IN THE FAMILY JUSTICE COURTS OF THE REPUBLIC OF SINGAPORE

[2017] SGHCF 29

District Court Appeal No 156 of 2016

Between

TYA

… *Appellant*

And

TYB

… *Respondent*

JUDGMENT

[Family law] — [Ancillary powers of court] — [Division of matrimonial assets]
[Family law] — [Ancillary powers of court] — [Variation of order for maintenance]

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TYA
v
TYB

[2017] SGHCF 29

High Court — District Court Appeal No 156 of 2016
Valerie Thean J
16 October 2017

18 December 2017 Judgment reserved.

Valerie Thean J:

1 This appeal arises out of a district judge's decision on applications by the appellant wife and the respondent husband to vary two ancillary orders made by consent under an interim judgment for their divorce, in the light of new circumstances that have arisen in their lives.

2 The first order is an order for the parties' matrimonial property to be sold upon their youngest child's turning 21 in 2021 and the sale proceeds divided equally between them after each party is refunded their respective CPF contributions to the purchase price. Both appellant and respondent sought to vary this order. The key question that arises is whether, on the facts of this case, the order has become unworkable according to the principles set out in the Court of Appeal's decision in *AYM v AYL* [2013] 1 SLR 924 ("*AYM*") and thus eligible to be varied under s 112(4) of the Women's Charter (Cap 353, 2009 Rev Ed). The second is an order for the maintenance of the appellant and their children.

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The respondent sought to reduce the amount he is liable to pay towards their maintenance on the ground of a material change in his circumstances within the meaning of s 118 of the Charter.

3 The district judge dismissed both the appellant's and respondent's applications regarding the first order but varied the order to allow the sale of the property on condition of the parties' consent if they were minded to do so subsequently. She varied the second order by reducing the monthly maintenance sum, and with retrospective effect. For the reasons detailed below, I allow the appellant's appeal on the first order and dismiss that part of her appeal which relates to the second.

Background

4 The appellant and the respondent married in January 1988 and have three children.[1] Their elder son is 29, their daughter is 28 and their younger son is 17. Their matrimonial home is a Housing Development Board flat.[2] It was in June 2016 valued at approximately $335,000.[3] The flat is held in the joint names of the parties.[4] The purchase of the flat was financed by a mortgage loan from the Oversea-Chinese Banking Corporation Limited ("OCBC"), on which repayment continues today to be due in the sum of $618 every month.[5]

5 The parties' marriage of 24 years came to an end on 14 November 2011, when they were granted Interim Judgment.[6] Under that judgment, two orders

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1 Record of Appeal dated 17 March 2017, p 46 at para 2, p 53 at cl 1, and p 124 at para 4.

2 Record of Appeal dated 17 March 2017 p 46 at para 2 and p 85.

3 Record of Appeal dated 17 March 2017, p 50 at para 12 and p 86.

4 Record of Appeal dated 17 March 2017 at p 85.

5 Record of Appeal dated 17 March 2017, p 47 at para 6.

6 Record of Appeal dated 17 March 2017, p 124 at para 4.

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were made by consent which are now the focus in this appeal. They are cll 3(a) and 3(b), and they read as follows:[7]

> a) Delayed sale of matrimonial flat located at [xxx] until the youngest child turns 21 years old. Upon sale, the proceeds of sale shall be used to repay any outstanding mortgage thereafter to repay to the parties respective CPF accounts the sum used towards the purchase of the flat including accrued interest and the balance sum after paying for the cost of the sale shall be divided equally between the parties.
>
> …
>
> b) Maintenance of $2,700 per month to the Plaintiff for the maintenance of the Plaintiff and children to be paid into their [daughter's] POSB Bank Account number [xxx] on the seventh day of each month.

6 It is the respondent's evidence that at the time of the divorce, he was earning a net income of about $3,500 to $4,000 a month.[8] Around early 2012, after the grant of Final Judgment, he became unable to hold down a full-time job, and his earnings were reduced to a net average of $2,000 a month.[9] In late 2014, he met his current wife.[10] Around April 2015, he secured a full-time job with a monthly gross salary of about $3,500.[11] He remarried in October 2015 and has been renting premises with his current wife.[12]

7 It is not disputed that the respondent was solely responsible for repaying the mortgage loan throughout the marriage. After Interim Judgment was granted, the respondent continued to make the mortgage repayments every month and in full, out of moneys in his Ordinary Account with the Central

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7 Record of Appeal dated 17 March 2017, p 53 at para 3.

8 Record of Appeal dated 17 March 2017, p 126 at para 12.

9 Record of Appeal dated 17 March 2017, p 126 at para 13.

10 Record of Appeal dated 17 March 2017, p 127 at para 15.

11 Record of Appeal dated 17 March 2017, p 127 at para 15.

12 Record of Appeal dated 17 March 2017 at p 147 and p 128 at para 25.

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Provident Fund ("CPF"), until October 2012, when his contribution to the repayments began to decrease in amount and consistency. As a result, the parties on 12 October 2012 agreed in writing to share in repaying the mortgage loan. The agreement reads:[13]

> AGREEMENT
>
> I, [the respondent] agree with [the appellant] to both share the payment of HDB housing loan in cash (to be deposited into HDB-OCBC housing loan account), starting from November 2012.
>
> PAYMENT AS BELOW
>
> [Respondent]: $300/-
> [Appellant]: $318/-
>
> NOTE
>
> If any of the party do not pay (or late payment) for the month of housing loan, the party will bear the penalty charged by the HDB-OCBC housing loan.
>
> This letter will be served as a proof and will be used for evidence for any court matter.

8 The respondent did not abide by this agreement.[14] As a result, in addition to contributing $318 a month, the appellant from June 2013 to June 2016 contributed a total sum of $12,396.76 to repay the mortgage loan because the respondent could not, or could not fully, contribute his share of $300 each month.[15] Eventually, she came to pay the full sum of $618 each month, and she continues to do so today. Of that sum, she pays $200 out of her CPF moneys and the remaining $418 in cash.[16] As at June 2016, $66,044.64 remained owing to OCBC on the loan.[17]

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13 Record of Appeal dated 17 March 2017 at p 59.

14 Record of Appeal dated 17 March 2017, pp 47–48 at paras 6–7.

15 Record of Appeal dated 17 March 2017, p 48 at para 7 and at p 66.

16 Record of Appeal dated 17 March 2017, p 48 at para 7.

17 Record of Appeal dated 17 March 2017, p 47 at para 6.

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9 The respondent was also inconsistent in making payment towards the maintenance of the appellant and their three children. In this regard, he is, according to the appellant, in arrears of $89,100.[18] In this connection, however, it should be noted that by June 2013 the parties' elder son had graduated from university and had by July that year started work.[19] By June 2014, their daughter had graduated too. Their younger son sat for his "O" Level papers last year and is understood to be currently pursuing a polytechnic diploma.[20]

10 In July and September 2016, the parties took out applications to vary cll 3(a) and 3(b) of the Interim Judgment.[21] The appellant sought to vary cl 3(a) under s 112(4) of the Charter. She asked the court to transfer to her the respondent's share in the flat without any refund to the respondent's CPF account. This was on the basis that the liabilities he owed her exceeded the value of his share in the flat. Those liabilities were said to comprise (i) personal loans she had extended to him; (ii) his maintenance arrears; and (iii) his share of the monthly mortgage repayments which he had failed consistently to contribute since June 2013.

11 The respondent disputed the legal basis for such a variation, and yet also sought to vary cl 3(a), to enable the sale of the flat within four months. He wanted his share of the sale proceeds so that he could move on with his life. He also asked the court to vary cl 3(b) under s 118 of the Charter to reduce the amount he needed to pay towards his wife's and their children's maintenance, contending that his wife had found work and that their two older children had become financially independent.

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18 Record of Appeal dated 17 March 2017 at p 57.

19 Record of Appeal dated 17 March 2017, pp 127–128 at paras 20, 21 and 23.

20 Record of Appeal dated 17 March 2017, p 101 at para 20 and p 102 at para 22.

21 Record of Appeal dated 17 March 2017 at pp 3–6.

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12 The district judge found no legal basis on which to transfer the respondent's interest in the flat to the appellant. Such a transfer, she held, was not the appropriate way by which the appellant was to recover any alleged personal debt owing to her by the respondent. The appropriate mode of recourse was civil action and, where maintenance arrears were concerned, enforcement proceedings under s 71 of the Charter.[22] The judge also did not think cl 3(a) was unworkable in the sense that it could not be implemented.[23] The district judge took the view, nevertheless, that the parties might reasonably decide together to sell the flat before 2021, and so she varied cl 3(a) to provide for that event.[24] She also allowed the respondent's application and varied cl 3(b). Having regard to when the parties' two older children started work, she revised that clause to the effect that the respondent would be liable to pay the appellant $2,100 per month with effect from 1 June 2013, and $900 per month with effect from 1 June 2014.[25]

13 The appellant now appeals against the whole of that decision.

Parties' cases on appeal

14 The appellant's original position on appeal was that cl 3(a) should be varied to provide that the amounts she is likely to have paid in cash on the housing loan by the time the property is sold in 2021, to be calculated by applying the doctrine of equitable accounting, be refunded to her.[26] At the oral hearing, however, her counsel, Mr Hanam, clarified that she was agreeable to an immediate sale of her property, provided that her cash contributions to the

22 Record of Appeal dated 17 March 2017, p 15 at [24] and p 17 at [27].

23 Record of Appeal dated 17 March 2017, p 16 at [26].

24 Record of Appeal dated 17 March 2017, p 21 at [36].

25 Record of Appeal dated 17 March 2017, p 26 at [48]–[49].

26 Appellant's Case dated 17 March 2017 at paras 12 and 24–26.

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mortgage repayments be refunded to her. The common factor between both positions, however, is her contention that cl 3(a) is eligible for variation because it has been rendered unworkable by the respondent's failure to contribute to the mortgage repayments. This failure, she contends, represents a material departure from the parties' common understanding, at the time they agreed on cl 3(a), that the respondent would be solely responsible for making the mortgage repayments.[27]

15 In addition, the appellant argues that cl 3(a) should be varied to take into account the maintenance arrears owed to her by the respondent. That may be done, she says, by ordering a charge over the respondent's CPF moneys.[28] Finally, she argues that the district judge erred in backdating the varied cl 3(b),[29] and that the maintenance amount should not have been reduced on the basis that the two older children had moved out.[30]

16 As the respondent's position in these proceedings has always been to seek an immediate sale of the flat,[31] it is noteworthy that the appellant and the respondent now converge on appeal on this point. They differ, however, on the basis upon which cl 3(a) should be treated as unworkable and consequently varied. They also differ on how the appellant's cash contributions should be refunded to her under a varied cl 3(a). For example, in the appellant's view, this may be done by adjusting the proportions in which the sale proceeds are divided, but the respondent rejects this approach on the basis that it may overcompensate the appellant.

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27 Appellant's Case dated 17 March 2017 at paras 10 and 21.

28 Appellant's Case dated 17 March 2017 at para 31.

29 Appellant's Case dated 17 March 2017 at para 41.

30 Appellant's Case dated 17 March 2017 at para 38.

31 Record of Appeal dated 17 March 2017, p 20 at para 33.

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17 The respondent also argues that the appeal is a disguised application for a declaration and enforcement of alleged debt owed to the appellant by the respondent.[32] The respondent echoes the district judge's view that the proper route for recovering such a debt is by way of a civil action. Finally, he submits that the court has no power to impose a charge on his CPF moneys to compel him to satisfy his maintenance debt to the appellant.[33]

Issues to be determined

18 The following issues arise in this appeal:

(a) Concerning the matrimonial flat, should cl 3(a) be varied, and if so, how?

(b) Concerning the respondent's maintenance arrears, should a charge be imposed on the respondent's CPF moneys?

(c) Concerning the maintenance order, should cl 3(b) varied, and if so, should the variation be backdated?

19 When the matter first came before me, the respondent appeared in person. Also, the appeal raised a number of interesting legal issues not yet addressed by counsel in the court below regarding the court's discretion under s 112(4) of the Charter and the principles on unworkability, set out in the Court of Appeal's decision in *AYM* ([2] *supra*), which governs the exercise of that discretion. A Young *Amicus Curiae*, Mr Allen Ng, was therefore appointed, and I am very grateful to Mr Ng for his valuable assistance. I turn now to address the three issues in sequence.

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32 Respondent's Case dated 14 August 2017 at para 10.

33 Respondent's Case dated 14 August 2017 at paras 14–15.

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Issue 1: Variation of cl 3(a)

Overview of applicable law

20 I begin with a summary of the established principles on the variation of an order for the division of matrimonial assets under s 112(4) of the Charter. That provision says that "[t]he 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". The court exercises its discretion under this broadly-worded provision in accordance with the following principles:

(a) Once an order of court has been fully implemented, the court generally does not have power to revisit or re-open the order, save where there is fraud: see *AYM* at [22] and [30]; see also *BMI v BMJ and another matter* [2017] SGCA 63 at [9].

(b) The court will vary an order for the division of matrimonial assets where the order is unworkable *ab initio* or has become unworkable as a result of new circumstances: *AYM* at [23].

(c) An order might be unworkable *ab initio* due to a lack of functionality of the order, or as a result of a fundamental misunderstanding at the time the order was made: *AYM* at [29].

(d) An order might become unworkable in the literal sense or purposive sense as a result of new circumstances which arise. It becomes unworkable in the literal sense when it becomes practically impossible to implement. It becomes unworkable in the purposive sense when new circumstances emerge which so radically change the situation that to implement the order would be to implement something radically

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different from what was originally intended: *AYM* at [25]; *Seah Kim Seng v Yick Sui Ping* [2015] 4 SLR 731 ("*Seah Kim Seng*") at [26].

(e) Where an order is unworkable *ab initio* or has become unworkable as a result of new circumstances, the court may vary the order as far as necessary and in a practical way: *AYM* at [23] and [25]; *Seah Kim Seng* at [48].

21 Underlying this collection of principles is the familiar tension between the need to ensure finality for the parties in the order which was made and the need to ensure justice between the parties through a measure of flexibility. The Court of Appeal's conclusion in *AYM* after analysing the history of s 112(4) was that the intention behind the provision was to confer on the court an administrative flexibility to ensure that the order which was made is carried out fairly and effectively. The purposive focus of the analysis is therefore necessarily on the nature of an order for the division of matrimonial assets as a statutory means of equitably resolving the breakdown of a marriage in a manner which helps the parties move forward in life.

22 Bearing these principles in mind, I turn to consider the parties' submissions and the factual matrix.

Should cl 3(a) be varied?

(1) Applicable principles

23 I begin with the observation that, as the district judge correctly noted,[34] cl 3(a) has not been fully implemented. This allows the parties to rely on unworkability as a ground for varying cl 3(a): see *AYM* at [22]. I shall elaborate

[34] Record of Appeal dated 17 March 2017, p 16 at para 25.

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on the applicable principles in this regard, with a focus on purposive unworkability, as that is the type of unworkability which is most pertinent in this case.

24 The Court of Appeal's reasoning in *AYM* implies the need for courts to have regard to the nature of an order's operation in deciding whether new circumstances which have arisen have truly rendered the order purposively unworkable. Thus the Court of Appeal appeared to suggest that the alleged change in circumstances may be less drastic in an application to vary a "continuing order" than in an application to vary orders which did not have a continuing effect. The court regarded this suggestion as "not inconsistent" (at [27]) with the principle (set out at [22] of the same judgment) that an order that has been implemented should not generally be liable to variation.

25 The court gave two contrasting examples to illustrate the variance in what counts as a radical change. First is the House of Lords' decision in *Barder v Caluori* [1988] AC 20 ("*Barder*"): *AYM* at [26]. In that case, the husband agreed to transfer his interest in the matrimonial home to his wife under a consent order in full and final settlement of their claims. In a tragic turn of events, the wife murdered their two children and committed suicide. In *AYM*, the court at [26] observed that in *Barder*, "the consent order recorded by the registrar remained *executory*" [emphasis added]. Thus it had yet to be implemented. The House of Lords thus granted leave to appeal against the order, holding that the order had been agreed on the fundamental assumption that the wife and their children would live in the property for an indefinite period, and that that assumption was invalidated upon their deaths.

26 The second example given in *AYM* concerns a type of order which the court referred to as a "continuing order". The court explained at [27] that some

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orders made under s 112 of the Charter "are of a continuing nature and may not be as quickly spent as an order for the sale of certain property and the distribution of the proceeds thereof". The example given by the court of such an order is an order made under s 112(5)(*e*) which postpones the sale of a property for the purpose of allowing the child of a marriage to have a place to live in. The court goes on to say that if the child moves out of the property before the period of postponement elapses and no longer requires it as a place to live in, it may be expedient to vary the order to effect an immediate sale of the property. This type of change certainly appears less drastic, in absolute terms, than change of the type which *Barder* appears to require, which the court in *AYM* characterised as "very rare and very extreme" (at [26]).

27 Now as a general proposition, it is clear that the requirement of radical change exists because it is important to ensure that parties can rely on the certainty and finality of an order on the division of matrimonial assets, being an order which almost always has significant implications for their everyday lives: see *AYM* at [26]. Bearing this proposition in mind, two points may be gleaned from the two examples discussed above.

28 First, the court must have regard to the nature of the order in question in deciding whether the alleged change in circumstances is sufficiently radical to justify varying the order. This principle explains why, in absolute terms, a lesser degree of radical change may be required to justify variation of a continuing order. This is because the order's finality is considered to be held in abeyance, given that the order has not fully been implemented. In this regard, a continuing order is different in nature from a merely "executory" order (of the type in *Barder*), as the former is expressly intended to be implemented over time while the latter has not been implemented for usually purely administrative reasons. This implies that there is a stronger interest in preserving the finality of an

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executory order, which would in turn require a more radical change of the circumstances for the order to be disturbed. Undoubtedly, such an interest would be even stronger in the case of an order that has been fully implemented: see *AYM* at [22].

29 Second and more importantly, the requirement of radical change does not simply mean that the more radical the change, the more likely it is that an order will be purposively unworkable. The court is not concerned with radical changes in the parties' lives that have nothing to do with the order which is sought to be varied. Thus in *Cornick v Cornick* [1994] 2 FLR 530 ("*Cornick*"), the wife by court order was granted 51% of the parties' net assets. A year later, the value of the matrimonial assets which remained with the husband increased substantially, with the result that the net effect of the order was to give the wife about 4% of the parties' assets. Her application to vary the order was rejected by the English High Court on the basis that what had occurred was nothing more than a natural albeit dramatic change in the value of the husband's shareholding, reflecting a natural process of price fluctuation.

30 What is crucial is that the alleged change must go towards invalidating the basis or fundamental assumption upon which the order was made or towards frustrating its purpose. This is the central and underlying principle behind all cases involving purposive unworkability, and it is conceptually independent of the degree of alleged radical change in circumstances in absolute terms. Thus in *Barder*, the wife's mother argued that the order should not be disturbed because the order was intended to achieve a clean break for the parties. But Lord Brandon of Oakbrook rejected that argument, holding that "[t]he intention to produce a clean break … will itself have been founded on the subsequently invalidated assumption" (at 40G). Thus, to allow the order to remain in effect would scarcely have achieved what the parties intended by it. In cases where

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the order is continuing, as in the example thereof discussed in *AYM*, and as this case aptly demonstrates, the occurrence of what is otherwise an unremarkable event can frustrate the purpose for which an order is made if the order fails to provide for that event.

31 Bearing in mind these principles relating specifically to the features of cl 3(a), I turn now to explain how they apply in the context of the facts and parties' arguments.

(2) Application to the facts

32 By way of preface, it is useful to highlight three essential and undisputed facts upon which the analysis below turns: (i) cl 3(a) provides for contributions towards the purchase of the flat to be refunded to the parties only if those contributions are made out of their CPF moneys; (ii) the respondent failed to make the mortgage repayments – which he had always done using his CPF moneys – a year after cl 3(a) was agreed upon; and (iii) the appellant then started repaying the mortgage loan, both by using her CPF moneys and in cash.

33 With this in mind, I turn to consider the evidence and the parties' submissions. The appellant submits that the parties had a "common understanding" behind their consent order of November 2011 that the respondent would be solely responsible for making monthly mortgage repayments in respect of their flat until their youngest child turns 21 in 2021.[35] In November 2011, she was a full-time housewife and had no income.[36] Therefore, she says, it could not have been contemplated that she would be repaying the mortgage loan. Indeed, it is undisputed that the respondent made

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35 Appellant's Case dated 17 March 2017 at para 9.

36 Record of Appeal dated 17 March 2017, p 27 at para 53.

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the monthly mortgage repayments, in full, for nearly a year after the consent order was made in November 2011. The respondent "materially departed" from this understanding because since October 2012 he stopped making those payments regularly, and eventually stopped doing so completely. The appellant says that this amounts to a radical change in circumstances which has rendered the consent order purposively unworkable and thus liable to variation.

34 The respondent's evidence, on the other hand, is that he made the mortgage repayments from November 2011 to October 2012 "out of goodwill".[37] He points out that there was no order obliging him to continue paying. His evidence is also that "the only agreement [he] gave to the [appellant] after the divorce was that [he] would allow the deduction from [his] CPF for the mortgage loan for as long as there was funds in it".[38] His counsel, Ms Tan, argues that the parties in November 2011 likely did not address their minds to who would repay the mortgage loan from November 2011 to 2021 when the property was to be sold.

35 I accept Ms Tan's contention that the evidence does not point to any agreement on the part of the parties that the respondent would be solely responsible for the mortgage repayments until 2021. While the appellant may have assumed that the respondent would pay, as he had always done, and while the respondent did pay, for a year after the order, there is no direct evidence as to why the respondent did so. The evidence adduced by the appellant is insufficient to the common understanding she alleges. The text of the order also, as pointed out by Mr Ng, provides for sale proceeds to be refunded into "the parties' respective CPF accounts".[39] Indeed it was because of a lack of a

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37 Record of Appeal dated 17 March 2017, p 131 at para 35.

38 Record of Appeal dated 17 March 2017, p 163 at para 17.

39 Young *Amicus Curiae*'s Supplementary Submissions dated 15 October 2017, p 4 at

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common understanding that the appellant in October 2012 came to an agreement with the respondent that he contribute half the monthly instalment for the repayment of the mortgage loan, although he did not comply: see [7] above. It could well be that she expected him to continue repaying the mortgage loan with his CPF moneys – because that had been the status quo for many years from the time of purchase of the flat and because she was a full-time housewife – and he simply fell short of her expectation. But that is not the common understanding the appellant alleges. Therefore, the mere fact that the respondent ceased to make mortgage repayments consistently after October 2012 is not a circumstance so radically different from the circumstances prevailing at the time cl 3(a) was agreed upon *such that* to implement cl 3(a) today would represent a radical departure from the parties' common understanding behind cl 3(a). If the respondent's sole responsibility for making mortgage repayments was fundamental to the order, it ought to have been specified in the order.

36 That is not the end of the matter, nevertheless. What happened as a result of the respondent's failure to make the mortgage repayments is the significant fact in this case. The appellant, cut off from a steady stream of maintenance payments and faced with the threat of losing her home, decided to find work. With the money she earned, she began herself to repay the mortgage loan. And she did so not only out of her CPF moneys but also *in cash*. But cl 3(a) does not make any provision for refunding any payments that are made in cash.

37 Arising from this, Mr Ng submits that if I find the parties to have agreed on cl 3(a) on the basis that they would share equally in the profits of the sale of the flat after being refunded for their respective contributions towards the mortgage, then cl 3(a) is literally unworkable.[40] This is because it contemplates

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para 6.

[40] Young *Amicus Curiae*'s Supplementary Submissions dated 15 October 2017 at para

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the refund only of contributions made out of CPF moneys, and does not extend to the refund of contributions made in cash. The appellant has made and continues to make such contributions in cash,[41] for which by cl 3(a) she will not be refunded. Thus, cl 3(a) contains a lacuna which the court is empowered to plug by varying the order under s 112(4) of the Charter. Mr Ng relies on *AYM* at [29] for this submission:

> We now deal with the situation where the court order is unworkable *ab initio*. … In [*CT v CU* [2004] SGDC 164] … the learned District Judge did observe (at [12]) that "[t]here must surely be a way for the court to *plug any gap or lacuna* in the ancillary matters order" [emphasis added]. This is also consistent with the view (expressed above …) that s 112(4) was also intended to provide for what are, in substance, purely administrative matters.

38 The difficulty with Mr Ng's argument is that the lacuna Mr Ng has identified does not make clause 3(a) literally unworkable. Its implementation today is not a "practical impossibility", nor does it involve a "lack of functionality", in the words of the Court of Appeal in *AYM* at [25] and [29]. On a literal application of the order, the appellant would continue to pay in cash, and when the property is sold, her cash contributions would count towards the profits of the sale and be divided between her and the respondent. There is no practical impossibility in this outcome. Of course, such an outcome would undoubtedly be unjust and inequitable. Inequitable circumstances alone, however, cannot justify a variation. In *Cornick* ([29] *supra*), the husband's windfall could have been said to have been in some sense inequitable, but that had nothing to do with the basis of order in question. I will not vary the order simply on this ground.

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41 Record of Appeal dated 17 March 2017, p 48 at para 7.

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39 Instead, I return to the fundamental basis of the order. Investigation into that basis must start with an examination of the text of the order itself. For ease of reference, I set it out again here:

> Delayed sale of matrimonial flat located at Blk 436 Fajar Road #12-386, Singapore 670436 until the youngest child turns 21 years old. Upon sale, the proceeds of sale shall be used to repay any outstanding mortgage thereafter to repay to the parties respective CPF accounts the sum used towards the purchase of the flat including accrued interest and the balance sum after paying for the cost of the sale shall be divided equally between the parties.

40 On a plain reading of this text, it is clear to me that the parties intended that first, each party's contributions towards the repaying the mortgage loan – which in essence constitute their capital investment in the flat – would be refunded to them with interest. Second, they intended to share equally in the fruit of that investment, namely, the profits of the sale of the flat. Third, to provide the wife and their youngest child a place to live, the parties intended to defer the realisation of the first two objectives – which would be achieved by selling the flat – until their youngest child turns 21. On the first of these objectives, while the text of the order refers only to CPF moneys, I consider that this was simply because at the time cl 3(a) was agreed upon, the status quo was that the mortgage repayments were being made using only CPF moneys, in particular, the respondent's CPF moneys. The lacuna in the order is that it does not provide for what happens to cash which is advanced by either party towards repaying the mortgage loan. And this lacuna emerged only when the appellant started to make mortgage repayments in cash.

41 Returning to the analysis of the Court of Appeal in *AYM* at [29], cl 3(a) had elements of *ab initio* unworkability, which later circumstances revealed. Instructive to the analysis here is an analogy with the doctrine of implied terms in contract law, which is a doctrine that seeks to identify the *presumed intentions*

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of contracting parties, at the time they entered into the contract, concerning a contingency that the contract is later shown not to have provided for: see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") at [93]. The analogy is appropriate because cl 3(a) is after all an order made on the parties' consent and because the issue here – namely, the basis upon which the parties agreed to cl 3(a) – is really a question of their presumed intentions in November 2011, given the lack of evidence I have alluded to at [35] above. In *Sembcorp Marine* at [101], the court explained the three steps for implying a term as follows:

> (a) First, ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) Second, consider whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Third, consider the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at the time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

42 Applying these criteria by analogy, I consider there to be a true gap in cl 3(a) because it fails to provide for what happens to either party's contribution to the mortgage repayments in cash. As Ms Tan submits, the parties likely did not address their minds to the question of who would pay, much less how in precise terms that would be done: see [34] above. Next, I consider that the present dispute is itself reason for the view that filling that gap would promote the efficacy of cl 3(a). Of course, I do not mean efficacy in the sense of business

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efficacy, but in the sense defined by the very purpose of an order for the division of matrimonial assets, that is, to resolve equitably the breakdown of a marriage in a manner which helps the parties move forward in life, as I have mentioned at [21] above. On these premises, it seems to me that if an officious bystander had suggested to the parties in November 2011 to provide in cl 3(a) that mortgage repayments in cash should, like mortgage repayments out of CPF moneys, be refunded to the parties before the profits of the sale are divided, the parties would have readily agreed. Of course, the point in pursuing this analogy should not be lost. The point is that it supports the view that the parties may properly be presumed to have intended that the entirety of each of their capital investment in the flat should be refunded to them upon the sale of the flat.

43 In my judgment, therefore, the proper analysis is that cl 3(a) is purposively unworkable because to implement it would depart from the basis on which the parties agreed on cl 3(a). That basis is that any contribution that any party might make to the mortgage repayments would be refunded before the profits of the sale are divided equally. But cl 3(a) provides only for contributions made using CPF moneys to be refunded and the appellant has since made mortgage repayments in cash. The gap in the clause now requires to be "plugged", as envisaged by the Court of Appeal in *AYM* at [29]. And as cl 3(a) is a continuing order, with every cash payment, the gap widens between the premise of the order and its effect upon implementation, making the order more and more purposively unworkable over time.

44 The last point to be mentioned here is that at the hearing, Mr Hanam stated that his client was willing to move out of the flat to allow its sale and to facilitate the return of her cash contributions. Mr Ng therefore submits that the need to postpone the sale of the flat has disappeared, and with it, another aspect of the fundamental basis of cl 3(a). This is another ground for varying cl 3(a),

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he says, relying on the court's example of an unworkable order in *AYM*, discussed at [26] above, in which a child moves out of the flat whose sale was postponed to give him a place to live. I accept this submission. Nevertheless, the analysis on the mortgage repayments above remains relevant because in varying an order, the court must have regard to why the order has been found to be unworkable, as I explain below.

How should cl 3(a) be varied?

45 I turn now to address how the order should be varied.

46 When an order for the division of matrimonial assets is eligible to be varied under s 112(4) of the Charter, the court ought to vary the order only to the extent necessary to give effect to the objective of the order. The starting point for discerning that objective is the text of the original order. Where the order is a consent order, the text will be of particular importance because it will be presumed to reflect the parties' intentions at the time they consented to the order. The variation will accordingly be an exercise in discerning those intentions, having regard to the circumstances in which they were formed, and subsequently giving effect to them in the best possible way. The court should also bear in mind the specific reason or reasons for which the order in question has been found to be unworkable. The variation which is effected by the court must have a rational connection to the unworkability that has been identified. This is an important principle for the mere fact of unworkability does not grant the court a *carte blanche* discretion to rewrite an order on the division of the parties' matrimonial assets. That would undermine the policy of finality behind s 112 of the Charter. Instead, the variation must address the unworkability which has arisen. It must represent a solution which goes no further than circumventing the unworkability identified and advancing the objective of the order.

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47 I have dealt with the objectives of cl 3(a) at [40] above. They are first, that each party's payments towards the mortgage should be refunded to them with interest. Second, the parties should share equally in the fruit of that investment, namely, the profits of the sale of the flat. Third, to provide the wife and their youngest child a place to live, the parties intended to defer the realisation of the first two objectives – in terms of selling the flat – until their youngest child turns 21. In the present case, the first of these objectives cannot be achieved by the order as it stands, and the third has fallen away. Accordingly, an immediate sale of the flat should be ordered, and the parties' respective contributions to the mortgage repayments should be refunded to them before the profits of the sale are equally divided.

48 The parties differ on how the appellant's cash contributions should be refunded to her. That can be done in an approximate way, says the appellant, by varying the division between the parties of the sales proceeds to 51:49 in her favour. I disagree with this approach. As Mr Ng points out, it is not clear whether such a variation would overcompensate (or perhaps even undercompensate) the appellant. Much would depend on the valuation of the flat, and I do not have an up-to-date valuation of it before me: see [4] above. More importantly, this solution would appear to go against the parties' intention to divide the profits of the sale of the flat equally. More appropriate and more in accordance with their original intention, in my view, is a variation to the effect that the parties' respective contributions to the mortgage repayments – whether by cash or by CPF moneys – are first to be refunded to them from the sale proceeds, before the sale proceeds which comprise the profit are divided between them equally.

49 I also find it appropriate that the sum eventually refunded to the appellant should include interest on her cash contributions. The parties have

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considered and submitted on a number of possible interest rates. Mr Ng suggests that I use the prevailing interest rate on the savings account the appellant has with the bank she uses, but there is no evidence of this interest rate before me. Mr Ng alternatively suggested that I direct parties to agree an interest rate. The appellant suggests an interest rate of 4%, based on the prevailing interest rate for CPF Special, Medisave and Retirement accounts. This is appropriate, says the appellant, because it appears from cl 3(a) that the parties contemplated that any contribution each party makes to the mortgage repayments would come from their CPF moneys. And if the appellant had put her monies in her CPF account and made the mortgage repayments out of only those moneys, she would have obtained the same interest as well. A third option is simple interest at the rate of 5.33% per annum, which is the recommended default interest rate applicable to pre-judgment sums in civil actions: see Supreme Court Practice Directions (1 January 2013 release) at para 77(9).

50 In my judgment, a simple interest rate of 5.33% should apply. I decline to direct the parties to adopt an interest rate fixed by a bank because insufficient evidence has been adduced in this regard. Also, she could well have put her money not in a bank but in an investment with a higher return. I also decline to direct parties to agree on an interest rate, as they may not be able to agree. I further decline to adopt the interest rate applicable for CPF Special, Medisave and Retirement accounts. The reason courts award compound interest at a rate of 4% per annum on CPF payments is that the CPF Board guarantees that rate of interest on money that is left in CPF accounts. When a party pays out of his CPF account, it is logical for a refund into that account of his payment to include interest calculated on that rate. The appellant has not done this. She has paid partly in cash and partly out of her CPF moneys. Therefore, it seems to me best to treat the interest to be awarded on her cash contributions like interest on pre-

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judgment sums owing, where a plaintiff is compensated for losing the opportunity to use the owed sum by being awarded simple interest on the sum at the rate of 5.33% per annum.

51 I therefore vary cl 3(a) as follows: "Parties shall sell the flat located at [xxx] within 6 months. Upon sale, the proceeds of sale shall be used to repay any outstanding mortgage, and thereafter to repay any sum either party has paid towards the purchase of the flat, into the parties' respective CPF accounts with accrued interest to CPF as applicable where such payment has been made out of CPF moneys, and into the parties' respective bank accounts with simple interest at the rate of 5.33% per annum where such payment has been made in cash. The balance sum, after paying for the cost and expenses of the sale, shall be divided equally between the parties."

Equitable accounting

52 Finally, on the issue of whether and how cl 3(a) should be varied, the parties rely on the doctrine of equitable accounting. Their arguments raise an issue of law, namely, the relationship between the doctrine of equitable accounting and the law on varying an order for the division of matrimonial assets under s 112(4) of the Charter. The issue does not affect my conclusions on unworkability and I deal with it here only for completeness.

53 The doctrine of equitable accounting was examined by the Court of Appeal in *Su Emmanuel v Emmanuel Priya Ethel Anne and another* [2016] 3 SLR 1222 ("*Su Emmanuel*"). The doctrine was described by the Court of Appeal as a "tool for retrospective adjustment" and, more generally, a process by which the financial burdens and benefits of land shared by co-owners are adjusted between them: *Su Emmanuel* at [94] and [96], citing *Snell's Equity* (John

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McGhee gen ed) (Sweet & Maxwell, 33rd Ed, 2015) at para 20-080. One of the circumstances in which a plaintiff may call the doctrine to aid is where he and the defendant have a common understanding on the extent to which each of them is to contribute to mortgage repayments in respect of a property. If the plaintiff repays more of the mortgage than was initially envisaged, such that the parties' common understanding is materially departed from, then equitable accounting may be brought into play to refund to the plaintiff the value of his contributions when the property is sold: see *Su Emmanuel* at [105]. This was what happened in *Su Emmanuel*. In that case, the plaintiff applied for the sale of a property in which she had a registered 49% share, and for a declaration that she had a beneficial interest of 70% in the property on the basis of a resulting trust or a common intention constructive trust. The court upheld the sale ordered below but did not find any trust. However, the court applied the doctrine of equitable accounting and held that the plaintiff was entitled to a sum from the proceeds of sale as refund for the mortgage repayments she had made on behalf of the defendant, who was a 50% owner of the property.

54 In the present case, the appellant essentially argues that the doctrine of equitable accounting may be invoked as a reason to regard an order on the division of matrimonial assets as unworkable and thus eligible to be varied.[42] Thus, she submits that there has been a departure from the common understanding between the parties in November 2011 because the respondent has failed to discharge his responsibility for repaying the mortgage. The respondent, in contradistinction, suggests that the alleged availability of the remedy of equitable accounting to the appellant is a reason not to vary cl 3(a) in this case. That is because the appellant may invoke that remedy after the flat is sold to recover the contributions in cash she made towards repaying the

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42 Appellant's Case dated 17 March 2017 at paras 12, 13, 23 and 25.

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mortgage.[43]

55 What is common to both arguments is that the availability of the doctrine of equitable accounting is relied upon as a reason for saying that cl 3(a) is unworkable or not unworkable. Both arguments adopt this common premise but reach opposite conclusions. Thus, the appellant's argument is essentially that because the requirements for equitable accounting are made out, it follows that cl 3(a) is purposively unworkable. The respondent's argument is essentially that because the requirements for equitable accounting are or may be made out, the appellant has an available remedy in that doctrine to which she may have recourse, and therefore cl 3(a) cannot be regarded as purposively unworkable.

56 I do not agree with both arguments, for three reasons. First, I reject the common premise behind both arguments for the simple reason that I have found that there was no common understanding between parties that the respondent was to be solely responsible for the mortgage repayments until 2021: see [35] above. This finding is sufficient to dismiss both sides' arguments on equitable accounting.

57 Second, even if the doctrine of equitable accounting were available to the appellant, that would not be a sufficient reason for denying the unworkability of an order which has otherwise been objectively established. Where unworkability has been established, the court is empowered to and ought to exercise its discretion to make the order workable.

58 Third, the doctrine of equitable accounting and the remedy of variation under s 112(4) of the Charter have different purposes. Equitable accounting is fundamentally an *ex post* accounting exercise by which the court adjusts the

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[43] Respondent's Supplementary Submissions dated 24 August 2017 at para 16.

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financial burdens and benefits of land shared by co-owners. By contrast, varying an order under s 112(4) concerns adjusting an order which was made to resolve equitably the breakdown of a marriage in a manner which helps the parties move forward in life. Thus, the considerations relevant to the analysis for each remedy are qualitatively different, even if they may overlap conceptually in some respects. This suggests that establishing the availability of one remedy ought not to entail any conclusion in respect of the availability of the other.

Issue 2: Charge on CPF moneys

59 I turn now to the second issue. The appellant asks me to impose a charge on $89,100 of the respondent's CPF moneys, corresponding to the value of his arrears in maintenance payable to the appellant, so that part or all of this sum may be paid out to the appellant upon the respondent's reaching the retirement age of 55.[44] For this contention, the appellant relies on the Court of Appeal's decision in *Central Provident Fund Board v Lau Eng Mui* [1995] 2 SLR(R) 826 ("*Lau Eng Mui*") for the proposition that a court may impose a charge on CPF moneys, which would supposedly "have the effect of vesting an *in rem* proprietary interest on the other spouse",[45] that is, the party seeking the imposition of the charge, in the amount under the charge.

60 This submission is based on a misreading of *Lau Eng Mui*. In that case, the Court of Appeal decided that where a court has made an order under what was then s 106 (and is today s 112) of the Charter dividing one spouse's CPF moneys between the spouses, it may impose a charge on the CPF moneys apportioned to the other spouse to protect her proprietary interest in them. Significantly, the court made it clear at [22] and [28] that it was the order under

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44 Appellant's Case dated 17 March 2017 at para 31.

45 Appellant's Case dated 17 March 2017 at para 31.

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s 106, and not the charge itself, which gave the other spouse a proprietary interest in the CPF moneys. The charge in *Lau Eng Mui* was simply a method of protecting a pre-existing proprietary interest, not creating one. That is why the charge imposed was not regarded by the court as a prohibited assignment, transfer, attachment, sequestration or levy within the meaning of s 25(1) of the Central Provident Fund Act (Cap 36, 1991 Rev Ed), the substance of which has been retained in s 24(2) of the Central Provident Fund Act (Cap 36, 2013 Rev Ed) ("the CPF Act").

61 It is clear, therefore, that the appellant can derive no assistance from *Lau Eng Mui* because she is asking me to impose a charge on the respondent's CPF moneys when she has no pre-existing proprietary interest in it. Her submission puts the proverbial cart before the horse. The respondent's maintenance liability confers on the appellant no proprietary interest in his CPF moneys: *Lau Eng Mui* at [25], after citing *Central Electricity Board v Govindamal* [1965] 2 MLJ 153 at 154. A charge of the kind she asks me to impose is akin to a process of execution in respect of a debt and is a prohibited transaction under s 24(2) of the CPF Act: see *Lau Eng Mui* at [22]–[25] and [28].

62 In my judgment, the appellant must fail on the second issue. The Charter provides under s 121(1) that arrears of maintenance are recoverable and provable against the defaulter in a civil action. Now that the appellant has agreed to an immediate sale of the flat, there will be other measures available to her arising from the proceeds available after sale too.

Issue 3: Variation of maintenance order

63 I turn to the final issue. I first note that the respondent applied to reduce the amount payable under the maintenance order on the footing of various

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reasons. Among the reasons not accepted by the district judge as a ground for variation are the respondent's reduced income as a result of being employed part-time for a period and the fact that the appellant, who is now 60, is now earning an income. The respondent does not appeal against those aspects of the district judge's decision on the maintenance order. Her decision rests on the fact that the parties' two older children have reached the age of majority. And it is this aspect of her decision that the appellant has appealed against. Hence, the issues on the maintenance order are first, whether the district judge was correct to reduce the monthly sum of maintenance payable ultimately to $900 and not $1,500 as suggested by the appellant; and second, whether she was correct to backdate the respondent's liability to pay the monthly reduced sums of $2,100 and $900 to June 2013 and June 2014 respectively on the footing of the parties' two older children having become financially independent from those months. I address these questions in sequence.

Reduction of maintenance amount

64 The appellant's estimate of her current monthly expenses is as follows:[46]

S/No.	Expenses	Amount
1	Monthly mortgage in cash	$318
2	Utilities	$120
3	Telephone, mobile and internet	$145
4	Household expenses	$300
5	Groceries	$200
6	Town Council	$56
7	Newspapers	$30
8	School fees for [youngest child]	$15

[46] Appellant's Case dated 17 March 2017 at para 36.

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9	Medical	$50
10	Transport for [youngest child]	$80
11	Pocket money for [youngest child]	$150
Total		$1,464

65 It is useful to contrast this estimate with her estimate of her monthly expenses at the time cl 3(b) was agreed upon, that is, in November 2011, when her two older children were still living with her:[47]

S/No.	**Expenses**	**Amount**
1	Monthly mortgage in cash	$318
2	Utilities	$120
3	Telephone, mobile and internet	$145
4	Household expenses	$300
5	Groceries	$200
6	Town Council	$56
7	Newspapers	$30
8	School fees for youngest child	$15
9	Medical	$50
10	University school fees for [second child]	$600
11	Food and transport for [second child]	$300
12	Food and transport for [first child]	$300
13	Food and transport for [youngest child]	$80
14	Pocket money for [youngest child]	$150
Total		$2,664

66 Comparing the two tables, it is at once easy to see why the district judge did not reduce the maintenance sum only to $1,500 as the appellant had asked.

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47 Record of Appeal dated 17 March 2017, p 193 at para 70.

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The only difference between the two tables are Items 10 to 14, which relate to expenses the appellant incurred in respect of her two older children. These items of expenditure were removed, correctly, in the current estimate, since those children are no longer living with their mother, nor are they being provided for by her. Notably, however, the appellant has proposed no change in the sums under Items 1 to 9. The sums in Items 1 to 7 are of particular relevance here because they together represent household expenses estimated on the basis that the appellant was to be taking care of all three children. Now that two of them have left, there is no reason for those sums to remain the same. That is why the district judge reduced them by pro-rating them to arrive at the figure of $900, which she regarded as a reasonable figure for the maintenance of the appellant and the parties' youngest child. In my view, this was a sensible adjustment.

67 I therefore see no reason to differ from the district judge on this point. She balanced the demands of the appellant's needs against the demands of the respondent's new family. She did not give weight to the respondent's change in income level, as that occurred sometime before his application to vary cl 3(b). (He is now earning about net $2,800 per month, compared to the $3,500 to $4,000 he was earning at the time of the divorce.[48]) And she did not give weight to the appellant's ability to earn an income as she was a full-time housewife for many years and is now 60 years of age. She was focused on what the appellant needed and what the respondent could reasonably provide. Accordingly, her decision to reduce the maintenance payable to $900 every month should stand.

Backdating of reduced maintenance liability

68 It is well-established that a court varying a maintenance order under s 118 of the Charter has the power to backdate the variation and in so doing give

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[48] Record of Appeal dated 17 March 2017, p 127 at para 15.

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it retrospective effect. Effectively, then, this means that the court has the power to remit maintenance arrears which have already fallen due: see *MacDonald v MacDonald* [1963] 2 All ER 857 at 859C–D. In *AXM v AXO* [2014] 2 SLR 705, which the parties have cited, the Court of Appeal said at [26]:

> … [S]ince a maintenance order (whether made pursuant to ss 113(*a*) or 113(*b*)) can be varied or rescinded "at any time", there is no reason in language, principle, or logic why the variation of a maintenance order made pursuant to either limb of s 113 could not be made to apply *retrospectively*.
>
> [emphasis in original]

69 In such cases, the court has a discretion to meet the justice of the case. The respondent submits that the district judge did not err in backdating the variation because not to do so would have unjustly required the respondent to bear a greater burden than he is obliged to under the law. To make good this submission, the respondent relies on s 69(5) of the Charter, which provides that a court shall not order a parent to make payment towards the maintenance of his child if the child has attained the age of 21 years unless the court is satisfied that the child has a mental or physical disability; is or will be serving full-time national service; or is or will be receiving further education. The two older children having graduated and become financially independent in June 2013 and June 2014 respectively, they would not have been entitled at law from those months onwards each to receive payment from the respondent towards their maintenance. Accordingly, it is only right that the variation effected by the district judge is backdated to achieve what would have been the position required by s 69(5) of the Charter.

70 I accept this argument. In my view, giving effect to the policy of the Charter is clearly a good reason to exercise the discretion under s 118 of the Charter to backdate a variation. The fact is that after her two older children became financially independent, the appellant no longer needed to incur

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substantial costs supporting them and the respondent no longer had any responsibility to maintain them. I therefore decline to interfere with the district judge's decision to backdate the respondent's liability to pay the reduced monthly sums of $2,100 and $900 to June 2013 and June 2014 respectively on the basis that the parties' two older children became financially independent from those months.

Conclusion

71 Accordingly, the appellant's appeal is allowed in part. Clause 3(a) is to be varied in the terms I have stated at [51] above. I shall hear the parties on costs.

Valerie Thean
Judge

Andrew Hanam (Andrew LLC) for the appellant;
Cherissa Tan (Dorothy Chai and Mary Ong Law Practice) for the defendant;
Ng Tee Tze, Allen (Rajah & Tann Singapore LLP) as Young *Amicus Curiae*.

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