IN THE FAMILY JUSTICE COURTS OF THE REPUBLIC OF SINGAPORE

[2017] SGHCF 16

Divorce (Transferred) No 844 of 2008
Registrar's Appeal No 14 of 2016

Between

UDA

… Appellant

And

UDB

… 1st Respondent

And

UDC

… 2nd Respondent

GROUNDS OF DECISION

Version No 1: 05 Nov 2020 (22:14 hrs)

[Family law] — [Matrimonial assets] — [Division]

[Family law] — [Matrimonial proceedings] — [Jurisdiction] — [Intervener]

[Family law] — [Matrimonial proceedings] — [Procedure] — [Cross-examination]

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UDA
v
UDB and another

[2017] SGHCF 16

High Court — Divorce (Transferred) No 844 of 2008 (Registrar's Appeal No 14 of 2016)
Debbie Ong JC
10 October; 30 December 2016

28 June 2017

Debbie Ong JC:

Background facts

1 The parties in this case, Divorce (Transferred) No 844 of 2008, have been in litigation for many years. Although the divorce suit was filed in 2008, the Ancillary Matters on the division of assets and maintenance have not yet been heard. This appears to be largely due to the complex issues and disputes concerning the care and control and access of their three children. The Court of Appeal made a consent order regarding the custody, care and control and access of the children in 2014. While that order was a final one, new developments have led to the parties filing new and further applications over the access of the children. Those applications are pending before me and are separate from matters related to the present appeal.

2 The parties' preparations for the hearing of the financial Ancillary Matters gained momentum in the last year or so. The defendant in the underlying divorce suit ("the Husband") alleged that an immovable property held in the name of the mother of the plaintiff ("the Wife") is beneficially owned by the divorcing parties and constituted a matrimonial asset. I shall refer to this asset as "PQR". The Wife's mother (referred to as "the Intervener") disputed this and upon her application, was granted leave to participate as an intervener in these proceedings.

3 The Husband applied for leave to cross-examine in respect of the dispute over the ownership of PQR. The Assistant Registrar ("AR") granted leave for cross-examination of the Husband, the Wife, and the Intervener. Registrar's Appeal Nos 14 and 15 of 2016 (collectively, "the appeals") are the appeals filed by the Intervener and the Wife respectively against the AR's grant of leave for cross-examination.

4 The Intervener took the position that the court ought to determine any property dispute involving an intervener together with the issues under s 112 of the Women's Charter (Cap 353, 2009 Rev Ed) ("WC") at the Ancillary Matters hearing by way of affidavit evidence. She informed the court through counsel that at the age of 67 years, she is too old to be cross-examined both in the course of the s 112 proceedings and in a civil suit should a writ action be filed. She also cited health reasons as the basis for objecting to being cross-examined.

5 At the hearing of the appeals, I asked the parties whether the court exercising its power under s 112 has the jurisdiction and power to determine a third party's interest in a property and make orders against the third party. I directed the parties to file further written submissions on this issue.

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6 The Intervener submitted that although s 112 does not expressly state that the court has power to determine the property rights and interests of an intervener, the court has in the past determined the nature and extent of third party interests before dividing the matrimonial assets between divorcing spouses. She cited several Singapore and English cases to support her submissions. The Intervener submitted in the alternative that even if I did not have jurisdiction to determine a third party's interests in a disputed property under s 112 of the WC, I have the jurisdiction to do so under ss 22 and 25 of the Family Justice Act 2014 (No 27 of 2014) ("FJA") and ss 16, 17 and the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA").

7 The Husband submitted that the civil aspect of the issue "ought to be dealt with as a civil matter would normally". He argued that s 112 does not apply to the determination of third parties' property rights. A separate civil suit should be commenced by either the Intervener or the divorcing parties in relation to PQR. He suggested, alternatively, that the English approach could be adopted where a preliminary civil hearing is first held to determine the Intervener's property interest before proceedings continue in the Family Division of the High Court. In the present case, the Husband told the court that he wished to also bring a conspiracy suit against the Wife and the Intervener. He submitted that the family court proceedings would not be appropriate for a conspiracy suit given the lack of trial procedures. The Husband through his counsel explained to the court that he had not taken out a separate writ action because he was concerned with cost implications in the event an argument is made that a separate writ action was unnecessary since the court could have determined the matter within the s 112 proceedings.

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8 After hearing the parties and considering their further written submissions, I ordered a stay of the Ancillary Matters proceedings to allow the Husband the opportunity to pursue a civil action to determine the disputed property interests first. The Intervener then filed an application for leave to appeal to the Court of Appeal in respect of my decision in Registrar's Appeal No 14 of 2016 to stay the Ancillary Matters proceedings pending further directions. Leave for appeal to the Court of Appeal was granted to the Intervener.

9 Although the decision being appealed is of an interlocutory nature, that is, to stay the financial Ancillary Matters proceedings, I will give full reasons for why a stay of proceedings was fair and just, including my views on the nature and scope of the court's powers in s 112 of the WC.

Third parties or interveners in s 112 WC proceedings

10 In most cases, the alleged pool of matrimonial assets does not involve property that may be owned by or co-owned with a third party, such as a relative of one of the parties to the divorce. However, in some cases, a divorcing spouse may allege that an asset held in the name of a person other than the spouses is beneficially owned by one or both of the spouses and may thus constitute a matrimonial asset. In these cases, the beneficial ownership of such an asset must first be decided in order for the court to determine the constitution of the entire pool of matrimonial assets liable for division under s 112.

11 A person who is not a party to the terminated marriage but whose property is alleged to be a matrimonial asset may seek leave to intervene or be added as a party in the Ancillary Matters proceedings. This appears to be

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pursuant to r 353 or r 367 of the Family Justice Rules 2014 ("FJR"). If the court directs that the third party (or "intervener", or "non-spouse") may participate in the proceedings, he or she would have a right to be heard in the s 112 proceedings. Whether or not the court has the jurisdiction and power to make an order in respect of the disputed property against the third party (or in favour of the third party) is a separate question, which I shall address below. A crucial issue arising in the present case is whether the addition of an intervener or a third party affects and in particular, expands, the court's jurisdiction and power in s 112 such that orders made pursuant to s 112 may extend to making orders binding third parties. A further related issue is whether the addition of a third party sufficiently invokes the court's jurisdiction and power in a new and different cause of action which can be heard within the s 112 proceedings.

Approaches

12 There are a few suggested approaches to addressing the issue presented by the current facts. These approaches may be in the nature of case management or substantive law, or a mixture of both characteristics. The following discussion is not exhaustive of all possible approaches, and they include an approach suggested in the submissions which I do not view as correct in law.

Option 1: Determine the property interests in s 112 proceedings but make no direct order against the intervener that affects the disputed property

Option 1(a)

13 In what I refer to as Option 1(a), the court exercising its s 112 power proceeds to hear the evidence of the intervener and the divorcing parties in order to determine whether the disputed asset is a matrimonial asset. It may do so on

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affidavit evidence only or may also permit cross-examination of relevant witnesses in respect of the specified issues in dispute.

14 There are two possible outcomes. First, if, after considering all the relevant evidence, the court decides that neither party to the marriage has any beneficial interest in the disputed asset, that asset is not included in the pool liable to division under s 112. The court then orders the division between the parties of their matrimonial assets (which does not include the disputed asset).

15 If, on the other hand, the court is of the view that at least one party has beneficial interest in the disputed asset, that asset (or part of it) may possibly be a matrimonial asset liable to division, if it falls within s 112(10) of the WC. In such a situation, it may be possible for the court to include the disputed asset in the pool to be divided, yet make no order that directly affects that asset. For example, if the court determines that Asset X, which is held in the sole name of the intervener, is beneficially owned by the husband (perhaps by a finding of a resulting trust), it may include Asset X in the pool of assets such that the total pool has a higher value than it would otherwise have. However, the court may make consequential orders which only directly affect the other assets in the pool but not Asset X. The court's order is one that divides certain matrimonial assets between the divorcing parties. It is an approach that is feasible where there are substantial matrimonial assets to be divided apart from the disputed asset.

16 This approach was taken by the High Court in *Lau Loon Seng v Sia Peck Eng* [1999] 2 SLR(R) 688. In that case, it was determined that the shares held in the names of the third parties belonged beneficially to the husband. The third parties did not intervene in the proceedings. The court ordered the husband to pay the wife the value of her interest in the shares determined by the court. It

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did not make an order for the sale or transfer of the disputed shares themselves from the third parties and the order involved a division of assets between the divorcing parties only. For this reason, the High Court considered this order to be within the court's jurisdiction.

Option 1(b)

17 A somewhat innovative variation of Option 1(a) (which I call Option 1(b)), is one modelled after *Yeo Chong Lin v Tay Ang Choo Nancy and another appeal* [2011] 2 SLR 1157 ("*Yeo Chong Lin*"). In that case, the High Court included into the pool of matrimonial assets, shares that the husband had transferred to their daughters. In other words, the High Court treated the shares as beneficially owned by the husband and a matrimonial asset. After the High Court delivered its decision on the division of assets under s 112, the daughters took out a civil suit to claim their beneficial ownership of the shares held in their names. On appeal against the decision on the division of assets, the Court of Appeal held that the High Court had erred in finding that the husband was the beneficial owner of the shares which were in the daughter's names. The daughters did not join as interveners in the s 112 proceedings. The Court of Appeal opined that the status of the daughters' shares had to await the outcome of the civil suit (at [84]):

> In the event that following the final outcome in S 373/2010 (including any appeal to this court), the Daughters' Shares are to be regarded as belonging to the Husband, then the values of those shares shall be added to constitute part of the matrimonial assets and the Husband shall pay to the Wife her due share of the enlarged matrimonial assets ...

18 Thus under Option 1(b), a court could first, make orders such as those in Option 1(a), *ie*, orders dividing the matrimonial assets between the divorcing

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parties, taking into account the value of the disputed asset, but without directly affecting the third party's rights in the disputed asset. It may then further order that if there should subsequently be a civil action determining the beneficial interest of any disputed assets, the orders shall be modified in the manner specified to take into account the final outcome of the civil action. While this may be feasible and expedient in some cases, it is not always free from difficulty, since it may involve some projections and speculations as to the various possible outcomes in the civil suit.

Option 2: Order that the s 112 proceedings be stayed to allow the property dispute to be separately determined first

19 Where the disputed property is the main or only substantial asset available for division, it may be difficult for the court to make a fair division order that does not directly affect the ownership rights in the disputed asset, as described in Option 1. In such a case, the court may find it just to direct that the Ancillary Matters proceedings be stayed until the property dispute is resolved either by the parties' agreement or in a separate civil action.

20 In such a scenario, it may at first blush appear that intervener proceedings become pointless. This is not quite true, because even in such a situation, the utility of adding the intervener is that the court is alerted to the claim by the intervener and may consider, for instance, a stay of the s 112 proceedings. Its usefulness is in apprising the court of the issues and enabling the court to fully consider all the facts and potential disputes before deciding on the next step to take.

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21 This approach avoids some of the uncertainties that remain if the court were to adopt Option 1. I will elaborate on these difficulties at [42] to [48] below.

Option 3: Determine the property interests in s 112 proceedings and make direct orders against the third party/intervener with respect to the disputed property (in my view, an option not supported by the law)

22 Option 3 is the approach that the Intervener urged this court to take in the present case. She asked the court to determine the property interests in respect of PQR in the s 112 proceedings. As PQR appears to be the most substantial matrimonial asset if found to be one, a just and equitable division would likely require a division of PQR between the Husband and the Wife. The Intervener submitted that the court has the power to make such orders against a third party as the third party has participated in the proceedings as an intervener.

23 While this approach is not entirely without authority, it is one that I respectfully hold is not supported by the law in the Women's Charter. The Intervener cited *ABX v ABY and others* [2014] 2 SLR 969 ("*ABX v ABY*") in support of her submissions. In *ABX v ABY*, the husband and his mother contended that the beneficial interest in a property held by them as joint tenants belonged wholly to the mother, and that the husband was holding his share on trust for her. The wife disputed this and alleged that the husband made almost all the payments for the disputed property. At the Ancillary Matters hearing, the High Court first found that the husband's and his mother's beneficial ownership of the disputed property were in the proportions of their financial contributions towards its acquisition. The husband's beneficial share in this asset, determined to be 85.6% of the disputed property, was included in the pool of matrimonial assets. The court then ordered that unless otherwise agreed, the husband and his

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mother were to sell the property and pay the wife 25% of the husband's 85.6% share from the net sale proceeds. The court accepted that while "the power of court under s 112 … is limited to matrimonial assets" (at [68]), it nevertheless had the general power to order the property to be sold and to give all necessary and consequential directions pursuant to para 2 of the First Schedule of the SCJA. The court noted that the mother had been joined as a defendant and given the opportunity to air her case. Further, it thought that the mother would suffer no undue hardship as "she already has accommodation and is financially independent" (at [69]).

24 With the greatest respect, while the court in *ABX v ABY* may have taken the most practical path which avoids further proceedings, I am of the view that the court exercising its power under s 112 of the WC does not have the power to make such an order against the third party. I explain my reasons in the next section.

My decision

25 In the present case, I adopted Option 2 and ordered a stay of the Ancillary Matters proceedings to allow the Husband the opportunity to pursue a civil action. In reaching this decision, I considered the court's jurisdiction and power under s 112 of the WC, the parties' rights to the various court processes, and the use of the judge-led approach provided by r 22 of the FJR.

The court's jurisdiction and power in s 112 of the WC

26 The court's power to order a division of matrimonial assets is conferred by statute (*ie*, the WC); it does not exist in common law or in any inherent power of the court. Section 112 of the WC provides:

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> (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.
>
> [emphasis added]

27 Section 112 is a forceful provision which enables the court to directly interfere with the property rights of the divorcing parties. For example, it allows the court to divide between both spouses, properties owned by and held only in the name of one party. This is because, as explained by the Court of Appeal in *Lock Yeng Fun v Chua Hock Chye* [2007] 3 SLR(R) 520 at [40]:

> [M]atrimonial assets are not to be viewed as belonging to the husband or the wife exclusively, to be dealt with accordingly upon a divorce. On the contrary, the legislative mandate to the courts is to treat all matrimonial assets as community property (or, as one writer put it, "deferred community of property" inasmuch as the concept of community property does not take place until the marriage is terminated legally) to be divided in accordance with s 112 of the Act …

Section 112 supports the philosophy of marriage by enabling the court to treat all assets acquired during marriage as the communal assets of married partners. This power to *divide* assets therefore lies within the family law regime, and its exercise should be made on family law principles, in contrast to principles that govern other areas of law, such as property law or succession law. As the power is driven by family law policies, it should be exercised in a way that protects family obligations and which enables the parties to continue family life in the most dignified manner. For instance, s 112(2)(*c*) of the WC obliges the court to consider the needs of minor children when dividing assets. The reach of such a powerful provision should "only [be] as wide as the current section 112 of the [WC] provides" (Leong Wai Kum, *Elements of Family Law in Singapore*

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(LexisNexis, 2nd Ed, 2013) at p 534). It cannot be enlarged by *general* jurisdiction-conferring provisions in the SCJA or FJA.

28 The court's power in s 112 is *ancillary* to its *matrimonial jurisdiction*. Section 112(1) confers on the court the power to "order the division *between the parties* of any matrimonial asset" [emphasis added]. The matrimonial jurisdiction of the court under s 93 of the WC is exercised over the two parties to the marriage. Its power in s 112 is exercised over the same two parties to the marriage only. This ancillary character of s 112 is related to the very basis of the power. The Court of Appeal in *NK* v *NL* [2007] 3 SLR(R) 743 explains the basis of the power to divide assets (at [20]):

> … The division of matrimonial assets under the Act is founded on the prevailing ideology of marriage as an equal co-operative partnership of efforts. The contributions of both spouses are equally recognised whether he or she concentrates on the economics or homemaking role, as both roles must be performed equally well if the marriage is to flourish. When the marriage breaks up, these contributions are translated into economic assets in the distribution according to s 112(2) of the Act. …

29 This power arises only when the court grants or has granted at least an *interim* judgment of divorce or nullity, or a judgment of judicial separation (see *Sivakolunthu Kumarasamy v Shanmugam Nagaiah and another* [1987] SLR(R) 702). For example, if the parties' marriage had been terminated by a valid foreign divorce judgment, they will not be able to obtain a divorce in the Singapore court (as there is no longer any marriage to dissolve) and consequently, the court has no power under s 112 to divide the parties' matrimonial assets. This is so even if both the parties agree to submit to the jurisdiction of the Singapore court and ask the court for an order under s 112. The parties' agreement cannot by itself confer jurisdiction on the court. Any

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gaps in the law arising from this situation has to be addressed by specific amendments to the WC. For example, fairly recent amendments to the WC in 2011 introduced Chapter 4A to Part X of the WC. They provide for the situation where the parties' marriage has been terminated in a foreign jurisdiction. Section 121C confers jurisdiction on the court, upon fulfilling certain conditions, to hear an application for financial relief despite not having granted the parties' divorce or nullity judgment. These developments illustrate the ancillary character of s 112. A court exercising its s 112 power does so in its exercise of its matrimonial jurisdiction.

Can the participation of an intervener expand the court's jurisdiction and powers when making orders under s 112?

30 The issue posed by the present facts is whether the process of intervening in the Ancillary Matters proceedings can expand the court's jurisdiction and powers in s 112 to a party other than the divorcing parties. In Lim Hui Min, "Matrimonial Assets and the 3rd Party—To Start a New Fight, to Join in the Fray, to Speak from the Sidelines, or to Live in Blissful Ignorance…" (2003) 15 SAcLJ 219 ("Lim") at [82], the author takes the position that "[w]here a party has intervened in the matter … the court is entitled to make any orders it sees fit in relation to that party. Such orders are obviously enforceable by any of the parties to the proceedings." The UK case of *TSB Private Bank International SA v Chabra and another* [1992] 1 WLR 231 was cited by Lim in support of this position. It was suggested that since an intervener had applied to be part of the Ancillary Matters proceedings, he or she should be bound by the orders granted, like any of the other parties to the proceedings. A similar position was taken in *ABX v ABY*, which was discussed at [23] above.

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31 With respect, I take a different view. In my view, an intervener does not become a party subject to the court's jurisdiction and power under s 112 merely by being granted leave to intervene in the proceedings. The matter before the court is a dispute between the divorcing spouses over the division of their matrimonial assets. The court is exercising its matrimonial jurisdiction over the two parties. I have already explained the ancillary nature of s 112 to the court's matrimonial jurisdiction. An intervener in circumstances such as the present *intervenes in the s 112 proceedings*. She does not invoke another law or enabling provision by such an action and no new cause of action outside of s 112 comes before the court. This *procedural* action of joining an intervener does not confer *substantive* jurisdiction and power on the court to make an order against an intervener who is not a party to the marriage. It does not make any difference to say that the court will apply family law principles to the division of assets between the parties but apply property law principles to the intervener. The court does not have such jurisdiction or power over the intervener in s 112 proceedings. Put in another way, the intervener who is not a party to the marriage does not come under the jurisdiction of the court exercising its matrimonial jurisdiction. I have, in paragraphs [26] to [29] above, explained the basis and scope of s 112. For this reason, I am of the view that Option 3 is not supported by the law. The court exercising its matrimonial jurisdiction has no power under s 112 to make orders against the third party.

32 The Intervener's submission that the court has power by virtue of s 25 of the FJA reflects a misunderstanding of the court's matrimonial jurisdiction and its s 112 power. Section 25 of the FJA provides:

> For the avoidance of doubt, the Family Division of the High Court may exercise the entire original and appellate civil and criminal jurisdiction of the High Court under the Supreme

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> Court of Judicature Act (Cap. 322) and under any other written law.

The broad jurisdiction of the Family Division of the High Court is not in doubt. A court may have jurisdiction to hear a civil suit and make orders on property interests, but its jurisdiction must be appropriately invoked. I illustrate this point by referring to an example on invoking the court's jurisdiction to hear a matter on the guardianship or custody of a child. Section 17(d) of the SCJA confers jurisdiction on the High Court to "appoint and control guardians of infants and generally over the persons and property of infants". But one does not simply walk into the court to ask for a grant of custody over one's grandchild. For instance, if a grandmother disagrees with the parenting style of her daughter-in-law, she must establish her basis for invoking the court's jurisdiction or power to grant her the custody of her grandchild. The enabling provision for the invocation of the court's jurisdiction and power is s 5 of the Guardianship of Infants Act (Cap 122, 1985 Rev Ed) ("GIA"), which permits only "either parent or … any guardian appointed under this Act" to make the application. Unless she is already a guardian appointed under the GIA, the grandmother may not be able to make the application (for a discussion on whether she could in limited circumstances do so, see Leong Wai Kum, "Restatement of the Law of Guardianship and Custody in Singapore" [1999] Sing JLS 432 and Debbie S L Ong and Stella R Quah, "Grandparenting in Divorced Families" [2007] 1 Sing JLS 25 ("Ong and Quah")). This stance has been said to preserve the balance of parental authority between parents and other persons, including grandparents (Ong and Quah at p 33). Similarly, the court may have the general jurisdiction to determine property rights and order a sale of property, but the appropriate party must invoke the appropriate enabling law and process.

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Judge-led approach

33 Further, I do not think that the "judge-led" approach provides a basis for the court to affect a third party's substantive rights and remedies in s 112 proceedings, as Option 3 must necessarily do. By way of background, the Family Justice Courts was established on 1 October 2014. One of the key recommendations of the Family Justice Review Committee was for the family court to employ a "judge-led" approach in family proceedings *(Recommendations of the Committee for Family Justice on the framework of the family justice system* (4 July 2014) at [141]–[142]):

> … the Committee proposes the introduction of elements into the court hearing process which (a) empowers the judge to proactively guide and direct proceedings, (b) reduces the acrimony between parties, and (c) minimises the negative impact that court proceedings may have on the parties involved, especially the children.
>
> Introducing these elements into the court process of the Family Court will help parties focus on the relevant issues, reduce the cost of litigation and the deployment of judicial resources, and expedite the fair and just resolution of cases.

34 Part 3 of the FJR provides for the "judge-led approach" in case management. The provisions in Part 3 of the FJR empower the court to shift away from the typically adversarial nature of court proceedings when resolving family disputes. In particular, wide discretion is given to the court in r 22(2) to "make such order or give such direction as it thinks fit, for the just, expeditious and economical disposal of the cause or matter" and may do so at its own motion.

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Basis of adding a party

35 The Intervener had argued at the hearing for leave to appeal against my decision that it was "regressive" not to consolidate the proceedings to determine the third party's interest within the s 112 proceedings, in order to avoid multiplicity of proceedings, delays and increased costs. She further submitted that the terminology describing the intervener did not matter – whether one was added as an "intervener" or "third party" to an action ought not to make a difference to the court's power to make binding orders against him or her. But there were no submissions to the court on the basis of adding the Intervener as a party to these proceedings. The Intervener's application below in Summons No 2415 of 2015 to be added as a party did not cite any law or rule in the FJR on which her application was based. I surmise that the application was made under r 353 of the FJR. In my view, the fact that an intervener is added as a party to the proceedings under r 353 (or r 367) of the FJR does not alter the court's jurisdiction and power under s 112 of the WC.

36 Rule 353 of the FJR is *in pari materia* with O 15 r 6(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). Rule 353(3) reads:

> (3) Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter, the Court may, on such terms as it thinks just and either of its own motion or on application —
>
> …
>
> (*b*) order any of the following persons to be added as a party:
>
> (i) any person who should have been joined as a party or whose presence before the Court is necessary to ensure that all matters in the cause or matter may be effectually and completely determined and adjudicated upon;

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> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between the person and that party as well as between the parties to the cause or matter.

While r 353 of the FJR is fairly new, its equivalent, O 15 r 6 of the ROC is not new and has been discussed in several Singapore decisions. The cases suggest that O 15 r 6 is a procedural rule that enables the court to bring parties before it for a practical and efficient disposal of the case. Being a procedural rule, it does not give a party additional substantive rights nor does it take away the rights of a party to the proceedings.

37 In *Tan Yow Kon v Tan Swat Ping and others* [2006] 3 SLR(R) 881 ("*Tan Yow Kon*"), Sundaresh Menon JC, as he then was, explained the rationale for the court's discretion to add a party (at [36]):

> … The key point one should keep in mind is that these rules are there to save rather than to destroy, to enable rather than to disable and to ensure that the right parties are before the court so as to minimise the delay, inconvenience and expense of multiple actions. The rules in question are to be construed with these purposes in mind.

A similar view was taken by KS Rajah JC in *Abdul Gaffar bin Fathil v Chua Kwang Yong* [1994] 2 SLR(R) 99 where it was held (at [48]) that the court's discretion under O 15 r 6 must be exercised to "bring all parties to disputes relating to one subject matter before the court at the same time so that the dispute may be determined without the delay, inconvenience and expense of separate actions". *Tan Yow Kon* further suggests that a party can be added notwithstanding that *no* causes of action lie against him or her (at [58]). This

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reiterates that the court's power to grant substantive reliefs against (or for) the third party is distinct from its power in the procedural provisions. The judge-led approach is not a licence for the court to interfere with the substantive rights of parties, or take away any procedural rights which will affect the parties' substantive remedies.

Parties' rights to the various court processes

38 In my view, the procedures and rules adopted in Ancillary Matters proceedings are not tailored to address property disputes involving non-spouses. The FJR, whose predecessor was the former Women's Charter (Matrimonial Proceedings) Rules (R 4, 2006 Ed), governs family proceedings. It has been noted by Lim (*supra* [30] at p 293) that the most significant procedural difference between a civil trial and an Ancillary Matters hearing lies in the right of cross-examination. Ancillary Matters, such as the division of assets and maintenance, are determined by affidavit evidence unless leave is granted for the cross-examination of witnesses (see rr 42, 81(2) and 590 of the FJR). On the other hand, where there are substantial disputes of fact, civil actions are usually commenced by writ and are resolved by way of a trial. A possible argument is that if leave is granted for cross-examination in the Ancillary Matters hearing, the differences in procedural advantages and disadvantages fall away.

39 I am of the view that the differences go beyond the mere right of cross-examination — a civil trial is markedly different from an Ancillary Matters proceeding. In a civil trial, parties set out the cases in their pleadings and are bound by them. They have the opportunity to adduce evidence from various experts and witnesses. They can also subpoena witnesses. Procedures in s 112 proceedings are far more limited. Moreover, cross-examination is not

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commonly permitted in Ancillary Matters hearings (see *X v K* [2003] SGDC 320 at [18]). Where cross-examination is directed, it is usually restricted to limited, specific areas of factual dispute.

40 In the present case, the Husband had, by seeking leave to cross-examine the Intervener in the s 112 proceedings, sought the closest type of process suited to deal with the factual dispute in respect of property PQR. Even then, the cross-examination permitted was confined to the limited, specific areas directed by the AR. Having been granted leave for cross-examination, the Husband was then met with an appeal against that order. Had he filed a writ action, which was his first preference but for concerns about adverse costs if it were alleged against him that he commenced a duplicitous action, the matter would have ordinarily proceeded with cross-examination. By submitting that the court should proceed to determine the third party interests in s 112 proceedings on the basis of affidavit evidence only and resisting a stay of the s 112 proceedings, the Intervener is effectively restraining the Husband from pursuing his civil action in accordance with the law and relevant processes. Being an intervener to a set of s 112 proceedings should not entitle the Intervener to do so. In my view, this would be an undesirable practical effect of Option 3, which would open the way for third parties faced with a separate civil action to argue that it is duplicitous or *res judicata* since the third party interests can be disposed of by way of an Option 3 order. This practical effect should be considered in addition to my objections to Option 3 as a matter of principle. In the present case, a civil suit will also enable the Husband to pursue his conspiracy claims (see [7] above), if he wishes, against the Wife and the Intervener.

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My reasons for adopting Option 2

41 For the reasons above, it is my view that Option 3 is not supported by the law in the WC as the court exercising its matrimonial jurisdiction has no power under s 112 to make orders against the third party. On the other hand, Option 1, which is for the court to determine the property interests in s 112 proceedings but make no direct order against the intervener, is principled and supported by the law. The application of relevant legal principles to determine incidental issues such as beneficial ownership in an asset in the course of s 112 proceedings does not alter the nature of the order that is granted; it remains an order dividing the matrimonial assets between the divorcing parties. Even then, there are difficulties with Option 1 orders, on which I will elaborate below. As for Option 2, it goes without saying that Option 2 does not run into any of the principled objections discussed above because it does not purport to make any ruling or order as regards the disputed asset until a settlement, agreement or judgment has been separately obtained.

42 I adopted Option 2 in the present case and stayed the Ancillary Matters proceedings pending the civil suit that the Husband has indicated he wished to pursue. I explain why this was the most appropriate case management approach and why Option 1, with its difficulties, was not appropriate on the present facts. I do not make any final judgment on the resolution of the difficulties raised here as these were not before me. The difficulties in Option 1 are best illustrated using the following hypothetical scenarios.

43 Let us consider the following hypothetical scenario. In divorce proceedings between a husband and a wife, the husband claims that Asset X belongs jointly to him and his wife and that it is a matrimonial asset. Asset X is

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held in the name of an "intervener" who is the wife's sister. Asset X is valued at $2m. The other matrimonial assets comprise assets in the wife's name totalling $0.5m and assets in the husband's name totalling $2.5m. Thus if Asset X is a matrimonial asset, the parties' total pool of assets is valued at $5m; if Asset X is excluded from the pool, the total matrimonial assets liable for division would be $3m.

Scenario A

44 In a hypothetical scenario "A", the court determines that Asset X belongs beneficially to the husband and the wife, and having been acquired during the marriage, is a matrimonial asset. Asset X is included in the pool of matrimonial assets. The total pool of matrimonial assets, including Asset X (valued at $2m), has a value of $5m. An order of equal division gives each party $2.5m in assets. The court makes no order directly against the intervener but orders that the husband keeps all assets in his own name, which total up to $2.5m. This order is in line with the approach in Option 1; it is an order dividing assets between the parties to the marriage.

45 The intervener (the wife's sister) is of the view that the court's division order under s 112 does not bind her. As a result, the wife is unable to obtain a transfer of Asset X to her. The wife would thus effectively receive assets valued at only $0.5m, which are already held in her name. Can the wife take out enforcement proceedings or a civil suit against the intervener for a transfer of Asset X? Would this property dispute be *res judicata* by virtue of the s 112 division order? The intervener could argue that the court has not made an independent adjudication of that property issue between the wife and her, as it only made an order "between the parties" to the marriage and the issue was not

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fully ventilated in a writ action (despite substantial factual disputes). Further, in the event that the court hearing the civil suit eventually finds that the wife's sister beneficially owns Asset X, then the s 112 division order would have only awarded the wife $0.5m in value of assets. Can the outcome of the civil suit result in a re-litigation of the s 112 order?

Scenario B

46 In scenario "B", the court finds that Asset X belongs to the intervener, after considering relevant evidence in the s 112 proceedings. As such, the division order is made on the finding that the pool of matrimonial assets has a value of only $3m (as it excludes Asset X). The court orders an equal division of assets and the divorcing parties are each entitled to $1.5m of the assets. This order, like that in scenario "A", is in line with the approach in Option 1; it is an order dividing assets between the parties to the marriage.

47 The husband subsequently takes out a separate civil suit against the intervener, claiming that he has a beneficial interest in Asset X. Would the doctrine of *res judicata* apply since the issue has been determined by the family court in the s 112 proceedings? If it does not, and the husband obtains judgment in his favour, will this outcome result in the re-opening of the s 112 proceedings?

48 These potential difficulties persuade me to direct a stay of the Ancillary Matters proceedings. As a matter of good case management and employing the judge-led approach exhorted in r 22 of the FJR, I think it most expedient and fair to order a stay of proceedings pending the conclusion of any civil action.

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49 Both the Husband and the Intervener cited English case law in their submissions. The English decisions cited were based on statutory provisions such as ss 24 and 24A of the Matrimonial Causes Act 1973 (c 18) (UK) which provide the court with the power to make "Property adjustment orders in connection with divorce proceedings". The English statutory provisions are different from s 112 of the WC. The power "to divide" matrimonial assets in s 112 is not modelled on any English statute. Given the rich and abundant jurisprudence built up on s 112 and the newly established Family Justice Courts and legislation governing family procedure and practice, I note but do not place much weight on these English authorities for guidance.

Conclusion

50 I ordered a stay of the Ancillary Matters proceedings to allow the Husband the opportunity to file appropriate proceedings to determine the disputed property interest first. Should the Husband proceed to take out a civil suit, it should, where feasible, as a matter of efficient case management, be fixed before me. This will be in line with the general docketing practice in our courts which facilitates the just and expedient disposal of cases and efficient use of judicial resources.

Debbie Ong
Judicial Commissioner

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for the 1st respondent;
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