TQ v TR and Another Appeal
[2009] SGCA 6

Case Number : CA 93/2007, 94/2007

Decision Date : 03 February 2009

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Foo Siew Fong and Loh Wern Sze Nicole (Harry Elias Partnership) for the appellant in Civil Appeal No 93 of 2007 and the respondent in Civil Appeal No 94 of 2007; Quek Mong Hua, Tan Siew Kim and Yip Luyang Elena (Lee & Lee) for the respondent in Civil Appeal No 93 of 2007 and the appellant in Civil Appeal No 94 of 2007

Parties : TQ — TR

Conflict of Laws – Choice of law – Family – Domicile – Law governing validity of prenuptial agreements – Prenuptial agreement executed in Netherlands by foreigners which provided there was to be no community of property – Whether domicile of parties relevant in determining governing law for validity of prenuptial agreement – Which law governed validity of prenuptial agreement – Whether clause in prenuptial agreement stipulating that marital property regime between parties to be governed by Dutch law could be construed as express choice of law clause in favour of Dutch law or clause supporting implied choice of Dutch law as governing law of agreement – Whether prenuptial agreement valid under Dutch law – Whether foreign prenuptial agreements which were valid by their proper law had to comply with general principles of Singapore common law of contract

Family Law – Custody – Care and control – Maintenance – Child – Wife – Matrimonial assets – Division – Prenuptial agreements – Types of marital agreements – Types of prenuptial agreements – Legal status of prenuptial agreements in Singapore – Prenuptial agreement executed in Netherlands by foreigners which provided there was to be no community of property – Whether prenuptial agreement was valid under Dutch law – What weight should be given to prenuptial agreement by court in exercising its power under s 112 Women's Charter (Cap 353, 1997 Rev Ed) for division of matrimonial assets – Whether prenuptial agreement should be given significant weight given that it was entered into by foreign nationals and governed by (as well as was valid according to) foreign law

[EDITORIAL NOTE: The details of this judgment have been changed to comply with the Children and Young Persons Act and/or the Women's Charter]

3 February 2009

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

1 This was an appeal against ancillary orders made in a divorce petition. The husband ("the Husband") is a Dutch citizen while the wife ("the Wife") is a Swedish citizen. The couple met in the late 1980s in London, UK. At that time, the Husband was working in London as an associate with a major international bank, while the Wife was working with a travel agency in Sweden. She moved to London in late 1988 in order to live with the Husband.

2 The couple decided to get married and, to that end, a prenuptial agreement was executed on 26 August 1991 ("the Agreement"). This agreement was prepared by a Dutch civil law notary in Wassenaar, the Netherlands, and stated, *inter alia*, that there was to be no community of property. The couple were married in the Netherlands on 13 September 1991, but went back to London

immediately after the wedding.

3 From 1991 to 1997, the couple lived in London. Three children were born during this time: a son ("the Son") was born in 1992; followed by a daughter ("the First Daughter"), born in 1995, who was born handicapped with a chromosome disorder and needs constant care and attention; finally, another daughter ("the Second Daughter") was born in 1997 (collectively "the Children").

4 On 30 September 1997, the family moved to Singapore when the Husband obtained a job here. The Son was then five years old, the First Daughter two years old, and the Second Daughter two months old. While in Singapore, the marriage deteriorated. The Wife left the matrimonial home in late September or early October 2003. She filed for divorce in Singapore on 15 March 2004. On or about 18 May 2004, interim care and control of the Children were granted to the Husband, although liberal access rights to the Children were given to the Wife. The Husband was initially ordered to pay interim maintenance of $800 a month to the Wife, although this was raised on appeal to $1,600 a month on 3 February 2005. The divorce petition was uncontested and a decree *nisi* was granted on 19 April 2005 based on both parties' accusations of each other's unreasonable behaviour.

5 The judge below ("the Judge") was asked to decide the ancillary matters. On 11 July 2007, he ordered as follows (see *TQ v TR* [2007] 3 SLR 719 ("the Judgment")):

(a) Both the Husband and the Wife were to have joint custody of the Children, but the Wife was to have care and control of all three children. The Husband was to have access from 7.00pm to 10.00pm three times a week on weekdays and from 8.00am to 8.00pm on weekends, alternating Saturdays and Sundays with liberty to apply.

(b) The Husband was to pay $1,200 a month for the maintenance of each child.

(c) The Husband was to pay a lump sum of $150,000 for the Wife's maintenance.

(d) There would be no order as to the division of assets.

6 The Wife appealed against the quantum for the maintenance of the Children and the making of no order as to the division of assets. The Husband appealed against the order for care and control of the Children and the maintenance orders for the Children and the Wife.

Our decision

7 On 17 March 2008, we varied the orders below in the following manner:

(a) Recognising that the Husband had already paid $50,000 as spousal maintenance to the Wife, he was to pay the Wife a further lump sum maintenance of $100,000 in 12 equal monthly instalments, beginning 1 March 2008. The Wife was to have liberty to apply to the Judge for further maintenance after a period of one year if there had been any misrepresentation of the Husband's assets or income or if there was a material change in the circumstances of either the Husband or the Wife.

(b) The Husband and the Wife were to have joint custody over the three children.

(c) Care and control of the two daughters was to remain with the Wife.

(d) Care and control of the Son was to remain with the Wife until further order by this court. The Husband could apply for this issue to be reviewed after he had complied with the

requirements of sub-para (g) below.

(e) The Husband was to pay the Wife $1,200 a month for each of the children under her care and control, until that child reached the age of 18 years or that child was no longer under the Wife's care and control, whichever was earlier.

(f) An account in a Singapore bank was to be opened in the name of the Wife's solicitors ("the Account").

(g) As the moneys constituting the alleged ALLIJU Trust (see [27] below) were removed from this jurisdiction during the pendency of the matrimonial proceedings for the maintenance of the Children, it was declared that the Husband held the said moneys in trust for the maintenance of the Children. Accordingly, the Husband was ordered to pay an equivalent sum of not less than $380,000 into the Account within 21 days, and leave was given to the Wife to include a penal notice to this order in the order of court to be extracted.

(h) Either the Husband or the Wife would be at liberty to draw on the Account to pay all reasonable expenses necessary for the welfare and education of the Children jointly or severally. In the event any issue arose, there would be liberty to apply to the Judge.

(i) The Wife was entitled to the costs of the appeal fixed at $2,500 and the usual consequential orders.

8 We now give the reasons for our decision.

Custody, care and control of the Children

9 The Judge had noted that "both parents had strong claims as well as shortcomings" (at [7] of the Judgment). He took into account the Son's desire to live in the Netherlands, although he chose not to place too much weight on the boy's personal preference, given his relative youth. The Judge recognised that, while both parents were caring, the Wife was physically present. She was also a better role model, given that there was evidence that the Husband (even in February 2003 before the Wife left him) had engaged in some questionable conduct over the Internet. The Judge also observed that if the Children were sent back to the Netherlands, they would be left in the care of the Husband's parents, with whom the Children had had only intermittent contact. The Husband had also spent the last 20 years away from his home country. Although the Judge noted that the Husband was probably financially better off, he thought that this was not a decisive advantage.

10 The Judge considered, but rejected, the option of granting split care and control of the Children (*ie*, the Son to the Husband, but the two daughters to the Wife). He felt that it would be unfair to the Wife to have to spend her time caring for the First Daughter who was handicapped, while the Husband had the relatively easier task of caring for the Son who was more mature and able. The Children were also close to each other. Any delay in sending the Son to the Netherlands would not necessarily be detrimental to his assimilation there. Finally, the Judge did not place much weight on a taped conversation submitted by the Husband which allegedly showed that the Wife agreed to let the Children go to the Netherlands.

11 The Husband, in arguing that care and control of the Children should be given to him, and that they should be allowed to return to the Netherlands with him, made the following points:

(a) It was objectively in the best interests of the Children to return to the Netherlands to

pursue their education and to enjoy their privileges as Dutch citizens rather than to remain in Singapore. The Wife was subordinating the Children's interests to her own in insisting that they remain in Singapore.

(b) The Husband as a parent was as good as, if not better than, the Wife, considering the personal sacrifices he had made on their behalf.

12 The parties both gave detailed reasons why the Children would be better off in Singapore or the Netherlands, under the Wife's or the Husband's care, respectively.

13 We agreed with the Judge's observation that "the circumstances not just of the parents but those of *all* three children (not just each of them in isolation) must be taken into account" [emphasis in original] (at [7] of the Judgment). We must first begin by recognising that both parents obviously loved and cared for the Children. There were cross-accusations of irresponsible behaviour and infidelity by both sides, but we did not think these concerns, even if true, affected the parties' parental love. The Children were also very attached to both parents, as well as to each other.

14 The second point to note is that this was an expatriate family who had come to Singapore initially because of the Husband's work commitments. There was significant debate on whether the couple had intended to stay here in the long term when they first arrived, or whether this was only meant to be a short stint before the family moved to the Netherlands, although that is not so significant in the context of the Children's present best interests. However, we do understand that the family – whether it was culturally Dutch, as asserted by the Husband, or whether it was not, as asserted by the Wife – was certainly not culturally Singaporean, and this had to be taken into account.

15 The third point is that the Husband says he plans to return to the Netherlands, where he will find a job, and the Wife says that she plans to remain and work in Singapore, where she is a permanent resident. It is thus inevitable that the Children will be living far away from one parent.

16 There is no question that joint custody of the Children is appropriate in this case and the only question relates to the issue of care and control. We begin, in this regard, by considering the situation of the Second Daughter. She is presently ten years old, and is studying at a school in Singapore. She has known no other home except Singapore, as she had moved here from London, where she was born, when she was only two months old.

17 The First Daughter is 13 years old. Because of her disability, she has been studying at a special needs school in Singapore. There was some evidence that special needs education is better in the Netherlands than in Singapore, but we felt that education was but one aspect of the support and care system required by a handicapped person in the First Daughter's situation. We also noted that she has a poor command of the Dutch language. Finally, she requires constant care and attention, possibly for the rest of her life.

18 We felt that the interests of the two daughters would be best served if they were cared for by their mother in Singapore. We did not think it wise to uproot them at this early stage of their lives. We also took into consideration the fact that the Wife's plans involved her personally caring for the Children after their school hours, when she would also have returned home from work. In comparison, the Husband's as-yet-undetermined job in the Netherlands may lead to the Children having to be left in the care of their paternal grandparents – who must be assumed to love the Children dearly, but who also cannot be substitutes for the personal love and care of a parent. It should be emphasised that this is not a decision indicating whether they should be acculturated as Dutch or otherwise. That

sort of major lifestyle decision must be taken by *both* parents as joint custodians. Furthermore, as the Children grow older, it may be that they can move to the Netherlands. The Second Daughter's interests, in particular, may dictate that she should go to the Netherlands for further schooling.

19 The Son, now 16 years old, has clearly expressed his wish to study in the Netherlands. He does not wish to remain in Singapore. While he would have much preferred to be living with both parents in the Netherlands, this is not possible in the circumstances. We understand that after he had finished his primary education in the Dutch education system at a school in Singapore, he was enrolled in another school offering higher education, but that, since July 2007, he has been home-schooled by his father. According to the Husband, the boy refuses to go to school. There are apparently no centres of higher learning in the Dutch education system in Singapore for the Son to attend.

20 We were initially of the view that the Son ought to return to the Netherlands with his father, in the light of his age and his clearly expressed desire to continue schooling there. We were also concerned with the prospects for his further education. However, we felt, having regard to all the circumstances, that it would be best if he should remain in Singapore with the Wife, at least until the Husband complied with the orders made with respect to the maintenance of the Children.

Maintenance for the Wife

21 The Husband drew a very high salary when he first came to Singapore as a vice-president of an international management consultancy, earning $44,416.67 a month. After he stopped working there (it was disputed whether he had been terminated or not), he ran his own consultancy business. According to the Wife, the business is a successful one, with alliance partners in the Philippines, China, Australia and New Zealand, as well as network relationships in Europe and the USA. The company is also registered in Indonesia, with operating units across various countries, including Singapore, Thailand and Hong Kong.

22 According to the Husband, however, his consultancy business is nothing more than a small, one-man operation run from his home. The various international linkages were with other small firms overseas, made to give the impression that his business was a regional one. At any rate, these partnerships did not materialise. The Husband also pointed to the fact that he is presently indebted to his father in the sum of $233,015.04.

23 The Wife's present salary as an employee in Singapore is $3,225 a month. The rental of an apartment at a condominium is $2,800 a month, leaving a sum of $425 a month.

24 Before us, the Husband argued that he was not financially well-off enough to meet the Wife's claim for the full lump sum maintenance of $150,000. We felt that the $150,000 lump sum maintenance ordered by the Judge was not an unreasonable sum. However, in consideration of the fact that the Husband was clearly not as well-off as he used to be, we ordered that the sum be paid in instalments.

Maintenance for the Children

25 It was the Wife's contention that the maintenance sums awarded by the Judge, amounting to $1,200 a month for each of the three children, were insufficient. She argued that the maintenance sums did not take into account the Children's needs, the Husband's and the Wife's earning capacities, as well as the standard of living of the family during the marriage. Particular emphasis was placed on the written submissions of the Husband's counsel before the Judge dated 10 April 2007 which listed

the amounts he had spent on the Children during the period when he had interim care and control over them. These expenses amounted to $8,719.53 a month for all three children. Consequently, the Wife asked for a total of $8,700 a month for the Children.

26 We noted that the Wife did not produce any evidence of the Husband's present income. It was insufficient for the Wife to merely point to evidence as to what the Husband's expenses on the Children previously were. Again, we stress that it was evident that the Husband's financial circumstances had materially deteriorated from the time when he was working at the international management consultancy.

27 Furthermore, we took into account the Husband's admission that he had set up a trust fund in Mauritius in June 2005 worth US$261,540, called the ALLIJU Trust. This fund was designated to be used for the benefit of *the Children*. We noted, with some degree of surprise and even incredulousness, that the ALLIJU trust was set up *after* the decree *nisi* had been granted. According to the Husband, the trust was an irrevocable one. We did not wish to intrude on the jurisdiction in the Mauritius context by ordering the ALLIJU trust to be set aside, but felt it important to recognise the fact that this was a naked attempt to present the Wife and the courts a *fait accompli* in respect of the issues of maintenance and the distribution of the matrimonial assets. Thus, we ordered that the Husband was to pay a sum equivalent to that in the ALLIJU Trust (measured in Singapore dollars) into an account in a Singapore bank, which could be used by either parent for the benefit of the Children.

Division of matrimonial assets

28 In agreement with the Judge, we made no order as to the division of matrimonial assets. For the reasons set out below (at [107]–[109]), we decided that, given the pivotal importance of the Agreement as a factor to be taken into account in the context of the division of the matrimonial assets, each party could keep whatever assets he or she had brought into the marriage. In any event, we noted that the issue might be academic for the parties concerned simply because the Husband asserted that he had no assets, and the Wife was unable to adduce any substantive proof to the contrary. However, given the public importance of the question of the enforceability of prenuptial agreements in general, we will discuss the issue in some detail.

The Agreement

29 The principal terms of the Agreement (translated from the Dutch) are as follows:

> Prenuptial agreement\125
>
> ...
>
> The persons appearing [before the civil law notary in Wassenaar] declared that they wished to provide for the proprietary effects of their intended marriage by the following:
>
> PRENUPTIAL AGREEMENT
>
> No matrimonial assets
>
> Article 1.
>
> There shall be no community of matrimonial assets whatsoever between the spouses.
>
> Movable property

Article 2.

[Clauses concerning rights in certain business or professional assets, and clothes and jewellery]

Compensation

Article 3.

Unless otherwise agreed, the spouses shall be required to compensate one another for anything that has been withdrawn from the capital of one spouse for the gain of the other spouse, to an amount equal or equivalent to the value thereof on the day of the withdrawal.

Such compensation shall be due and payable on demand.

Management

Article 4.

[Clause concerning one spouse managing the other's property]

Costs of the household

Article 5.

1. The costs of the common household, including the costs of caring for and bringing up any children ... shall be paid pro rata from the net earned incomes of the spouses; in so far as these incomes are insufficient, such costs shall be met pro rata from each spouse's net capital.

... [Clauses defining "earned income" and "net capital"]

Article 6.

1. A spouse who has contributed more towards the costs of the household than his or her share in accordance with the above provisions in any one calendar year shall be entitled to claim back from the other spouse any amount contributed in excess.

2. [Clause concerning the lapsing of claims for excess contributions]

Life insurance

Article 7.

[Clauses concerning life insurance policies]

Accounting

Article 8.

The spouses shall be required to keep proper accounts of their income and capital and to allow the other spouse to inspect the books and records on first demand.

Pension rights

Article 9.

1. The value of any entitlement to pension, irrespective of whether any pension benefits are already payable or not, shall not be settled, subject to the following provisions.

2. The husband undertakes, as an irrevocable commitment, to pay an amount of three thousand thirty-six hundred [sic [translator's comment]] Dutch guilders (NLG 3,600) per year into an account to be specified by the wife, which can be disposed of only by the wife, for as long as one or more of their children is under the age of five and the wife is not in a position to build up pension rights of her own. The wife undertakes to use the amount in question to build up an adequate pension provision.

3. In a situation where the wife works part-time while the youngest of their children is over the age of five, the husband and wife shall consult with each other about setting aside money for her pension.

4. The foregoing provisions shall not apply if and in so far as the pension plan in question grants entitlement to pension, irrespective of whether any pension benefits are already payable or not, to the former spouse of the spouse who is a member of such pension plan, or if a mandatory statutory scheme is introduced with respect thereto.

Final declarations

The persons appearing further declared the following:

…

The marital property regime in force between them shall be governed by Netherlands law.

…

After the sum and substance of this deed had been stated to the persons appearing, they unanimously declared that they had taken cognizance of the contents of this deed and that they did not require the deed to be read out in its entirety.

Thereupon this deed was signed, after it had been read out in part, by the persons appearing, who are known to me, civil law notary, and by me, civil law notary.

Some preliminary issues

30 Before we discuss how the Agreement affects the division of the matrimonial property, there are two preliminary issues which must be dealt with. The first concerns the conflict of laws aspect of the Agreement. The second concerns the Wife's argument that the Agreement was no longer binding because it had been abandoned by the parties, as evinced by the fact that they did not abide by its terms during the marriage itself.

Conflict of laws

31 The Agreement raises conflict of laws issues because it was executed in the Netherlands by foreigners who at the time were not domiciled in Singapore and also because of the clause under the

"Final declarations" (see [29] above) which reads as follows:

> The marital property regime in force between [the parties] shall be governed by Netherlands law.

The Judge resolved the issue in the following manner: first, he noted that the Agreement was executed under Dutch law; next, he considered what the place of domicile of the parties at the time of the divorce was; after a brief examination of the facts, he concluded that the Wife's domicile was not the Netherlands; on this basis, he concluded that the court could consider whether to enforce the Agreement irrespective of where the parties' domicile might have been.

32 We beg to differ from that approach. The validity of a contract, including marital property agreements, is governed by its proper law (see Tan Yock Lin, *Conflicts Issues in Family and Succession Law* (Butterworths Asia, 1993) at p 275). The proper law is determined by (in order of descending priority): (a) the express choice of the parties; (b) the implied choice of the parties; and (c) in the absence of any express or implied choice of law, by ascertaining the system of law with which the agreement has the closest and most real connection, which is presumed to be the law of the matrimonial domicile unless rebutted (see *Dicey, Morris & Collins on The Conflict of Laws* (Sir Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) ("*Dicey*") vol 2 at para 28R-030). The law of the domicile of the parties would therefore be relevant (if at all) only at the third stage.

33 It should be noted that the applicable clause does not expressly state that the Agreement itself is to be governed by Dutch law. It refers, literally, to the matrimonial property regime of the marriage being governed by that law. But this would, in our view, be an unnecessarily narrow reading. The Agreement as a whole concerns itself *solely* with the marital proprietary relations of the parties. There is thus, in substance, no meaningful distinction between the Agreement and "the marital property regime". One can thus, in the special circumstances of this case, read this clause either as an express choice of law clause in favour of Dutch law, or as a clause supporting an implied choice of Dutch law.

34 The validity of the Agreement thus depends on its status under Dutch law. The parties have each tendered expert opinions with respect to this question. The Wife's expert stated that the Agreement was possibly annulled on the basis that the Wife entered into the Agreement without it being properly explained to her in English, or that the Husband took advantage of the circumstances under which the Agreement was signed. Alternatively, the Wife's expert suggested that, according to a certain Dutch case, the Agreement could be disregarded on the principles of reasonableness and fairness.

35 The Husband's expert opined that the Agreement, as a prenuptial agreement under Art 1:114*ff* of the Civil Code of the Netherlands, would be upheld by the Dutch courts. The Dutch courts did not have any discretion to disregard or vary the effect of any prenuptial agreement, assuming that the agreement was not in conflict with general principles of good faith. The Agreement was an "authentic deed" under Art 156 of the Code of Civil Proceedings of the Netherlands, being a deed drafted by civil servants in a manner prescribed by law. As such, the circumstances surrounding the signing of the Agreement were irrelevant, and the parties could not question the contents of the Agreement. A notary public was also expected to question both parties and could only cooperate with the parties if he was convinced that each party knew the consequences of the deed. The Husband's expert also pointed out that the Agreement stated that the contents of the Agreement had been explained to both parties, who had explicitly waived their right to have it read to them before signing. Finally, he distinguished the case cited by the Wife's expert, arguing that it only stood for the proposition that where there was some unforeseen event, such an event would be dealt with in the spirit of the prenuptial agreement.

36 The Husband also exhibited a letter from a notary public in which the notary public stated that he had explained the Agreement to the parties in English, and had ensured that the parties understood its contents and implications. The notary public also described how the Wife took an active part in the negotiations and even asked for additional clauses to be included in the boilerplate agreement regarding her retirement benefits compensation. However, this letter is not a sworn affidavit.

37 In our view, the Agreement is valid under Dutch law. The Wife did not adduce, beyond her bare assertions, any evidence to prove that the Agreement had not been explained to her. Perhaps some bad faith on the Husband's part could have been inferred if the terms of the Agreement had been manifestly in his favour and to her detriment, but this was not the case. In fact, the Agreement contains a term unequivocally in favour of the Wife, specifying that the Husband was to pay the Wife a certain sum of money, so long as one or more of the Children was under the age of five and the Wife was not in the position to enjoy pension rights of her own (see Art 9 of the Agreement, reproduced above at [29]). Such a term is inconsistent with the Wife's argument that she was pressured to sign the Agreement blindly. We should add, however, that these findings were arrived at only on the basis of the affidavit evidence placed before the courts. Further, although we dismissed the Wife's application in Summons No 5667 of 2007, which was an attempt to introduce new evidence on appeal to impugn the Agreement at the eleventh hour (and which did not, in our view, pass muster under the well-established principles laid down in the leading English Court of Appeal decision of *Ladd v Marshall* [1954] 1 WLR 1489), we should state that we did not rule on the veracity or probity of that evidence as such. There is therefore nothing to prevent the Wife from raising this point in any fresh proceedings in an appropriate jurisdiction.

Variation by subsequent conduct

38 The Wife argued that even if the Agreement validly recorded the parties' wishes with respect to their marital property rights, their conduct subsequent to the marriage demonstrated that they had abandoned the marital arrangement. They did not lead independent lives, inasmuch as they had children together, and moved to Singapore which necessitated the Wife stopping work. Also, they did not abide by Arts 3 to 9 of the Agreement, as proper accounting and compensation were not practised.

39 According to the Husband, the parties did indeed keep their finances separate. The Wife reimbursed the Husband on a regular basis for her own expenses, the Husband honoured his obligation to compensate the Wife for her lost pension rights, and separate accounts were maintained except for a joint shopping account in their initial years in Singapore.

40 The Judge had concluded that "[b]oth parties might not have kept their individual accounts as neatly and honestly as the prenuptial agreement required them to do but there is little point in drawing adverse inferences that neutralise each other" (at [9] of the Judgment). We are of the view that there is sufficient evidence from the accounts to show that while detailed accounts were not kept, the parties did not regard their marriage as being one that related to the concept of a community of property. Of course, the fact that the parties did not lead independent lives in the non-pecuniary sphere, in the sense that they had children together and moved to Singapore together, is irrelevant. It would be bizarre indeed (and probably contrary to public policy, see below at [54]) if the Agreement required the parties to live apart and/or not to have children. The existence of jointly-held assets, such as the joint account, is also not necessarily indicative that there is community of property. Indeed, the Agreement contemplates such a possibility and contains deeming provisions in the event of disputes over such assets. Thus, it is our view that the Agreement, at least in relation to the article stipulating that there was to be no community of property, was not varied by the

subsequent conduct of the parties.

Conclusions on the preliminary matters

41 We have found that the proper law of the Agreement is Dutch law. The validity, interpretation and effect of the Agreement are thus governed by that law. We have seen that the Agreement is valid under Dutch law. Dutch rules of construction were not placed in evidence before us, so we presume that those rules are similar to our own. The general effect of the Agreement was that the Dutch matrimonial property regime applied to the parties' proprietary relations with each other in accordance with the provision in the "Final declarations", except in so far as the community of property doctrine did not apply, as stipulated by Art 1 of the Agreement.

42 Assuming that under the Dutch matrimonial property regime, the Agreement, being valid, would have been enforceable without more, does this mean that the same position obtains when a party seeks to enforce the Agreement in Singapore? If it is solely the contractual jurisdiction of this court which is sought to be invoked, it is difficult to see why not (for instance, if the parties were still married and were merely seeking a declaration as to the ownership of a particular disputed asset). However, in the present situation, the parties, having submitted to the jurisdiction of our courts in so far as the granting of the decree *nisi* was concerned, were now seeking to invoke our statutory powers in respect of ancillary matters. The question is thus whether parties who seek to have ancillary matters decided in Singapore can contract to have the proprietary incidences of their marriage governed by a regime other than that provided for under the *lex fori*. In our view, the governing law relating to the ancillary matters generally is *Singapore* law (and, indeed, the parties did not, correctly in our view, seek to argue to the contrary) (see also the recent English High Court decision of *NG v KR (Pre-nuptial contract)* [2008] EWHC 1532 at [87] where Baron J cited (with approval) *Dicey* ([32] *supra*) vol 2 at para 18‖207, which stated that the English court, in making an order for financial provision under the Matrimonial Causes Act 1973 (c 18) (UK) ("the 1973 UK Act"), would apply its own law irrespective of the domicile of the parties, and accepted this as "an accurate statement of Law"). However, as the Agreement is a *foreign* one that is *valid by its proper law* (*viz*, Dutch law), the further requirement (set out below at [94]–[97] with respect to local agreements) to the effect that a prenuptial agreement must also be valid according to the general principles of the Singapore common law of contract would *not* apply in the present case (assuming, as was the case in this appeal, that the prenuptial agreement is not repugnant to, or does not otherwise contravene, any overriding public policy of the *lex fori* (here, Singapore)). In all other respects, however, the legal effect of the Agreement would be governed by Singapore law in accordance with the principles set out below.

Marital agreements: Some definitions

43 We now turn to the substantive issue of whether the Agreement should have any effect in the division of the matrimonial assets in this case in the context of Singapore law. Before we proceed, we need to lay down some definitions in this difficult and contentious field.

44 An agreement made between spouses or spouses-to-be can be called a "marital agreement". There are at least four different kinds of marital agreements, each entailing different legal considerations, and it is therefore important to draw some clear distinctions. We acknowledge that the terminology used here may differ from that used elsewhere, as certain terms are commonly used loosely to cover one or more kinds of marital agreements.

45 Strictly speaking, prenuptial agreements (or "antenuptial agreements" as they are sometimes called) refer to agreements reached by a husband and a wife before their marriage concerning what

would happen in the event of a divorce. Such agreements can cover any issue which is usually the subject of ancillary proceedings, including maintenance, the division of matrimonial assets, and children.

46 Prenuptial agreements are to be distinguished from prenuptial settlements, which regulate rights and obligations only during the marriage but not after its termination (see the English High Court decision of *N v N (Jurisdiction: Pre-nuptial Agreement)* [1999] 2 FLR 745 ("*N v N*") at 751–752). The ambit of such agreements can be very wide, covering any aspect of married life from the mundane to the highly idiosyncratic. It must be noted that an agreement can sometimes be both a prenuptial agreement as well as a prenuptial settlement if it makes provisions concerning both the subsistence as well as the end of the marriage.

47 A distinction must also be drawn between two kinds of postnuptial settlements. These are separation and pre-divorce settlements, which are agreements made after a marriage by which the parties decide on what happens upon their separation or divorce, respectively. Such agreements are often made in the context of ongoing litigation. Just like prenuptial agreements, postnuptial settlements may address any ancillary matter.

The legal status of prenuptial agreements in Singapore

Introduction

48 The Judge upheld – and gave effect to – the prenuptial agreement entered into between the parties in the present appeal. As mentioned above (but for the reasons set out below at [107]–[109]), we arrived at what, in effect, was the same result, albeit adopting a somewhat different approach.

49 It is significant, for reasons that we will elaborate upon below, that the Agreement was entered into by foreign parties *and* was also governed by (as well as was valid according to) foreign law. It should be further noted that the Agreement related to the division of matrimonial property, and *not* maintenance or custody. This is also a significant point in so far as the present appeal is concerned. However, as already mentioned above (at [42]), Singapore law is the governing law with respect to the ancillary matters that are the focus in the present case. In the circumstances, it is incumbent on this court to state what the local position is with respect to the legal status of prenuptial agreements in the context of the application of the relevant provisions of the Women's Charter (Cap 353, 1997 Rev Ed) ("the Act"), assuming that where (as in the present case) the prenuptial agreement is foreign, that agreement concerned is valid according to its proper law under the relevant principles of the conflict of laws and is not repugnant to, and does not otherwise contravene, any overriding public policy of Singapore (which we have already ascertained is indeed the case). In this last-mentioned regard, there is *no* need for such an agreement to satisfy the *further* requirements of the *Singapore* common law of contract (which are applicable to local prenuptial agreements (see generally below at [94]–[97])) *unless* (as just mentioned) the agreement itself is repugnant to, or otherwise contravenes, any overriding public policy of Singapore.

The interaction of statute and the common law

50 It would be appropriate to begin with a general (and central) point of legal reference that ought, in our view, to apply to the analysis of all prenuptial agreements in the Singapore context. The legal status of a prenuptial agreement in the Singapore context is the result of the interaction of both statute law (here, the Act) on the one hand and the common law on the other. Put simply, where one or more of the provisions of the Act expressly covers a certain category of prenuptial agreement,

then that provision or those provisions will be the governing law. Where, however, the Act is *silent*, then the legal status of the prenuptial agreement concerned will be governed by *the common law*. In this regard, it will be assumed that any prenuptial agreement which contravenes any express provision of the Act and/or the general or specific legislative policy embodied within the Act itself will not pass muster under the common law.

51 Whilst the Act is the main statute governing matrimonial matters in Singapore, the English common law was received as part of the law of Singapore. This last-mentioned proposition is now statutorily embodied in s 3 of the Application of English Law Act (Cap 7A, 1994 Rev Ed) ("AELA"), which reads as follows:

> **Application of common law and equity.**
>
> **3.**—(1) The common law of England (including the principles and rules of equity), so far as it was part of the law of Singapore immediately before 12th November 1993, shall continue to be part of the law of Singapore.
>
> (2) The common law shall continue to be in force in Singapore, as provided in subsection (1), so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require.

52 The received rules and principles of English common law (including the rules and principles of equity) must necessarily be subject (as s 3(2) of the AELA (reproduced in the preceding paragraph) clearly states) to the circumstances of Singapore. Indeed, whilst a uniform common law is desirable (particularly in commercial matters where certainty and predictability are at a premium), this is not necessarily the case in other areas of Singapore law where the local culture and mores might require a somewhat (or even radically) different approach from that adopted under the received English common law (especially so since Singapore is now an independent nation). The present appeal represents (potentially, at least) one such instance, dealing as it does with the legal status of prenuptial agreements in the *matrimonial* sphere.

53 Indeed, it was precisely the recognition of the prevailing customs and mores in relation to marriages amongst the Chinese (consistently with s 3(2) of the AELA) that prompted this court in *Kwong Sin Hwa v Lau Lee Yen* [1993] 1 SLR 457 ("*Kwong Sin Hwa*") to hold that a prenuptial agreement – to the effect that the parties would continue to live separately and that there would be no cohabitation or consummation of the marriage until after the celebration of the traditional Chinese customary rites and the setting up of the matrimonial home – was valid and enforceable. It should be noted that the Women's Charter (Cap 353, 1985 Rev Ed) ("the 1985 Act"), which was the prevailing legislation in *Kwong Sin Hwa*, was *silent* with respect to this particular issue (the same can be said about the Act now). This decision was also referred to in subsequent decisions (see, for example, the Singapore High Court decisions of *Chan Yeong Keay v Yeo Mei Ling* [1994] 2 SLR 541 and *Tan Lan Eng v Lim Swee Eng* [1994] 1 SLR 65).

54 It should be borne in mind that the actual decision in *Kwong Sin Hwa* did not, however, contravene any express provision of, or any legislative policy underlying, the 1985 Act. If there had been such a contravention, the result would have been quite different. An instance of a situation that would have resulted in such a contravention may be found in the English decision of *Brodie v Brodie* [1917] P 271 ("*Brodie*"), which related to a prenuptial agreement that purported to render it lawful at all times for the husband to live separate and apart from his wife as if he were unmarried, and to estop the wife from either (through the initiation of legal proceedings) compelling or attempting to compel him to cohabit or live with her or taking any proceedings against him to obtain judicial

separation. As L P Thean J, delivering the judgment of the court, correctly pointed out in *Kwong Sin Hwa* (at 465, [22]):

> The *Brodie* pre-nuptial agreement is *far different in nature and character* from the pre-nuptial agreement in *Tan Siew Choon* [*v Tan Kai Ho* [1969-1971] SLR 361] and the pre-nuptial agreement in this case. The *Brodie* pre-nuptial agreement was *intended to enable the husband to resile from the marriage and evade his marital obligations altogether. That agreement if implemented and enforced, would make a mockery of the law regulating marriages. Obviously such an agreement is unquestionably against public policy and void*. We respectfully agree with Horridge J. *On the other hand, the pre-nuptial agreement here and in Tan Siew Choonwas nothing of that kind. The intention of the parties was to comply both with the law and with the custom; if implemented, it was intended to fulfil the parties' marital obligations. The only effect on the relationship of the parties as husband and wife was that it postponed their cohabitation and consummation of the marriage. It was not intended to negate the marriage or enable one or both parties to resile from the marriage. We do not see how such pre-nuptial agreement can be regarded and treated on the same footing as the Brodiepre-nuptial agreement.* [emphasis added]

Thean J also observed thus (at 469, [38]):

> *It is clear to us that not every pre-nuptial agreement regulating or even restricting the marital relations of the husband and wife is void and against public policy. Needless to say, much depends on the relevant circumstances and in particular, the nature of the agreement, the intention of the parties and the objective the agreement was designed to achieve.* In our opinion, the law does not forbid the parties to the marriage to regulate their married lives and also the incidents of the marriage, so long as such agreement does not seek to enable them to negate the marriage or resile from the marriage as the *Brodie* pre-nuptial agreement did. [emphasis added]

55 Apart from the *specific* type of prenuptial agreement considered in *Kwong Sing Hwa*, there are, in addition, *at least three broad categories* of such agreements, as follows:

(a) prenuptial agreements relating to the maintenance of the wife and/or the children;

(b) prenuptial agreements relating to the custody (as well as the care and control) of children; and

(c) prenuptial agreements relating to the division of matrimonial assets.

The prenuptial agreement that is before the court in the present appeal falls, in fact, under category (c) above.

56 We turn now to consider the legal status of prenuptial agreements in each of the above categories in accordance with the central principle set out at [50] above.

Prenuptial agreements relating to the maintenance of wife and/or children

57 The Act is *silent* with respect to the legal status of *prenuptial* agreements relating to the maintenance of the wife and/or the children. Significantly, however, the Act *does* contain express provisions relating to *postnuptial* agreements. Sections 116 and 119 of the Act, in particular, are relevant in this latter regard.

58 Section 116 of the Act reads as follows:

Compounding of maintenance

116. An agreement for the payment, in money or other property, of a capital sum in settlement of all future claims to maintenance, shall not be effective until it has been approved, or approved subject to conditions, by the court, but when so approved shall be a good defence to any claim for maintenance.

59 Section 119 of the Act reads as follows:

Power of court to vary agreements for maintenance

119. Subject to section 116, the court may at any time and from time to time vary the terms of any agreement as to maintenance made between husband and wife, whether made before or after 1st June 1981, where it is satisfied that there has been any material change in the circumstances and notwithstanding any provision to the contrary in any such agreement.

60 Reference may also be made to s 132 of the Act, which reads as follows:

Power of court to set aside and prevent dispositions intended to defeat claims to maintenance

132.—(1) Where —

(*a*) any matrimonial proceedings are pending;

(*b*) *an order has been made under section 112 and has not been complied with*;

(*c*) *an order for maintenance has been made under section 113 or 127 and has not been rescinded*; or

(*d*) *maintenance is payable under any agreement to or for the benefit of a wife or former wife or child*,

the court shall have power on application —

(i) if it is satisfied that any disposition of property has been made by the husband or former husband or parent of the person by or on whose behalf the application is made, within the preceding 3 years, with the object on the part of the person making the disposition of reducing his or her means to pay maintenance or of depriving his wife or former wife of any rights in relation to that property, to set aside the disposition; and

(ii) if it is satisfied that any disposition of property is intended to be made with any such object, to grant an injunction preventing that disposition.

(2) In this section —

"disposition" includes a sale, gift, lease, mortgage or any other transaction whereby ownership or possession of the property is transferred or encumbered but does not include a disposition made for money or money's worth to or in favour of a person acting in good faith

and in ignorance of the object with which the disposition is made;

"property" means property of any nature, movable or immovable, and includes money.

[emphasis added]

61 It is clear, from the above-mentioned provisions, that all *postnuptial* agreements with respect to *maintenance* are subject to the scrutiny of the court and may, in fact, even be varied if there has been any material change in circumstances. In other words, *the courts* have the *statutory* power to *override* any *postnuptial* agreement entered into between the spouses with regard to maintenance. This is a very significant point in the context of *prenuptial* agreements as well, for at least two closely-related reasons.

62 First, as we have already noted, the Act is *silent* with regard to *prenuptial* agreements relating to the maintenance of the wife and/or the children. Hence, in accordance with the general principle set out above (at [50]), the *common law* would apply.

63 Secondly, and also in accordance with the general principle set out above, the applicable common law principles must nevertheless be consistent with, *inter alia*, the legislative policy underlying the Act. In this regard, the legislative policy with respect to *postnuptial* agreements is, as we have just seen (at [61] above), very clear: The courts have overall power to override any such agreement. The issue that arises is whether or not *prenuptial* agreements ought, under the *common law*, to be subject to the *same* principle. It is clear, in our view, that there is no reason in logic or principle why the aforementioned legislative policy which governs postnuptial agreements ought not to apply *equally* to prenuptial agreements. *In other words, all prenuptial agreements relating to the maintenance of the wife and/or the children will be subject to the overall scrutiny of the courts.*

64 This being the case, we turn, then, to relevant decisions at common law – in particular, to ascertain whether they would impact the general principle stated at the end of the preceding paragraph. In this regard, the leading decision is that of the House of Lords in *Hyman v Hyman* [1929] AC 601 ("*Hyman*") (which has in fact been cited in local decisions, for example, the Singapore High Court decisions of *Wong Kam Fong Anne v Ang Ann Liang* [1993] 2 SLR 192 ("*Wong Kam Fong Anne*"), especially at 199, [27] and 201, [33] as well as *Chia Hock Hua v Chong Choo Je* [1995] 1 SLR 380 ("*Chia Hock Hua*") at 383, [9]). It was held in *Hyman* that an agreement between a husband and a wife which prevented the wife from seeking maintenance from the courts beyond the provision that was made for her in the agreement itself was void as being contrary to public policy.

65 In *Hyman*, s 190 of the Supreme Court of Judicature (Consolidation) Act 1925 (c 49) (UK) conferred on the court the power to order maintenance in favour of the wife (see, in the Singapore context, the power of the court to order maintenance for the wife and the children pursuant to ss 113 and 127 of the Act, respectively). One main rationale for the court's decision was that the (*statutory*) duty placed on the husband, in so far as the maintenance of the wife was concerned, was one that involved the *public* interest inasmuch as it "prevent[ed] the wife from being thrown upon the public for support" (*per* Lord Atkin in *Hyman* at 629). In the circumstances, therefore, "[t]he wife's right to future maintenance is a matter of *public* concern, *which she cannot barter away*" [emphasis added] (*ibid*). In a similar vein, Lord Hailsham LC observed thus (*id* at 614):

> [T]he power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of *the public, and ... the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of*

that jurisdiction. [emphasis added]

66 However, leaving aside the fact that *Hyman* did not relate to a prenuptial agreement as such, it is our view that the decision in *Hyman* does *not* necessarily mean that, whilst such an agreement would be contrary to public policy in the *contractual* context, it would necessarily follow that it is *wholly without legal effect* in so far as the issue of a claim for *maintenance* under *statute* in the context of *family law* is concerned. Although this particular point did not come expressly to the fore in most of the judgments of the House in *Hyman*, Lord Hailsham LC clearly expressed the view that such an agreement, whilst void under the common law, *might still possess some legal effect*. Indeed, as the learned Lord Chancellor observed (at 609):

> The *only question* which the order appealed against determines is that the existence of the covenant in the deed of separation *does not preclude the wife from making an application to the Court; this by no means implies that, when the application is made, the existence of the deed or its terms are not most relevant factors for consideration by the Court in reaching a decision.* [emphasis added]

Reference may, in this regard, also be made to the judgments of Lord Buckmaster and Lord Atkin in the same decision (at 625 and 629, respectively).

67 In summary, there is nothing in the actual decision in *Hyman* itself which detracts from the general principle we have laid down earlier to the effect that *all prenuptial agreements relating to the maintenance of the wife and/or the children will be subject to the overall scrutiny of the courts.* And, consistently with the view expressed by Lord Hailsham LC in the preceding paragraph, there is nothing preventing the court concerned from endorsing the *substance* of the terms of a prenuptial agreement with regard to maintenance if it appears to that court that those terms embody what would be a just and fair result in so far as the claim for maintenance is concerned (although, needless to say, the court always retains the right in appropriate cases to award a reasonable lump sum payment in lieu of a maintenance scheme). In this regard, it is important to note that the courts would certainly prevent any attempt by the husband at circumventing his obligation to furnish the requisite maintenance by disposing of his property (whether by direct or by indirect means) – a point *statutorily* provided for in respect of *postnuptial* situations (see s 132 of the Act, reproduced above at [60]). Uppermost in the mind of the court concerned would be the provision of *adequate* maintenance to the wife and/or the children in accordance with the various criteria set out in the Act as well as in the case law. We should add that, in so far as a prenuptial agreement relates to the maintenance of the *children*, the courts will be especially vigilant and will be slow to enforce agreements that are apparently not in the best interests of the child or the children concerned.

68 Indeed, the principles stated in the preceding paragraph are buttressed by the fact that the local courts (in both *Wong Kam Fong Anne* ([64] *supra*) and *Chia Hock Hua* ([64] *supra*)) have viewed *Hyman* as being *confirmed statutorily* by *s 116 of the Act* (reproduced above at [58]) in the context of *postnuptial* agreements; s 116 itself, as we have seen, confers on the courts the power to scrutinise all postnuptial agreements relating to the maintenance of the wife and/or the children and (more importantly) embodies a legislative policy which we have held above (at [63]) to apply *equally* to *prenuptial* agreements.

Prenuptial agreements relating to the custody (as well as the care and control) of children

69 Turning to the next broad category, *viz*, prenuptial agreements relating to the custody (as well as the care and control) of children, s 129 of the Act ought to be noted and reads as follows:

Power of court to vary agreement for custody

129. The court may, at any time and from time to time, vary the terms of *any* agreement relating to the custody of a child, whether made before or after 1st June 1981, notwithstanding any provision to the contrary in that agreement, where it is satisfied that it is reasonable and for the welfare of the child to do so.

[emphasis added]

70 The word "any" in s 129 suggests that that provision is applicable to *both* prenuptial as well as postnuptial agreements. However, even if this particular provision is not applicable to prenuptial agreements, we are of the view that the *same* principle would apply at common law simply because (as with the situation relating to prenuptial agreements in relation to the maintenance of the wife and/or the children) the common law ought to be consistent with the legislative policy embodied within s 129. Indeed, as a matter of general logic as well as principle, we are of the view that the courts must always have the power (whether at common law or under statute) to scrutinise both prenuptial *as well as* postnuptial agreements relating to the custody (as well as the care and control) of children. There ought, in our view, to be a *presumption* that such agreements are unenforceable *unless* it is clearly demonstrated by the party relying on the agreement that that agreement is in the *best interests* of the child or the children concerned. This is because such agreements focus on the will of the parents rather than on *the welfare of the child* which has (and always will be) *the paramount consideration* for the court in relation to such issues (see s 125(2) of the Act). It might well be the case that the *contents* of the prenuptial agreement concerned *coincide with* the welfare of the child or the children concerned. However, *the court* ought nevertheless to be the final arbiter as to the appropriateness of the arrangements embodied within such an agreement.

Prenuptial agreements relating to the division of matrimonial assets

71 The governing provision with regard to the division of matrimonial assets is s 112 of the Act, the material portions of which read as follows:

Power of court to order division of matrimonial assets

112.—(1) The court shall have power, when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportions as the court thinks *just and equitable*.

(2) It shall be the duty of the court in deciding whether to exercise its powers under subsection (1) and, if so, in what manner, to have regard to all the circumstances of the case, including the following matters:

(*a*) the extent of the contributions made by each party in money, property or work towards acquiring, improving or maintaining the matrimonial assets;

(*b*) any debt owing or obligation incurred or undertaken by either party for their joint benefit or for the benefit of any child of the marriage;

(*c*) the needs of the children (if any) of the marriage;

(*d*) the extent of the contributions made by each party to the welfare of the family,

including looking after the home or caring for the family or any aged or infirm relative or dependant of either party;

(*e*) *any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce*;

(*f*) any period of rent-free occupation or other benefit enjoyed by one party in the matrimonial home to the exclusion of the other party;

(*g*) the giving of assistance or support by one party to the other party (whether or not of a material kind), including the giving of assistance or support which aids the other party in the carrying on of his or her occupation or business; and

(*h*) the matters referred to in section 114(1) so far as they are relevant.

(3) The court may make all such other orders and give such directions as may be necessary or expedient to give effect to any order made under this section.

(4) 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.

…

(8) Any order under this section may be made upon such terms and subject to such conditions (if any) as the court thinks fit.

…

[emphasis added]

72 The key issue which arises is the role (if any) which a *prenuptial* agreement relating to the division of matrimonial assets plays in the light of the provisions of s 112 of the Act.

73 It is clear, in our view, that as the ultimate power resides in the court to order the division of matrimonial assets "in such proportions as the court thinks *just and equitable*" [emphasis added] (see s 112(1)), a prenuptial agreement *cannot* be construed in such a manner as to *detract from* this ultimate power. However, this does not mean that such a prenuptial agreement cannot (where *relevant*) be utilised to *aid* the court in exercising its power pursuant to s 112 of the Act. Indeed, and turning specifically to s 112(2)(*e*) of the Act (which has been reproduced above at [71]), it would appear (contrary to the arguments made by the Wife) that a *prenuptial* agreement relating to the division of matrimonial assets between the spouses would (without any strained construction) fall within its ambit. There is a reference to "*any* agreement" [emphasis added], which would presumably encompass both prenuptial as well as postnuptial agreements. Further, the very nature of a prenuptial agreement relates to what would happen on *termination* of the marriage and therefore constitutes an "agreement between the parties with respect to the ownership and division of the matrimonial assets made *in contemplation of divorce*" [emphasis added] within the meaning of s 112(2)(*e*). In a similar vein, whilst one writer has noted that it could be argued that prenuptial agreements are made "in contemplation of *marriage*" [emphasis added], he also notes that it may be argued that prenuptial agreements are made "in contemplation of *divorce* as such agreements would make provisions for financial distribution, whether assets or maintenance, between spouses *in the event of a divorce*"

[emphasis added] (see Yap Teong Liang, "Pre-Nuptial Agreements: Greater Prominence in the Future?" *The Singapore Law Gazette* (April 2000), p 14 at p 14; reference may also be made to Debbie Ong Siew Ling, "Prenuptial Agreements and Foreign Matrimonial Agreements: *TQ v TR*" (2007) 19 SAcLJ 397 at 403, para 21, as well as the English Court of Appeal decision of *Wyatt-Jones v Goldsmith* (Court of Appeal (Civil Division), 28 June 2000, transcript available on Lexis) at [3]).

74 It is, of course, equally clear that s 112(2)(*e*) would also cover *postnuptial* agreements. The following observations of Michael Hwang JC in *Wong Kam Fong Anne* ([64] *supra* at 201, [33]) are also apposite, especially if we bear in mind the fact that the learned judge was not dealing with any equivalent of s 112(2)(*e*) of the Act as such:

> Both as a matter of law as well as of policy, my view is that, if the parties to a marriage, *in circumstances where a divorce is imminent or a real possibility* freely enter into an agreement in respect of the division of their assets, that agreement may be considered a valid reason for the court not to exercise its powers under s 106 [of the 1985 Act, the predecessor provision of s 112 of the Act] [emphasis added]

Reference may also be made in this regard to the English Court of Appeal decision of *Edgar v Edgar* (1981) 2 FLR 19 ("*Edgar*").

75 However, although also subject to the scrutiny of the courts, due regard must be given to the fact that postnuptial agreements relating to the division of matrimonial assets are made in circumstances that are very different from those in relation to prenuptial agreements and may (all other things being equal) warrant the courts according postnuptial agreements more weight than prenuptial agreements in the exercise of their discretion under s 112(2)(*e*) of the Act. In the Privy Council decision of *MacLeod v MacLeod* [2008] UKPC 64 ("*MacLeod*"), which concerned a postnuptial agreement made between a husband and a wife in 2002 that dealt with their financial arrangements while they stayed together and in the event of a divorce (and which was also an affirmation of an earlier prenuptial agreement made in 1994, albeit with important variations), the Board noted, as follows (at [31] and [36]):

> … There is an enormous difference in principle and in practice between an agreement providing for a present state of affairs which has developed between a married couple and an agreement made before the parties have committed themselves to the rights and responsibilities of the married state purporting to govern what may happen in an uncertain and unhoped for future. …
>
> ...
>
> Post-nuptial agreements, however, are very different from pre-nuptial agreements. The couple are now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry. There is nothing to stop a couple entering into contractual financial arrangements governing their life together, as this couple did as part of their 2002 agreement.

That said, how much weight is to be allocated to a prenuptial or postnuptial agreement in each case must ultimately depend on the precise circumstances of the case (see [80]–[86] below).

76 What, then, about the *legislative history* behind the enactment of s 112(2)(*e*) itself? There is no clear indication either way as to whether or not prenuptial agreements were intended to be covered under that particular provision. In addition, however, to the very broad wording of s 112(2)

(*e*) itself (see above at [71]), this particular provision was not, in fact, present in the predecessor section of the Act relating to the division of matrimonial assets (*viz*, s 106 of the 1985 Act; see also the decision of this court in *Wee Ah Lian v Teo Siak Weng* [1992] 1 SLR 688 ("*Wee Ah Lian*") at 698, [39]). This probably explains why Hwang JC was, in *Wong Kam Fong Anne*, at pains to utilise the prenuptial agreement in that case in order to justify not entering into an inquiry pursuant to s 106 of the 1985 Act (simply because he had held (at 200, [31]) that "once the court has decided to exercise its powers under s 106, there is no room for giving effect to the intention of the parties as such"). It is true that this factor is not as powerful as that centring on the very broad wording of the provision itself. However, it is entirely plausible to argue that the Legislature was aware of the prior case law relating to prenuptial agreements at the time s 112(2)(*e*) was drafted. In any event, construing s 112(2)(*e*) as covering prenuptial agreements is consistent with the approach adopted by the English (see below at [79]).

77 If, as we have concluded, s 112(2)(*e*) covers prenuptial agreements as well, then it is clear that the courts are to consider, as part of all the circumstances of the case, the prenuptial agreement in arriving at a just and equitable division of the matrimonial assets that are available for distribution between the parties. *However*, it is pertinent to note that it follows that the prenuptial agreement *cannot* be enforced, *in and of itself*. It bears reiterating that its terms constitute one of the factors that the court should take into account in arriving at its decision as to the proportions in which the matrimonial assets concerned are to be distributed.

78 We should also observe – and this is an important point – that *even if* s 112(2)(*e*) of the Act is *not* construed as covering prenuptial agreements, this will not preclude the court from considering a prenuptial agreement, as the matters set out in s 112(2) (including that contained in s 112(2)(*e*)) are not exhaustive. Indeed, it bears reiterating that s 112(1) of the Act states that the court has the power "to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportions as the court thinks *just and equitable*" [emphasis added]. More specifically, s 112(2) states that "[i]t shall be the duty of the court in deciding whether to exercise its powers under [s 112(1) of the Act] and, if so, in what manner, *to have regard to all the circumstances of the case*" [emphasis added].

79 The approach we have adopted is not dissimilar to that adopted in England. The English position also allows the court to consider a prenuptial agreement as a factor in arriving at its decision with respect to the division of matrimonial assets pursuant to s 25 of the 1973 UK Act ([42] *supra*), which requires, *inter alia* (and like s 112(2) of the Act), the court "to have regard to all the circumstances of the case". That provision also includes a number of matters (*none* of which, however, refers, *unlike* s 112(2)(*e*) of the Act, to an agreement entered into between the parties in contemplation of divorce and, looked at in this light, the *Singapore* provision (*viz*, s 112(2)(*e*) of the Act) is *clearer* than its UK counterpart). However, it should also be noted that s 25(2)(*g*) of the 1973 UK Act does refer to "the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it". This is, apparently, the *closest "equivalent"* of s 112(2)(*e*) of the Act. It should also be noted that, in the English High Court decision of *M v M (Prenuptial Agreement)* [2002] 1 FLR 654, Connell J was of the view that it did not matter whether a prenuptial agreement was taken into account under the more specific rubric of s 25(2)(*g*) of the 1973 UK Act or, more generally, having regard to all the circumstances of the case (see *id* at [21] and [39]). By parity of reasoning, it would (as we have already noted in the preceding paragraph) follow, in the *Singapore* context, that, *even in the absence of s 112(2)(*e), the court could *still* take a prenuptial agreement into account under its more general duty pursuant to s 112(2) of the Act "to have regard to all the circumstances of the case".

80 Returning to the Singapore position, *notwithstanding* the fact that a prenuptial agreement cannot be enforced in and of itself, much will depend, in the final analysis, on the precise terms of that agreement as viewed in the context of all the relevant circumstances as a whole (some of which have been set out in s 112(2) of the Act, which has been reproduced above at [71]). To this end, 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*. *However, it is important to reiterate that everything will depend upon the precise circumstances before the court*. In this regard, the comments of Baron J in *NG v KR* ([42] *supra*) at [118]–[119] ought to be noted:

> [O]ver the years, Judges have become increasingly minded to look at the precise terms of agreements and will seek to implement their terms *provided the circumstances reveal that the agreement is fair.* …
>
> Upon divorce, when a party is seeking quantification of a claim for financial relief, it is the Court that determines the result after applying [the 1973 UK Act]. *The Court grants the award and formulates the order with the parties' agreement being but one factor in the process and perhaps, in the right case, it being the most compelling factor*.
>
> [emphasis added]

There is no blanket rule that a prenuptial agreement must be enforced to the exclusion of all the other relevant circumstances before the court. The ultimate aim of the court is (in accordance with s 112(1) of the Act, which has been reproduced above at [71]), to arrive at a division of matrimonial assets that is both *just and equitable* as between the parties. We pause to observe that this approach (mandated by s 112 of the Act) is, in fact, flexible and permits the court to consider other developments and changes that have taken place since the marriage (many of which are encompassed within the factors mentioned in s 112(2) itself).

81 In this regard, the recent English Court of Appeal decision of *Crossley v Crossley* [2008] 1 FLR 1467 ("*Crossley*") is significant inasmuch as Thorpe LJ emphasised, in that case, the need to accord prenuptial agreements *primacy where the facts warrant it*.

82 In *Crossley*, the parties had become engaged some three months after first meeting. The husband was a 62-year-old property developer with an independent fortune which he declared to be in the region of £45m. The wife, who was 50 years old, declared her fortune to be in the region of £18m. After their engagement, there followed negotiations between experienced lawyers pursuant to settling the terms of a prenuptial agreement. In Thorpe LJ's words (at [2]):

> This seems to me to have been an entirely appropriate step for the parties to take. The husband had been married once before and had had a long-term previous relationship, and had four children as a result. The wife had been three times previously married and had three children from those previous marriages.

83 The prenuptial agreement was finalised and signed. The key thrust of the agreement was that both parties would, in the event that the marriage ended, walk away with whatever they had brought into the marriage. The marriage hit the rocks very early on, with the parties separating slightly over a year later. The wife petitioned for divorce. She issued a Form A (notice of an application for ancillary relief) as a preliminary step pursuant to her claims for financial provision. A date for the exchange of forms between the parties was triggered as a consequence – which would lead, in turn, to the exchange of questionnaires and other documents as well as a first appointment before the court. The husband issued a summons which sought, *inter alia*, an order that the wife

show cause why her claims for ancillary relief should not be resolved in accordance with the terms of the prenuptial agreement. Bennett J in the English High Court did not order the conventional exchange and delivery of questionnaires. He was of the view that the requisite forms should be completed without documents and questionnaires, with an explanation being furnished in the forms as to why the prenuptial agreement was (or was not, as the case might be) a knockout blow. The wife's counsel was, not surprisingly, unhappy with the approach adopted by the judge as he desired the delivery of questionnaires in order to develop the wife's case centring on the husband's alleged concealment of very substantial assets in a couple of jurisdictions. Bennett J responded by directing, instead, the wife's solicitor to write to the husband's solicitors setting out the wife's case on the issue, which was to be answered by the husband in his own form. The case management approach adopted by Bennett J constituted the nub of the appeal before the Court of Appeal in *Crossley*. The Court of Appeal dismissed the wife's appeal.

84 Thorpe LJ was clear beyond peradventure about the critical importance of the prenuptial agreement in the context of the facts before him; in his words (*Crossley* at [15]):

> All these cases are fact dependent and this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the court will look to the prenuptial agreement as not simply one of the peripheral factors in the case *but as a factor of magnetic importance*, it seems to me that this is just such a case. [emphasis added]

85 The learned judge's further observations should also be noted, as follows (at [17]):

> I would classify, in the circumstances of this case, the contract into which the parties entered in December 2005 [*ie*, the prenuptial agreement] as in many respects *akin to a marital property regime into which parties enter in civil law jurisdictions* in order to provide for the property consequences of a possible future divorce. It can be categorised as something *akin to* a contract for the separation of goods within the *French* legal system. *It does seem to me that the role of contractual dealing, the opportunity for the autonomy of the parties, is becoming increasingly important*. As counsel have pointed out, *the possibility of legislation* for prenuptial contracts was raised by this government in I think 1998, and although the responses to the white paper consultation were few in number, there was certainly not in any way a disincentive to further progress. Since then, Resolution has formulated a very convincing paper for the legislation of prenuptials, and much of the debate concerning possible reform of s 25 of the [1973 UK Act] has emphasised the opportunity for some statutory acknowledgment of the importance of prenuptials. *There is, in my judgment, an even stronger argument for legislative consideration, given the resolution of the European Union to formulate some regulation to tackle the difficulties that arise from different approaches in the member states. There is an obvious divide between the provisions of the civil law jurisdictions and the absence of any marital property tradition in the common law systems. Undoubtedly there would be some narrowing between this European divide if greater opportunity were given within our justice system for parties to contract in advance of marriage, to make provision for the possibility of dissolution*. The approach that Bennett J took in this case seems to me to accord with a developing view that prenuptial contracts are gaining in importance in a particularly fraught area that confronts so many parties separating and divorcing. [emphasis added]

86 The observations just quoted are significant inasmuch as they emphasise the fact that, as the UK is part of the European Community, there are other factors (relating to desirable integration *vis-à-vis* other legal systems) that do not arise in the Singapore context. However, this does *not* detract from the more general point (which *is* applicable in Singapore) to the effect that there may well be situations (such as that in *Crossley*) where a prenuptial agreement would be accorded

significant – indeed, even conclusive – weight (see also *MacLeod* ([75] *supra* at [28]) where the Privy Council cited *Crossley* as an example of the "right case" where this would be appropriate). As Thorpe LJ put it, such an agreement would be "a factor of *magnetic importance*" [emphasis added] (see [84] above). On a *broader* level, there may be more than a hint of *an attitudinal shift* in favour of prenuptial agreements. It should, however, also be noted that, although both Keene and Wall LJJ agreed with Thorpe LJ, Wall LJ stated that he "prefer[red], speaking for [himself], to limit [his] decision strictly to the facts of this particular case" (*Crossley* at [22]).

87 There is another specific issue that arises (and which is of particular relevance in the context of the present appeal). This relates to prenuptial agreements which have been entered into *abroad* and are *wholly* foreign in nature. It would appear to us, as a general guide (and no more), that if a prenuptial agreement is entered into by foreign nationals and that agreement is governed by (as well as is valid according to) a foreign law, then there is no reason in principle why the court should not accord *significant (even critical) weight* to the terms of that agreement – bearing in mind that (as we have noted) prenuptial agreements are not, generally speaking, void as being contrary to the public policy of Singapore and there is therefore no overarching public policy of the *lex fori* which prohibits such agreements in the first place (with, perhaps, the exception of certain prenuptial agreements relating to the custody (as well as the care and control) of children (see above at [70])). The assumption here is also that such foreign law is not repugnant to the public policy of Singapore. Such an approach will also avoid the danger of forum shopping (see, for example, Jeremy D Morley, "Enforceable Prenuptial Agreements: Their Time has Come" (2006) 36 Fam Law 772).

88 However, such an approach is, it should be noted, confined (in the main at least) to prenuptial agreements relating to the division of matrimonial assets and it is important to emphasise that there is *no blanket rule* to the effect that such agreements will (even with respect to the division of matrimonial assets only) be accorded significant (let alone crucial) weight *as a matter of course*. Where, for example, there has been clear fraud or other indications of unconscionability, the court might even disregard the agreement concerned altogether (see also below at [94]–[97] with regard to the applicability of the principles of the common law of contract). Indeed, where this is the situation, it will (in all likelihood) be the case that the agreement is not valid by its governing law in any event. Much will, of course, depend on the precise facts of the particular case as well as on the expert evidence adduced (in this last-mentioned regard, it behoves the parties concerned to adduce the best and clearest evidence that they can muster; indeed, to obviate potential as well as unnecessary bias and/or confusion, an *independent* expert (whether appointed by consent of the parties or even by the court) might be the best way forward in such situations). The court ought not – and cannot – be utilised by any one party as a means to achieve an unjust and unfair outcome.

89 What, then, about *other* prenuptial contracts which do not possess a *wholly* foreign element? Should, for example, significant weight also be accorded to prenuptial agreements which are *not* (unlike the situation referred to in the preceding paragraph) *wholly* foreign in nature? For example, there may be situations where foreign nationals enter into a prenuptial agreement which is governed by Singapore law. On the other hand, a Singapore national who marries a foreign national may enter into a prenuptial agreement which may be governed by either Singapore law or foreign law.

90 What about situations where there is no foreign element at all? This would involve a situation where both the husband and the wife are Singaporeans and who have entered into a prenuptial agreement prior to their marriage.

91 The *overarching* principle, in our view, remains the same: The *court* decides the *weight* that is to be accorded to the prenuptial contract in question in so far as the division of matrimonial assets is concerned and this is, in turn, heavily dependent on the *particular facts* of the case itself. Hence,

it might be the case that, even where the prenuptial agreement is *wholly local* in character, a *significant (even pivotal)* weight would nevertheless be accorded to that agreement *if the facts and circumstances so warrant it*. Indeed, this was the case (albeit in the English context) in *Crossley* ([81] *supra*).

92 However, there is an important factor that was raised by a writer in a perceptive comment on the present case at first instance (see Debbie Ong ([73] *supra*) at 404–405, paras 23–24), and this relates to the argument that where a prenuptial agreement has (as in the present appeal) been entered into a relatively long time ago, it might not reflect the current circumstances of the parties and might even "[violate] the broad scheme of s 112 [of the Act]" (see *id* at 404, para 24) (see also Debbie Ong Siew Ling, "When Spouses Agree" (2006) 18 SAcLJ 96 at 113, paras 52–53). Whilst this is an important factor, another writer has pointed (not unpersuasively, in our view) to possible difficulties with the argument just mentioned (see generally Lenore J Weitzman, *The Marriage Contract: Spouses, Lovers, and the Law* (The Free Press, 1981) at pp 248–250). In particular, Weitzman argues that the argument from a change in circumstances "is inherent in all long-term relationships" (at p 249), that there could be "provisions for periodic or extraordinary renegotiation" (*ibid*), that there are doctrines that could address the issue of changed circumstances both in family law and in contract law (most notably, the doctrine of frustration) (*ibid*), and that (as is the case with contracts in the business context) "[t]he same principles of goodwill, cooperation, affection, and mutual regard as well as a stake in the joint enterprise should also allow parties to [prenuptial] contracts to cope effectively with new and unanticipated situations" (at p 250). The reality is, as already emphasised above, that the courts will have to deal with each fact situation differently, *having close regard to all the circumstances of the case concerned*.

93 Finally, it is also important to point out that where such an agreement touches on issues of the *maintenance* of the wife and/or the children *as well as* on issues relating to the *custody (including the care and control) of the children*, the court will (as already alluded to above), *ceteris paribus*, be *less* inclined to accord significant weight to it as these issues relate directly to *the welfare of individual persons* and, in this regard, the changes in circumstances could impact adversely on them. Reference may also be made to the very recently proposed examination, in the UK, of marital *property* agreements, as opposed to other agreements (see generally the UK Law Commission, in its *Tenth Programme of Law Reform* (Law Com No 311, 10 June 2008) (Chairman: Justice Etherton) ("*UK Law Commission Programme*"), where it said (at para 2.17) that the status and enforceability of marital *property* agreements (including prenuptial agreements) would be examined and where it also observed (at para 2.19) that "[t]here is a view that the fact that pre-nuptial agreements are not currently binding [in England] may deter people from marrying or entering into civil partnerships in some cases", that "[t]he issue may be of particular importance to those who have experienced divorce and wish to protect their assets, however extensive, from a future claim for ancillary relief", and that "[i]t may also be crucial for couples who have entered into marital property agreements in jurisdictions in which such agreements are enforceable"). Interestingly, the very recent Privy Council decision of *MacLeod* ([75] *supra*) not only cited (at [34]) para 2.17 of the *UK Law Commission Programme* but also expressed the view (at [35]) that if prenuptial agreements were to be *generally* valid and enforceable, this would have to be effected by the *Legislature*.

Are there any other legal constraints on the extent to which prenuptial agreements can be considered by the court?

94 It is our view that prenuptial agreements ought generally to comply with *the various legal doctrines and requirements that are an integral part of the common law of contract* (see also, for example, the English High Court decisions of *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120 at 131–132 and *J v V (Disclosure: Offshore Corporations)* [2004] 1 FLR 1042 ("*J v*

V") at [41]; *NG v KR* ([42] *supra*) at [37]–[38] and [136]; and the Privy Council decision of *MacLeod* (at [38]); as well as the Singapore High Court decisions of *Wong Kam Fong Anne* ([64] *supra*) at 201, [34] and *Chia Hock Hua* ([64] *supra*) at 385–386, [16]–[17]). This is only logical as well as just and fair, given that such agreements are, *ex hypothesi*, *contracts* to begin with. However, this requirement would *not* apply to foreign prenuptial agreements which are valid by their proper law, *save where it is otherwise shown that the agreement concerned is repugnant to, or otherwise contravenes, the public policy of the* lex fori *(here, Singapore)*.

95 The various common law doctrines and requirements referred to in the preceding paragraph are too numerous to set out here (let alone to recount in any detail). They may be found in any standard contract law textbook. However, a few of the more obvious ones may be set out in the briefest of fashions.

96 The prenuptial agreement in question must obviously have been *validly formed* in the first place in accordance with the general rules and principles relating to offer and acceptance (and see the decision of this court in *Wee Ah Lian* ([76] *supra*)). Hence, for example, an absence of a requisite offer or acceptance would be fatal to any reliance on an alleged prenuptial agreement as it would not have come into proper legal existence in the first instance.

97 At the other end of the contractual spectrum are to be found the various *vitiating factors*. These include standard contractual doctrines such as misrepresentation, mistake, undue influence, duress, unconscionability, as well as illegality and public policy. In this last-mentioned respect, there is also the possibility of "saving" that part of the prenuptial agreement that is objectionable via the doctrine of severance (*cf*, though, the unsuccessful attempt at invoking this doctrine in the English Court of Appeal decision of *Bennett v Bennett* [1952] 1 KB 249; the English High Court decision of *N v N* ([46] *supra*); and the Australian High Court decision of *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432; *cf* also s 7 of the Uniform Premarital Agreement Act (US) (adopted by 26 states and the District of Columbia)). There has also been mention of the safeguard relating to the availability of independent legal advice (and see, in the US context, Allison A Marston, "Planning for Love: The Politics of Prenuptial Agreements" (1997) 49 Stan L Rev 887 at 909–916). We would pause to observe that this particular factor is in fact an integral part of the factors that the courts would generally take into consideration in any event (particularly in the context of the application of the doctrines of undue influence, duress and unconscionability).

98 However, in the Singapore High Court decision of *Tan Siew Eng v Ng Meng Hin* [2003] 3 SLR 474 ("*Tan Siew Eng*"), the court took into account the terms of a contract (for the purposes of the division of matrimonial assets under s 112 of the Act) *notwithstanding* the fact that it had found that the contract concerned was no longer contractually binding on the parties inasmuch as the contract had been *repudiated* by one of the parties. It has, in fact, been pertinently pointed out by a leading author in the field (endorsing *Tan Siew Eng*) that such an approach "appears to drag the court into having to consider what could be [copious] argument on both sides" (see Leong Wai Kum, *Elements of Family Law in Singapore* (LexisNexis, 2007) at p 99). Prof Leong proceeds to observe thus (at p 101):

> This decision [*viz*, *Tan Siew Eng*] may portend a newer approach whereby the court, faced with an agreement made between spouses, can focus its concern on whether the substantive term is fair. Where it is fair, the court can find a way to make its court order closely following this term in their agreement. Where it is less than fair, the agreement can readily be ignored. This focus may be more fruitful than being bogged down with the contractual issues reflecting the continued validity of the agreement.

99 The approach proffered by Prof Leong in the preceding paragraph has much force. We are nevertheless of the view that the court ought still to have regard to the general principles of the common law of contract, if for no other reason than to place some legal parameters on what would otherwise be a *wholly* substantive exercise of discretion on the part of the court. Indeed, even if Prof Leong's approach is adopted, the court would still need to consider the various arguments centring on the validity of the prenuptial agreement in any event simply because, in many situations at least, these arguments would probably have an impact on the court's decision on the substantive issue before it. If, for example, a prenuptial agreement has been entered into as a result of fraud, duress, undue influence or unconscionability, its term(s) (based on the approach just mentioned) would be clearly unfair and probably be ignored by the court accordingly. However, this result would, in substance, be the same as the court finding that the prenuptial agreement is void or voidable and hence of no legal effect. There is also the need (fulfilled by the more traditional approach set out above at [94]) to also give effect to the general principles of the common law of contract (though *cf* Leong ([98] *supra*) at p 112).

100 That having been said, having regard to the fact that the court is not dealing with commercial contracts as such, we are of the view that the court does retain a residuary discretion, even in a situation where the prenuptial agreement concerned does not comply with one or more of the legal doctrines and requirements under the common law of contract, to give *some* weight to that agreement (*cf* also, in the context of division of matrimonial assets, the need (pursuant to s 112(2) of the Act, reproduced above at [71]) "to have regard to all the circumstances of the case"; reference may also be made, for example, to the decisions of *Edgar* ([74] *supra*) and *MacLeod* ([75] *supra*)). However, we envisage that the exercise of such residuary discretion will, by its very nature, occur only in limited circumstances. Much will depend on what particular legal aspect is involved and/or the specific facts of the case before the court. Where, for example, a prenuptial agreement is void for statutory illegality in contravention of a fundamental policy underlying the statute concerned, the court will *not* consider that agreement *at all*. Looked at in this light, on the other hand, the decision in *Tan Siew Eng* ([98] *supra*) can be viewed as a specific application of this residuary discretion in what was – in contrast to the situation just mentioned – a much less egregious situation.

A summary of the rules and principles

101 A general summary of the rules and principles that ought to be applied by our courts in relation to prenuptial agreements would be appropriate and is as follows.

(1) Central principle

102 The legal status of a prenuptial agreement in the Singapore context is the result of the interaction of both statute law (here, the Act) on the one hand and the common law on the other. Put simply, where one or more of the provisions of the Act expressly covers a certain category of prenuptial agreement, then that provision or those provisions will be the governing law. Where, however, the Act is *silent*, then the legal status of the prenuptial agreement concerned will be governed by *the common law*. In this regard, it will be assumed that any prenuptial agreement which contravenes any express provision of the Act *and/or* the general or specific legislative policy embodied within the Act itself will not pass muster under the common law.

(2) Main categories of prenuptial agreements

103 The following main categories of prenuptial agreements are *subject to the close scrutiny of the court* (in accordance with the general principles stated therein):

(a) In so far as prenuptial agreements relating to the *maintenance* of the wife and/or the children are concerned, the *common law* principles apply in the apparent absence of an applicable provision under the Act (and *cf*, especially, ss 116, 119 and 132 of the Act in relation to *postnuptial* agreements). In particular:

(i) The court will ascertain whether the terms of the prenuptial agreement are just and fair inasmuch as they provide the wife and/or the children with adequate maintenance in accordance with the various criteria set out in the Act as well as in the relevant case law.

(ii) The court will certainly prevent any attempt by the husband at circumventing his obligation to furnish adequate maintenance by disposing of his property (by direct or indirect means).

(iii) In so far as the prenuptial agreement relates to the maintenance of the children, the court will be especially vigilant and will be slow to enforce agreements that are apparently not in the best interests of the child or the children concerned.

(b) In so far as prenuptial agreements relating to the *custody (as well as the care and control) of the children* are concerned, the court operates on the basis of the common law and, possibly, s 129 of the Act. In particular, there is a *presumption* that such an agreement is unenforceable *unless* it is clearly demonstrated by the party relying upon the agreement that that agreement is in the *best interests* of the child or the children concerned.

(c) In so far as prenuptial agreements relating to the *division of matrimonial assets* are concerned, the governing provision is s 112 of the Act. In particular, the ultimate power resides in the court to order the division of matrimonial assets "in such proportions as the court thinks *just and equitable*" [emphasis added] (see s 112(1) of the Act). In particular:

(i) In arriving at its decision, the court will have regard to all the circumstances of the case (see s 112(2) of the Act) and this would include a prenuptial agreement.

(ii) What *weight* the prenuptial agreement will be given will depend on *the precise facts and circumstances of the case.* In an appropriate situation, a prenuptial agreement might be accorded significant – even conclusive – weight.

(iii) The court might be readier to place more emphasis on the fact that the prenuptial agreement in question has been entered into by foreign nationals and is governed by (as well as is valid according to) a foreign law (assuming that that foreign law is not repugnant to the public policy of Singapore). However, it is important to emphasise that everything depends, in the final analysis, on the precise facts and circumstances of the case itself (see sub-para (i) above).

104 As would be apparent, the common tenet that runs through all the above prenuptial agreements is that they are ultimately subject to the scrutiny of the courts. Until the Legislature decides otherwise, the courts' scrutiny remains a necessary safeguard, bearing in mind the context in which these agreements arise (see *NG v KR* ([42] *supra*) at [129]):

> To my mind, independent scrutiny of these agreements remains as necessary in modern times as it was in [the] last century because of the vulnerability of parties involved at times of high emotion where inequality of bargaining power may exist between them. Although civilization has made much progress over the centuries and the roles of men and women have altered so that, in

some cultures, equality has been achieved that does not mean that fundamental human nature has changed. Whilst the Court must permit of current mores and will take full account of contemporary morality it should not be blind to human frailty and susceptibility when love and separation are involved. The need for careful safeguards to protect the weaker party and ensure fairness remains.

(3) Requirements under the general law of contract

105 Before prenuptial agreements can be considered by the court, they must generally comply with the various legal doctrines and requirements that are part of the common law of contract. However, this requirement would *not* apply to a *foreign* prenuptial agreement that is valid by its proper law *and* which is not repugnant to, or does not otherwise contravene, any overriding public policy of the *lex fori* (here, Singapore). The court also retains a residuary discretion, in limited circumstances, to give *some* weight to a prenuptial agreement that does not comply with one or more of the legal doctrines and requirements under the common law of contract.

Procedure

106 In so far as the requisite procedure is concerned, we are of the view that it would be appropriate if the terms of a valid prenuptial agreement are converted into a court order. In particular, in so far as the division of matrimonial assets pursuant to s 112 of the Act is concerned, a valid prenuptial agreement is, as explained above, only a guide and will (to the extent that it is relevant) be reflected in the order of court itself.

Our decision

107 The prenuptial agreement in the present appeal (entered into by the parties on 26 August 1991) is, as noted earlier, wholly foreign in nature (the Agreement, between a Dutch citizen and a Swedish citizen, was entered into in the Netherlands and was signed by the parties before a notary public). As also mentioned earlier, the Agreement dealt with the parties' respective matrimonial assets only.

108 As we held above (at [31]–[37]), the Agreement is governed by Dutch law. It was also not disputed that the Agreement is valid by Dutch law and that there were no factors (under either Dutch law or local law) that operated to vitiate the Agreement (bearing in mind the fact that we arrived at our findings only on the basis of the affidavit evidence placed before the courts and also did not take into account the fresh evidence sought to be introduced by the Wife at the eleventh hour to impugn the Agreement (see above at [37])). In the circumstances, therefore, we could – and did – take the Agreement into account. We were also cognisant of the fact that the Agreement related to *the division of matrimonial assets* and, as we have noted above, the courts would be more inclined to place more emphasis on prenuptial agreements that related to the division of matrimonial assets (as opposed, for example, to those agreements that related to the maintenance of the wife and/or the children as well as agreements that related to the custody (as well as the care and control) of the children). Indeed, given the fact that both parties in the present appeal are foreign nationals and the fact that the Agreement is governed by (as well as valid according to) a foreign law which is not repugnant to the public policy of Singapore, we decided that the Agreement ought to be given the highest significance, being – in the words of Thorpe LJ in *Crossley* ([81] *supra* at [15]) – "a factor of magnetic importance". Indeed, at the time they entered into the Agreement, neither party anticipated that the marriage would end here in Singapore. Both parties entered into the marriage thinking that the Agreement was valid and binding. We also recognised the fact that persons may (particularly in jurisdictions where prenuptial agreements are commonplace) decide to get married only *because* of

the assurance furnished by a binding prenuptial agreement.

109 In the circumstances, it would, in our view, be neither just nor equitable for the Wife to now ask the court to allow her to evade her responsibilities under the Agreement. As we have also referred to above (at [87]), to hold otherwise may encourage forum shopping by those who wish to avoid the enforceability of their respective prenuptial agreements in their home countries. Further, the Wife's argument centring on the length of time since the making of the Agreement cannot be, in and of itself, a reason for disregarding it for the reasons set out above (at [92]). As (if not more) importantly, we have already noted (at [28] above) that, in any event, the Husband asserted that he had no assets, and the Wife was unable to adduce any substantive proof to the contrary.

110 However, as we have already emphasised above, each case will obviously depend on its own facts and it would therefore be inappropriate to draw any general principles from the actual decision in the present appeal (other than those listed above (at [101]–[105])).