AXM *v* AXO
[2014] SGCA 13

Case Number	: Civil Appeal No 34 of 2013
Decision Date	: 17 February 2014
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Engelin Teh SC and Linda Ong (Engelin Teh Practice LLC) for the appellant; The respondent in person; Associate Professor Debbie Ong (Faculty of Law, National University of Singapore) as Amicus Curiae.
Parties	: AXM — AXO

Family Law – Maintenance

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 3 SLR 731.]

17 February 2014

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

1 This appeal was brought by the appellant wife ("the Wife") against the decision of the High Court in Registrar's Appeal Subordinate Courts No 55 of 2012 ("RAS 55/2012"), dismissing the Wife's appeal against the order of the District Judge ("the DJ") with regard to the ancillary matters in Divorce No 4306 of 2008. The appeal concerned the narrow question of whether and, if so, when, a court may backdate the commencement of a maintenance order for a wife made pursuant to s 113(*b*) of the Women's Charter (Cap 353, 2009 Rev Ed) ("the Act") (popularly known as a "final maintenance order") such that it overlaps with the time during which an (earlier) maintenance order made pursuant to s 113(*a*) of the Act (popularly known as an "interim maintenance order") was in force. We also considered the same question with respect to maintenance orders for children made pursuant to s 127(1) of the Act. Arguments were presented by counsel for the Wife, the respondent husband ("the Husband"), who was in person, as well as the learned *amicus curiae*, Assoc Prof Debbie Ong ("Prof Ong"). At the end of the hearing, we were not persuaded that the DJ had the power (*on the facts of the present case*) to retrospectively reduce the amount payable by the Husband to the Wife under an earlier interim maintenance order by way of backdating the final maintenance order such that it effectively overrode the interim maintenance order during the period of overlap between the two orders. However, for reasons which we will elaborate upon below, we substituted the order made by the DJ pursuant to ss 113(*b*) and 127(1) of the Act, with an order that Husband pay to the Wife a monthly maintenance amount of A$4,500 for a period of 30 months from April 2012 to October 2014, and thereafter a monthly maintenance amount of A$5,500. We also ordered that each party was to bear his and her own costs.

2 We now give the detailed grounds for our decision.

Facts

Background to the dispute

3 The Wife and the Husband are both Australian nationals. They were married in Sydney,

Australia, on 29 September 2001. The marriage of eight and a half years bore three children, who were born in 2002, 2005, and 2007, respectively. After the birth of the first child, the Wife stopped her work as a marketing executive with Singapore Airlines and became a full-time homemaker, save for some part-time work running an online shop. The Husband worked as the managing director and, subsequently, the chief executive officer of a Singapore-based human resource and recruitment company.

4 The family moved to Singapore in 2004 after the Husband found employment here. After the breakdown of the marriage in 2007, the Wife and the three children moved back to Australia, where they now reside. The Husband remained in Singapore until late 2012, after which he returned to Australia. The Husband now works and resides in Hong Kong.

5 On 5 September 2008, the Wife commenced divorce proceedings against the Husband in Singapore on grounds of the Husband's alleged adultery and unreasonable behaviour. Interim judgment was granted on 10 March 2010. The ancillary matters came up for hearing before the DJ on 9 February 2012. On 27 March 2012, the DJ made orders pertaining to custody and access, division of matrimonial assets as well as maintenance for the Wife and the three children ("the Final Maintenance Order"). Upon hearing parties' further arguments, the DJ then backdated the commencement of the Final Maintenance Order by ten months. The DJ subsequently issued her written grounds of decision (see *AXM v AXO* [2012] SGDC 208 ("the DC GD")). The Wife appealed to the High Court in RAS 55/2012 against the DJ's orders with respect to maintenance and the division of matrimonial assets. Her appeal was heard by the High Court Judge ("the Judge") on 12 September 2012, and was dismissed on 3 October 2012. The Judge subsequently dismissed the Wife's application for leave to appeal to the Court of Appeal against his dismissal of her appeal in RAS 55/2012, issuing written grounds of decision in *AXM v AXO* [2013] 3 SLR 731 ("the High Court GD"). The Wife appealed to the Court of Appeal against the refusal of leave to appeal. The Court of Appeal granted the Wife leave to appeal on the narrow issue of whether the DJ erred on the law or on the facts in backdating the Final Maintenance Order (see also above at [1]).

Background to the maintenance issue

6 Prior to the grant of interim judgment, the Wife obtained an order (on 6 August 2009) for the Husband to pay interim maintenance of A$9,315 per month for herself and the children with effect from December 2008, payable on the first day of every month ("the Interim Maintenance Order"). The Order also required the Husband to pay arrears in maintenance from December 2008 until the date of the Interim Maintenance Order, totalling A$57,397.

7 Thereafter a tortuous series of court proceedings pertaining to the Interim Maintenance Order ensued. Between 2009 and 2011, the Husband appealed against the Interim Maintenance Order and took out two applications for downward variation of the quantum payable under that order. All of these proceedings proved unsuccessful. The Husband also unsuccessfully appealed against the dismissal of his first variation application. He was refused leave to appeal out of time from the dismissal of the second variation application. Throughout this time, the Husband did not comply fully with the Interim Maintenance Order. He made only partial payments occasionally. The Wife therefore took out three enforcement applications between December 2009 and June 2011, resulting in two enforcement orders being made against the Husband in June 2010 and December 2011, respectively. The Husband complied with the first enforcement order but breached the second, and, as a result, was imprisoned for two weeks beginning 6 March 2012.

8 The Interim Maintenance Order remained in force as at 9 February 2012, when the ancillary matters came up for hearing before the DJ. On the issue of maintenance, the DJ ordered the Husband

to pay A$500 for the monthly maintenance of the Wife and a total of A$5,000 for that of the three children, bringing the total monthly maintenance to A$5,500. This Final Maintenance Order commenced on 1 March 2012. After the delivery of the order, counsel for the Husband wrote to the court requesting to make further arguments that the commencement of the Final Maintenance Order should be backdated. The DJ heard these further arguments on 10 April 2012. After hearing further arguments from both the Husband and the Wife relating to the issue of backdating, the DJ ordered that the Final Maintenance Order be backdated to commence on 1 May 2011, which was 10 months before the original date of commencement of the Order (see the DC GD at [49]). The result of this was that the amount of maintenance payable to the Wife between 1 May 2011 and 1 March 2012 was reduced by a total of A$38,150 (being (A$9,315 - A$5,500) x 10). As the Husband was in arrears under the Interim Maintenance Order, the effect of the backdating was to relieve the Husband of having to pay A$38,150 in arrears.

9 The Wife then filed an appeal in the High Court against the DJ's orders relating to maintenance and the division of matrimonial assets. By the time the substantive appeal reached us, the appeal was confined to the question of whether the DJ erred in backdating the Final Maintenance Order such that it resulted in the effective remittance of the arrears which were due under the prior Interim Maintenance Order.

DJ's decision on the maintenance order

10 In her grounds of decision, the DJ explained how she arrived at the quantum of A$5,500 under the Final Maintenance Order. She stated that she was satisfied that the objective evidence supported the Husband's claim that he earned S$9,666 per month (see the DC GD at [31]–[33]). She also attributed an income of between A$800 and A$1,000 per month to the Wife based on the Wife's income-earning capacity from her previous online business (see the DC GD at [37]). Further, she capped the Wife and children's total monthly expenses at A$6,977.

11 The DJ also explained why she granted the Husband's request to backdate the Final Maintenance Order. The main reason was that the delay in the hearing of the final ancillaries prejudiced the Husband who continued to be liable for the high level of interim maintenance during that time. The DJ attributed the delays to various interlocutory applications instituted by the Wife between October 2008 and February 2012 which included enforcement proceedings, committal hearings, and discovery applications, as well as the Husband's non-production of certain documents pursuant to discovery orders. The DJ found that there were two main periods of unwarranted delay: (a) a 10-month delay from January 2011 to October 2011 between the filing of the parties' second and third ancillary matters affidavits; and (b) a 10-month delay between November 2010 and September 2011 in the hearing of the Husband's second application for variation of the Interim Maintenance Order (see the DC GD at [47]). The Husband's application was filed on 22 November 2010, but was only heard on 31 August 2011 after having been adjourned four times for the Wife to produce certain supporting documents and to file further submissions. The DJ was of the view that the parties should have pressed on with the ancillary matters rather than wait for the resolution of the various interlocutory matters. In the result, the DJ found it appropriate to backdate the commencement of the Final Maintenance Order by what she calculated to be half of the sum of the two 10-month periods of delay (see the DC GD at [49]).

The arguments

12 The Wife's case in this appeal was that backdating the Final Maintenance Order would be tantamount to overriding and nullifying the earlier Interim Maintenance Order. She argued that the issue was *res judicata*. She also contended that she and her children would be unfairly prejudiced if

they were deprived of maintenance arrears and further made to return the notional "excess" amounts of maintenance which were owed pursuant to the Interim Maintenance Order during its subsistence. The Husband was in person and did not make substantive arguments before us. However, in his arguments and further arguments before the DJ, the Husband cited a number cases (see the Singapore District Court decision of *ZG v ZH* [2008] SGDC 293 ("*ZG v ZH*") as well as the Singapore High Court decisions of *AMW v AMZ* [2011] 3 SLR 955 ("*AMW v AMZ*") and *AJE v AJF* [2011] 3 SLR 1177 ("*AJE v AJF*")) in which the backdating of maintenance orders, albeit on application of the recipient wives rather than the paying husbands, had been considered. Relying on *obiter dicta* in *AJE v AJF* at [27], the Husband argued that the operative date of the maintenance order should take into account factors such as whether a party had to sell his or her possessions and incur debts to make up for the shortfall in maintenance. He claimed that not backdating the Final Maintenance Order would be unjust to him as he had been forced to liquidate his assets in order to fulfil the high amount due under the Interim Maintenance Order. Before proceeding to set out the *amicus curiae's* submissions, we pause to note – parenthetically – that the Judge appeared to accept that such backdating was possible in principle (see the High Court GD at [5] and [6]).

The *amicus curiae's* submissions

13 Prof Ong submitted that the court has the power to backdate orders made under ss 113(*a*), 113(*b*) and 127(1) of the Act. She submitted that, as in the instant case, the court has the power and discretion to backdate a final maintenance order and to order a refund of sums paid or due under a prior and higher interim maintenance order. The following points were made:

(a) Maintenance orders should be capable of being backdated because this ensures, where appropriate, that any expenses which ought to have been covered by the person responsible for maintenance of the wife and/or children are covered for the period before the date of hearing. However, sufficiently good reasons for backdating must be provided.

(b) Interim maintenance orders can be backdated to the date of the filing of the writ of divorce, but not earlier, because this date marks the start of matrimonial proceedings, and consequently, the start of the period for which interim maintenance was designed to provide. An interim maintenance order is provisional in nature, aiming to tide parties over the period prior to final judgment.

(c) The court has the power to backdate a final maintenance order where there is already a prior, higher or lower interim maintenance order, because: (1) the court does not investigate the full facts at the interim stage; (2) only the final maintenance order takes into account the financial resources of the parties after division of matrimonial assets; and (3) backdating may be the most practical way of achieving fairness in some cases. Where the final maintenance order is lower than the interim maintenance order, backdating may have the effect of setting off all or part of the arrears in interim maintenance. This enables the slate to be wiped clean, but might also cause the payee hardship if she had to take loans pending the hearing of ancillary matters. Therefore the court should consider the following factors:

(i) whether the payee would be prejudiced, especially if she has relied on payments already received and now has to return the excess monies;

(ii) the reason for the disparity in the final and interim sums. The court should be more ready to backdate the final order if the reason for disparity is a fuller investigation of facts, rather than a material change in circumstances; and

(iii) whether it is fair and necessary to backdate a final maintenance order where an interim maintenance order has already regulated the parties at a time past.

14 However, Prof Ong did not submit (at least expressly) on whether, in the present case, the court's discretion was better exercised by backdating the Final Maintenance Order.

Our decision

The nature of interim and final maintenance orders

15 The relevant provisions in the context of the present appeal are, in our view, to be found at ss 113 and 118 of the Act. Section 113 of the Act ("s 113") reads as follows:

> **Power of court to order maintenance**
>
> **113.** The court may order a man to pay maintenance to his wife or former wife —
>
> (*a*) during the course of any matrimonial proceedings; or
>
> (*b*) when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage.

16 As can be seen, the court's power to order the payment of maintenance at any point during or after the conclusion of matrimonial proceedings resides in s 113. Section 113(*a*) of the Act ("s 113(*a*)") empowers the court to make an order for maintenance while matrimonial proceedings are on-going. Such an order is commonly termed an "interim maintenance order". In a sense, it is of an "interim" nature in so far as it constitutes a sum of maintenance to tide the wife over whilst the divorce and/or ancillary proceedings are in progress (as Prof Ong has pertinently pointed out above at [13(b)]). Looked at in this light, it is a very necessary as well as practical order.

17 On the other hand, s 113(*b*) of the Act ("s 113(*b*)") refers to a maintenance order granted in conjunction with the "granting or subsequent to the grant of", *inter alia*, "a judgment of divorce". This is what is commonly termed a "final maintenance order". Such an order for maintenance is, in our view, one which is granted at the *conclusion* of the entire divorce proceedings proper (including both the divorce as well as the ancillary proceedings). In a sense, it is "final" inasmuch as the amount of maintenance for the wife is fixed – at least for the foreseeable future.

18 In this regard, we note that although the terms "interim maintenance order" and "final maintenance order" have been utilised by our courts in practice (as well as by the parties and the *amicus curiae* in the present appeal and, as a result, in this judgment), such nomenclature, in fact, appears nowhere in the Act. The closest correlation, as explained above, is found in ss 113(*a*) and 113(*b*). The terms "interim maintenance" and "final maintenance" are simply convenient shorthands for maintenance orders made pursuant to ss 113(*a*) and 113(*b*), respectively.

19 It is apposite at this point to address the Husband's argument that the Interim Maintenance Order made under s 113(*a*) was provisional. The power to order maintenance for wives at different stages of matrimonial proceedings is located in a single section within the Act. Orders made under ss 113(*a*) and 113(*b*) differ only in terms of *when* the orders are sought and made, and *not* in the *nature* of the orders themselves. In particular, a so-called "interim" order made under s 113(*a*) is in no way inferior or subordinate to a "final" order made under s 113(*b*). Both types of orders regulate, with finality, the financial obligations of the parties to each other for the duration of their operation. They

are binding on the parties for as long as they are not rescinded, terminated or varied.

20 In our view, an order made under s 113(*a*) is "interim" or "provisional" only in the sense of its *duration* and *time of operation*; in particular, it only operates until such time the ancillary matters are concluded and judgment for divorce has been made final. Such an order is also "interim" in the sense that the amount stipulated thereunder does not bind the court at the final ancillaries stage (see the Singapore High Court decision of *Lee Bee Kim Jennifer v Lim Yew Khang Cecil* [2005] SGHC 209 at [7]). However, the interim maintenance order is in no way "interim" or "provisional" when it comes to regulating the respective parties' rights and obligations for the time being. This was where the Husband, with respect, fell into error. His argument was that since an interim maintenance order is only provisional, there was nothing to stop the court from effectively overriding the effect of the Interim Maintenance Order in the present case during the period of its operation by way of backdating the subsequent Final Maintenance Order. We are unable to accept this argument. It is clear in our view that once a so-called interim maintenance order under s 113(*a*) has been granted, it is a final and binding order of court as to the amount and form of maintenance payments during the period pending the resolution of ancillary matters, and regulates the parties' financial obligations with finality for that limited period. This so-called interim maintenance order cannot (as explained below at [23]) be derogated from, except in two limited instances which we will elaborate upon below at [22]. It suffices at this juncture to note such an order can be set aside or substituted upon an appeal, or specifically varied pursuant to s 118 of the Act.

21 By backdating the Final Maintenance Order such that it commenced during a period when a prior court order as to maintenance was in force, the DJ therefore effectively created a situation where there were two different but equally binding obligations operating on the Husband. In our view, the DJ, with respect, therefore erred in backdating the Final Maintenance Order on the facts of this case. In so finding, we are in no way suggesting that the court does not have the discretion to backdate maintenance orders made pursuant to s 113 *under any circumstances*. The cases cited to us by the Husband (see above at [12]) are examples of situations where backdating was legitimate and appropriate, given that there was no prior interim maintenance order in existence which stood to be overridden by a backdated final maintenance order. On the present facts, however, the DJ's backdating of the Final Maintenance Order was erroneous.

Variation of orders made under s 113 of the Act

22 We pause to point out that, although an order made under s 113(*a*) is in effect a final and binding order, this is not to say that it is immutable for all time and in all circumstances. It is, of course, open to the parties to appeal against a maintenance order and have it substituted should it be demonstrated to be erroneous. Aside from an appeal, the Act also provides an avenue for parties to apply for variation or rescission of an operative maintenance order. This avenue is s 118 of the Act ("s 118"). Section 118 reads as follows:

> **Power of court to vary orders for maintenance**
>
> **118.** The court may ***at any time*** *vary or rescind any* ***subsisting*** *order* for maintenance, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, ***where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances*** .
>
> [emphasis added in italics and bold italics]

23 There is no other provision in the Act by which rescission or variation of an order made under s 113 may be effected. As we pointed out in the course of the oral submissions before this court, s 118 appears to be the only source of jurisdiction and power for a court to, *inter alia*, vary a maintenance order made pursuant to s 113. Absent express statutory jurisdiction, we do not think that the court could effect a similar variation under, say, its (alleged) inherent jurisdiction. We pause to point out – parenthetically – that even the boldest legal spirits would probably refrain from invoking the rubric of inherent jurisdiction for this would open the doors to the possible (illegitimate) arrogation of jurisdiction which could then be applied to every (and any) situation the court feels it would like to intervene in. Whilst the "floodgates argument" should not be too liberally entertained (indeed, if it had been, we would not have had the law of negligence as we know it today (which developed from the seminal House of Lords decision in *Donoghue v Stevenson* [1932] AC 562 (reference may also be made, in this regard, to Geoffrey Lewis, *Lord Atkin* (Butterworths, London, 1983; reprinted, Hart Publishing, 1999) at pp 51–67; Matthew Chapman, *The Snail and the Ginger Beer: The Singular Case of Donoghue v Stevenson* (Wildy, Simmonds & Hill Publishing, 2009) and *The Juridical Review – Donoghue v Stevenson: The Paisley Papers* (*Special Edition*) (W. Green, 2013)), this is nevertheless a situation where it clearly ought to apply.

24 Section 118 was introduced into our legislation through s 108 of the Women's Charter (Amendment) Act 1980 (Act 26 of 1980). It is identical to s 83 of the Malaysian Law Reform (Marriage and Divorce) Act 1976 (Act 164 of 1976) ("the Malaysian Act"). Section 83 of the Malaysian Act is, in turn, one of the provisions introduced to "give the Court necessary powers incidental to making orders for maintenance which are to be found in corresponding legislation in England" (see the explanatory notes to the Law Reform (Marriage and Divorce Bill) 1972 annexed to the *Report of the Royal Commission on Non-Muslim Marriage and Divorce Laws* (Kuala Lumpur, 1971) at p 57). The applicable English legislation at the time of the Malaysian reforms was the Matrimonial Causes Act 1965 (c 72) (UK) ("MCA 1965") as amended by the Divorce Reform Act 1969 (c 55) (UK) and the Matrimonial Proceedings and Property Act 1970 (c 45) (UK), as well as the Matrimonial Causes Act 1973 (c 18) (UK) ("MCA 1973") which consolidated the aforementioned English statutes. There are no provisions in these English statutes which are comparable to s 83 of the Malaysian Act or s 118 of our Act. Variation of financial provision orders in England is provided for under what was once s 31 of the MCA 1965 and what is now s 31 of the MCA 1973. Both s 31 of the MCA 1965 and s 31 of the MCA 1973 (prior to its amendment by s 6 of the Matrimonial and Family Proceedings Act 1984 (c 42) (UK)) empowered the court to "vary or discharge the [financial provision] order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended", and in doing so to "have regard to *all the circumstances of the case*, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates…" [emphasis added]. It appears that the Malaysian and Singapore Parliaments chose to enact a variation provision that was more restrictive than the equivalent English provision. The relevant variation provisions in the Malaysian and Singaporean legislation require the court to be satisfied that the order from which variation or rescission is sought was "based on *any misrepresentation or mistake of fact or where there has been any material change in the circumstances*" [emphasis added]. The burden of proving the existence of any of these three conditions lies with the party seeking the variation or rescission (see the Malaysian High Court decision of *YCC @ JCC v LSY* [2006] 7 MLJ 137 at [28] and *ATS v ATT* [2013] SGHC 156 at [15]). Whilst s 47 of the Malaysian Act specifically provides that all suits and proceedings brought under Pt VI (Divorce) of the Malaysian Act should be treated based on principles which "in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings", there is no such provision in our Act. Therefore, even if s 83 of the Malaysian Act could possibly be read broadly such that a variation or rescission could be granted based on "all the circumstances" despite not fulfilling any of the three conditions (an approach which was suggested by a Malaysian court in the Malaysian High Court decision of *Lina Soo v Ngu Chu*

Chiong & Anor [1999] 5 MLJ 396 (reversed by the Malaysian Court of Appeal in *Ngu Chu Chiong @ Ngu Choo Chiong v Lina Soo* [2008] 3 MLJ 42 (but not, apparently, on this particular point)); although *cf* the (also) Malaysian High Court decision of *Uma Sundari a/p Muthusamy v Kanniappan a/l Thiruvengadam* [2009] 5 MLJ 853 at [14]–[15]), there is, in the *Singapore* context, no reason to read s 118 more broadly than the clear words of that section import. It may also well be the case that there might be no real difference (from a *practical* perspective) between the broad and narrow readings just referred to as the three conditions set out in s 118 probably cover the vast majority of the potential situations which may come before the court in any event.

25 There are a few other features of s 118 which we pause to explain. The first is that there is nothing in the express language of s 118 or in principle to restrict its application to either so-called final or interim maintenance orders. Maintenance orders made pursuant to both ss 113(*a*) and 113(*b*) are capable of being varied under and only under s 118. In fact in the present case the Husband twice applied unsuccessfully for variation of the Interim Maintenance Order under s 118 (see above at [7]).

26 Second, since 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*. Indeed, this has been the approach of the English and Malaysian courts, and we respectfully agree. In, for example, the Malaysian Supreme Court decision of *Gisela Gertrud Abe v Tan Wee Kiat* [1986] 2 MLJ 297, the court affirmed the lower court's exercise of its power under s 83 of the Malaysian Act to vary a maintenance order retrospectively (in *Gisela Gertrud Abe v Tan Wee Kiat* [1986] 2 MLJ 58). The husband had become unemployed for seven months and had fallen into arrears of maintenance for those months. He later deposited the outstanding arrears with the wife's solicitors. The trial judge treated his retrenchment as a material change in circumstances which rendered it unjust for him to continue paying the original maintenance sum. She thus (retrospectively) rescinded the order for the seven months of his unemployment, and reduced the maintenance sum for the period after he regained employment. The Supreme Court affirmed the substantive effect of the trial judge's decision, but characterised the retrospective rescission as a retrospective variation in the form of a suspension of the maintenance order for the seven months of the husband's unemployment (see at 298–299). The arrears deposited with the wife's solicitors were ordered to be refunded to the husband (the Supreme Court, however, allowed the wife's appeal with regard to the quantum of maintenance ordered by the trial judge after the husband had regained employment). The English decision of *MacDonald v MacDonald* [1963] 3 WLR 350 ("*MacDonald*") adopted a similar approach. The English Court of Appeal there clarified (at 353) that the High Court's power under s 28(1) of the Matrimonial Causes Act 1950 (c 25) (UK) ("MCA 1950") to "discharge or vary" orders made extended to backdating its reduced maintenance order even if that resulted in maintenance which had already accrued being remitted or written off. It might be noted – parenthetically – that s 28 of the MCA 1950 is the predecessor provision of s 31 of the MCA 1973. Section 31(2A) of the MCA 1973 expressly provides that the court's power under this section extends to remission of any arrears due under orders which are subsequently varied. Section 28 of the MCA 1950 did not have an equivalent provision, which is why the court in *MacDonald* had to read that power into s 28 of the MCA 1950.

27 Third – and unique to the Singapore and Malaysian legislation as well as of crucial importance to the present facts – for an order to be capable of variation, such an order must be a "subsisting" one.

28 Fourth, it should be noted that any decision by the court to vary or rescind a subsisting maintenance order under s 118 is, of course, itself subject to an appeal (depending on the court in which that order is made and in accordance with the applicable rules and principles governing appeals from decisions of that court (if any)).

29 In the present appeal, it might be thought that the DJ's backdating of the Final Maintenance Order could possibly be read as a retrospective downward variation of the Interim Maintenance Order, utilising s 118. Having stated that, however, we are of the view that s 118 could *not* be utilised *on the facts of this particular case*. To elaborate, once the DJ had made an order pursuant to s 113(*b*), the previous order made pursuant to s 113(*a*) would, in our view, *no longer be a "subsisting" order* which is amenable to either variation or rescission pursuant to s 118 (see also above at [27]). Put simply, the Interim Maintenance Order would have been *replaced* by the Final Maintenance Order made pursuant to s 113(*b*) in the sense that the former would have ceased thereafter to operate between the parties. *However*, if either party had applied to the DJ for a variation of the order made pursuant to s 113(*a*) *prior to* the DJ's order for maintenance made pursuant to s 113(*b*), we see no reason in principle, language, or logic why the DJ could not have either varied or rescinded the order she had made earlier pursuant to s 113(*a*) by utilising s 118.

30 It may be asked whether the approach we have outlined in the preceding paragraph, if it is correct, is an excessively technical one to take. More to the point, has justice and fairness been sacrificed at the altar of legal technicality? Even if it could be argued that there is a *lacuna* in the law of maintenance in s 118 itself, why should the courts not be permitted to fill this gap by nevertheless being permitted to retrospectively vary an order for maintenance made pursuant to s 113(*a*), *notwithstanding* the fact that it has now been *replaced* by an order for maintenance made pursuant to s 113(*b*)? This is a powerful argument – if nothing else because the primary purpose of any court is to achieve a substantively just and fair result. However, as was pointed out in the Singapore High Court decision of *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 (at [5]–[9]):

> 5 However, the court must be extremely wary of falling into the flawed approach to the effect that "the ends justify the means". This ought never to be the case. The obsession with achieving a substantively fair and just outcome does not justify the utilisation of any and every means to achieve that objective. There must be fairness in the *procedure or manner* in which the final outcome is achieved.
>
> 6 Indeed, if the procedure is unjust, that will itself taint the outcome.
>
> 7 On the other hand, a just and fair procedure does *not*, in and of itself, ensure a just outcome. In other words, procedural fairness is a necessary but not sufficient condition for a fair and just result.
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> 8 The quest for justice, therefore, entails a continuous need to balance the procedural with the substantive. More than that, it is a continuous attempt to ensure that both are *integrated*, as far as that is humanly possible. Both *interact* with each other. One cannot survive without the other. There must, therefore, be – as far as is possible – a fair and just procedure that leads to a fair and just result. This is not merely abstract theorising. It is the *very basis* of what the courts do – and ought to do. When in doubt, the courts would do well to keep these bedrock principles in mind. This is especially significant because, in many ways, this is how, I believe, laypersons perceive the administration of justice to be. The legitimacy of the law in their eyes must never be compromised. On the contrary, it should, as far as is possible, be enhanced.
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> 9 It is true, however, that in the sphere of practical reality, there is often a *tension* between the need for procedural justice on the one hand and substantive justice on the other. The task of the court is to attempt, as … pointed out in the preceding paragraph, to *resolve* this tension. There is a *further* task: it is to actually attempt, simultaneously, to *integrate* these two conceptions of justice in order that justice in its fullest orb may shine forth.

[emphasis in original]

Put simply, the courts equally cannot sacrifice legal principle in their quest for a substantively just and fair result. Indeed, on the facts at hand in the present appeal, we explain below (at [35]–[37]) how a substantively just and fair result can be achieved in accordance with legal principle through an adjustment of the final maintenance order.

31 For the avoidance of doubt, we are also of the view that s 118 did *not* apply to the *Final* Maintenance Order on the facts of this case. It was no part of the parties' cases that the *Final* Maintenance Order was based on a mistake of fact or misrepresentation. Neither was there any attempt to show that there had been a material change in the circumstances between the making of the Final Maintenance Order and the hearing before us. The burden of meeting the conditions set out under s 118 must be satisfied by the party seeking the variation or rescission. Neither party in this case sought to satisfy the burden or even argued for the rescission or variation of the Final Maintenance Order. Rather, both parties came before us with the understanding that the Wife's complaint against the DJ's decision was in the form of a straightforward appeal.

32 Based on the foregoing reasons, we find that on the facts of this case, it was not open to the DJ to retrospectively vary the Interim Maintenance Order, whether by backdating the Final Maintenance Order or by utilising the mechanism furnished under s 118. The DJ's order was, with respect, technically erroneous and this court has the power to substitute it with a correct order.

Some observations on orders for the maintenance of children under ss 127 and 72 of the Act

33 We note, for completeness, that the power of the court to order maintenance for children during the pendency of matrimonial proceedings and at any time subsequent to the grant of a judgment of divorce is found in s 127 of the Act ("s 127") which reads as follows:

> **Power of court to order maintenance for children**
>
> **127.**—(1) During the pendency of any matrimonial proceedings or when granting or at any time subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage, the court may order a parent to pay maintenance for the benefit of his child in such manner as the court thinks fit.
>
> (2) The provisions of Parts VIII and IX shall apply, with the necessary modifications, to an application for maintenance and a maintenance order made under subsection (1).

This is essentially a procedural provision which brings into operation the provisions of Parts VIII and IX of the Act, including the substantive obligation of parents to maintain their children found in s 68 of the Act:

> **Duty of parents to maintain children**
>
> **68.** Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, and whether they are legitimate or illegitimate, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

Under the same Part, broad powers are conferred on the court to vary or rescind a child's maintenance order pursuant to s 72 of the Act ("s 72"):

> **Rescission and variation of order**
>
> **72.**—(1) On the application of any person receiving or ordered to pay a monthly allowance under this Part and on proof of a change in the circumstances of that person, his wife or child, or for other good cause being shown to the satisfaction of the court, the court by which the order was made may rescind the order or may vary it as it thinks fit.
>
> (2) Without prejudice to the extent of the discretion conferred upon the court by subsection (1), the court may, in considering any application made under this section, take into consideration any change in the general cost of living which may have occurred between the date of the making of the order sought to be varied and the date of the hearing of the application.

Unlike s 118, the power of the court to vary or rescind a maintenance order for children under s 72 is *not* limited to situations where there has been misrepresentation, mistake of fact or a material change of circumstances. This apparent discrepancy can be traced to the Women's Charter (Amendment) Act 1996 (Act 30 of 1996) ("the 1996 Amendment"). Before the 1996 Amendment, the provision governing the court's power to vary or rescind a maintenance order for children was identical to s 118. However, this power was considerably broadened by the introduction of the present-day s 127 through the 1996 Amendment. Interestingly, this provision did not appear in the Women's Charter (Amendment) Bill 1996 (Bill 5 of 1996) ("the 1996 Bill"); it was first proposed by Prof Leong Wai Kum ("Prof Leong") in her submissions to the Select Committee on the 1996 Bill (see *Report of the Select Committee on the Women's Charter Amendment Bill (Bill No 5/96)* (Parl 3 of 1996, 15 August 1996) ("*Select Committee Report*") at pp B32–33). The rationale behind her proposal was to prevent the separation of the duty of a parent to maintain his or her child into two distinct periods (during the marriage and after the termination of marriage) and to harmonise the provisions relating to children. Prof Leong was also of the view that "[a] parent's duty towards his or her child's financial needs is actually not affected by the state of the parents' marriage. Whether the parents are married or separated or divorced, their duty in this regard should be exactly the same" (see the *Select Committee Report* at p B32). (Similar sentiments were expressed by Prof Ong, who opined in her written submissions that the duty of parents to maintain their children "persists independently of the unmarried, married or divorced status of the child's parents".) It appears that the proposed provision was subsequently passed into law by Parliament without any debate as such on the same.

34 In the present appeal, the parties did not seek to invoke the broader powers conferred upon the court under s 72 to vary or rescind an order for the maintenance of children. As mentioned above (at [31]), this case concerned a straightforward appeal from the Judge's decision below. It is therefore not necessary for us to say any more about s 72 and the broader manner in which that provision is framed (as compared to s 118). (As we have observed above at [24], the broader scope of s 72 might *not* make much *practical* difference in any event.) We would, however, reiterate that the DJ, with respect, erred in backdating the Final Maintenance Order because this effectively created a situation where there were two different but equally binding obligations on the Husband (see above at [21]). This reasoning applies with equal force to not only the maintenance order for the Wife but also (as a matter of general principle) the maintenance order for the children (notwithstanding the (literal) absence of the word "subsisting" in s 72 as well as taking into account the fact that it is unlikely that the Singapore Parliament would have intended an inconsistency between the approaches to be adopted with respect to maintenance for the wife and for the children, respectively).

The present appeal

35 We were, however, of the view that the DJ had valid reasons for moving to partially relieve the Husband of his arrears of maintenance due under the Interim Maintenance Order. The DJ's decision to backdate the lower Final Maintenance Order was clearly borne out of a concern to do justice to the parties pending the hearing of final ancillaries – a hearing which was a long time coming due to protracted interlocutory proceedings. The ancillary matters were heard on 9 February 2012, 23 months after the grant of interim judgment. This was, in our view, not an insignificant period of time, and it was occasioned by an unfortunate combination of actions on the part of both the Husband and the Wife. There were also factors such as the time the court took to process the parties' various applications and to fix hearings, which were not within the control of either party. Although the parties were understandably eager to pin the blame for the delay on each other, we find it unnecessary to engage in an exercise of fault apportionment at this stage of proceedings. However, in our view, the fact of the matter was that the Husband continued to bear the burden of making interim maintenance payments during this unduly protracted period of time. We find ourselves in agreement with the DJ that this had unfairly prejudiced the Husband.

36 We were therefore loath to alter the substantive effect of the DJ's decision to effectively remit a portion of the arrears accrued by the Husband under the Interim Maintenance Order. Our concern, as we have already explained above, is that the DJ achieved this effect by taking a technically erroneous route. What the DJ ought to have done was to make a final maintenance order for the Wife under s 113(*b*) and for the children under s 127(1) which took into account the respective resources and obligations as directed by ss 114 and 69(4) of the Act. This would have included consideration of the respective parties' resources and outstanding obligations *as altered by the operation of the Interim Maintenance Order*. Such an order made pursuant to ss 113(*b*) and 127(1) would have operated prospectively but would have accounted for the Husband's depleted resources due to his maintenance obligations under the earlier Interim Maintenance Order. This was not done by the DJ, and it was therefore within this court's appellate power to substitute the DJ's technically erroneous order with a technically correct order which achieves the same effect (albeit not in the same amount ordered by the DJ). This court's appellate power includes the power to "make any order which ought to have been given or made, and make such further or other orders as the case requires", even if such an order was not specifically sought in the Notice of Appeal (see ss 37(5) and 37(6) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)).

37 We therefore substituted the DJ's Final Maintenance Order as stated at [1] above.

A summary

38 A *summary* with regard to the *general* principles applicable may be apposite at the present juncture.

3 9 *First*, a maintenance order made pursuant to s 113(*a*) is "interim" or "provisional" only in the sense of its duration of operation, and is conclusive in determining the parties' financial relations for the time being.

4 0 *Second*, a maintenance order whether made pursuant to ss 113(*a*) or 113(*b*) can only be rescinded or varied, upon a successful appeal against that order *or* by operation of s 118 (bearing in mind that a decision in the latter regard might itself be subject to an appeal).

4 1 *Third*, a maintenance order made pursuant to ss 113(*a*) or 113(*b*) can be varied or rescinded at any time under s 118, but only "where [the court] is satisfied that the order was based on any

misrepresentation or mistake of fact or where there has been any material change in the circumstances".

4 2 *Fourth*, a maintenance order made pursuant to s 113(*a*) *cannot* be varied or rescinded under s 118 if an order for maintenance pursuant to s 113(*b*) has (*subsequently*) been made as there would no longer be a "subsisting" order that can be varied or rescinded under s 118.

4 3 *Fifth*, similar principles would apply with regard to the corresponding maintenance orders for children made pursuant to s 127. Although the language of s 72 (with regard to the grounds for variation or rescission of such orders) is literally broader, there might be no *practical* difference in the final analysis.

Conclusion

44 For the reasons set out above, we substituted the DJ's Final Maintenance Order with an order that the Husband pay a monthly maintenance amount of A$4,500 for a period of 30 months from April 2012 to October 2014, and thereafter a monthly maintenance amount of A$5,500.

45 We would also like to express our gratitude to the *amicus curiae*, Prof Ong, for her perceptive and helpful arguments which greatly assisted this court in arriving at its decision.