Judgments

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 172 of 2015 was dismissed by the Court of Appeal on 5 July 2016. See [2016] SGCA 39.]

12 November 2015

Hoo Sheau Peng JC:

Introduction

1 In the appeal before me, the central dispute was whether a decree *nisi* obtained in an uncontested divorce petition should be set aside (with the consequential setting aside of orders on ancillary matters) on the application of the late husband's personal representatives based on facts (particularly facts about a prior foreign divorce judgment) which were known to the parties to the marriage but not raised by them at the time of the divorce hearing.

2 The appellants, Yap Chai Ling and Yap Swee Jit ("the appellants"), are the personal representatives of the late Yap Kiat Cheong ("the Husband"). The respondent, Hou Wa Yi, was his wife ("the Wife"). For convenience, I will refer to the Husband and the Wife collectively as "the Parties".

3 On 20 May 2005, the Wife filed Divorce Petition No 2201 of 2005/B ("D 2201/2005") in the District Court, seeking a dissolution of the Parties' marriage. On 26 September 2006, a decree *nisi* was granted on an uncontested basis ("the Decree *Nisi*"). Three years later, several orders were made in respect of the ancillary matters ("the Ancillary Orders"). The Wife appealed against the Ancillary Orders. Before her appeal could be dealt with in the High Court, the Husband passed away on 8 February 2011.

4 On 22 July 2013, the appellants filed Originating Summons (Family) No 330 of 2013 ("the application below" or "OSF 330/2013"), seeking, *inter alia*, an order to set aside the Decree *Nisi* and, consequentially, to set aside the Ancillary Orders. District Judge Tan Peck Cheng ("the DJ") dismissed the application on 12 May 2014 and set out the grounds of her decision in *Yap Chai Ling and another v Hou Wa Yi* [2014] SGDC 299 ("the GD"). The appellants appealed to this court.

5 On 2 March 2015, I dismissed the appeal. On 21 August 2015, the Court of Appeal granted leave for the appellants to appeal against the decision. The appellants filed the appeal on 3 September 2015. Thus, I now provide my detailed reasons.

Background Facts

6 I begin with the rather convoluted history of the case. On 21 August 1991, the Husband, a Singapore citizen, and the Wife, a Chinese national, registered their marriage in Shanghai ("the Shanghai marriage") after which they moved to Singapore. The Husband tried to apply for the marriage to be registered in Singapore. It soon transpired that, at the time of the Shanghai marriage, he was still legally married to his previous wife. He had married his previous wife in Singapore on 28 September 1959 in accordance with Chinese customary rites but had only obtained a decree *nisi* (and not a decree absolute) in respect of this marriage, before he purported to marry the Wife. For this reason, the Husband was charged for bigamy in January 1992 and the Wife was deported.

7 Later, the charge for bigamy was dropped as it appeared that the Husband had thought that a grant of a decree *nisi* was sufficient to dissolve a marriage. On 1 June 1992, the High Court granted the decree absolute in respect of his previous marriage, facilitating the return of the Wife to Singapore. The Parties then solemnised and registered their marriage in Singapore on 30 September 1992 ("the Singapore marriage") after which they made their home in Singapore.

8 Unfortunately, the marriage broke down. From July 2000 onwards, the Parties began living in separate rooms. On 25 April 2001, the Husband commenced Divorce Petition No 601380 of 2001 ("D 601380/2001") to seek the dissolution of the marriage on the basis of the Wife's unreasonable behaviour. This petition was contested by the Wife. The Husband withdrew D 601380/2001 on 27 November 2001 on the understanding that they would proceed to divorce on an uncontested basis. In November 2002, the Wife left Singapore and returned to Shanghai, where she made her home.

Divorce proceedings in Shanghai

9 On 13 July 2004, the Husband commenced divorce proceedings in the Min Xing District People's Court in Shanghai ("the Shanghai court of first instance") on the basis that he and the Wife had lived separate lives since July 2000. The Wife contested the proceedings on the basis that the Shanghai marriage was null and void from the outset since the Husband was still legally married to his previous wife at the time it was registered. She also contended that divorce proceedings should be taken up in Singapore instead of Shanghai. On 24 March 2004, the Shanghai court of first instance ruled against the Wife and granted the divorce ("the Shanghai divorce judgment"). While the court agreed that the Shanghai marriage was not valid at its inception, it held that the Shanghai marriage became valid *from* 1 June 1992, when the High Court of Singapore granted the Husband a decree absolute in respect of his marriage with his previous wife.

10 The Wife then appealed to the Shanghai No 1 Intermediate People's Court ("the Shanghai appellate court"), canvassing the same argument on appeal, *viz*, that the Shanghai marriage was null and void to begin with so there was no marriage to dissolve. In response, the Husband adopted the reasoning of the Shanghai court of first instance and argued that, by reason of the grant of the decree absolute on 1 June 1992, "the situation causing the marriage to be void was no longer in existence, thus the marriage registration of both parties in Shanghai had become a valid marriage". On 20 June 2005, the Shanghai appellate court upheld the decision of the Shanghai court of first instance and likewise held that the Shanghai marriage, while invalid at its inception, became valid from the time of the grant of the decree absolute on 1 June 1992.

11 It is notable that, both at first instance and on appeal, the Parties stated that they did not want the Shanghai courts to divide the matrimonial assets. However, sometime later, the Husband applied separately to the Chinese courts for a division of the matrimonial assets. On 11 June 2006, the Chinese courts ordered a division of the Parties' Chinese assets only (leaving the assets in Singapore untouched).

Divorce proceedings in Singapore

12 On 20 May 2005, the Wife filed D 2201/2005. She cited the Husband's unreasonable behaviour as the premise for her claim that there had been an irretrievable breakdown of the marriage. On 27 January 2006, the Husband responded by filing Summons No 1348/2006/G to strike out the divorce petition. The summons was subsequently withdrawn. A year later, on 15 June 2006, the Wife amended the petition by deleting the reference to the Husband's behaviour and citing the fact that the parties had lived apart for a continuous period of at least four years prior to the filing of the petition as the basis for the divorce. Following the amendment, the divorce proceeded on an uncontested basis and the Decree *Nisi* was granted on 26 September 2006.

13 When the parties attended before a district judge for the hearing of the ancillary matters on 17 December 2007, the court raised concerns over the effect of the Shanghai divorce judgment. Thereafter, the Husband proceeded to file (and subsequently withdraw) two successive applications for declarations that the Shanghai divorce judgment had dissolved the marriage and that D 2201/2005 should therefore be struck out and the Decree *Nisi* rescinded on the basis that there had never been any subsisting marriage for the Singapore court to dissolve. The first application was an originating summons filed on 2 June 2008 in the High Court and withdrawn on 30 September 2008. The second was a summons filed in D 2201/2005 itself, which was withdrawn on 3 April 2009.

14 The withdrawal of the two applications paved the way for the ancillary matters to be heard. During the hearing on the ancillary matters, the District Court was informed that the Parties had agreed that the Chinese

properties had been dealt with by the Shanghai courts and that no further orders should be made for their division in Singapore. On this premise, the District Court proceeded to give certain orders as to the division of the Parties' Singapore assets. Soon after, the Husband requested for leave to present further arguments to the effect that a shophouse (worth $1.7m) should be excluded from the pool of matrimonial assets because the Wife had previously agreed to this. On 19 November 2009, this request was granted and the District Court accepted the Husband's argument, varying the ancillary orders to exclude the shophouse from the pool of matrimonial assets. This is the form the Ancillary Orders presently take. Without going into too much detail, the Ancillary Orders pertained to the division of property, shares, and several sums of money in bank accounts. The Wife was awarded $62,176.87, representing her share of the matrimonial assets, and a lump sum maintenance of $14,400. This added up to a total sum of approximately $76,576. Dissatisfied, the Wife appealed the Ancillary Orders in Registrar's Appeal (State Courts) No 149/2009/C ("RAS 149/2009").

Events following the Husband's death

15 On 8 February 2011, while RAS 149/2009 remained pending, the Husband passed away. On 22 March 2011, RAS 149/2009 was adjourned *sine die*. In his will dated 26 January 2002 ("the Will"), the Husband left the bulk of his estate comprising, *inter alia*, two properties (including the Parties' matrimonial home) and the monies in his Central Provident Fund account to the first and second appellants, who were his niece and nephew respectively. The Wife received $1,000 under the Will. I pause here to observe that the Will antedated the Ancillary Orders, which is why many provisions were made for the distribution of assets which were subsequently ordered to be divided under the Ancillary Orders. The appellants were named as the executors of his estate, and were granted letters of probate on 29 March 2011.

16 On 3 June 2011, the appellants applied to have the Decree *Nisi* made absolute. This was refused by the District Court on 27 September 2011 on the ground that the marriage had been dissolved by the death of the Husband so the court had neither the jurisdiction nor the power to grant a decree absolute. On 6 October 2011, the appellants filed an appeal against the decision, which was dismissed by the High Court on 27 March 2012 (see *Hou Wa Yi v Yap Kiat Cheong (Yap Chai Ling and another, interveners)* [2012] 2 SLR 995). On 27 September 2012, the appellant filed Summons No 13074/2012/H to enforce the Ancillary Orders.

17 In the meantime, on 18 August 2011, the Wife commenced District Court Suit No 2503 of 2011 ("DC 2503/2011"), against the appellants, as executors of the Husband's estate, for the maintenance of her daughter ("M"), who was born in November 2003. The Wife alleged that the child was the biological child of the Husband so his estate was therefore now legally obliged to maintain her. In response, the appellants filed a defence denying that M was the child of the Husband. However, the action has since been discontinued for want of prosecution.

The application below – OSF 330/2013

18 On 22 July 2013, the appellants filed the application below seeking, *inter alia*, the following prayers:

(a) First, an order that the Decree *Nisi* granted be declared null and void ("the prayer for declaratory relief").

(b) Second, further and/or in the alternative, an order that the Decree *Nisi* be rescinded and/or set aside ("the prayer for rescission").

(c) Third, and consequently, that the Ancillary Orders be rescinded and/or set aside.

19 The Wife subsequently filed Summons No 30002/2013 to strike out the application or, in the alternative, to be granted leave to file an affidavit in reply. The DJ declined to strike out the application and instead directed the Wife to file an affidavit in reply which she duly did. The DJ then heard parties before delivering her decision on 12 May 2014.

The parties' arguments

20 In the court below, Mr Koh Tien Hua, counsel for the appellants, relied on the following two distinct grounds in support of his case that the Decree *Nisi* ought to be set aside:

(a) First, he argued that the Decree *Nisi* had to be set aside as a nullity as there was no marriage for the Singapore court to dissolve. He contended that the Shanghai courts, whose judgment on this matter *ought* to be recognised in Singapore, had already dissolved the marriage prior to the grant of the Decree *Nisi* (see [9] and [10] above). This ground formed the basis for the prayer for declaratory relief (see [18(a)] above).

(b) Second, he contended that the Decree *Nisi* had been granted contrary to material facts which cast doubt on whether the factual basis for the grant of the Decree *Nisi*, *ie*, that the Parties had lived separate and apart for four years before the filling of D 2201/2005, was correct. Mr Koh argued that neither the pleadings and affidavits filed in support of the Husband's first divorce application (D 601380/2001) nor those tendered in support of D 2201/2005 suggested that the Parties had been living apart since July 2000. Mr Koh submitted, instead, that the "objective evidence" showed that the Husband had attempted to reconcile with the Wife in November/December 2002 and that this period of reconciliation lasted for several months until the birth of M in November 2003. This ground formed the basis for the prayer for rescission (see [18(b)] above).

21 Ms Dorothy Chai, counsel for the respondent, submitted:

(a) The Shanghai divorce judgment only pertained to the Shanghai marriage. However, the Decree *Nisi* was issued in respect of the Singapore marriage, which had not been dissolved by the Shanghai courts. Further, she argued that according recognition to the Shanghai divorce judgment would be contrary to Singapore's laws and public policy because it would amount to accepting the position of the Shanghai courts that the Shanghai marriage, though bigamous at its inception, could be regularised.

(b) The Parties are best placed to know whether they had lived apart for four years and the appellants' arguments were mere speculations and inferences based largely on affidavits filed in support of applications that had since been withdrawn. She pointed out that great weight should be placed on the fact that the Husband had *never* (even when filing the two abortive applications for the Decree *Nisi* to be set aside: see [13] above) disputed that Parties had lived apart for the four years immediately preceding the divorce petition.

(c) Finally, she submitted that the application below was an abuse of process and that its grant would cause the Wife "grave prejudice". She pointed out that the Husband had previously initiated and withdrawn two applications for the same relief (the first in 2008; the second in 2009: see [13] above). She also pointed out that, should the Decree *Nisi* be set aside, the Ancillary Orders would also be set aside with the consequence being that the Wife would be left only with the sum of $1,000 given to her under the Will, with no further entitlement to stake a claim on the matrimonial assets located in Singapore. This would leave her saddled with years of wasted legal costs and a liability to refund any sums that had been paid out to her under the Ancillary Orders.

The District Judge's decision

22 The reasons given by the DJ for dismissing the application below may broadly be summarised as follows.

23 First, she held that there was a subsisting marriage which could be dissolved by the Decree *Nisi*. In her view, it was "abundantly clear" that the Shanghai courts were only considering the Shanghai marriage, since there was "no reference whatsoever" to the Singapore marriage either in the judgments of the court or in their records of proceedings. To her the question, therefore, was "whether the dissolution of the Shanghai marriage dissolved all marriage relationship between the Parties even though there is the Singapore marriage". This, she said, turned on whether the "Shanghai court judgement [sic] ought to be recognised in Singapore as dissolving the marriage relationship between the husband and wife".

24 She answered this question in the negative. While both Chinese law and Singapore law affirmed the importance of monogamy, there was a crucial difference. Chinese law appeared to accept that the Shanghai

marriage, while invalid at its inception because the Husband was still lawfully married to his previous wife, could nevertheless be recognised as valid from the date the decree absolute was granted. By contrast, Singapore law would view the Shanghai marriage as being void *ab initio* by reason of the Husband's incapacity to marry and would further hold that this void marriage could not be validated by the subsequent grant of the decree absolute. For this reason, she held that the Singapore court should not recognise the Shanghai divorce judgment as "it would be repugnant to Singapore law and contrary to public policy."

25 Second, she held that there was no basis to conclude that the Parties did not live apart for four years. The appellants' assertions were not founded on any personal knowledge, as evinced by the pleadings they filed in DC 2503/2011 (which they, as executors of the Husband's estate, resisted: see [17] above), which only contained a bare denial that M was the Husband's child without any indication that they had personal knowledge of the Parties' marital affairs. The DJ held that there were three pieces of "objective evidence" from which it was possible to conclude that it was "more likely than not" that the Parties had separated for at least four years before the filing of D 2201/2015. These were: (a) the Husband himself had cited this as a ground for the grant of divorce in the Shanghai proceedings; (b) the Husband did not contest the amended petition for divorce in D2201/2005 based on the fact that they had been living apart for four years since July 2000; (c) "in both the husband's applications to set aside the Decree Nisi in D2201/2005 he had stated in his affidavit in support of his applications that the parties had lived separate and apart from each other since July 2000".

26 Finally, the DJ stated that she "also considered" the "grave prejudice and injustice" that would be occasioned to the Wife if the Decree *Nisi* were rescinded. She held at [32] of her GD that:

The husband in his lifetime had applied to rescind the [d]ecree [n]isi only nearly 2 years after the divorce was granted and in any event he withdrew his applications. To rescind the [d]ecree [n]isi now would mean that the wife would only inherit $1,000 under the husband's will and she would not be able to have her share of the matrimonial assets awarded to her by the ancillary order of court.

Issues in the appeal

27 In the main, the parties advanced the same broad arguments before me as in the court below. Considering their arguments, the following three issues arose for my decision:

(a) Had the DJ erred in deciding not to recognise the Shanghai divorce order as having dissolved the marriage relationship between the Husband and Wife and, in so doing, found that there was a subsisting marriage which could be dissolved by the grant of the Decree *Nisi*? This was the first ground of appeal raised by Mr Koh and it corresponded to his first argument in the proceedings below (see [20(a)] above).

(b) Had the DJ erred in finding that the Parties had lived apart for four years prior to the grant of the Decree *Nisi* and, in so doing, wrongly concluded that that there was no basis for the Decree *Nisi* to be rescinded? This was the second ground of appeal raised by Mr Koh and it corresponded to his second argument in the proceedings below (see [20(b)] above).

(c) Had the DJ had erred in finding that there would be grave prejudice and injustice to the Wife if the Decree *Nisi* were to be rescinded and, further, would this have constituted an independent ground for refusing to rescind the Decree *Nisi* if the court found in favour of the appellants in respect of either one or both of the first two issues? This was Mr Koh's third ground of appeal, and it covered the last head of Ms Chai's submissions (see [21(c)] above) which was accepted by the DJ (see [26] above).

28 These were the issues as far as the substantive merits of the case were concerned. However, I think it is important to add that after the first hearing on 4 November 2014, it became clear that there were a number of preliminary issues of law which were not addressed in the DJ's decision. Before I go to the substantive issues, I will first discuss the applicable law and deal with these preliminary matters.

The law on section 99(2) of the Women's Charter

29 The application below was expressed as having been taken out under Section 99(2) of the Women's Charter (Cap 353, 2009 Rev Ed) (I will refer to this provision as "s 99(2)" and the Women's Charter as the "WC"), which currently reads:

Where a judgment of divorce has been granted but not made final, then without prejudice to section 97, **any person** may show cause why the judgment should not be made final by reason of the **material facts not having been brought before the court**, and in such a case the court **may** —

(a) notwithstanding subsection (1), make the judgment final [decree absolute];

(b) rescind the interim judgment [decree nisi];

(c) require further inquiry; or

(d) otherwise deal with the case as it thinks fit.

[emphasis added in bold]

30 It was not disputed by Ms Chai that the provision was applicable. Section 99(2) is *mutatis mutandis* with its legislative precursor in s 99(2) in the Women's Charter (Cap 353, 1997 Rev Ed), which used, respectively, the expressions "decree *nisi*" and "decree absolute" instead of "interim judgment" and "final judgment". To maintain congruence with the Decree *Nisi* which was granted before the change in terminology, I shall use the former nomenclature.

31 For analytical purposes, s 99(2) may be broken down into four constituent parts:

(a) The first is a jurisdictional requirement. Section 99(2) may only be invoked between the grant of a decree *nisi* and the issuance of the decree absolute: *ie*, before a marriage is dissolved. This raised a preliminary question of whether this court even had the jurisdiction to set aside the Decree *Nisi* given that the marriage had already been dissolved by reason of the death of the Husband.

(b) The second is a standing requirement. An application pursuant to s 99(2) may be brought by "any person". It may seem counterintuitive that a provision purportedly open to all imposes any sort of standing requirement but both parties accepted that the expression "any person" includes "any member of the public" but specifically *excludes* the parties to the marriage. This raised the question of whether the appellants, who purportedly brought the application in their capacity as "personal representatives" of the Husband, had standing to invoke s 99(2).

(c) The third is a substantive requirement. In order to "show cause why the judgment should not be made [absolute]", an applicant must point to some "material facts not having been brought before the court". This is the gateway to relief under s 99(2). Without proof of this, no relief may be granted. The substantive requirement requires some analysis and will be discussed in some detail below.

(d) The fourth is the discretionary component. Even if the substantive requirement has been satisfied, the court is not bound to rescind a decree *nisi*. It may choose to exercise one of the alternative powers afforded to it under s 99(2), including the power to "deal with the case as it thinks fit" (s 99(2)(*d*)).

The jurisdictional requirement

32 Ms Chai submitted that the *raison d'être* of s 99(2) is to give third parties (*ie*, anyone other than the husband and the wife) the right to show cause why a decree *nisi* should not be made absolute and is "strictly limited to the determination of [the status of the] parties' marriage" [emphasis in original removed]. Therefore, she submitted that since the status of the marriage had already been determined by the death of the Husband (*ie*, it has been dissolved pursuant to s 7(a) of the WC: see [16] above), there is no longer a subsisting *res* for the purposes of s 99(2) in respect of which the court may exercise its jurisdiction.

33 Mr Koh disagreed with Ms Chai. He submitted that there was still a subsisting *res* in this case, in the form of the Decree *Nisi* and the Ancillary Orders, over which the court may exercise its jurisdiction. In support, he cited the decision of the Court of Appeal in *Sivakolunthu Kumarasamy v Shanmugam Nagaiah and another* [1987] SLR(R) 702 ("*Sivakolunthu*").

34 After considering the matter, I agreed with Mr Koh. *Sivakolunthu* stands as authority for the proposition that divorce proceedings do not abate upon the death of one of the parties to the marriage such that the court is deprived of jurisdiction over all subsequent matters in relation to the marriage. Instead, the key question is always whether further proceedings in the suit could be taken. This would depend on a consideration of at least two inter-related matters: (a) the nature of the further proceedings sought to be taken; and (b) the relevant statutory provisions which are engaged by the further proceedings (see *Sivakolunthu* at [31] and [32]). If the proceedings concern a matter which has already been determined by the death of one of the parties (*eg*, the status of the marriage) or a cause of action which cannot be carried on after the death of one of the parties (*eg*, a claim for maintenance during the subsistence of the marriage under s 69(1) of the WC), then the court's jurisdiction will necessarily cease.

35 On the present facts, it was clear to me that what the appellants sought to do was to rescind the Decree *Nisi* in order that there may be the consequential rescission of the Ancillary Orders. At its core, the object of the appellants' application was the enforceability of the Ancillary Orders, and not simply the determination of the Parties' marriage. The former was not dependent on the Husband being alive. On this basis, I did not agree with Ms Chai that this application should be dismissed because the status of the Parties' marriage had already been determined. There was still a *res* before the court over which the court may exercise its jurisdiction (see *Sivakolunthu* at [33]).

The standing requirement

36 To reiterate, both Mr Koh and Ms Chai were in agreement that an application under s 99(2) may be brought by any member of the public save for the parties to the marriage. This is a troubling submission because all the local cases cited by parties on s 99(2) involved applications by parties to the marriages (see, *eg*, *Chng Yock Eng v Kwa Teck Meng* [2004] SGDC 268 ("*Chng Yock Eng*"); *Racaza Juliet S v Caton David Andrew* [2004] SGDC 275 ("*Racaza*"); and *Tan Bee Hoon (also known as Chen MeiYun) v Goh Leong Heng Aris Chen MeiYun* [2005] SGDC 221) ("*Tan Bee Hoon*"). For this reason, I think it necessary to examine this issue more closely, beginning with the position in England, from where s 99(2) originated, before turning to its development in Singapore.

The origin of s 99(2)

37 I begin with the origins of the divorce jurisdiction of the English courts. Under the common law, marriage was understood as the "voluntary union *for life* of one man and one woman, to the exclusion of all others" [emphasis added]: *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130. The common law did not know of the concept of a divorce. Before 1857, divorces could only be procured through the passage of a private Act of Parliament (see, *generally*, Tan Cheng Han, *Matrimonial Law in Singapore and Malaysia* (Butterworths Asia, 1994) at 122). This only changed with the passage of the Matrimonial Causes Act 1857 (c 85) (UK) which provided for the first time, the right of divorce through judicial process. However, the grounds upon which a divorce could be obtained were limited to that of adultery on the part of the wife, or aggravated adultery or an unnatural offence on the part of the husband (s XXVII). The court was under a duty to inquire whether the facts pleaded in support of the divorce were true and whether there had been any collusion or condonation of the adultery (ss XXIX and XXX). If any collusion or condonation of the adultery were present, no divorce would be granted (s XXXI).

38 Given the narrow grounds on which a divorce may be presented, parties to unhappy marriages often colluded to procure a divorce. To arrest this trend, the Matrimonial Causes Act 1860 (c 144) (UK) was passed: *Forster v Forster and Berridge (Graham intervening)* (1863) 3 Sw. & Tr. 150 at 156 and 157. For the first time, s 7 introduced a two-stage process by which a divorce was granted (*ie*, first as a decree *nisi* and then a decree absolute). The creation of a gap of time between the decree *nisi* and the decree absolute

was to allow members of the public and the Queen's Proctor an opportunity to intervene in the proceedings to "show Cause why the said Decree should not be made absolute by reason of the same having been obtained by Collusion or by reason of material Facts not brought before the Court": s 7 of the Matrimonial Causes Act 1860. This was to prevent the court from being misled, either because of a misrepresentation by the petitioner or because of collusion between the parties, and therefore inadvertently pronouncing a divorce where it was not warranted: *Lautour v Her Majesty's Proctor* (1864) 10 H.L.C. 685 at 699 per Lord Westbury LC.

39 The rationale behind this enactment was explained by Bucknill J in *W. (M. J.) v W. (H. R. W.)* [1936] 1 P 187 at 198:

… the Legislature by the various statutes that have been passed has clearly indicated that *proceedings for divorce are not merely a personal matter but are also a matter of public interest. … It is a matter of public interest that a decree for dissolution of marriage should not be obtained on evidence which has been manufactured* so as to indicate adultery where none in fact has taken place. [emphasis added]

Thus, it has long been the position in England, since the old case of *Stoate v Stoate* (1861) 2 Sw. & Tr. 384 which was decided just a year after the passage of the Matrimonial Causes Act 1860, that the parties to the marriage may not avail themselves of s 7.

40 A second consideration for the English position may be found in the doctrine of *res judicata*. To allow the parties to mount an attack on a decree *nisi* by way of such an application would be to allow them a further opportunity to re-litigate a matter to which they had been party. In *Squires v Squires* [1959] 1 WLR 483 ("*Squires*"), a case relied on by Mr Koh, the wife had prayed for a divorce on the ground of cruelty. The husband did not defend the suit and the wife was granted a decree *nisi*. Subsequently, the husband issued a summons under s 12(2) of the Matrimonial Causes Act 1950 (the modified version of s 7 the Matrimonial Causes Act 1860, which is substantially the same as our s 99(2)) praying for a rescission of the decree *nisi* on the basis that he and his wife had resumed cohabitation after the grant of the decree *nisi* and that, therefore, the cruelty upon which the decree *nisi* had been based had been condoned. Before Stevenson J, the Queen's Proctor argued that a party to the marriage was not entitled to bring an application under s 12(2) of the Matrimonial Causes Act 1950. Stevenson J summarised the argument the following way (at 485 to 486):

… [s 12(2) of the Matrimonial Causes Act 1950] is conferring a procedural right which is *designed to safeguard the interest of the public in seeing that a marriage is not dissolved in consequence of collusion or of the suppression of material facts. But it was not intended to permit, and does not permit a party to re-open a judgment* in which a decree nisi has been pronounced against him, and emphasis has been placed on the inconvenience, indeed the scandal, which might result if a party to a suit were enabled by reason of this provision, which is designed for the protection of the public at large, to re-open litigation to which he has been a party and which he had an opportunity of defending. [emphasis added]

Stevenson J, after going through an extensive review of the authorities, affirmed counsel's submission and held that he had no jurisdiction to hear the matter because the husband had no standing to bring an application under s 12(2) of the Matrimonial Causes Act 1950.

Why parties to a marriage cannot bring a s 99(2) application

41 From England, we turn to Singapore. Like in England, the concept of a judicial divorce did not exist in Singapore before the intervention of statute (see Leong Wai Kum, *Principles of Family Law in Singapore* (Butterworths Asia, 1997) at 692). It was only with the passage of the Divorce Ordinance 1910 (Ordinance XXV of 1910), which was largely modelled on the English Matrimonial Causes Act 1857 (as modified by subsequent enactments), that local courts were granted the jurisdiction to issue decrees for the dissolution of marriages. Section 17(2) of the Ordinance was, *mutatis mutandis,* identical to s 7 of the Matrimonial Causes Act 1860. It likewise permitted third parties to show cause why a decree *nisi* ought not to be made absolute by reason of collusion or the non-disclosure of material facts. It remained largely unchanged until it was

repealed and re-enacted as s 95(2) of the Women's Charter (Ordinance No 18 of 1961). No changes were made to the text of the provision until the passage of the Women's Charter (Amendment) Act 1980 (Act No 26 of 1980) ("1980 Amendment") which enacted extensive changes to the law of divorce. Section 95(2) of the Women's Charter (Cap 47, 1970 Rev Ed) was repealed and re-enacted. The reference to collusion was removed and the powers available to the court upon such an application were specifically enumerated in four sub-paras. This is the form which s 99(2) takes today.

42 From the brief survey of the origin of s 99(2), it appeared clear to me that the position in Singapore ought to be the same as that in England in that parties of a marriage are not entitled to rely on s 99(2). In this regard, I adopt the twin reasons articulated by the English courts concerning the rationale for the provision (see [38] – [39]) and *res judicata* (see [40]). In my view, s 99(2) was introduced by the legislature to avoid the court being misled by parties who seek to procure a divorce, and not for parties to re-litigate matters. Accordingly, the purpose and object of s 99(2) is to provide a mechanism for third parties, and not the parties themselves, to show cause why a decree *nisi* ought not to be made absolute because of non-disclosure of material facts.

43 My view is also fortified by the existence of s 99(3) of the WC. This was originally introduced by the 1980 Amendment as s 87(3) and it now reads:

Where a [decree nisi] of divorce has been granted and no application for it to be made [absolute] has been made by the party to whom it was granted, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, *the party against whom it was granted may make an application to the court* and on that application the court may —

(a) Notwithstanding the provisions of subsection 1 of this section make the [decree absolute]; or

(b) rescind the [decree nisi]; or

(c) require further inquiry; or

(d) otherwise deal with the case as it thinks fit.

[emphasis added]

44 The expression "application" in s 99(3) refers specifically to an application for a decree *nisi* to be made absolute. The differences between ss 99(2) and 99(3) are telling. While s 99(2) relates to applications not to make decrees absolute and is open to "any party", s 99(3) applications may only be brought for the purpose of obtaining decrees absolute and is only open to the respondents.

45 When viewed in light of their history and purpose, there is a logical unity to ss 99(2) and (3). Strangers to a marriage have no standing to procure its final dissolution through the grant of a decree absolute and so their right of intervention is limited only to the provision of facts to prevent a decree absolute from being granted. Conversely, respondents to divorce proceedings may elect to accept the state of affairs and bring the marriages to an end by applying for decrees absolute. However, since they have already had the chance to be heard, they may not re-litigate the grant of the divorce. One exception to this general rule is that should a respondent be absent during divorce proceedings and subsequently wishes to set aside any orders made, he or she may apply to do so under O 35 r 2 of the Rules of Court (Cap 332, R 5, 2014 Rev Ed) ("ROC") (see discussion at [48] below). This is a separate recourse which is independent of s 99(2). For completeness, I should also note that s 97(1) of the WC provides that the Attorney-General may also intervene in a divorce to raise such matters as he thinks necessary or to show cause against an interim judgment.

The local cases

46 I am mindful that my conclusion that parties to a marriage cannot rely on s 99(2) appears to run contrary to the precedent cases. That being said, this issue of standing has not, to the best of my knowledge, been

specifically raised or argued in these precedent cases. Apart from the authorities cited in argument as set out at [36] above, there appears to be one decision of the High Court and several decisions of the District Court (see, *eg*, *AWN v AWO and another appeal* [2012] SGHC 228 ("*AWN*") and *Shameek Bhushan v Tina Gupta* [2014] SGDC 425) ("*Shameek Bhushan*")) which have applied s 99(2). In *all* these cases, the applications were brought by the respondents to the divorce petitions. Save for the cases of *Chng Yock Eng* and *Racaza*, the applications were dismissed because the facts cited were not deemed to be material. In my view, however, the outcomes in *Chng Yock Eng* and *Racaza* can be defended without having to accept that parties to a marriage can rely on s 99(2).

47 In *Chng Yock Eng*, a divorce had initially been granted to the wife on the basis of desertion. The wife stated in the petition that the husband had left for a business trip and she had not heard from him in more than two years. The husband did not enter an appearance and the wife was granted a decree *nisi*. The ancillary matters were then heard in the husband's absence and the requisite orders were made. Following that, the wife applied and was granted a decree absolute. Subsequently, it transpired that the husband and wife had long agreed (before the husband left for the business trip) that they would live apart in separate households and had agreed that neither would interfere with the other's affairs. The husband tendered evidence of this. He applied to set aside the decree absolute and decree *nisi*, with a view towards contesting the divorce itself and the ancillary matters. The precise statutory basis for his application was not stated. However, the District Court considered two alternative statutory bases: (a) O 13 r 8 of the ROC, which pertains to the setting aside of default judgments, and (b) s 99(2). It eventually proceeded to consider and apply s 99(2).

48 It has become clear, since the decision of the Court of Appeal in *AOO v AON* [2011] 4 SLR 1169 at [23] and [24], that while the concept of a "default judgment" does not exist in the context of matrimonial proceedings, a court may still proceed to hear a matrimonial case *on its merits* in the absence of one party. However, the absent party may apply under O 35 r 2 of the ROC to set aside judgments which had been given in his or her absence. Thus, I think *Chng Yock Eng* ought properly to be viewed not as an application under s 99(2) but as an application to set aside a judgment given in the absence of one party brought under O 35 r 2 of the ROC. In fact, on a separate ground, I am doubtful that s 99(2) was applicable as the decree absolute had already been granted (see [31(a)]).

49 In *Racaza*, the parties married in Hong Kong in October 1995. At the time, the wife was still married to one Hiroaki Isa, and this marriage was only dissolved by mutual consent in Japan in December 1995 (*ie*, 2 months after the parties' marriage). Some years later, the marriage broke down and the wife filed for divorce in Singapore. The matter proceeded on an uncontested basis and a decree *nisi* was granted. Shortly after, the husband discovered that the wife was still married to Mr Isa when she purported to marry him. He then filed a s 99(2) application to have the decree *nisi* (and the ancillary orders granted pursuant to it) rescinded and for a bare declaration that the marriage was a nullity. For her part, the wife filed a separate application for a petition of nullity to have the marriage voided. The court granted the application for the decree *nisi* to be rescinded but declined to issue a declaration, holding that the validity of the marriage ought to be properly determined at the time of the wife's petition for nullity.

50 What is important to note about *Racaza* is that *both parties* agreed that the decree *nisi* ought to be rescinded, albeit for different reasons (see *Racaza* at [10]). On this basis, I think it falls outside the scope of s 99(2). In *Squires*, counsel drew the court's attention to a number of cases where decrees *nisi* were rescinded *by consent* following reconciliation between the parties. Stevenson J distinguished these cases as belonging to a separate stream of authority which had nothing to do with s 99(2). He opined at 490 that the practice may be founded on the inherent jurisdiction of the court but declined to express a definite view. Applying that analysis to *Racaza*, it may be possible to view *Racaza* as a case where the decree *nisi* was rescinded by consent.

Whether the appellants have standing

51 Having considered the law, I now return to the facts of this case. Mr Koh confirmed during oral

submissions that the appellants were acting in their capacity as the "personal representatives of the late [Husband] and/or the Executors of the Estate of the [Husband]", as stated in the title to OSF 330/2013, in bringing this appeal (though I note that the notice of appeal seemed to suggest that the appellants had brought the notice of appeal in their personal capacities). Mr Koh then submitted, citing the passage of *Squires* reproduced at [40] above, that the only restriction that may be placed on s 99(2) was that parties to the marriage should not be permitted to re-litigate the matter of their divorce. However, this principle did not apply here because the personal representatives "have a legitimate expectation that an order by the Court is one that is sound and correct and not one made through deceit or misrepresentations". Therefore, he submitted, they should be allowed to invoke s 99(2). Unsurprisingly, Ms Chai took a different view. She submitted that "personal representatives" did not fall within the ambit of "any person". However, she did not cite any specific authority for this proposition.

52 In my view, Mr Koh's submission was misconceived. When personal representatives sue *in the name of the estate*, what they are doing is pursuing a cause of action which used to vest in the deceased but now, following his or her death, is vested in his estate pursuant to s 10(1) Civil Law Act (Cap 43, 1999 Rev Ed): *Teo Gim Tiong v Krishnasamy Pushpavathi (legal representatives of the estate of Maran s/o Kannakasabai, deceased)* [2014] 4 SLR 15 ("*Teo Gim Tiong*") at [14]. The fact that the appellants are personal representatives only gives them the *authority* to pursue the claim on behalf of the estate but it does not change the fact that they must be pursuing a cause of action which vested in the estate to begin with: *Teo Gim Tiong* at [15]. If, as Mr Koh conceded, the Husband could *never* have had recourse to s 99(2), there was no subsisting cause of action which survived his death and was vested in his estate to be exercised by his personal representatives.

53 The nub of the issue is capacity. The fact that the appellants happen to be personal representatives of the Husband's estate does not stop them from bringing an action in s 99(2) in their personal capacities. However, should they elect to bring a claim *qua* personal representatives of the Husband, then I did not think they would have any standing. However, given that it was clear the appellants would have been able to bring an action in their own names, I proceeded on the premise that the application below, and the appeal therefrom, had been taken out in their personal capacities, rather than in their capacities as personal representatives of the Husband.

The substantive requirement

54 As explained above, third parties are empowered to intervene in divorce proceedings to protect the public interest by "show[ing] cause why a decree absolute should not be made [absolute] by reason of the material facts not having been brought before the court". When considering a s 99(2) application substantively, it appears to me that the court has to ask itself three questions:

(a) First, are the facts "material"? The test is, in my view, whether it was necessary for the facts to have been brought to the notice of the court for consideration. From my review of the authorities, it appears to me that facts are "material" if they relate to the basis of the grant of a decree *nisi*. For example, in *Shameek Bhushan*, the husband applied to rescind the decree *nisi* on the basis that the wife had failed to inform him that her father had filed a criminal complaint against him in India for having treated his wife cruelly. In rejecting the application, the District Judge held at [17] that the existence of criminal investigations in India was entirely separate and independent of the Singapore divorce proceedings and was therefore not a material fact which was either "incompatible with or that vitiated the foundation of the [decree *nisi*]".

(b) Second, were these facts before the court which granted the decree *nisi*? All that is required is that the material facts have not been brought before the court and had therefore not been taken into account in the decision to grant the decree *nisi.* It is not necessary to go further to show that the party seeking the divorce had this information in his or her possession but deliberately chose to withhold it: *Howarth v Howarth* (1884) 9 PD 218 at 225, per Cotton LJ.

(c) Third, has sufficient "cause" been shown? This suggests that the material facts which have not been placed before the court are of such gravity that there is justification to exercise the court's power to set aside

the decree *nisi*. From a review of the authorities, the facts in question must be completely incompatible with or must vitiate the basis of the grant of the decree *nisi*. In *AWN*, Choo Han Teck J held at [8] that in order to succeed under s 99(2), "the applicant must satisfy the court that the non-disclosure of such material facts before the court vitiates the foundation of the [decree *nisi*]." The court will examine if the factual basis upon which the petitioner sought the divorce was "false such that the decree could not be supported" (*Tan Bee Hoon* at [21]). In conducting this inquiry the court must put itself in the shoes of the court which granted the decree *nisi*.

55 In practice, these three questions are often taken in the round by the courts. A useful touchstone is to ask: had these facts have been raised at first instance would it have affected the outcome of the divorce petition?

The discretionary component

56 Finally, I turn to the exercise of the court's discretion. Even if the substantive requirement has been satisfied, the court is still reposed with a discretion and it may nevertheless go on to make the decree *nisi* absolute (s 99(2)(*a*)) or otherwise "deal with the case as it thinks fit (s 99(2)(*d*)). In my view, in exercising its discretion, the court is no longer bound to place itself in the shoes of the court which originally heard the divorce petition but may instead take all subsequent events into account. This is the critical difference between the inquiry which takes place at the stage of discretion and that which the court undertakes when examining if sufficient "cause" has been shown. The court may now consider, for example, the length of time in which the state of affairs has existed, the conduct of the parties and the prejudice that would accrue should the decree *nisi* be rescinded. Having set out the applicable law, I now turn to the substantive issues.

Facts concerning the Shanghai divorce judgment

57 I had some difficulty with the structure of the argument Mr Koh advanced in support of their prayer for declaratory relief based on the Shanghai divorce judgment. Even though the application below was purportedly brought under s 99(2), no mention of s 99(2) was made in their submissions on this point. Instead, the first mention of "material facts" occurred much later, when the second issue, *ie*, that relating to the four years' separation, was discussed. Thus, Mr Koh's argument appeared to be a straightforward prayer for declaratory relief brought pursuant to the inherent jurisdiction of the court. As Mr Koh put it in his submissions, "as the Shanghai Court has dissolved the marriage between the parties, there is no marriage to be dissolved in [D 2201/2005] and on this ground, the [Decree *Nisi*] made therein on 24 September [sic] has to be set aside and/or rescinded."

58 That being said, I did not think this to be a crucial point for two reasons. First, it was possible to reframe the appellants' arguments under the rubric of s 99(2). On that premise, the "material facts" relied on by the appellants in respect of their prayer for declaratory relief concerned the issuance of the Shanghai divorce judgment and all the facts leading up to it. It was undisputed that these facts were not placed before the District Court which heard D 2201/2005. Mr Koh argued that, had this information been available, the court would (a) have recognised the Shanghai divorce judgment under the rules of private international law; and (b) have held that it did not have the jurisdiction to grant the Decree *Nisi* since there was no subsisting marriage over which it could exercise jurisdiction. Second, and perhaps more importantly, the prayer for declaratory relief, whether framed under the inherent jurisdiction of the court or under s 99(2), turned on the question of whether the Shanghai divorce judgment ought to be recognised. Thus, I proceeded on the premise that the prayer was properly brought under s 99(2).

59 To me, it was evident that the facts relating to the Shanghai divorce judgment ought to have been brought before the District Court for consideration. In other words, I found that these were material facts. A court only has the jurisdiction to grant a divorce if there is a valid and subsisting marriage (see *Ho Ah Chye v Hsinchieh Hsu Irene* [1994] 1 SLR(R) 485 ("*Ho Ah Chye*") at [61]). If these facts had been placed before the District Court, it would have had to consider whether the Shanghai divorce judgment ought to have been recognised. If the court answered that question in the affirmative, it would not have had the jurisdiction to grant the Decree *Nisi*. With that, I move on to consider whether these material facts were incompatible with or would vitiate the foundation of the Decree *Nisi*. This turned on the prior issue whether recognition should

be accorded to the Shanghai divorce judgment.

Marital status

60 Before I turn to the question of recognition proper, I think it is vital that I first make an important clarification about marital status. At [23] of her GD, the DJ wrote:

… It is abundantly clear that the Shanghai court was hearing the husband's application to dissolve the Shanghai marriage. There was no reference whatsoever to the Singapore marriage either in the Shanghai court or the Shanghai appellate court judgements or record of the proceedings. Hence *the Shanghai court specifically heard and dissolved the Shanghai marriage and not the Singapore marriage*. [emphasis added]

61 With respect, I found the italicised portion of the GD difficult to understand. Insofar as it appears to suggest that there can be multiple subsisting marriage relationships which can exist in parallel and be dissolved separately, this is clearly wrong. Mr Koh submitted, and I accepted, that there can only be "one marriage relationship even though a husband and wife may undergo two or more marriage ceremonies": *Noor Azizan bte Colony (alias Noor Azizan bte Mohamed Noor) v Tan Lip Chin (alias Izak Tan)* [2006] 3 SLR(R) 707 ("*Noor Azizan bte Colony*") at [5]).

62 Under the monogamous understanding of marriage which prevails in Singapore law, marriage is understood as effecting a permanent change in the *legal status* of those who enter into the marital union. Marriage ceremonies or celebrations are merely the formalities which accompany the acquisition of that legal status. As a corollary, a divorce, which effects the dissolution of the marital union, operates on the marital *status* of persons and not on the marital ceremonies or solemnisations which preceded its formation: *Thynne (Bath, Marchioness) v Thynne (Bath, Marquess)* [1955] 3 WLR 465 at 473, per Singleton LJ. There is no such thing as a divorce which only operates on "the Shanghai marriage" (*ie*, the marriage celebration in Shanghai) but not on "the Singapore marriage" (*ie*, the marriage celebration in Singapore). The purport of the Shanghai divorce judgment was the determination of the parties' *status* as married persons.

63 That being said, I found odd that, in a later portion of the same paragraph, the DJ stated that she agreed that there can only be "one marriage relationship between a husband and wife even though they may register their marriage in more than one country". To my mind, it was incongruous for the DJ to accept, on the one hand, that there could only be one marital status but still make the finding, on the other, that the Shanghai court "only heard and dissolved *the Shanghai marriage and not the Singapore marriage*". Be that as it may, I think the DJ correctly identified the crux of the issue as "whether the Shanghai court judgement [sic] ought to be recognised in Singapore as dissolving the marriage relationship between the husband and wife" (see the GD at [23]). That is the question to which I shall now turn.

Recognition of the Shanghai divorce judgment

64 Section 7(*b*) of the WC provides that a marriage can be dissolved by an order of a court of competent jurisdiction, which includes a foreign court (see *Noor Azizan bte Colony* at [10]). However, a foreign divorce judgment will only have effect if it is recognised in Singapore in accordance with the rules of private international law (see, *generally*, *Ho Ah Chye* at [55]). As Assoc Prof Debbie Ong (as Her Honour then was) explained in *International Issues in Family Law in Singapore* (Academy Publishing, 2015) at para 5.59, there are three generally recognised bases for recognition:

(a) where the judgment was granted by a court of the domicile of one of the parties;

(b) where the judgment was granted by a court which exercised jurisdiction on the same basis that a Singapore court would have exercised jurisdiction;

(c) where there is a real and sufficient connection between the court which granted the judgment and either party to the marriage.

65 On the facts of this case, it was undisputed that the Wife, a Chinese national, had returned to China in November 2002 and had done so with the intention of making her home there (see [8] above). That was where she resided when proceedings commenced in Shanghai on 13 July 2004 and it appeared that she was still domiciled there at the time of the application below. Therefore, I proceeded on the basis that the Shanghai courts had jurisdiction based on the domicile of the Wife. Once a foreign court is found to be competent, the defences to recognition are limited and international comity usually compels our courts to recognise the foreign divorce judgment (see *Ng Sui Wah Novina v Chandra Michael Setiawan* [1992] 2 SLR(R) 111 at [26]).

66 However, one recognised basis to refuse recognition is where enforcement would be manifestly contrary to public policy (see *Ho Ah Chye* at [53] and [68(g)]). While the concept of public policy is, by necessity, incapable of precise delimitation, it has been said that it is a discretion that should be exercised only where it offends the judicial sense of "substantial justice" (see *Gray (Orse Formosa) v Formosa* [1962] 3 WLR 1246 at 1253 per Pearson LJ).

The regularisation of a bigamous union

67 After considering the matter, I agreed with the DJ that this was a case in which recognition ought to be refused on the ground of public policy. At [23] of her GD, the DJ found that Chinese law, like Singapore law, provides for monogamous marriages. However, the critical difference is that Chinese law recognises (and did in fact recognise in the present case) the possibility that a marriage which is void for want of capacity may nevertheless be regularised. The Shanghai court of first instance held:

This court deems that, even though both parties had registered their marriage in Shanghai City on the 21st day of August 1991 with the necessary marriage formalities and obtained the marriage certificate, they ***did not satisfy the requirement to be married person*** because the marriage between the [Husband] and [the Husband's previous wife] was still in existence at that time. Therefore, *their matrimonial relationship does not conform to the prerequisites of a valid marriage.* However, upon investigation of the fact by this court, ***since the 1st day of June 1992, the [Husband] had dissolved his marriage with [his previous wife]****, at this point in time; that marriage shall no longer exist.* ***As such from then on, the petitioner and the respondent shall possess the necessary prerequisites of a qualified marriage as prescribed by the law. Hence, their relationship as husband and wife shall be lawful and valid.*** [emphasis added in italics and bold italics]

In a similar vein, the Shanghai appellate court ruled:

… on 21 August 1991, the marital relationship between [the Husband] and [his previous wife] had not been dissolved, the situation of a void marriage in fact existed between both parties. However, *after the marital relationship between [the Husband] and [his previous wife] was dissolved on 1 June 1992, the* ***situation of the said void marriage ceased*** *accordingly. The* ***void marriage of both parties became a legally valid marriage****.* [emphasis added in italics and bold italics]

68 In other words, Chinese law viewed the Husband's lack of capacity as a temporary obstacle to the validity of the marriage which could be cured by the grant of the decree absolute. By contrast, Singapore law would view the Shanghai marriage of 21 August 1991 as a complete nullity because of the absence of capacity: ss 4, 5, 11 and 105 of the WC. To recognise the Shanghai divorce judgment would be tantamount to acknowledging that a bigamous marriage may be regularised. Normally, mere differences in the marriage laws of countries will not be sufficient to justify non-recognition (see *El Fadl v El Fadl* [2000] 1 FCR 685 at 702i–703a). However, I think the difference in the present case is of an altogether different kind because of the importance of the principle at stake. As Prof Leong Wai Kum explains, the principle of monogamy is the cornerstone of Singapore's marriage policy (see Leong Wai Kum, *Elements of Family Law* (LexisNexis, 2nd Ed, 2013) ("*Elements of Family Law*") at 27). The principle of monogamy is at the core of the WC: the long title of the Act provides that it is "[a]n Act to provide for monogamous marriages" and the proscription against polygamy takes up the whole of Part II.

69 The case of *Vervaeke (formerly Messina) v Smith and others* [1983] 1 AC 145, where Belgian law and

English law took diametrically opposed positions on the validity of sham marriages, is instructive. In 1954, the appellant, born in Belgium, entered into a sham marriage with the respondent, S, an Englishman, in order that she may carry on trade as a prostitute in England. She did so for nearly 10 years thereafter, having nothing to do with S during that time. Sometime later, she petitioned for nullity in England on the basis that she had not effectively consented to the marriage. This was refused on the ground that it was a central principle of English marriage law that the sanctity of the marriage contract would be recognised, and that the parties' private motivations could not undermine the validity of the marriage (at 152H). Undeterred, the appellant sought a decree of nullity from a Belgian court on the ground that her marriage to S was a sham. This was granted on the basis that the parties, in desiring to perpetuate a sham, had not really "consented" to marry. Therefore, the marriage would be set aside. Thereafter, the appellant sought recognition of the Belgian decree from the English courts. In such circumstances, three of the law lords held that the principle of English public policy was of such a character as to justify non-recognition of the foreign nullity decree (per Lord Hailsham of St Marylebone LC at 156H–157A; per Lord Simon of Glaisdale at 161G, 163H–164A and 164G). I note though that the other two law lords expressed no view on the public policy argument, preferring instead to dismiss the matter on the ground of *res judicata*.

70 I would like to be clear that this act of non-recognition is not meant as a critique of Chinese law. Not only is it not the place of the courts of one country to criticise the laws of another, it is also clear that Chinese law also recognises the principle of monogamy (see [67] above). Rather, I was concerned with how the recognition of the Shanghai divorce judgment by *our courts* would impact on the special place of monogamy in the structure of our marriage laws (in particular, the way that we have chosen to give effect to it by providing that all marriages contracted in contravention are void *ab initio*).

71 In light of the foregoing, although the facts relating to the Shanghai divorce judgment were material, they were neither completely incompatible with nor did they vitiate the foundation of the Decree *Nisi*. Therefore, I agreed with the DJ that under this ground, the appellants had failed to show sufficient cause for the grant of relief under s 99(2).

Facts concerning separation of four years

72 Mr Koh argued that that there were material facts not placed before the court which heard D 2201/2005 which, properly considered, would justify the rescission of the Decree *Nisi* on the basis that the Husband and Wife did not, prior to the grant of the Decree *Nisi*, live apart for four years. These facts may broadly be grouped into the following three clusters:

(a) The first concerned D 601380/2001, which was the divorce petition filed by the Husband in Singapore that was subsequently withdrawn (see [8] above). Mr Koh pointed out that even though this divorce was contested, the Wife never mentioned in her Answer and Cross Petition (filed on 25 April 2001) that she had been living apart from the Husband since July 2000.

(b) The second concerned D 2201/2005 itself. Mr Koh pointed out that in the supplementary affidavit filed in support of her petition on 24 April 2006 ("supplementary affidavit"), *ie*, the one filed after she amended the basis of her petition to four years' separation instead of the Husband's unreasonable behaviour, the Wife averred that between July 2000 and November 2002, the Parties were still living together though they slept in separate rooms and allegedly did not have sexual relations. It was only after November 2002, when the Wife returned to Shanghai, that the Parties were said to have started "living separate to the exclusion of each other".

(c) The third concerned the maintenance claim in DC 2503/2011 (see [17] above). In the Statement of Claim, it was alleged that following the Wife's return to Shanghai in November 2002, the Husband attempted to reconcile with her. To that end, he travelled to Shanghai frequently. It was alleged that it was during one of these trips that M was conceived.

73 By the above, Mr Koh submitted that it could not be said that the Parties had separated in July 2000. Mr Koh placed the date of separation at November 2002 at the earliest (when the Wife returned to China) or

July 2004 at the latest (when the Shanghai divorce proceedings were commenced).

74 In response, Ms Chai submitted that even though it was undisputed that the Husband visited the Wife after November 2002 (and that they shared sexual intimacy on at least one occasion in December 2002), there was no genuine reconciliation. This, she argued, could be seen from the fact that they continued to live apart. In support, she cited the case of *Piper v Piper* (1978) 8 Fam 243 wherein the husband continued visiting the wife frequently even after they started living apart. Notwithstanding this, the court found that the husband was only behaving as an intimate friend and that there was no resumption of the marital relationship. Ms Chai further submitted that the appellants, who were never parties to the marriage, should not be allowed to gainsay the fact of separation given that the Husband himself had never questioned this while he was alive (see [21(b)] above).

75 At the outset, I should state that it was clear to me that the first and second clusters of facts did not fall within the ambit of s 99(2). In respect of the first cluster of facts surrounding D 601380/2001, I note that the Husband cited the Wife's unreasonable behaviour as the premise for his application for divorce. Conversely, the Wife cited the Husband's unreasonable behaviour as the reason for the breakdown of the marriage. Thus, the contents of the Answer and Cross-Petition were directed at the refutation of the Husband's allegations and to the citation of facts relevant to the Cross-Petition. When cast in this light, it was not surprising that no mention would have been made of the fact of the Parties' separation. These were not material facts.

76 The second cluster were all facts (or inferences from facts) found in the pleadings and affidavits filed in D 2201/2005. By definition, these were all materials which were already before the District Court which granted the Decree *Nisi* and they did not fall within the ambit of s 99(2). In any case, I think that the supplementary affidavit, read in context, supports the reading that the period of separation began in July 2000 and not November 2002:

PARTICULARS

(a) That the relationship between the [Husband] and the [Wife] is so bad that they were *not communicating as husband and wife at all since July 2000*.

(b) That the [Husband] and [Wife] *did not have any intimate relationship since July 2000*. We visually and practically treat each other as strangers.

(c) That *between July 2000 to November 2002, although the [Wife] and [Husband] stayed in the same Matrimonial flat, the Petitioner did not sleep in the [Husband's] room nor have any sex. Parties did not approach nor initiate any sexual union*.

(d) That since November 2002, the [Wife] completely moved out of the Matrimonial flat as the [Husband] refused to extend the [Wife's] Long Term Social Visit Pass in Singapore. The [Wife] went back to her country of origin, China.

(e) That the [Husband] and [Wife] have been living separately to the exclusion of each other since November 2002.

The supplementary affidavit asserted that the breakdown *began* with the breakdown in communication and cessation of sexual contact in July 2000 and it *culminated* in the physical separation of the couple following the Wife's return to Shanghai in November 2002.

77 Turning to the third cluster of facts, the Statement of Claim in DC 2503/2011 showed that the Parties continued to maintain a "cordial" relationship (see para 13 of the Statement of Claim) even after their separation, and might have spent short periods of time with each other in 2002 and 2003 (and also that they might have had sexual intercourse). I agreed with Mr Koh that these were material facts that ought to have been brought before the court for consideration as they related to the factual basis for the grant of the Decree *Nisi*. The next question, therefore, was whether these "material facts" were incompatible with or vitiated the

foundation of the Decree *Nisi*. I did not think so for two alternative reasons.

78 First, I agreed with Ms Chai that the fact that the Husband visited the Wife and the fact that they might have had sexual intercourse would not be determinative of the question of whether there was a resumption of the *consortium vitae*. In *Seah Cheng Hock v Lau Biau Chin* [1968–1970] SLR(R) 513 where A V Winslow J clarified that the expression "living separately" comprised both the *fact* of separation as well as the *intention* to separate (at [10]). Conversely, any resumption of the *consortium vitae* must be constituted not just by their living together, but must also be accompanied by the requisite *intention* to resume the *consortium vitae*. Applying that analysis to the present facts, the question was whether the facts indicated that there had been a resumption of the *consortium vitae*. In my judgment, there was nothing which suggested this. While I accepted that the Parties might have continued to maintain a "cordial" relationship even after their separation (and that they had spent short periods of time with each other in 2002 and 2003 including instances of sexual intercourse), they had quite clearly decided to live apart. There was no indication that they had intended to resume living together as man and wife.

79 Second, even if it were assumed that the Parties had reconciled for brief periods of time in 2002 and 2003, I did not think that the periods of reconciliation, taken together, gave rise to the inference that there had not been a four year period of separation. Section 95(7) of the WC states:

In considering for the purposes of subsection (3) whether the period for which the defendant has deserted the plaintiff or the period for which the parties to a marriage have lived apart has been continuous, *no account shall be taken of any one period (not exceeding 6 months) or of any 2 or more periods (not exceeding 6 months in all) during which the parties resumed living with each other*, but no period during which the parties lived with each other shall count as part of the period of desertion or of the period for which the parties to the marriage lived apart, as the case may be. [emphasis added]

Section 95(7) provides that short spells of reconciliation during a four-year period of continuous separation will not preclude a finding that the marriage had irretrievably broken down within the meaning of s 95(3)(*e*) provided (a) the total period of separation (excluding the periods of reconciliation) exceeds four years and (b) the total periods of time spent living together do not add up to more than six months.

80 In this case, the period of separation relied on by the Wife in support for her application for divorce was July 2000 to 20 May 2005 (when D 2201/2005 was filed): *ie*, a four year and ten month period of separation. Even assuming there were intermittent periods of contact between the Parties during this time, the facts cited by the appellants (including the fact that the child, M was born in November 2003) did not show that these periods of contact collectively lasted for more than six months. Thus, there was really nothing to contradict the claim that the Parties had, as alleged in D 2201/2005, lived apart for a period of four years preceding the divorce petition.

81 Furthermore, I agreed with the DJ that great weight should be placed on the fact that the Husband had *never* challenged the fact of their separation. In fact, the Husband himself had relied on the fact that he had lived apart from the Wife since July 2000 as a ground for the proceedings before the Shanghai courts. It was evident that he maintained that position for he did not contest D 2201/2005 once the Wife amended the basis of the divorce petition to the fact that the two of them had lived apart for more than four years.

82 In that light, I was of the view that the appellants had not shown sufficient "cause" for the grant of relief under s 99(2). The Decree *Nisi* was not granted contrary to the material facts which were not disclosed. I agreed with the DJ that there was no reason for the Decree *Nisi* to be rescinded or set aside on this ground.

83 Before I leave this point, I observe that the Wife's supplementary affidavit was deficient in many ways. It *completely* omitted any details of the Husband's attempts at reconciliation and the occasions of sexual intimacy in December 2002 or January 2003. Parties in matrimonial proceedings (even if uncontested) must plead the necessary facts, and do so accurately. It is pertinent to set out what the Court of Appeal stated in *Kwong Sin Hwa v Lau Lee Yen* [1993] 1 SLR(R) 90, at [39]:

Lastly, we endorse the sentiment expressed both by P Coomaraswamy J and K S Rajah JC that in uncontested matrimonial causes, it is wrong for parties to assume that the courts merely rubber stamp their petitions and grant the decree sought. It must be remembered that even in such proceedings the *material* allegations must be proved to the satisfaction of the court. [emphasis added]

Exercise of discretion

84 While the above would be sufficient to dispose of the appeal, I turn to deal with the final issue, which was Mr Koh's contention that the DJ had erred in considering that grave prejudice and injustice would accrue to the Wife if the Decree *Nisi* were to be rescinded. This matter fell for consideration because even if the substantive requirement had been satisfied, the court had to consider whether it should exercise its discretion to grant the relief sought. In this regard, the court may have regard to events which have transpired *since* the grant of the Decree *Nisi* (see [56] above).

85 Reviewing the facts and circumstances in totality, I agreed with the DJ that grave prejudice and injustice would accrue to the Wife if the Decree *Nisi* were to be rescinded. Even if it were accepted that the Shanghai divorce judgment ought to be recognised or even if the facts revealed that there had not been a four year period of separation, I would still have exercised my discretion not to rescind the Decree *Nisi*. I now give my reasons.

The denial of ancillary relief

86 First, and most importantly, should the Decree *Nisi* be rescinded, the Wife would be denied her rights to ancillary relief under Singapore law to the matrimonial assets in Singapore. Three facts have to be borne in mind.

(a) First, it appeared that both the Husband and the Wife had proceeded on the basis that the assets in Singapore would be divided by the Singapore courts applying Singapore law. This can clearly be seen from the fact that they both proceeded on the basis, at the time of the ancillary hearing, that the Singapore courts would divide the Parties' Singapore assets (see [14] above). In fact, when the Decree *Nisi* was granted, the Chinese courts had already ordered a division of the Parties' Chinese assets (leaving the ones in Singapore untouched) (see [11] above).

(b) The second was that the appellants' application, if granted, would also result in the setting aside of the Ancillary Orders. Under the WC, the court's power to make orders for the division of the matrimonial assets only arises "when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage" (s 112). If the appellants prevailed in having the Decree *Nisi* declared null and void or in having it rescinded, the Ancillary Orders would likewise have to be set aside (see *Chng Yock Eng* at [22] and [23]). This meant that the assets which were divided in the Ancillary Orders would revert to the Husband's estate and fall to be divided on the basis of the Will, leaving the Wife with just $1,000 instead of the $76,576 she had initially been awarded (see [14] above).

(c) The third was that the Wife would no longer be able to apply for a division of the matrimonial assets in Singapore since the Husband had passed on (see *Wong Yuk Fong Lily v Menezes Ignatius Augustine (Menezes Daniel Matthew, intervener)* [1992] 1 SLR(R) 252 at [11]). Even if he were to be alive, the Wife would not be able to apply for financial relief because Chapter 4A of the WC, which deals with the provision of financial relief consequent on foreign divorce proceedings, only came into force in 2011.

87 When those three points were taken into consideration, it became clear that the rescission of the Decree *Nisi* would mean that the Wife would be denied *any* share of the matrimonial assets located in Singapore. This denial would be contrary to the common understanding upon which the parties had conducted their matrimonial affairs following the breakdown of the marriage. This seemed to me to be clearly unjust.

88 To illustrate the principles at play, the case of *Chaudhary v Chaudhary* [1985] 2 WLR 350, though factually rather dissimilar, is useful. In that case, the husband and wife had married in Kashmir and had

lived there for 10 years before the husband left for England, leaving his wife and children behind. Once there, he found employment and married another woman. The wife subsequently joined him in England. However, they were unable to reconcile, and she returned to Kashmir. Subsequently, the husband purported to divorce his wife by going to a mosque in London and pronouncing an oral "talaq" three times in the wife's absence. When the wife heard of this, she returned to England. After a period of time during which she was neglected by the husband, she commenced divorce proceedings. The husband then travelled to a mosque in Pakistan and once again purported to divorce the wife through the "talaq" procedure, which was sufficient to effect the dissolution of the marriage under Pakistani law. The husband then tried to resist the divorce proceedings in England on the basis that the marriage had already been dissolved because either of the "talaqs" pronounced would have been independently sufficient to dissolve the marriage. The Court of Appeal refused to recognise the foreign divorce on two alternative grounds: first that the oral "talaqs" did not fall within the ambit of the Recognition of Divorces and Legal Separations Act 1971 (c 53) (UK) and the second that recognition would have been contrary to public policy. On the second ground, Oliver LJ put the matter the following way, at 371:

… In my judgment it must plainly be contrary to the policy of the law in a case *where both parties to a marriage are domiciled in this country to permit one of them, whilst continuing his English domicile, to avoid the incidents of his domiciliary law and to deprive the other party to the marriage of her rights under that law* by the simple process of taking advantage of his financial ability to travel to a country whose laws appear temporarily to be more favourable to him. … In exercising his discretion [to refuse recognition on grounds of public policy] against the recognition of the talaq pronounced in Kashmir, even on the footing that it is otherwise effective under the provisions of section 3(1), the judge was, in my judgment, quite right and I would accordingly dismiss the appeal. [emphasis added]

89 It is important to remember that the Parties resided in Singapore for the duration of their marriage (eight years, from 1992 to 2000). Therefore, it was curious that the Husband, despite being a citizen of Singapore and domiciled here, travelled to Shanghai in 2004 to obtain a divorce. Meanwhile, the Wife, despite having returned to Shanghai since November 2002, contested the divorce proceedings in Shanghai (albeit unsuccessfully) and then returned to Singapore to file a petition of divorce in 2005. As it turned out, it appeared that the Husband wished for the division of only the Chinese assets to be dealt with by the Chinese courts, and then the Parties proceeded on the basis that the Singapore courts would deal with the division of the Singapore assets in Singapore.

90 Had it been the Husband who was applying for the recognition of the Shanghai divorce order now in order to rescind the Decree *Nisi* (assuming he has such recourse outside of s 99(2)), I would have had no hesitation in refusing it on the principle in *Chaudhary*: parties to a marriage cannot deliberately contrive to avoid the incidents of their domiciliary law by travelling to another country to procure a divorce and thereby deny the other party the share of the matrimonial assets he or she would otherwise have been entitled to. The fact that this application was lodged by the appellants should not change anything (see also my discussion at [96] below).

91 In response, Mr Koh contended that there was no unfairness because the Shanghai courts had already ordered the division of Chinese properties. Thus, it "would have considered these assets to be the entirety of the pool of assets available for distribution". On this premise, he argued that allowing the Wife a further division of the Singapore assets would be tantamount to giving the Wife two bites of the cherry. Further, he argued, citing the decision of the Court of Appeal in *Foo Jee Seng and others v Foo Jhee Tuang and another* [2012] 4 SLR 339 ("*Foo Jee Seng*"), that the Husband's testamentary intentions as expressed in the Will must be given effect to. The provisions of the Will are clear and the Husband only intended to give the Wife a sum of $1,000 so the DJ had erred in considering that it would be unjust for the Wife to only receive this sum of money and nothing from the estate.

92 I found Mr Koh's arguments unpersuasive. His argument that the Chinese courts had already made a determination that the Chinese properties constituted the whole of the matrimonial pool ran directly counter to the position taken by the Husband at the ancillary hearing. On that occasion, the Husband did not object

to the Singapore court dealing with the division of the Singapore assets. Acting with the benefit of legal advice and knowing full well the contents of the Will, he participated fully in the proceedings which culminated in the distribution of the Parties' Singapore assets. He did not appeal against the Ancillary Orders. Thus, the argument was unmeritorious. Further, the reference to *Foo Jee Seng* was completely irrelevant as the principle articulated there applies to the construction of wills. This was not such a case.

Abuse of process of the court

93 My second reason was that I think the appellants' application must be viewed in light of the history of the case. It is an abuse of process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings (see *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [52]). In my view, the matters of which the appellants complained were matters which ought properly to have been raised between the Husband and Wife at the hearing of the divorce in D 2201/2005. It bears repeating that the Decree *Nisi* was granted on an uncontested basis. Then, the Husband made no mention either of the Shanghai divorce judgment or of the Parties' attempts at reconciliation. Nonetheless, the Husband filed and withdrew two successive applications to set aside the Decree *Nisi*, which caused a considerable delay to the proceedings (see [13] and [14] above). Had it been the Husband who had brought these proceedings, I would have had no hesitation in declining it on the basis that it was an abuse of process of the court.

94 Granted, these proceedings were not brought by the Husband but by the appellants in their personal names (see [53] above). However, I thought it important to note that the appellants are not unrelated members of the public seeking to rescind the Decree *Nisi* purely in the public interest out of concern as to the soundness of the grant of the Decree *Nisi*. Instead, they are the executors of the estate and the beneficiaries under the Will. They are interested parties who also sought the setting aside of the Ancillary Orders. Cast in this light, I was of the view that the Husband's prior conduct remained an important consideration against the exercise of my discretion to grant relief in favour of the appellants.

Conduct of the appellants

95 Third, I also took into account the conduct of the appellants in taking inconsistent positions with regards the Decree *Nisi*, and, consequently, causing a further delay in matters. It should be remembered that the appellants first applied on 3 June 2011, in their capacity as executors of the estate, to affirm the divorce by way of a grant of a decree absolute (see [16] above). When they filed this application on 22 July 2013, they sought to do precisely the opposite.

96 Given that the Husband had taken two applications to challenge the Decree *Nisi* based on the facts relating to the Shanghai divorce judgment, these facts should have been readily apparent from the files. Furthermore, I note that the Wife filed the maintenance claim on 18 August 2011, which the appellants defended. At this point, the appellants ought to have been well aware of the facts which cast doubt on the question of whether the Parties had lived apart for four years. Nonetheless, the appellants did not take this matter up and instead, on 6 October 2011, proceeded to appeal to the High Court against the District Court's decision not to make the Decree *Nisi* absolute. After the High Court dismissed the appeal on 27 March 2012, the appellants then sought to enforce the Ancillary Orders (see [16] above). More than a year later, on 22 July 2013, the application below was filed. While I would not wish to unduly fault the appellants, I was of the view that they did not act with reasonable expedition and had therefore caused further delay, with consequential detriment to the Wife. In the affidavit in support of their application, the appellants briefly explained that it was only during the course of reviewing the files that they discovered these material facts which necessitated the application. To my mind, this was an unsatisfactory explanation for the delay, given the sequence of events as set out.

97 For these three reasons, I agreed with the DJ that a great deal of prejudice and injustice would be visited upon the Wife should the Decree *Nisi* be rescinded. Indeed, I had no doubt that much time and expense had already been devoted by the Wife to the proceedings, including the ancillary matters hearing. In the final analysis, I would still have exercised my discretion to refuse to rescind the Decree *Nisi*.

Conclusion

98 For the foregoing reasons, I dismissed the appeal. I appreciate that this means that recognition would not be accorded to the Shanghai divorce judgment. I acknowledge this is not often done. However, the facts of this case were extraordinary and, I think, justified what would otherwise not normally be done. The usual rule is that costs follow the event. There was no reason for a departure here and I therefore ordered that costs of $7,000 (inclusive of disbursements) be paid by the appellants to the Wife.