

UDA v UDB and another
[2018] SGCA 20

Case Number : Civil Appeal No 92 of 2017
Decision Date : 24 April 2018
Tribunal/Court : Court of Appeal
Coram : Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Judith Prakash JA; Tay Yong Kwang JA; Steven Chong JA
Counsel Name(s) : Foo Soon Yien and Oh Zhen Hao, Thaddeus (Bernard & Rada Law Corporation) for the appellant; Salem Ibrahim, Kulvinder Kaur and Sarah Kee (Salem Ibrahim LLC) for the first respondent; Koh Tien Hua and Chew Wei En (Eversheds Harry Elias LLP) for the second respondent.
Parties : — UDA — UDB — UDC — UDA — UDB — UDC

Family law – Ancillary powers of court

Family law – Matrimonial assets – Division

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [\[2017\] SGHCF 16.](#)]

24 April 2018

Judith Prakash JA (delivering the grounds of decision of the court):

Introduction

1 In October 2014, the Family Justice Act 2014 (No 27 of 2014) (“the FJA”) was brought into force. One of the purposes of the Act was to give jurisdiction over family proceedings to a dedicated court system which could design the best processes and approaches to deal with an area of law which has wide-ranging societal and personal impact. To this end, the FJA established three courts as Family Justice Courts: the Family Division of the High Court (the “Family Division”), the Family Courts and the Youth Courts. This judgment is concerned with one aspect of the jurisdiction of a court which is exercising the jurisdiction and powers of the Family Division or the Family Courts, which court we sometimes hereafter refer to as a “family justice court”.

2 An important function of a family justice court is to handle the disputes that frequently arise when a marriage breaks down. Such disputes often involve the ownership and distribution of property. There are almost as many ways of acquiring and owning a property as there are human relationships. Accordingly, the property that may be the subject of competing claims between husband and wife may also be subject to claims from third parties. The issue which was brought into sharp focus in this case was the extent of the jurisdiction of a family justice court exercising powers in relation to the division of property on divorce when third party interests are involved.

Background

3 This case involves a husband, a wife, and the wife’s mother. Divorce proceedings were started by the husband in 2008. The proceedings were prolonged due to disputes unrelated to the issue before us. By 2015, matters had reached the stage where the parties were preparing for the ancillary

matters hearing on the division of matrimonial property. In July 2015, the mother, whom we shall henceforth call “the intervener”, applied for leave to intervene in the divorce proceedings. The basis of her application was that she wished to dispute the husband’s claim that an immovable property owned by the intervener was actually held by her on trust for the husband and wife and constituted a matrimonial asset. This application succeeded before the Family Court.

4 Thereafter, the husband applied for leave to cross-examine the intervener and the wife in respect of the dispute over the ownership of the property. The Family Court granted leave for cross-examination of the husband, the wife and the intervener. The wife and the intervener were dissatisfied and appealed to the Family Division against the order for cross-examination. On the hearing of the appeal, the High Court Judge (“the Judge”) raised the question of whether the court, exercising its power under s 112 of the Women’s Charter (Cap 353, 2009 Rev Ed) (“the Charter”), had the jurisdiction and power to determine the intervener’s interest in the property and make orders against her since she was a third party to the divorce proceedings.

5 The intervener and the wife took the position that the court ought to determine any property dispute involving the intervener together with the issues under s 112 of the Charter. They submitted that although this section did not expressly state that the court which dealt with the division of matrimonial property had such power, such courts had in the past determined the nature and extent of third party interests before dividing the matrimonial assets between divorcing spouses. Further, this jurisdiction arose, if not from s 112 of the Charter, then from ss 22 and 25 of the FJA as well as ss 16 and 17 of and the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) (“the SCJA”).

6 The husband, on the other hand, argued that s 112 of the Charter did not apply to the determination of a third party’s property rights and a separate civil suit had to be commenced by either the intervener or the divorcing parties in relation to the disputed property.

The decision below

7 The Judge decided to stay the hearing of the ancillary matters pending further directions on the basis that the family justice court exercising jurisdiction and power to make orders under s 112 of the Charter does not have the jurisdiction and power over a third party such as to enable it to make an order directly affecting the third party’s property rights. Her reasons were given in her written grounds identified as *UDA v UDB and another* [2017] SGHCF 16 (“the GD”).

8 The Judge began her analysis by setting out the three possible approaches which a family justice court could take in the course of an ancillary matters hearing in which a claim was made that an asset legally owned by a third party was in fact a matrimonial asset:

(a) Option 1(a): the court, exercising its powers under s 112 of the Charter, hears the evidence of the intervener and the divorcing parties in order to determine whether the disputed asset is a matrimonial asset. It can do this either on affidavit evidence only or by permitting cross-examination. If the court concludes that one or both of the divorcing parties has/have a beneficial interest in the property, it may include the asset in the matrimonial pool but not make any order directly affecting that asset (GD at [13]–[15]). For example, if the court determines that Asset X is held in the sole name of the intervener but is beneficially owned by the husband, it may include the husband’s interest in Asset X in the pool of matrimonial assets, but effect a just and equitable division only by making orders directly affecting the other assets in the pool. For example, the court could order the husband to pay a larger proportion of his income to the wife, instead of giving her a share in his interest in Asset X.

(b) Option 1(b): the same as Option 1(a), save that the court further provides in its order that, should there subsequently be a civil action determining the beneficial interest of any of the disputed assets, its order should be modified in the manner specified to take into account the final outcome of the civil action.

(c) Option 2: the court stays the proceedings under s 112 in order to allow the property dispute to be separately determined first. This option needed no further discussion as being part of the court's case management powers.

(d) Option 3: the court simply determines the property interests in the asset in the s 112 proceedings and makes orders affecting that property – for example, a sale or transfer of the property.

9 The Judge noted that there was case support for both versions of Option 1 and for Option 3. Option 1(a) was used in *Lau Loon Seng v Sia Peck Eng* [1999] 2 SLR(R) 688 ("*Lau Loon Seng*"), Option 1(b) was used in *Yeo Chong Lin v Tay Ang Choo Nancy and another appeal* [2011] 2 SLR 1157 ("*Yeo Chong Lin*") and Option 3 was used in *ABX v ABY and others* [2014] 2 SLR 969 ("*ABX v ABY*").

10 The Judge went on to reject Option 3 as a lawful and viable option because, in her view, the court lacked jurisdiction in s 112 proceedings to make an order which would affect a third party's substantive rights and remedies (GD at [31] and [33]). She reasoned that the court's power under s 112 "lies within the family law regime, and its exercise should be made on family law principles, in contrast to principles that govern other areas of law, such as property law or succession law". The court's powers under s 112 are "forceful" and should not be enlarged by *general* jurisdiction-conferring provisions in the FJA or SCJA (GD at [27]).

11 Further, the court's power in s 112 is ancillary to its matrimonial jurisdiction and gives it the power to "order the division *between the parties* of any matrimonial asset" [emphasis added]. This jurisdiction is exercised over the two parties to the marriage only (GD at [28]). Moreover, it is ancillary in that it arises only when the court grants at least an interim judgment of divorce or nullity, or a judgment of judicial separation (GD at [29]). The phrase "between the parties" – appearing twice in s 112(1) – means that the court can only interfere directly with the property rights of the divorcing parties, and not with those of a non-party or an intervener. The court's jurisdiction does not extend to making orders against the third party (GD at [27], [28] and [31]).

12 The Judge also dealt with the intervener's submission that the court had power to deal with a third party claim by virtue of s 25 of the FJA. In her view, this submission reflected a misunderstanding of the court's matrimonial jurisdiction and its s 112 power (GD at [32]). While s 25 of the FJA did confer broad civil jurisdiction on the Family Division, the point was that such jurisdiction had to be appropriately invoked by the correct party.

13 The Judge observed that the participation of an intervener does not expand the court's jurisdiction and powers when it makes orders under s 112. The supposed basis for intervention, r 353 of the Family Justice Rules (GN No S 813/2014) ("the FJ Rules"), is *in pari materia* with O 15 r 6 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). The cases suggest that O 15 r 6 is a procedural rule for the practical and efficient disposal of the case and "does not give a party additional substantive rights" (GD at [36]). In the case of intervention in ancillary relief proceedings, the court remains constrained by s 112 to make orders against the divorcing parties only, and not against the intervener, who is not a party to the marriage and therefore "does not come under the jurisdiction of the court exercising its matrimonial jurisdiction" (GD at [31]).

14 The Judge also considered but rejected the notion that the “judge-led approach” (see Part 3 of the FJ Rules) provided a basis for the court to affect a third party’s substantive rights and remedies in s 112 proceedings (GD at [33]). Ancillary matters proceedings under s 112 were not tailored to address property disputes involving non-spouses, and did not share many of the procedural features of a civil trial, *eg*, the right of cross-examination, pleadings, the opportunity to adduce expert evidence and subpoena of witnesses (GD at [38] and [39]).

15 By contrast, the Judge considered Options 1(a) and 1(b) (together, “Option 1”) to be “principled and supported by the law” (GD at [41]). Option 1 involves the court determining the property interests in s 112 proceedings but without making any direct order against the intervener or third party which would affect the disputed property. The application of legal principles to determine the beneficial ownership of an asset in the course of s 112 proceedings would not alter the nature of the order eventually granted; it would remain an order dividing the matrimonial assets between the divorcing parties (GD at [41]). This cohered with the wording of s 112(1) of the Charter.

16 From a practical point of view, the Judge considered that Option 1 would be “feasible where there are substantial matrimonial assets to be divided apart from the disputed asset” (GD at [15]). By contrast, where the disputed asset was the “main or only substantial asset available for division”, the court might have to stay the s 112 proceedings until the dispute was resolved, either by the parties’ agreement or by separate civil proceedings (GD at [19]). Option 1(b) moreover might “involve some projections and speculations as to the various possible outcomes in the civil suit” (GD at [18]).

17 As for Option 2, it was a viable option to which no objection could be made since it did not purport to make any ruling or order as regards the disputed asset until a settlement, agreement or judgment had been separately obtained (GD at [41]).

18 The Judge decided that the appropriate option to choose in the case before her was Option 2. This was because the disputed property would, if found to be a matrimonial asset, be the most substantial such asset. This meant that an equitable division would likely require a division of the disputed property between the husband and wife and therefore an order would have to be made against the third party. This situation made Option 1 inappropriate. The Judge therefore ordered a stay of the ancillary matters to allow the husband the opportunity to pursue a civil action to determine the disputed property interests first.

19 The intervener appealed. We dismissed the appeal, upholding the Judge’s stay order and supplementing the same by imposing a time period of 30 days for the husband to commence any civil action he might have in respect of the property and against the intervener and the wife. Briefly, we agreed with the Judge that under s 112 a family justice court, whether operating in the Family Division or as a Family Court, could not make orders directly impacting the property rights of a third party notwithstanding that such party may have intervened in the divorce proceedings. Our reasons are set out below.

The arguments on appeal

20 The intervener’s position was that the Judge, sitting in the Family Division, had the jurisdiction and power to determine the beneficial ownership of the property and make consequential orders directly affecting the Intervener’s rights and interest in the property. She submitted that not to do so would be “regressive ... for the handling of family disputes”. Further, the Judge erred by characterising the court’s determination of the beneficial ownership as an exercise of its powers under s 112 of the Charter. Rather, the court carried out its task in two stages:

(a) First, it determined the beneficial interests in the disputed asset in an exercise of its jurisdiction under ss 22(1)(a), 22(1)(b) and 25 of the FJA and ss 16(1)(b) and 17(a) of the SCJA.

(b) Secondly, it exercised its jurisdiction under s 112 of the Charter to determine if the divorcing parties' share(s) in the disputed asset constituted a matrimonial asset.

21 The intervener further submitted that she had invoked the Family Division's jurisdiction by applying for and being granted leave to intervene in the divorce proceedings, and would consequently be bound by any determination and/or order made by the Judge regarding the ownership of the property. In oral arguments before us the intervener emphasised r 353 of the FJ Rules as being intended to allow a third party to intervene in s 112 proceedings so that all issues relating to the property in dispute could be determined by the same court at the same time, thus saving costs and allowing a speedier disposal of the case. In her submission, r 353 existed to vest family justice courts with the power to hear all parties and to hold otherwise would render the rule pointless.

22 Finally, the intervener submitted that the Judge ought to have determined the ownership of the property and made consequential orders affecting the intervener's interest in the property. The intervener also asserted that the Family Division has the same jurisdiction and power as a civil court to determine a claim in conspiracy in respect of the property. This was relevant as the husband had said he wanted to sue the wife and the intervener for conspiracy.

23 The husband submitted that the Judge was right to stay the proceedings because s 112 of the Charter does not give the court jurisdiction to deal with a property law issue raised by a third party or make a division of a third party's property. While s 25 of the FJA gives the Family Division original and appellate civil jurisdiction, that provision is simply intended to allow the same judge to hear both the ancillary proceedings under s 112 of the Charter as well as civil proceedings regarding the property dispute. The "object" of s 25 of the FJA is allegedly to enable parties to save costs since the two matters need not go before separate judges. The husband submitted that the intervener objected to commencing a civil claim because she wished to avoid cross-examination in a civil trial.

Issues

24 The main issue before us in this appeal was whether a family justice court, when exercising its powers under s 112 of the Charter to divide matrimonial assets between divorcing spouses, has the jurisdiction to hear and to determine claims by a third party to be the legal or beneficial owner of any alleged matrimonial asset (a "disputed asset") and to make orders which would directly affect the third party's interest in the disputed asset such as for the sale or transfer of the asset. Related to that issue was the subsidiary issue of whether, as between the spouses themselves, the court could take their beneficial interests in the disputed asset into account in ordering the division of matrimonial assets. It should be noted in relation to the subsidiary issue that the family court's powers in that regard were not challenged by any of the parties. It is however useful to re-examine this issue in the context of our analysis of the present legal regime.

Analysis of the statutory regime

Section 112 of the Charter

25 We start our analysis with s 112 of the Charter because it pre-dates the FJA and is at the core of the main issue. We then consider whether the analysis of the court's jurisdiction under s 112 should, in any way, be expanded by the FJA and the FJ Rules.

26 Section 112 falls within Part X of the Charter, which deals with the voluntary end of marriage, *ie*, while the parties are alive, and the consequences of the same. There are six chapters within Part X which provide for divorce, judicial separation, nullity, financial provision consequent upon the end of marriage, the welfare of children and related matters respectively. Chapter 4 is entitled “Financial Provisions Consequent on Matrimonial Proceedings” and s 112 is the first section in this chapter.

27 The heading and the language of s 112 make it plain that the section is concerned with the conferment of powers on the court. Sub-section (1) contains the primary power whilst sub-ss (3) to (9) contain ancillary powers which allow the court to implement the orders made pursuant to sub-s (1). The sub-section starts:

Power of court to order division of matrimonial assets

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

[emphasis added]

28 We have highlighted certain portions of sub-s (1) because they provide the framework for the interpretation of this section. First, the phrase “when granting or subsequent to the grant” followed by the enumeration of the types of judgments which are being granted as judgments of divorce, judicial separation or nullity, places the power conferred in the specific context of matrimonial proceedings. It also indicates that the power is to be exercised only if the proceedings have resulted in a legal end to the marriage concerned in one of the ways specified. This context is one that involves only the spouses, they being the only possible parties to proceedings for a judgment of divorce, judicial separation or nullity under Part X of the Charter. No third party can apply for someone else’s marriage to be ended by divorce or judicial separation. Whilst in certain very limited circumstances, a third party may be able to obtain a declaration that the marriage between two other persons is void, the proceedings which give rise to such declarations will not be matrimonial proceedings and will not fall under Part X of the Charter. It is of paramount importance that the only legal route to the application of s 112 is through matrimonial proceedings.

29 The second highlighted phrase, “between the parties”, circumscribes the power granted as one that can be applied only to the parties to the matrimonial proceedings who, again, are the spouses only. Other people, no matter how closely related to the spouses and even if they are the children of the marriage, do not fall within the phrase “between the parties” as it is used in s 112(1).

30 Third, the property that is to be divided or sold is described as a “matrimonial asset”. Sub-section (10) specifically defines a matrimonial asset as:

(a) any asset acquired *before the marriage by one or both parties to the marriage* subject to certain conditions; or

(b) any other asset acquired *during the marriage by one or both parties to the marriage*.

31 The word “acquired” as used in s 112(10) means the acquisition of ownership which is not simply a bare legal title but amounts to either legal title with beneficial ownership or beneficial

ownership alone. If one had only bare legal title to a piece of property, that would not justify calling the property one's "asset": see for example *BG v BF* [2007] 3 SLR(R) 233 where this court held at [36]–[37] that a piece of property the husband had purchased for a trust had not been "acquired" by him because acquisition implied ownership. So to qualify as a matrimonial asset, the property concerned must have been acquired beneficially by either or both parties to the marriage who are now involved in the matrimonial proceedings. Thus an item of property that is legally and beneficially owned by a third party is not covered by s 112(1) and the court's power under that section does not extend to it.

32 On its face therefore, s 112(1), though a "forceful" section as the Judge described it, has force only between the parties to the marriage. It has no application to any third party whether related to either spouse or not. This initial impression is only enhanced when some of the other subsections of s 112, those containing what we have referred to as the "ancillary" powers, are examined. Under s 112(2), when the court decides whether and how to exercise the power of division, it must consider a number of matters all of which pertain to the actions, rights and obligations of the parties undertaken by them in the context of their marriage and their respective enjoyment of the assets. For example, under s 112(2)(a), the court assesses the parties' respective financial contributions to the acquisition of the assets and under s 112(2)(d), the court considers non-financial contributions to the welfare of the family in the form of looking after the home or caring for the family or the dependants of either party. Third parties have no place in this assessment.

33 Another example is s 112(5) which gives the court power, among other things, to postpone the sale or vesting of any share in any matrimonial asset or grant either party the right to occupy or use the matrimonial home to the exclusion of the other for such period as the court thinks fit. It is therefore readily appreciable that s 112 contemplates the settlement of rights between the parties to the marriage based on their needs as well as the needs of the children of the marriage. Postponement of the enjoyment of property rights is not a power available to a court outside the context of s 112.

Other statutory provisions

34 Given what we have said above, s 112 does not permit a third party such as the intervener in this case to appear before the family justice court hearing ancillary matters and ask it to adjudicate the third party's claim to the alleged "matrimonial asset". The intervener's position was that the clear language of s 112 which has led to our interpretation aforesaid was however belied by the FJA, the SCJA and r 353 of the FJ Rules. She argued that the same permit a family justice court, or at least a court of the Family Division, to determine the ownership of property claimed by a third party pursuant to its general civil jurisdiction which runs alongside the specific jurisdiction conferred by s 112 of the Charter. We now turn to consider this argument.

35 We begin with the relevant statutes. The civil jurisdiction of the High Court is contained in ss 16, 17 and 17A of the SCJA. Section 16, headed "**Civil jurisdiction — general**", confers on the High Court jurisdiction to hear and try an action *in personam* where the defendant is served with a writ or other originating process in the prescribed manner or submits to the jurisdiction of the court. Section 17, headed "**Civil jurisdiction — specific**", delineates in seven sub-paragraphs specific areas of jurisdiction. Of these, sub-paragraph (a) refers to jurisdiction relating to divorce and matrimonial causes while sub-paragraph (d) confers jurisdiction in relation to the appointment and control of guardians of infants and generally over the persons and property of infants. Sub-paragraphs (e) and (f) relate to jurisdiction to appoint guardians for certain vulnerable people and the administration of the estates of deceased persons. To round up this summary, s 17A of the SCJA gives the High Court concurrent jurisdiction with the Syariah Court in certain matters.

36 The SCJA is thus the font of the court's jurisdiction in all aspects of matrimonial proceedings. This jurisdiction is devolved to the Family Division by s 22 of the FJA, which states:

Original civil jurisdiction of High Court exercisable through Family Division

22.—(1) The part of the civil jurisdiction of the High Court which shall be exercised through the Family Division shall consist of —

(a) the jurisdiction conferred on the High Court by sections 17(a), (d), (e) and (f) and 17A of the Supreme Court of Judicature Act (Cap. 322); and

(b) such other jurisdiction relating to family proceedings as is vested in or conferred on the High Court by any written law.

(2) For the avoidance of doubt, the Family Division of the High Court shall, when exercising any jurisdiction referred to in subsection (1)(a) or (b), have all the powers of the High Court in the exercise of its original civil jurisdiction.

37 The intervener put particular stress on the last part of sub-s (2) above, that is "all the powers of the High Court in the exercise of its original civil jurisdiction".

38 The extensive jurisdiction conferred on the Family Division is re-emphasised by s 25 of the FJA which reads:

Family Division may exercise entire jurisdiction of High Court

25. For the avoidance of doubt, the Family Division of the High Court may exercise the entire original and appellate civil and criminal jurisdiction of the High Court under the Supreme Court of Judicature Act (Cap. 322) and under any other written law.

39 The jurisdiction of the Family Courts is somewhat narrower than that of the Family Division. Their jurisdiction is contained in s 26(1) of the FJA which states:

Jurisdiction of Family Courts

26.—(1) ...

(2) Subject to subsections (4), (5) and (6), a Family Court shall have —

(a) all the civil jurisdiction of the High Court referred to in section 22(1)(a) and (b);

(b) when exercising any jurisdiction referred to in section 22(1)(a) or (b), all the powers of the High Court in the exercise of the original civil jurisdiction of the High Court; and

(c) such other jurisdiction relating to family proceedings as is conferred on a Family Court by any written law.

It can immediately be seen that the Family Courts' jurisdiction only encompasses the specific areas of civil jurisdiction covered by ss 17(a), 17(d), 17(e) and 17(f) of the SCJA and no more. There is no reference to s 16 of the SCJA. The intervener recognised this, hence her submission was confined to the jurisdiction of the Family Division.

40 The intervener emphasised that the Judge sat as a judge of the Family Division. Pursuant to s 25 FJA, she argued, the Judge had the power to determine a property dispute between the divorcing parties and a third party arising out of its general rather than its specific civil jurisdiction. It would only be after determining that dispute that the court would then exercise its jurisdiction under s 112 of the Charter to determine if the asset is a matrimonial asset and if so how it should be divided. In support of her position, the intervener cited *THF v THG* [2015] SGFC 127 ("*THF*"), decided by a judge of the Family Court.

41 In *THF*, the defendant husband had argued that his sister had a beneficial interest in a property in his name and that he was merely holding it on trust for her. Although the husband eventually abandoned this argument, the District Judge explained why she would have declined to determine the sister's beneficial interest. She stated at [29]:

... [I]f that was indeed the Defendant's position, he would have to obtain a High Court order to determine the issue of property rights as between the Defendant and the sister. This court only has jurisdiction, and is only concerned, to divide matrimonial assets and not determine property rights as against a third party and a party to the divorce.

42 The District Judge's view was based on the statutory provisions circumscribing the jurisdiction of the Family Court. She stated at [30] (see in particular (d) and (e)):

(a) Section 26(1) [FJA] provides that the Family Court shall have all the civil jurisdiction of the High Court referred to in section 22(1)(a) and (b) of the FJA; and such other jurisdiction relating to family proceedings as is conferred on a Family Court by any written law.

(b) Section 22(1)(a) and (b) specifies that the civil jurisdiction of the High Court which shall be exercised through the Family Division shall consist of (a) the jurisdiction conferred on the High Court by sections 17(a), (d), (e) and (f) of the SCJA; and such other jurisdiction relating to family proceedings as vested in or conferred on the High Court by any written law.

(c) Section 17(a) SCJA provides that the civil jurisdiction of the High Court shall include jurisdiction under any written law relating to divorce and matrimonial causes. Section 2 of the FJA defines "family proceedings" to *inter alia* include "any civil or quasi criminal proceedings under the Women's Charter". Hence, the Family Court has jurisdiction to hear proceedings under the Women's Charter. Further, under section 112 [WC], I have the power to order the division of "matrimonial assets".

(d) It is therefore clear that I do not have the jurisdiction to hear and decide disputes relating to a third party's share in properties jointly owned with one of the parties to the marriage. That is a matter of property law and trusts. And it is not an action/proceeding falling under the Women's Charter.

(e) If divorcing parties have a property dispute with a third party, they will have to take out the necessary proceedings in the High Court (whether High Court Family Division or High Court) for a determination. Section 25 of the FJA specifically provides that "the [Family Division of the High Court] may exercise the entire original and appellate civil and criminal jurisdiction of the HC under the SCJA and under any written law."

43 The case of *THF* was followed in another Family Court decision, *UAX v UAY* [2017] SGFC 55, which held at [35] that the Family Court has no "jurisdiction to hear property disputes relating to a third party's claim to a beneficial interest in the share in properties jointly owned with one or both of

the parties to the marriage” for the reasons stated in *THF*. While we agree with the decision in *THF* in relation to the jurisdiction of the Family Courts, in so far as the jurisdiction of the Family Division is concerned the understanding of the effect of s 25 of the FJA expressed there is, in our judgment, incorrect.

44 In our judgment, the Family Division courts, like the Family Courts, are only able to decide the beneficial ownership of an asset alleged to be a matrimonial asset pursuant to s 112 of the Charter pursuant to the courts’ *specific* civil jurisdiction under s 17(a) of the SCJA (“jurisdiction under any written law relating to divorce and matrimonial causes”, the Charter being one of the most important pieces of such written law) rather than the High Court’s *general* civil jurisdiction under s 16 of the SCJA.

45 Going back to the beginning of the FJA, s 4 of the same sets up the Family Division of the High Court and states that through this division the High Court shall exercise, *inter alia*, “*such part* of the original ... civil jurisdiction of the High Court as is specified in this Act” [emphasis added]. The specification follows in s 22 which starts “*The part* of the civil jurisdiction of the High Court which shall be exercised through the Family Division shall consist of ...” [emphasis added] followed by the enumeration of the relevant sub-paragraphs of s 17 of the SCJA. Thus not all of the civil jurisdiction of the High Court is conferred on the Family Division, only that which is connected with personal and interpersonal matters affecting individuals, generally within the domestic context. This is in line with the purpose of the Act which as stated earlier was to set up a specialised court system (see [1] above). In the light of the way that s 22 plainly delineates the jurisdiction conferred on the Family Division, the purpose of s 25 is to be a gap-filling provision for the purpose of assisting the Family Division in exercising its primary jurisdiction. It confirms that the Family Division has power to deal with civil issues when they arise in the course of matters in which the Family Division’s jurisdiction has been properly invoked. The intervener’s argument for a broader interpretation of s 25 was also made before the Judge. The Judge rejected it, basically for the same reason that we have, saying at [32] of the Judgment:

The broad jurisdiction of the Family Division of the High Court is not in doubt. A court may have jurisdiction to hear a civil suit and make orders on property interests, but its jurisdiction must be properly invoked ... the court may have the general jurisdiction to determine property rights and order a sale of property, but the appropriate party must invoke the appropriate enabling law and process.

46 Returning to the point about invoking the appropriate jurisdiction, the question that the intervener could not answer was how she would be able to invoke the Family Division’s jurisdiction to determine her property claim. She was not seeking to commence divorce proceedings in her own right and, in any case, her claim to the property had nothing to do with her husband. She could not start any sort of independent action claiming relief under s 112 of the Charter since, as we have discussed at [28] above, the powers the court has there are ancillary powers which can be exercised only in the specific context of divorce or similar proceedings under Part X of the Charter. If she did file an independent claim it would have to be by way of a writ or originating summons in the High Court and that would mean that the court adjudicating the dispute would not be a court operating in the Family Division in line with the FJA.

47 The intervener rejected such an understanding, arguing that because of r 353 of the FJ Rules she did not have to start an independent action in the High Court but could bring herself into the divorce proceedings. And indeed she was in this case given leave to intervene. Having done so, she would be entitled to have her claim determined before the court went on to decide the ancillary matters. In essence, her contention was that when she intervened in the matrimonial proceedings,

the Family Division's general civil jurisdiction and powers were invoked.

48 As mentioned above at [13], the Judge rejected this contention, stating at [31] of the GD that applying to intervene is not an invocation of another law or enabling provision and cannot bring a new cause of action outside of s 112 of the Charter before the court. She emphasised that "[t]his *procedural* action of joining an intervener does not confer *substantive* jurisdiction and power on the court to make an order against an intervener who is not a party to the marriage" [emphasis in original]. We entirely agree. Further, it is a fundamental tenet of statutory interpretation that subsidiary legislation like rules of procedure cannot create substantive rights. Rule 353 is a procedural rule permitting parties with an interest in proceedings to be added to those proceedings but only where the court has jurisdiction to determine that issue between the intervener and the original parties in those same proceedings. It cannot be used to confer jurisdiction on the court since jurisdiction can only be derived from statute. The purpose of a procedural rule like r 353 is facilitative only: it assists in the smooth implementation of substantive law. Since the jurisdiction the intervener was advocating for did not exist, she could not create it by invoking a procedural rule.

49 We now turn to the issue of how a third party claim like that of the intervener should be handled when the property concerned is, in some way, affected by the claims or contentions made in ancillary matters proceedings.

Matrimonial assets and third party claims

50 Given the diverse ways in which beneficial interests in assets may be acquired and the legal recognition of the possibility of many co-owners of property, it is not uncommon for divorcing parties to contend that assets that appear to be theirs are not theirs or, as in this case, that assets in the names of others actually belong to one or both of the erstwhile spouses. Given our analysis of s 112 of the Charter as applying only between the parties to a marriage and their assets, how then can the court handling the ancillary matters deal with those assets in which a third party is alleged to have an interest? The appropriate answer to this question depends on which parties are disputing the ownership of the asset and also where the legal title lies.

51 There are four possible situations in which property may come before a court that is hearing an ancillary matters proceeding. These are where:

- (a) the property is accepted as a matrimonial asset, having been acquired jointly by the spouses or solely by one of them, and the only question is how it should be divided;
- (b) the property is in the name of one of the spouses and the issue is whether the circumstances of its acquisition render it a matrimonial asset;
- (c) the property is in the name of one of the spouses who claims to be holding it in trust for a third party, whilst the other spouse disputes this and contends that the property belongs beneficially to the legal owner and is therefore a matrimonial asset; and
- (d) the property is in the name of a third party but one or both spouses claims that it is a matrimonial asset because the third party is holding the whole or part of the property on trust for one or both spouses.

52 Situations (a) and (b) above result in a dispute that is, and can only be, between the spouses. Thus, they sit comfortably within the four corners of s 112 of the Charter. The family justice court thus has complete jurisdiction to hear the dispute and, having made its decision, exercise its powers

to divide the property (assuming it has held the same to be a matrimonial asset) and to provide for its disposal in accordance with s 112. In situations (a) and (b), no third party is involved.

53 The next two situations do involve a third party. This is where the complications begin because although we have held that third parties cannot appear in s 112 proceedings, different approaches are applicable depending on whether the third party wishes to actively assert his rights in the property in dispute.

54 A third party claiming an interest in any property alleged to be a matrimonial asset is entitled to have his rights ruled on by the court and is, further, entitled to the benefit of a final ruling which he can assert against the rest of the world. If the third party wants to directly assert those rights, what should he do? He can, of course, and should commence independent civil proceedings against either or both the spouses (depending on the factual situation) for a declaration as to his interest and other relief. The question is whether he can do anything in relation to the ongoing s 112 proceedings. Given that the third party cannot participate in those proceedings, whilst he may ask for leave to intervene in the proceedings, the only purpose of such intervention would be to notify the court of his interest and apply for a stay of the s 112 proceedings pending determination of his separate civil suit.

55 A family justice court that is apprised of a third party's actively asserted claim to property that one or both spouses claim constitutes a "matrimonial asset" should utilise what the Judge described as "Option 2". It should stay the s 112 proceedings in order to allow the property dispute to be separately determined first. If it is notified that the claim exists but that no separate action has been commenced yet, then depending on the legal ownership of the property concerned and whether the spouses or either of them wants a binding order against the property or the third party, different possibilities arise.

56 If the property is legally owned by the third party, then the following options will be available to the court and the spouses.

(a) First, the spouse who claims the property to be a matrimonial asset may obtain legally binding confirmation from the third party that this is so and an undertaking that the third party would respect and enforce any order that the court may make relating to the beneficial interests in the property.

(b) If this is contested, either that spouse or the other who is asserting that the property belongs beneficially to the third party would have to start a separate legal action to have the rights in the property finally determined, *vis-à-vis* the third party, in which case the s 112 proceedings would have to be stayed until the rights are determined. This would be Option 2.

(c) The third possibility would be for the spouse to drop his or her claim that the property is a matrimonial asset and allow the s 112 proceedings to continue without it.

(d) Alternatively, that spouse may ask the court to determine whether the asset is a matrimonial asset without involving the third party's participation at all or making an order directly affecting the property. This is Option 1.

57 In respect of [56(d)] above, the family justice court should only take Option 1 if both spouses agree to it, as this course could result in the disputed asset being treated as a matrimonial asset and adjustments being made in the division of other assets to account for its value when in separate proceedings later it may be determined that the third party was both the legal and the beneficial owner of the property and neither spouse had any interest in it at all. Thus, the result of taking

Option 1 may be to prejudice the spouse who has had to account to the other for the value of an item of property which turns out not to be a matrimonial asset. By the time of the separate action the s 112 proceedings may have completed and no adjustments may be possible to reflect the decision made in the third party's separate proceedings. If both spouses do not agree to Option 1 in this situation, then directions would have to be given regarding the taking of separate proceedings against the third party and Option 2 would come into play. We should add that Option 1 would not be viable if the disputed asset is the main or only substantial asset available for division.

58 The other situation is where the property is in the name of one of the spouses and the third party is a "shadowy" figure in the wings whom that spouse claims has an interest in the property but no order is sought by or against the third party directly. In such a case, because no order is sought by or against the third party, it is permissible for the court to make an order exercising its powers under s 112 because the only parties directly affected by the order will be the parting spouses. This, again, is an Option 1 course. The choice of Option 1 would have the same risks for the spouses as alluded to in [57] above. Thus, for instance, the spouse in whose name the property stands, having been ordered to share the value of the property with the other spouse, may later find he or she has to account to the third party for such value or to transfer the property outright to the third party. This is because the determination of the ownership of the disputed property in the s 112 proceedings will not bind the third party who may challenge it in separate proceedings. But that is the risk the spouse takes by not seeking an order that will bind the third party. Once such an order is sought, in our view, this would be the same situation as discussed in [56(b)] above and a separate set of proceedings would have to be issued.

59 The facts of the present case fell clearly within the situation described in [55] above. The intervener was asserting her rights to her property directly. She could not do so under s 112 for the reasons that we have already given. Accordingly, whilst the Judge was correct to have chosen Option 2, this was not a matter of discretion on her part. The family justice court in such a situation has no choice but to refer an intervener, like the mother here, to a civil court to determine the ownership of the property. In this case also, it was correct to stay the s 112 proceedings pending the outcome of the civil suit as the property concerned would be, if so determined, the major matrimonial asset. There may be other situations where the disputed property is a minor part of the matrimonial assets under consideration and, in such a case, the parties may decide that the disputed asset can be left out of the calculation and that they wish to proceed on that basis. That, however, would have to be a course that both parties accept voluntarily. Otherwise, a stay would have to be put in place.

60 The intervener cited a number of cases to support the proposition that the Family Division had the jurisdiction to determine third party claims to a matrimonial asset. Most of these cases in which the High Court (exercising its s 112 jurisdiction) dealt with property as a matrimonial asset despite the contention that a third party had an interest in such property, were cases in which the third party was "shadowy" and had not directly asserted a claim.

61 For example, in *Lau Loon Seng*, the court found that certain shares which ostensibly belonged to the husband's brother and the latter's wife were actually held in trust for the husband and therefore the shares were matrimonial assets. The husband was ordered to pay the wife 40% of the value of the shares. The husband complained that the District Judge had no jurisdiction to decide on the issue on the basis that the wife should have taken a separate application for a declaration of trust and it was wrong to make the decision without notice to the third party registered owners of the shares. On appeal to the High Court, this argument was rejected because the husband knew that the wife regarded those shares as matrimonial assets, he had addressed the issue in his affidavit and, essentially, the issue was confined to the division of the assets between the spouses and had no

direct effect on the legal ownership of the shares (at [11] of the judgment). In our view, the argument was correctly rejected: the husband had not chosen to join the third parties or to seek an order that would affect them. Instead, he was trying to prevent an order being made in favour of the wife against him. Whilst the decision meant that the husband had to share the value of his putative shares with the wife and was therefore exposed to the possibility that, in separate proceedings involving the third parties, it might be found that he had no beneficial interest in the shares at all, that result came from the way that the husband had chosen to run his case. It had always been open to him to start separate proceedings against the third parties to establish their beneficial ownership and his lack of an interest. If he had done so, he could have sought a stay of the s 112 proceedings pending the resolution of the other proceedings.

62 We next consider *Lam Siew Lan v Lian Tong Looi* [2000] SGDC 33. There, the husband originally had 280,000 shares in a company but divested 240,000 of these to his mistress ("Sussie") and his two illegitimate children by her. The District Judge stated at [48]:

Although the husband had divested himself of 240,000 shares in L & S, I query the timing of the disposition. The shares were transferred after the divorce proceedings commenced and to his minor children with Sussie and Sussie. He said that he transferred his shares to the children to provide for their future but I found this questionable. I therefore held that the husband still owned 280,000 shares in L & S, either legally or beneficially and ordered the wife to be given 20% of the value of the shares.

This order took effect as an order for the husband to pay the wife 20% of the value of the shares, rather than to transfer or sell the shares themselves. Once again, no order was made affecting the third party; the affected party was the husband and therefore the decision was within the ambit of the s 112 power.

63 Something similar happened in *Yeo Chong Lin*. The High Court had found that certain shares registered in the daughters' names actually belonged to the husband and ordered him to pay a percentage of the value of the shares to the wife. By the time the matter came on appeal, the daughters had started a separate suit to claim that the husband had no beneficial interest in the shares and this court therefore excluded the value of the shares from the matrimonial assets pending resolution of the daughters' suit. Another case which can be viewed from this perspective is *ARX v ARY* [2015] 2 SLR 1103 where the property was registered in the husband's mother's name but the court held that it could be treated as part of the pool of assets. Accordingly, its value was taken into account but no order was made against the mother.

64 We recognise, however, that there have been cases in which, unfortunately, the jurisdiction of a court hearing s 112 proceedings has been exceeded. Generally speaking, in such cases the parties have not objected on jurisdictional grounds to the court's determining the ownership of assets in which a third party had an interest. One such case was *ABX v ABY* (not to be confused with the similarly named case cited in [63] above). In this case, the main property in dispute was the flat which the husband and his mother had acquired as joint tenants. The mother was joined as the second defendant to the divorce proceedings. The court determined the respective interests of the husband and the mother in the flat and then ordered the husband and the mother to sell the flat and pay the wife a proportion of the husband's beneficial interest in the net sale proceeds. The court recognised that the mother's interest was not a matrimonial asset but took the view that under para 2 of the First Schedule to the SCJA, it had the power in any cause or matter relating to land to order the land to be sold. We respectfully disagree. The powers granted by para 2 of the First Schedule to the SCJA can only be used when the court's jurisdiction has been properly invoked. In this case, the jurisdiction that had been invoked was that granted by s 112 of the Charter and thus

the mother should not have been a defendant and no orders should have been made against her or her property pursuant to that jurisdiction.

65 To sum up, those cases where the High Court dealt under s 112 with the rights of the spouses and the third party where the third party was seeking a determination of his rights were wrongly decided for the reasons that the Judge and we have given. The Judge eschewed Option 3 as a lawful option. We entirely endorse her position.

Conclusion

66 The intervener emphasised the convenience and the savings in terms of costs and time that would be enabled if issues between spouses and third parties regarding property rights could be dealt with in the same set of proceedings. We recognised the appeal of such an approach but were unable to accede to it. The jurisdiction of our courts is governed by statute and we cannot arrogate jurisdiction to ourselves where the legislature has not conferred it.

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