *en bloc* sale. Hence, even if the husband's proposed amendment to the time of payment amounted to a renunciation of the Settlement Agreement, at the relevant time the wife either did not interpret his proposal as a renunciation or agreed to a variation of the Settlement Agreement.

34 In any event, even if there is a breach of an agreement to settle parties' rights to matrimonial property by way of one party's refusal to meet his obligations subsequent to the valid formation of such a settlement, the court would still be entitled under s 112(2) of the Charter to consider this agreement and place the appropriate weight on it in the light of the circumstances. Any breach or purported repudiation of a postnuptial agreement would be a relevant factor to be considered by the court, but such breach would not and could not negate the fact that there was a binding postnuptial agreement.

35 The wife also argued that there was a "misunderstanding" in respect of two material issues:

(a) who should pay off the outstanding overdraft if City Towers did not go *en bloc*; and

(b) the apportionment of the sale proceeds from the City Towers Property and Jalan Mat Jambol Property if the properties did not go *en bloc*.

On the evidence, the husband did not go so far as to insist that there was no agreement for him to be liable for the outstanding overdraft, and that his liability was only triggered if the City Towers Property went *en bloc*. The husband merely stated, in the letter dated 31 August 2011, that the Settlement Agreement was incomplete in so far as it did not mention that the parties had also agreed that the husband's half share of the outstanding overdraft was to be paid from the proceeds of the *en bloc* sale because the husband did not have available spare funds. In the same letter, the husband stated that if the *en bloc* exercise failed, he would settle his half share of the overdraft at that time. In fact, the wife's solicitors accepted this as the draft consent order, sent to the husband on 6 October 2011, was amended to reflect the husband's position. Accordingly, there was no "misunderstanding" as to who should pay off the outstanding overdraft if the City Towers Property did not go *en bloc*.

36 In any case, it is not clear how a "misunderstanding" would affect the validity and binding character of the Settlement Agreement. The wife has not shown that there is an operative unilateral mistake as to a term of the Settlement Agreement because the wife has not shown that the husband has any actual knowledge of the alleged mistake. Moreover, the Settlement Agreement was drafted by the mediator and the parties were represented: this fact militates against the existence of an operative unilateral mistake.

37 In addition to the fact that there was a signed Settlement Agreement, the following facts suggest that there was a binding Settlement Agreement:

(a) The wife's lawyers sent the husband a draft consent order for the husband's endorsement. The draft consent order essentially reproduced the terms set out in the Settlement Agreement.

(b) The wife's lawyer wrote to the wife on 6 October 2011 stating that the wife had "confirmed the settlement arrived at during the mediation on 11th May 2011".

38 In conclusion, there is no reason to disturb the Judge's finding that there is a binding

Settlement Agreement.

Issue 2: Whether the court is bound to give full effect to the Settlement Agreement

39 The starting point with respect to the division of matrimonial assets subsequent to the issue of a judgment of divorce is s 112 of the Charter, which provides that the court shall have the power to order the division of matrimonial assets in such proportions as the court thinks "just and equitable", and shall have regard to "all the circumstances of the case" when deciding whether to exercise this power. The circumstances include the matters enumerated in the non-exhaustive list of factors set out in s 112(2). In this case, the arguments have centred on factor (*e*) of the list. That factor refers to "any agreement between the parties with respect to the ownership and division of matrimonial assets made in contemplation of divorce".

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

41 The husband argued that agreements reached *after* divorce proceedings have commenced are not caught by s 112(2)(*e*) because such agreements are not "made in contemplation of divorce". On this basis, the husband argued that the Settlement Agreement was not merely a factor to be taken into account in the court's exercise of its power to order a division of matrimonial assets under s 112, but, as a binding contract, had to be given full effect by the court.

42 We do not agree that agreements reached *after* divorce proceedings have commenced are not caught by s 112(2)(*e*) of the Charter. The ordinary meaning of the words "agreement … made in contemplation of divorce" in s 112(2)(*e*) does not restrict the time the agreement is made to a time before divorce proceedings have commenced. The words "made in contemplation of divorce" simply clarify that the parties must have intended for the agreement to govern the allocation of matrimonial assets upon the contingency of divorce, whenever that might actually happen, in contradistinction to a time when the parties are still married (see also *Lian Hwee Choo Phebe v Tan Seng Ong* [2013] 3 SLR 1162 at [20]).

43 The husband's argument is also inconsistent with the express words of s 112 and the general approach of the court in ordering the division of matrimonial assets. These are that: (a) the ultimate power resides in the court to order the division of matrimonial assets "in such proportions as the court thinks just and equitable"; and (b) a postnuptial agreement cannot be enforced directly but only by the court after considering all the circumstances, and any such agreement cannot "oust the jurisdiction of court" to determine division of assets: *AOO v AON* [2011] 4 SLR 1169 ("*AOO v AON*") at [19] (this is consistent with the position relating to prenuptial agreements, as stated in *TQ v TR* at [73], [77], [80] and [104]). In any event, even if agreements reached *after* divorce proceedings have commenced are not strictly caught by s 112(2)(*e*), this does not preclude the court from considering the agreement because the court is required to have regard to "all the circumstances of the case", and the factors set out in s 112(2), which are factors to be considered by the court in reaching a just and equitable division of matrimonial assets, are not exhaustive: see *TQ v TR* at [78].

44 The husband referred to *Lock Han Chng Jonathan (Jonathan Luo Hancheng) v Goh Jessiline* [2008] 2 SLR(R) 455 ("*Jonathan Lock*") at [38] for the proposition that "in order to give efficacy to [Court Dispute Resolution], a court-mediated settlement must be binding on the parties and carried out according to its terms". This argument is misconceived because *Jonathan Lock* was concerned with the quantification and assessment of damages arising from a road traffic accident and not the

division of matrimonial assets in divorce proceedings. The latter is governed by s 112 of the Charter, which gives the court the overriding discretion to decide on the just and equitable division of the matrimonial assets. The parties' agreement is by no means binding on the court's exercise of its power.

45 Moreover, there is no good reason to adopt a narrow reading of s 112(2)(*e*). The husband's arguments that agreements reached after divorce proceedings have commenced should be treated differently from agreements reached prior to filing such proceedings can be adequately taken into account by assigning the appropriate weight to be given to such agreements. There is judicial recognition that postnuptial agreements relating to the division of matrimonial assets may be given more weight than prenuptial agreements because the circumstances are very different from those in relation to prenuptial agreements (even though the weight to be allocated to an agreement must ultimately depend on the precise circumstances): *TQ v TR* at [75]. In reaching a just and equitable division of matrimonial assets between the parties, the court can choose to place more weight on such agreements where the circumstances show that the process by which the parties reached the agreement is fair, and the agreement does not seem to be manifestly disadvantageous to one party.

46 The husband argued that settlement agreements on ancillary matters made after private mediation would necessarily be converted into a consent order. However, that is not the case as the parties can still choose not to agree to a consent order being entered into. Court scrutiny of the agreement is necessary and there are two requirements that must be satisfied: (a) that there is a real contract between the parties; and (b) actual consent of the parties must be signified to the court (see *AOO v AON* at [13] and [15]). Hence, where there is a deed of settlement that has been signed but a party did not participate in the proceedings at all, that would not satisfy the second requirement stated above and the ancillary order is liable to be set aside: see *AOO v AON* at [18].

47 The provisions of s 112(2)(*e*) mean that the court has the discretion not to give full effect to an agreement entered into by divorced parties with regard to the distribution of their assets. In appropriate circumstances, however, the weight to be given to such arrangements may well be conclusive, *ie*, where the facts warrant it, there may be a need to accord such an agreement primacy (to adopt the words of Thorpe LJ in *Crossley v Crossley* [2008] 1 FLR 1467). The question that faces us is whether this is such a case.

Issue 3: What weight should be given to the Settlement Agreement

48 As stated earlier, the Judge held that the Settlement Agreement was only one of the factors that the court should take into account under s 112(2) of the Charter in determining what division is just and equitable. The Judge considered that the proposed division in the Settlement Agreement was not just and equitable because the husband would receive 68% of the assets while the wife would only receive 32% of the assets, and this proportion did not include the other assets disclosed by the husband and wife which were not provided for in the Settlement Agreement. Accordingly, the Judge declined to give the Settlement Agreement conclusive weight and carried out his own division exercise.

49 Although the Judge is correct that under s 112(2) of the Charter, the presence of an agreement between the parties in regard to distribution of assets is only listed as one of the factors to be considered, with respect, this does not mean that, in all circumstances, such an agreement would have no greater weight than any other of the listed factors. The factors are a guide to the court, not a mandatory list of items that must be ticked off and given equal weight if they exist. To follow such a course would lead to a mechanistic process of division which would not always be fair. The discretion given to the court to achieve a just and fair distribution means that if the facts

warrant it one or more factors may be given more weight than the others and even primacy over the others. In the circumstances of this case, our view is that the Settlement Agreement should have been given significant, if not conclusive, weight.

The approach towards postnuptial agreements relating to the division of matrimonial assets

50 Generally speaking, agreements dealing with the distribution of assets upon divorce can be placed in two categories: prenuptial and postnuptial. In *TQ v TR*, this court held that there is no blanket rule that a prenuptial agreement must be enforced to the exclusion of all the other relevant circumstances before the court; much will depend on the precise terms of that agreement as viewed in the context of all relevant circumstances as a whole, including the matters set out in s 112(2) of the Charter (at [80]). We recognised that it might well be the case that a prenuptial agreement is, given the circumstances as a whole, considered to be so crucial that it is, in effect, enforced in its entirety.

51 The issue that arises here is how much weight should be accorded to postnuptial agreements in general. Postnuptial agreements are made in circumstances that are very different from those existing in relation to prenuptial agreements. Such differences may warrant the courts according postnuptial agreements more weight than prenuptial agreements in the exercise of their discretion under s 112(2)(*e*) of the Charter.

52 It is useful to draw a distinction between two kinds of postnuptial agreements. Postnuptial agreements may be made when the husband and wife are still together and intend to remain together, or when they are at the point of separating or have already separated, in which case, the postnuptial agreement may be called a "separation agreement". A separation agreement is made when the marriage has failed and when the parties have either gone their separate ways or are proposing to do so. The separation agreement is meant to cater to the immediate needs and desires of the parties, instead of some future possibility of breakup which the couple neither want nor expect to happen. Therefore, as a general proposition, where the parties enter into a separation agreement, especially after divorce or separation proceedings have already commenced, such a separation agreement will, in our view, generally carry significant weight. Nevertheless, the weight to be allocated to a postnuptial agreement in each case must ultimately depend on the precise circumstances of the case.

53 In determining the weight to be given to separation agreements, we endorse these observations by Ormrod LJ made in the context of a separation agreement in *Edgar v Edgar* [1980] 1 WLR 1410 at 1417:

> To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; *all* the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Under pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an

exclusive catalogue. [emphasis in original]

54 Indeed, where parties have properly and fairly come to a formal separation agreement with the benefit of legal advice, the court will generally attach significant weight to that agreement unless there are good and substantial grounds for concluding that to do so would effect injustice. This approach is sensible because the parties to a marriage are in the best position to determine what is a just and equitable division of the matrimonial assets based on their own assessment of each party's direct and indirect contributions to the marriage and their knowledge of the extent and value of the assets. Due to the inherent limitations of fact-finding in the litigation process, the court should not lightly depart from such a separation agreement.

55 In this connection, there is judicial recognition that divorce is a very personal matter and there may be private reasons as to why certain concessions were made in reaching a settlement agreement. This was recognised in *Lee Min Jai v Chua Cheow Koon* [2005] 1 SLR(R) 548 at [5], in the context of whether a consent order should be rescinded:

> Under s 112(4) of the Women's Charter (Cap 353, 1997 Rev Ed), the court "may, at any time it thinks fit, extend, vary, revoke or discharge any order made under this section, and may vary any term or condition upon or subject to which any such order has been made". But this section, and the authorities referred to by Mr Chia, should not be construed as an invitation to revise the terms of a settlement merely so that they appear more equitable or will be, in fact, more equitable in the objective opinion of the court. Privately settled terms in respect of the ancillary matters in a divorce may not always appear to be fair. But divorce is a very personal matter, and each party would have his own private reasons for demanding, or acquiescing, to any given term or condition in the ultimate settlement. What the court should be alert to, is that one party had not taken an unfair advantage over the other in the course of negotiating and settling the terms. Hence, in *Dean v Dean* [1978] 3 All ER 758, the court held (as set out in the headnote) that:
>
> > [W]here an agreement between the parties had been reached at arm's length and the parties had been separately advised, the agreement itself would be prima facie evidence of the reasonableness of its terms, and formal discovery would probably be unnecessary.

56 We are of the view that giving significant weight to a separation agreement, unless there are good and substantial grounds for concluding that an injustice will be done, is not inconsistent either with the approach in *TQ v TR* or with s 112 of the Charter. This does not mean that in every case significant weight will be given to such an agreement. Whilst the court may incline to give significant weight to a separation agreement which the parties have freely and voluntarily arrived at with the benefit of legal advice, the court will always (consistently with s 112(2)) examine the precise circumstances before it to determine whether in the instant case it would be unfair to do so. In determining whether such unfairness exists, the court will not accord great significance to the fact that it might have made a different distribution than that agreed to. The grounds for disregarding such a separation agreement would have to be more substantial than a slight difference of opinion on the fairness of the distribution provided for by the agreement.

57 An illustration of when the court might not give significant weight to a separation agreement is *AFS v AFU* [2011] 3 SLR 275. In that case, the husband and wife had entered into a deed of separation which provided that the assets acquired by either party after the date of the deed would remain as assets of the acquiring party, while two recitals required full disclosure by both parties. Andrew Ang J found that it would be inequitable to the wife to hold both parties to the clause in question as the husband, in breach of the recitals, had failed to disclose his acquisition of shares worth some S$12m and S$985,000 as consideration thereof when the deed was being drawn up, and

had subsequently failed to comply with his duty of full and frank disclosure to the court. These shares and the consideration were found to be matrimonial assets which the wife would have had a share of had they been disclosed under the agreement. Ang J awarded the wife a 25% share of the shares and the consideration, leaving undisturbed the wife's earlier 50% share of the matrimonial assets dealt with in and by the deed.

The weight to be given to the Settlement Agreement

58 The Settlement Agreement, being a postnuptial agreement concluded after the Interim Judgment, is akin to a separation agreement and should be treated accordingly.

59 In this particular case, the following facts justify giving effect to the Settlement Agreement as they show that it was reached after a well-considered process and at a time when parties had already been through the ancillary matters process:

(a) The Settlement Agreement was reached at the end of a mediation session after the ancillary matters process had started. Therefore, parties would have had a better grasp of their interests and positions, and would have been in a better position to reach a settlement which had due regard to their interests.

(b) Both parties were represented by legal counsel, and the mediator was an experienced lawyer. The husband was represented by a Senior Counsel, while the wife was represented by two lawyers, both senior and one extremely senior, from two law firms. The parties had the opportunity of taking advice from their solicitors on the terms being negotiated.

(c) The mediation took place from 10am to 5pm during which the parties had many private sessions with the mediator.

(d) The parties had the opportunity to and did in fact make amendments to the handwritten Settlement Agreement.

(e) The wife's lawyers sent the husband a draft consent order for the husband's endorsement. The draft consent order essentially reproduced the terms set out in the Settlement Agreement.

(f) The wife's lawyer wrote to the wife in a letter dated 6 October 2011 stating that the wife had "confirmed the settlement arrived at during the mediation on 11th May 2011".

60 We would like to emphasise the importance to our decision of the fact that the Settlement Agreement resulted from a mediation process during which the parties had independent advice. Whilst the end of a marriage may be legally brought about by the issue of an interim judgment, the marriage will not end in truth until all outstanding matters are settled and the parties are free to walk away and rebuild their lives. This cannot happen as long as they are disputing the division of the assets and having to rebut each other's cases in relation to the same. That process often breeds contention and bitterness. Thus, it would be in both parties' interests if they could come to a negotiated solution without resorting to determination by the courts which would resuscitate old complaints and acrimonious feelings. The process also takes time and can be costly. Such solutions can be facilitated by mediation. Accordingly, if the mediation process is properly followed, as it was in this case, the parties having participated in the process and received advice thereon, and a settlement agreement results, the court will attach significant weight to the agreement unless there are good and substantial grounds for concluding that to do so would cause an injustice.

61 The following table shows that division in accordance with the Settlement Agreement, on the interpretation that the parties keep their respective properties in the event that no *en bloc* sale takes place, would give the Husband 62% of the matrimonial assets, while the Wife would get 38% (based on the most recent valuations at the time of the hearing as used by the Judge):

Value of Assets according to the Judgment dated 16 September 2013			**Division according to Settlement Agreement dated 11 May 2011**	
	Assets	**Value**	**Husband**	**Wife**
1	Jalan Mat Jambol	$3.5m	$3.5m	
2	Villa Aman	$800,000	$800,000	
3	City Towers	$2.5m		$2.5m
4	Husband's 5% share in Suritas Sdn Bhd	$35,000	$35,000	
5	Wife's 25% share in Suritas Sdn Bhd	$175,000		$175,000
6	Husband's bank accounts	$132,465	$132,465	
7	Husband's AIA policy	$37,425	$37,425	
8	Husband's CPF funds	$137,648	$137,648	
9	Husband's shares	$15,144.67	$15,144.67	
10	Wife's bank accounts	$7,722.88		$7,722.88
11	Wife's AIA policy	$14,556.07		$14,556.07
12	Wife's CPF funds	$45,652.32		$45,652.32
	Total:	**$7,400,613.94**	**$4,657,682.67** (62%)	**$2,742,931.27** (38%)

62 A contrary interpretation of the Settlement Agreement is that it was a shared assumption that both properties would be sold soon after the formation of the Settlement Agreement (whether in *en bloc* sales or otherwise), and the parties had agreed to divide, in the specified proportions, any sale proceeds in excess of the agreed valuations of the two properties. Based on this interpretation, division in accordance with the Settlement Agreement would give the Husband 58.9% of the matrimonial assets, while the Wife would get 41.1% (based on the most recent valuations at the time of the hearing as used by the Judge):

Value of Assets according to the Judgment dated 16 September 2013			**Division according to Settlement Agreement dated 11 May 2011**	
	Assets	**Value**	**Husband**	**Wife**
1	Jalan Mat Jambol	$3.5m	$2,700,000 ($1.9m + 50% of surplus above $1.9m)	$800,000 (50% of surplus above $1.9m)
2	Villa Aman	$800,000	$800,000	

3	City Towers	$2.5m	$500,000 (40% of surplus above $1.25m)	$1,250,750 ($1.25m + 50% of surplus above $1.25m)
4	Husband's 5% share in Suritas Sdn Bhd	$35,000	$35,000	
5	Wife's 25% share in Suritas Sdn Bhd	$175,000		$175,000
6	Husband's bank accounts	$132,465	$132,465	
7	Husband's AIA policy	$37,425	$37,425	
8	Husband's CPF funds	$137,648	$137,648	
9	Husband's shares	$15,144.67	$15,144.67	
10	Wife's bank accounts	$7,722.88		$7,722.88
11	Wife's AIA policy	$14,556.07		$14,556.07
12	Wife's CPF funds	$45,652.32		$45,652.32
	Total:	**$7,400,613.94**	**$4,357,682.67** (58.9%)	**$3,042,931.27** (41.1%)

63 In the light of the above calculations, it cannot be said that the distribution effected by the Settlement Agreement is manifestly disadvantageous to one party, even taking into consideration the findings of the Judge on the length of the marriage and the contributions made by each party.

64 Whilst in an appropriate case it may be possible to argue that the distribution of the assets effected by an agreement between the parties is so skewed that it indicates that vitiating factors such as duress or undue influence were present during or prior to negotiations, that is not the situation here. No suggestion of such vitiating factors has been made. The wife's complaint was not that she had come under any pressure to sign but that, after she agreed, the husband had tried to change the agreement. We have dealt with that argument above.

65 The Settlement Agreement was, more likely than not, an accurate estimation of what the parties thought was just and equitable in view of their various direct and indirect contributions and the assets which each of them had. In situations such as this where the finances of the parties are intertwined, as they often are in a marriage, the parties are in a better position to decide on what is a just and equitable division of the matrimonial assets, based on facts which in truth only they are really privy to. We note further that there were other assets in each party's sole ownership which were to be kept by him/her and were not affected by the Settlement Agreement. For example, the wife has some gold and jewellery which are of value. In fact, under cl 6 of the Settlement Agreement, the husband specifically agreed not to make any claim to the wife's jewellery; the wife would know the true value of that concession.

66 There being no good and substantial grounds to justify the conclusion that holding the parties to their agreement would cause injustice and since the distribution effected by the Settlement Agreement is not inequitable, we attach conclusive weight to the Settlement Agreement. This is reflected in the orders we make below at [71].

67 It seems that the wife decided not to proceed with the Settlement Agreement because:

(a) The husband was suggesting amendments to the draft consent order, and that may have given her the impression that amendments could still be made to the Settlement Agreement.

(b) The wife wanted a better deal because while the *en bloc* exercise for the City Towers Property appeared to be proceeding, the *en bloc* exercise for the Jalan Mat Jambol Property had not received the necessary support from the subsidiary proprietors. That may not be as advantageous to the wife because while the surplus sale proceeds from the *en bloc* sale of the wife's City Towers Property would be shared between the husband and wife in accordance with the Settlement Agreement, there would not be an *en bloc* sale of the husband's Jalan Mat Jambol Property and hence there would be no surplus sale proceeds to be divided in accordance with the Settlement Agreement.

68 We accept that the Settlement Agreement was based on the common anticipation that there would likely be *en bloc* sales of both the City Towers Property and the Jalan Mat Jambol Property. Apparently, neither property was subsequently sold as part of an *en bloc* sale. That, however, does not detract from the fact that the Settlement Agreement was made on the basis of the agreed valuations as at March 2009, and that the parties agreed to share the surplus of the sale proceeds, if any, in the specified proportions. Accordingly, the orders we make below do, in substance, give effect to the parties' common intention evidenced in the Settlement Agreement to share the sale proceeds of the two properties to the extent the same exceeded the values given as at March 2009.

Conclusion

69 For the foregoing reasons, we allow the appeal and order that:

(a) The wife is to sell the City Towers Property in the open market within six months. The net sale proceeds shall be divided as follows:

(i) The wife is to retain $1.25m.

(ii) Any amount by which the net sale proceeds exceeds $1.25m shall be divided between the parties in the proportions 60:40 in favour of the wife.

(b) The husband is to sell the Jalan Mat Jambol Property in the open market within six months and the wife shall sign all necessary documents and deeds so as to enable the husband to effect the sale and, in default of her doing so, the Registrar shall be authorised to sign all such documents and deeds. The net sale proceeds shall be divided as follows:

(i) The husband is to retain $1.9m.

(ii) Any amount by which the net sale proceeds exceeds the sum of $1.9m shall be divided equally between the parties.

(c) Each party is to give the other party the right of first refusal to purchase the abovementioned properties at their current market values as determined by a valuer who has been jointly appointed.

(d) The wife is to transfer her share of the Villa Aman Property to the husband.

(e) The Malaysian company, Suritas, is to be voluntarily wound up and the proceeds distributed to the parties in accordance with their respective shareholdings.

(f) The parties are to keep all other assets in their own names.

(g) There shall be no order for maintenance of the wife.

(h) There shall be liberty to apply for any further orders that are needed to give effect to the above orders.

70 Since we find, as did the Judge, that the Settlement Agreement is binding, the liability for the overdraft account as at the date of this judgment should be shared equally by the parties. In accordance with the Settlement Agreement, the wife is liable to account for the sum of $40,000 which she had withdrawn, subject to proof that the said sum or any other lesser sum thereof was used for repairs for the City Towers Property. The wife has also agreed to refund any such sum allegedly spent on repairs that is not supported by documentary evidence.

71 The wife shall bear the costs of the appeal as taxed or agreed and the security deposit shall be released to the husband's solicitors.