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PRENUPTIAL AGREEMENT ON DIVISION OF MATRIMONIAL ASSETS SUBJECT TO COURT SCRUTINY

TQ v. TR and Another Appeal[1]

LEONG WAI KUM*

The Court of Appeal affirmed the legality of a prenuptial agreement on division of matrimonial assets and held that it is always subject to scrutiny under section 112 of the *Women's Charter*.[2] This note deals only with these principles.

I. THE CASE

A Dutch man and Swedish woman executed a prenuptial agreement in the Netherlands some sixteen years before it came to the courts in Singapore. The agreement was interpreted by the Court of Appeal to provide that there would be no division of matrimonial assets. The couple married in the Netherlands, lived in London for several years during which they had three children and from late 1997 came to Singapore when the husband started work here. The marriage deteriorated. The wife filed for divorce.

The High Court ordered the husband to continue to maintain his children fully even though they would be living with their mother. The husband was to further pay the wife $150,000 for her maintenance. There was no order of division of matrimonial assets.[3] Both parties appealed.

The Court of Appeal varied the orders to some extent. Of interest in this note, it approved of the decision not to make an order of division of matrimonial assets. Andrew Phang J.A. said:

> In agreement with the Judge, we made no order as to the division of matrimonial assets. … [W]e decided that, given the pivotal importance of the Agreement as a factor to be taken into account in the context of the division of matrimonial assets, each party could keep whatever assets he or she had brought into the marriage.

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* Professor, Faculty of Law, National University of Singapore.

1 [2009] 2 S.L.R. 961 [*TQ v. TR and Another Appeal*].

2 Cap 353, 1997 Rev. Ed. Sing [*Women's Charter*]. The statute was amended, in ways irrelevant to this discussion, by the Statutes (Miscellaneous Amendments) (No. 2) Act 42 of 2005; see Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2007) at 887-889.

3 See *TQ v. TR* [2007] 3 S.L.R. 719 noted by Debbie Ong Siew Ling, "Prenuptial Agreements and Foreign Matrimonial Agreements: *TQ v. TR*" (2007) 19 Sing. Ac. L.J. 397.

> In any event, we noted that the issue might be academic for the parties concerned simply because the Husband asserted that he had no assets, and the Wife was unable to adduce any substantive proof to the contrary.[4]

An applicant for an order of division of matrimonial assets is required to prove that there is property held by either or both spouse(s) that comes within the definition of 'matrimonial asset'.[5] This wife was unable to do so. The usual conclusion would have been a dismissal of her application for failure of proof. The Court of Appeal, however, opined that "given the public importance of the question of the enforceability of prenuptial agreements in general, we will discuss the issue in some detail".[6]

Many of its observations may, therefore, technically be *obiter dicta*. Even so, they are noteworthy.

II. Validity and Interpretation of Foreign Agreement by Choice of Law

The prenuptial agreement was formed in the Netherlands between a Dutch man and Swedish woman who married in the Netherlands and set up their matrimonial home in England. Among the 'final declarations' in the prenuptial agreement was: "The marital property regime in force between them shall be governed by Netherlands law". There was not one iota of connection with Singapore then.

A. *Proper Law of Contract Determines Validity in Formation of Agreement*

Of the formation of a foreign prenuptial agreement, Andrew Phang J.A. observed:

> The validity of a contract, including marital property agreements, is governed by its proper law.[7] The proper law is determined by (in order of descending priority): (a) the express choice of the parties; (b) the implied choice of the parties; and (c) in the absence of any express or implied choice of law, by ascertaining the system of law with which the agreement has the closest and most real connection, which is presumed to be the law of the matrimonial domicile unless rebutted.[8]

There was no explicit choice of law by the contracting parties but Andrew Phang J.A. read one clause "either as an express choice of law clause in favour of Dutch

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4 *TQ v. TR and Another Appeal*, *supra* note 1 at para. 28.

5 The *Women's Charter*, *supra* note 2, defines 'matrimonial asset' in s. 112(10); see also Leong, *supra* note 2 at 587-665. The writer has written of the sequence of decisions that must be made by the court in the applicant's favour for an order of division of matrimonial assets to ultimately be made; see Leong, *supra* note 2 at 559-562.

6 *TQ v. TR and Another Appeal*, *supra* note 1 at para. 28.

7 "(see Tan Yock Lin, *Conflicts Issues in Family and Succession Law* (Butterworths Asia, 1993) at p 275".

8 "(see *Dicey, Morris & Collins on The Conflict of Laws* (Sir Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) vol 2 at para 28R-030)." *TQ v. TR and Another Appeal*, *supra* note 1 at para. 32.

law, or as a clause supporting an implied choice of Dutch law".[9] It followed that the validity in formation of the agreement depended on compliance with Dutch law. On the evidence available, the Court of Appeal was content to find the formation of this agreement validly formed. The wife could not prove her bare assertions of its invalidity.

B. *Proper Law of Contract Determines Interpretation of Agreement*

Andrew Phang J.A. observed that, Dutch law being the proper law of the prenuptial agreement, "[the] validity, interpretation and effect of the Agreement are thus governed by that law".[10] In so observing his Honour followed the established view of conflict of laws' jurists of the reach of the proper law of an agreement.[11]

The Court of Appeal was, however, rather hampered by the lack of evidence of Dutch law. The agreement placed before it was "(translated from the Dutch)"[12] and there was a letter from a notary public who "stated that he had explained the Agreement to the parties in English, and had ensured that the parties understood its contents and implications"[13] before they executed it.

The Court of Appeal was content to observe:

> Dutch rules of construction were not placed in evidence before us, so we presume that those rules are similar to our own. The general effect of the Agreement was that the Dutch matrimonial property regime applied to the parties' proprietary relations with each other in accordance with the provisions in the "Final declarations", except in so far as the community of property doctrine did not apply, as stipulated by Art 1 of the Agreement.[14]

The prenuptial agreement was, thus, interpreted to provide that there shall be no division of matrimonial assets upon divorce.

This finding is perhaps somewhat less than robust. Perhaps there should have been greater attempt to present the Dutch rules of construction. It is well known that foreign law should be proven in the same way as any alleged fact. At the very least, the translator should have been proven to be fully competent to translate legal documents from Dutch into English. All translations risk some degree of misinterpretation. This is even more so of a legal document executed in a civil law country into English for use in a common law country. The Netherlands may differ starkly from Singapore in terms of the effect of marriage on one spouse's entitlement to property owned by the other.[15]

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9 *Ibid.* at para. 33.

10 *Ibid.* at para. 41.

11 See Ong, *supra* note 3 at 400 where the author suggests "[the] proper law governs the contract's validity, interpretation, effect and discharge", citing as support Collins *et al.*, *Dicey & Morris: The Conflict of Laws*, 13th ed. (London: Sweet & Maxwell, 2000) at para. 32-007.

12 *TQ v. TR and Another Appeal*, *supra* note 1 at para. 29.

13 *Ibid.* at para. 36.

14 *Ibid.* at para. 41.

15 See Leong, *supra* note 2 at 529-532 and the writer's earlier article, Leong Wai Kum, "Division of Matrimonial Assets: Recent Cases and Thoughts for Reform" [1993] Sing. J.L.S. 351 at 352-355.

There may be room to disagree with the chosen interpretation. The translated agreement provided:

> The persons appearing [before the civil law notary in Wassenaar] declared that they wished to provide for the proprietary effects of their intended marriage by the following: …
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> Article 1.
> There shall be no community of matrimonial assets whatsoever between the spouses.[16]

There was no reference to 'divorce' anywhere. Was it possible to read Article 1 as providing for something quite different, namely that during the subsistence of their marriage there shall be no community of property?

The use of the phrase 'matrimonial assets' instead of 'properties' in Article 1 is surely not conclusive. In a Dutch agreement 'matrimonial assets' may well be used interchangeably with 'properties'. In Singapore, on the other hand, we associate 'matrimonial assets' only with property upon the event of divorce. If Article 1 were interpreted to provide that there is no community of property during the course of marriage, its effect on the proper resolution of an application to our courts for an order of division of matrimonial assets is greatly reduced as it says nothing of this.

III. General Legal View of Prenuptial Agreement

Andrew Phang J.A. was in complete agreement with established law.[17]

A. *Legal Status of Prenuptial Agreement*

In the 1993 Court of Appeal case *Kwong Sin Hwa v. Lau Lee Yen*,[18] L.P. Thean J. decided:

> It is clear to us that not every pre-nuptial agreement regulating or even restricting the marital relations of the husband and wife is void and against public policy. Needless to say, much depends on the relevant circumstances and in particular, the nature of the agreement, the intention of the parties and the objective the agreement was designed to achieve. In our opinion, the law does not forbid the parties to the marriage to regulate their married lives and also the incidents of the marriage, as long as such agreement does not seek to enable them to negate the marriage or resile from the marriage as the *Brodie* pre-nuptial agreement did.[19]

Kwong Sin Hwa established that "an agreement made between spouses, or between intended spouses, is not 'inherently wrong"'.[20] It is not illegal or unlawful or against public policy or necessarily void and, in this context, it may be immaterial to distinguish between these invalidating states. The only prenuptial agreement that the law in Singapore forbids is one that would 'negate the marriage or resile from the

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16 *TQ v. TR and Another Appeal*, *supra* note 1 at para. 29.
17 *Ibid.* at para. 54.
18 [1993] 1 S.L.R. 457 [*Kwong Sin Hwa*].
19 *Ibid.* at para. 38.
20 Leong, *supra* note 2 at 96.

marriage'. The writer has observed:

> The threshold test of 'negate the marriage or resile from the marriage' is very strict. It would be the rare exception rather than the rule for an agreement to be found to fall foul of this threshold. As an illustration of a spouses' agreement falling foul of this high threshold to thus become an unlawful agreement, the Court of Appeal in *Kwong Sin Hwa v. Lau Lee Yen* cited the decision of the High Court in England in *Brodie v. Brodie*[21] where the spouses entered an agreement before they married which they affirmed after they married that they would never commence marital cohabitation as man and wife but rather continue to live separately as unmarried persons. It may be surmised that this kind of agreement must be most exceptional. L.P. Thean J. … observed of this decision thus:
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> > The *Brodie* pre-nuptial agreement was intended to enable the husband to resile from the marriage and evade his marital obligations altogether. That agreement, if implemented and enforced, would make a mockery of the law regulating marriages.[22]

It is the extreme nature of the *Brodie* agreement that must be noted. The man was pressured by the woman expecting his child to marry her. He agreed to do so but only on condition that he would always live apart from her as if they were unmarried and she would never compel him to do otherwise. It appeared that the fact they went through the formality of marriage satisfied the woman's family members with whom she would continue to live with her child.

This agreement made a mockery of marriage. Marriage was a complete farce. It is not expected that many such extreme agreements will be made. A prenuptial agreement on division of matrimonial assets is far from negating the marital condition.

B. *Kwong Sin Hwa Principle Applied to More Complex Situation*

On closer examination of the facts, however, the Court of Appeal in *TQ v. TR and Another Appeal* has applied the *Kwong Sin Hwa* rule to a far more complex situation. The prenuptial agreement dwelt on division of matrimonial assets and there is developed law on this in Singapore.

In *Kwong Sin Hwa* the prenuptial agreement was that they would not commence living with one another as husband and wife even after the solemnisation of marriage until the performance of the Chinese customary rites of marriage. There is no legal regulation of the specific time by which the spouses must consummate their marriage. The Court of Appeal, therefore, had no difficulty taking note of the agreement so that, the continuing failure of one of the parties to agree to undergo the Chinese rites of marriage, was good evidence of her 'wilful refusal' to consummate the marriage.

TQ v. TR and Another Appeal involves a prenuptial agreement that there shall be no division of matrimonial assets. The writer has said:

> A vast body of principles has been settled by the numerous decisions made under [the *Women's Charter* section 112 on division of matrimonial assets.] There is

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[21] [1917] P 271, [1916-17] All E.R. 237 [*Brodie*].

[22] Leong, *supra* note 2 at 97.

> much that is known of this marital obligation to share their mutual gains in just and equitable proportions. … This raises a potentially difficult question: how should the court strike the proper balance between respecting the spouses' autonomy and holding them to their marital obligations?[23]

An ancillary application for an order requires the court to balance respect for the prenuptial agreement and compliance with developed law on division of matrimonial assets.

IV. Effect of Prenuptial Agreement in Application for Order of Division of Matrimonial Assets

What effect achieves the right balance? Andrew Phang J.A. rightly noted the state of the law in section 112 of the *Women's Charter*.

A. *Women's Charter Section 112*

The Singapore Parliament enacted the forerunner of the current statutory power, namely section 106 the former *Women's Charter*, in 1980.[24] This was improved in 1996 to become section 112(1) of the current *Women's Charter*:

> The court shall have power, when granting … a judgment of divorce … to order the division between the parties of any matrimonial asset … in such proportions as the court thinks just and equitable.[25]

B. *"Whether to Exercise Its Powers under Subsection (1)"*

Section 112 of the *Women's Charter* in so empowering the court, provides in its subsection (2) thus:

> It shall be the duty of the court in deciding whether to exercise its powers under subsection (1) and, if so, in what manner, to have regard to all the circumstances of the case, including the following matters: …
> (e) any agreement between the parties with respect to the ownership and division of matrimonial assets made in contemplation of divorce ….

The broad discretion cannot possibly be clearer.

The courts have always, however, exercised their discretion judicially. On a proper application to them, they have furnished sound reasons if no order is the right conclusion to the application. The writer has suggested:

> [T]he judicial discretion needs to be exercised with the defining principles [in the law of division of matrimonial assets][26] in mind, in particular, that it is only by

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23 *Ibid.* at 102.

24 The then *Women's Charter* (Cap. 47, 1970 Rev. Ed. Sing.), s. 106, was introduced vide its *Amendment Act* 26 of 1980 effective 1 June 1981.

25 For brief discussion of the 1996 amendment vide *Women's Charter (Amendment) Act* 30 of 1996, see Leong, *supra* note 2 at 529-539.

26 See *Koo Shirley v. Mok Kong Chua Kenneth* [1989] S.L.R. 342, elaborated in Leong, *supra* note 2 at 539-555.

> exercising the power that the court gives a spouse due credit for the non-financial contribution that this spouse made during marriage. It comes as no surprise, therefore, that there are very few reports of applications that were dismissed by the court.[27]

It may be that a court should decline to exercise the power only where the parties have already made an agreement to comprehensively re-arrange their financial affairs including dividing the matrimonial assets in fair proportions.[28] Indeed, by the modern practice "where the court adjudges the spouses to have made an agreement where the division of matrimonial assets between them is reasonable in the circumstances, the court incorporates these terms into its order [of division of matrimonial assets]",[29] an order of court is even more likely than before. In *Tan Siew Eng v. Ng Meng Hin*, even though the marital agreement had been mutually repudiated, Woo Bih Li J. decided to make his order of division of their matrimonial assets following the substantive terms of their repudiated agreement as these terms would, in his Honour's judgment, achieve the 'just and equitable' proportions of division.[30]

Given these decisions, Andrew Phang J.A. rightly did not dwell on this point. If his Honour was to decide not to make an order for division of matrimonial assets, it would not be purely due to his unbridled discretion.

C. *"Any Agreement … Made in Contemplation of Divorce"*

Despite the reference in section 112(2)(e) of *Women's Charter* to an agreement "made in contemplation of divorce", Andrew Phang J.A. chose to lay emphasis on the phrase "any agreement" as naturally including all postnuptial agreements. Despite this, his Honour had no difficulty choosing to read the provision more broadly thus:

> [The phrase] would presumably encompass both prenuptial as well as postnuptial agreements. Further, the very nature of a prenuptial agreement relates to what would happen on termination of the marriage and therefore constitutes an 'agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce …[31]

It may be possible to disagree with his Honour. A prenuptial agreement is just as likely, if not more so, to provide for what should happen during the course of the marriage as what should happen upon divorce. Further, it could be that marital agreements can rationally be separated by its relationship with the condition of the marriage into:

(i) Prenuptial;
(ii) Agreement made during marriage;
(iii) Agreement made upon separation; and
(iv) Agreement made in contemplation of divorce.

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27 Leong, *supra* note 2 at 556.

28 *Wong Kam Fong Anne v. Ang Ann Liang* [1993] 2 S.L.R. 192 [*Wong Kam Fong Anne*] and *Lee Leh Hua v. Yip Kok Leong* [1999] 3 S.L.R. 506; Leong, *supra* note 2 at 556.

29 Leong, *supra* note 2 at 558.

30 [2003] 3 S.L.R. 474 [*Tan Siew Eng*].

31 *TQ v. TR and Another Appeal*, *supra* note 1 at para. 73.

Section 112(2)(e) specifically includes one group of agreements only. This necessitates some discussion of whether the other groups may also be included on a purposive reading.

Nothing turns, however, on this disagreement. The provision simply directs a court on how to discharge its duties when hearing an application for an order of division of matrimonial assets. It is submitted that optimal statutory interpretation would read the reference to 'any agreement' as widely as possible.

V. Substantive Term in Prenuptial Agreement as One Factor Towards 'Just and Equitable' Division

The ultimate issue thus became: assuming the prenuptial was valid and subsisting, how should the court allow it to influence its resolution of the application for an order of division of matrimonial assets?

A. *Basic Premises*

Andrew Phang J.A. settled some basic premises. The prenuptial agreement does not reduce the broad discretion in the court under section 112(1) of the *Women's Charter*. No agreement, prenuptial or postnuptial, and howsoever it may be worded, will ever be allowed to oust the jurisdiction of the courts in Singapore. The court's power is intact.

There is no room for the application of ideas from a foreign legal system. An ancillary application for an order of division of matrimonial assets is governed by the *lex fori*. Parties cannot, by private contract, require the court to apply any other than the *lex fori* although the spouses here had not attempted this.

Andrew Phang J.A. noted that the High Court in England recently endorsed this as well.[32] The relevant parts of Baron J.'s judgment in *NG v. KR (Pre-nuptial contract)* are worth quoting:

> In the field of family law England is a *lex fori* country. This is a central pillar of our system of private international law and Mr Mostyn QC pointed to me *Dicey and Morris* (14th Edition) at Paragraph 18-207 where it is stated
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> > "It has never been doubted that the court, when making an order for financial provision under the [UK] Matrimonial Causes Act 1973 … always applies its own law, irrespective of the domicile of the parties. Thus where a divorce is granted by an English Court in a case in which the parties are domiciled in Scotland one party cannot be heard to say that the order proposed to be made by the English court is more generous to the other party than any order which the Court of Session would be likely to make."
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> I accept that is an accurate statement of Law.[33]

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[32] *TQ v. TR and Another Appeal*, *supra* note 1 at para. 42

[33] [2008] E.W.H.C. 1532 (Fam) at para. 87, [2009] 1 F.C.R. 35.

B. *No Enforcement of Agreement in and of Itself*

Andrew Phang J.A. reiterated an important working principle thus:

> If, as we have concluded, s 112(2)(e) covers prenuptial agreements as well, then it is clear that the courts are to consider, as part of all the circumstances of the case, the prenuptial agreement in arriving at a just and equitable division of the matrimonial assets that are available for distribution between the parties. However, it is pertinent to note that it follows that the prenuptial agreement cannot be enforced, in and of itself. It bears repeating that its terms constitute one of the factors that the court should take into account in arriving at its decision as to the proportions in which the matrimonial assets concerned are to be distributed.[34]

The impact of the above statement was, however, somewhat qualified when his Honour continued:

> [N]otwithstanding the fact that a prenuptial agreement cannot be enforced in and of itself, much will depend, in the final analysis, on the precise terms of that agreement as viewed in the context of all the relevant circumstances as a whole … . To this end, it might well be the case that a prenuptial agreement is, given the circumstances as a whole, considered to be so crucial that it is, in effect, enforced in its entirety. However it is important to reiterate that everything will depend upon the precise circumstances before the court.[35]

The writer has said before that for an agreement to practically determine the outcome of the application for an order of division of matrimonial assets, the agreement should possess the qualities of being comprehensive in re-organising the financial arrangements between the former spouses and it should bring about a re-organisation that is fair between them. Even so, the court still has two options regarding its decision on the application:

> Where the agreement is intended by the spouses as a comprehensive financial arrangement so that there are no longer any residual financial issues between them, and of the division of matrimonial assets, the agreement achieves what the court considers to be a 'just and equitable' division of the spouses' matrimonial assets, the courts have demonstrated that they may pursue either of two options:
> (1) the court could dismiss the application for an order for division of matrimonial assets that had been made before it to leave the parties to their comprehensive and fair settlement of the issue; or alternatively
> (2) the court could proceed with hearing the application and in the end would then probably incorporate the terms of the marital agreement into its order of division of matrimonial assets.[36]

Were the prenuptial agreement not comprehensive the court would still need to make its own order over the matters that have not been settled. Were it not fair, the court would readily substitute its own order.

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[34] *TQ v. TR and Another Appeal*, *supra* note 1 at para. 77.

[35] *Ibid.* at para. 80.

[36] See Leong, *supra* note 2 at 779. In the latter option, the court order may either be a consent order or a usual court order upon making its decision.

There have been Singapore cases as well as fairly recent English decisions that demonstrate that the substance of the agreement is just one factor for the court's consideration.

C. *Singapore Decisions According Effect to Substantive Term in Agreement*

Wee Ah Lian v. Teo Siak Weng[37] merits close study. The spouses were legally advised in drawing up their agreement that would comprehensively re-arrange their finances upon their imminent divorce. The Court of Appeal decided that the agreement was subject to the court's broad discretion to order the just and equitable division of matrimonial assets. Karthigesu J. decided thus:

> We must still decide whether in the exercise of our discretion under s 106 of the Women's Charter (Cap 353)[38] we ought to uphold the settlement. … In our view, it is incumbent on the court to see that these provisions of the section are not violated when ordering a division of matrimonial assets following the granting of a decree of divorce, and the same would apply where the court's intervention is sought notwithstanding that the parties may have reached an agreement before seeking the court's intervention. … Were we to uphold the settlement, we would apprehend that we would not be transgressing either s 106(2) or s 106(4).[39]

In this early report, the Court of Appeal had emphasised its power to achieve a fair division of matrimonial assets. It was only when the Court of Appeal found the agreement to achieve a fair division that it upheld it.

Andrew Phang J.A. referred to two decisions of the High Court[40] where the court was faced also with agreements made in contemplation of divorce between spouses who appeared financially sophisticated. These agreements were found both to be comprehensive and to arrange for fair division of matrimonial assets and maintenance, respectively, upon divorce.[41] Only then did the High Court dismiss the applications for ancillary financial orders to leave the spouses to what they had agreed.

In 2003 the High Court in *Tan Siew Eng*,[42] instead of not making the ancillary financial order applied for, chose to make the order applied for and simply incorporated the substantive terms of the marital agreement into its order. Woo Bih Li J. had found that the comprehensive agreement made in contemplation of divorce after extensive negotiations between the spouses had been mutually repudiated. Despite this his Honour "was of the view that the terms in the Settlement Agreement were just and equitable and made an order following the terms of the Settlement Agreement … ."[43]

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37 [1992] 1 S.L.R. 688 [*Wee Ah Lian*].

38 See *supra* notes 24 and 25.

39 *Wee Ah Lian*, *supra* note 37 at 698-B, 698-D, and 699-B.

40 *Wong Kam Fong Anne*, *supra* note 28 and *Chia Hock Hua v. Chong Choo Je* [1995] 1 S.L.R. 380.

41 *TQ v. TR and Another Appeal*, *supra* note 1 at paras. 64 and 74.

42 *Supra* note 30.

43 *Ibid.* at para. 43. The fact his Honour felt able to use the agreement in making his order despite the agreement having ceased to exist is dramatic and can be welcomed or criticised. The writer welcomes the decision and regards it to reflect a new view that agreements between spouses should never be enforced

There have, therefore, already been decisions at both the Court of Appeal and High Court levels where our courts have considered agreements that spouses made in resolving an application for a financial order either of division of matrimonial assets or of the provision of maintenance to the former wife. Where the court has found the substantive terms of the agreement to be fair enough in compliance with the law, the courts have demonstrated that there are two options open to them. The older cases have dismissed the application to leave the spouses to what they agreed to. In the more recent case the court simply made the order and incorporated the substantive term from the marital agreement and this, most dramatically, despite the agreement itself having terminated by the spouses' mutual repudiation thereof.[44]

The difference between the agreements in these Singapore decisions and *TQ v. TR and Another Appeal* is that the former were all postnuptial agreements (indeed they were all made in contemplation of divorce) while the latter was a prenuptial agreement. Apart from the fact that an agreement made in contemplation of divorce is specifically mentioned as a proper factor for consideration of what constitutes 'just and equitable' division of the matrimonial assets in section 112(2)(e) of the *Women's Charter*, there is also the obvious time difference. Agreements made in contemplation of divorce are much closer in time to the ancillary application for an order of division of matrimonial assets while the prenuptial could have been many years ago. The 'freshness' of the agreement will suggest that the spouses had a better sense of each one's financial condition and needs as well as their financial and non-financial contributions during the course of their marriage. It is not unreasonable to think that the agreement in contemplation of divorce will better reflect what might be the 'just and equitable' division rather than an agreement made much longer before.

TQ v. TR and Another Appeal in deciding that some consideration should also be accorded to the prenuptial agreement thus takes an established principle one step further. Whether the Court of Appeal extending consideration to a prenuptial agreement made sixteen years ago will encourage more persons to enter prenuptial agreements on division of matrimonial assets remains to be seen. It ought not escape attention that the prenuptial agreement here was foreign and the parties were Dutch and Swedish. It should also be remembered that technically the decision of the Court of Appeal was *obiter dictum* as there was no finding made that there were matrimonial assets available for division.

D. *English Decisions According Effect to Agreements*

Andrew Phang J.A. referred to two recent English decisions and one from the Judicial Committee of the Privy Council on appeal from the Isle of Man. Of *NG v. KR*, his

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by court but its substantive terms accepted to reflect their will at the time the agreement was made. It follows that, where the court finds the spouses' will to also be largely consistent with the statutory directive as to what kind of order the court should aim for, the court may make its order following the substantive term. On the contrary where one is more wed to contractual norms, it may be thought that terms from a repudiated agreement should no longer be given as much consideration as his Honour did. Andrew Phang J.A. is closer to the latter view although he did not criticise Woo Bih Li J.'s decision and instead observed that it "can be viewed as a specific application of this residuary discretion in what was … a much less egregious situation", *TQ v. TR and Another Appeal*, *supra* note 1 at para. 100.

[44] See point made *ibid.* regarding whether substantive terms in a repudiated agreement should be given as much consideration.

Honour quoted Baron J. approvingly thus:

> However, it is important to reiterate that everything will depend upon the precise circumstances before the court. In this regard, the comments of Baron J in *NG v. KR* ought to be noted:
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> > [O]ver the years, Judges have become increasingly minded to look to the precise terms of agreements and will seek to implement their terms provided the circumstances reveal that the agreement is fair. …
> >
> > Upon divorce, when a party is seeking quantification of a claim for financial relief, it is the Court that determines the result after applying [the 1973 UK Act]. The Court grants the award and formulates the order with the parties' agreement being but one factor in the process and perhaps, in the right case, it being the most compelling factor.[45]

His Honour also cited with approval the Court of Appeal in England's recent decision to give primacy to the prenuptial agreement before it in *Crossley v. Crossley*.[46] The facts were fairly unusual. The parties were already advanced in age when they become engaged to be married. Each was independently wealthy. The 62-year-old man had £45m while the 50-year-old woman had £18m. They were separately represented in negotiations that lead to their prenuptial agreement in which they agreed that, upon divorce, each would walk away with whatever he or she brought into the marriage. The agreement was also fairly 'fresh' as the spouses did not stay married for longer than a year. While the appeal mainly centred over the lower court's 'case management approach', Andrew Phang J.A.'s interest was in the primacy accorded to this prenuptial agreement thus:

> The Court of Appeal dismissed the wife's appeal. Thorpe LJ was clear beyond peradventure about the critical importance of the prenuptial agreement in the context of the facts before him; in his words (*Crossley* at [15]):
>
> > All these cases are fact dependent and this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the court will look to the prenuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case.[47]

There was also the Privy Council decision in *MacLeod v. MacLeod*[48] where the spouses made a prenuptial agreement on financial rearrangements upon divorce and a postnuptial agreement which affirmed the prenuptial albeit with important variations. The Privy Council approved of the significance accorded to the marital agreement particularly the postnuptial agreement.

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45 *TQ v. TR and Another Appeal*, *supra* note 1 at para. 80.
46 *Ibid.* at paras. 81-85 citing [2008] 1 F.L.R. 1467.
47 *Ibid.* at paras. 83 and 84.
48 [2008] U.K.P.C. 64.

E. *Each Case is Decision on Facts and Unique Circumstances*

Andrew Phang J.A. repeatedly observed that every decision is made on its own set of facts and circumstances so that the ultimate result reached may hold less precedential value than the principles subscribed to. Of the instant case, his Honour reminded:

> In the circumstances, it would, in our view, be neither just nor equitable for the Wife to now ask the court to allow her to evade her responsibilities under the Agreement. … [T]o hold otherwise may encourage forum shopping by those who wish to avoid the enforceability of their respective prenuptial agreements in their home countries. Further, the Wife's argument centring on the length of time since the making of the Agreement cannot be, in and of itself, a reason for disregarding it … . As (if not more) importantly … the Husband asserted that he had no assets, and the Wife was unable to adduce any substantive proof to the contrary. … [E]ach case will obviously depend on its own facts and it would therefore be inappropriate to draw any general principles from the actual decision in the present appeal … .[49]

The Court of Appeal's approval of the High Court's decision not to make an order of division of matrimonial assets should be appreciated as the inevitable result of the finding that the applicant-wife had not been able to prove that there was any property that could be made the subject of an order of division of matrimonial assets. In this sense, as important as *TQ v. TR and Another Appeal* is, it is not likely the last word on whether the existence of a prenuptial agreement not to divide matrimonial assets upon divorce will lead the court to so order.

VI. Applicable Legal Principles

The legal principles applicable to a prenuptial marital agreement have been clarified.

A. *Prenuptial Agreement not Inherently Unlawful or Against Public Policy*

TQ v. TR and Another Appeal affirmed that there is nothing inherently unlawful or against public policy when two persons enter a prenuptial agreement on their financial re-arrangements upon divorce. Such a prenuptial agreement is no different from the one in *Kwong Sin Hwa* where the agreement was to defer cohabitation until a precondition was fulfilled.

The Court of Appeal has thus twice decided that a prenuptial agreement is no different from a postnuptial agreement or one made in contemplation of divorce. None of them is inherently unlawful or against public policy. The test of whether any agreement is unlawful or against public policy is: does the agreement attempt to 'resile from the marriage or negate the marriage'? The test is intentionally set very high. Few marital agreements will be found unlawful by this test. There is no reason why the spouses, as fully competent adults, ought not to be allowed to choose how to live their lives.

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[49] *TQ v. TR and Another Appeal*, *supra* note 1 at paras. 109 and 110.

B. *Agreement to Comply with Requirements of Common Law of Contract*

TQ v. TR and Another Appeal affirmed that for agreement to receive consideration by court it must comply with the requirements of law of contract thus:

> It is our view that prenuptial agreements ought generally to comply with the various legal doctrines and requirements that are an integral part of the common law of contract. … The various common law doctrines and requirements … are too numerous to set out here (let alone to recount in any detail). They may be found in any standard contract textbook. … The prenuptial agreement in question must obviously have been validly formed in the first place in accordance with the general rules and principles relating to offer and acceptance (and see the decision of this court in *Wee Ah Lian*[50]). … At the other end of the contractual spectrum are to be found the various vitiating factors. These include standard contractual doctrines such as misrepresentation, mistake, undue influence, duress, unconscionability, as well as illegality and public policy … [including] the possibility of 'saving' that part of the prenuptial agreement that is objectionable via the doctrine of severance … . There has also been mention of the safeguard relating to the availability of independent legal advice …[51]

A wholly local prenuptial agreement will be assessed as to its validity in formation on principles of the law of contract in Singapore. Where there are significant foreign elements, choice of law rules on the contractual issues become activated and some or all of these issues may be determined according to the proper law of the agreement.

Andrew Phang J.A. had this reminder:

> Before prenuptial agreements can be considered by the court, they must generally comply with the various legal doctrines and requirements that are part of the common law of contract. … The court also retains a residuary discretion, in limited circumstances, to give some weight to a prenuptial agreement that does not comply with one or more of the legal doctrines and requirements under the common law of contract.[52]

His Honour noted the High Court decision in *Tan Siew Eng*[53] was not wholly consistent with this requirement. Andrew Phang J.A. did not criticise the decision but noted, on the contrary, that there is room for a degree of variation from the norm thus:

> [H]aving regard to the fact that the court is not dealing with commercial contracts as such, we are of the view that the court does retain a residuary discretion, even in a situation where the prenuptial agreement concerned does not comply with one or more of the legal doctrines and requirements under the common law of contract, to give some weight to that agreement …. However, we envisage that the exercise of such residuary discretion will, by its very nature, occur only in very limited circumstances. … Looked at in this light … the decision in *Tan Siew*

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50 *Supra* note 37.

51 *TQ v. TR and Another Appeal*, *supra* note 1 at paras. 94-97. The writer has questioned the need for such adherence to contractual principles; see *infra* note 55.

52 *Ibid.* at para. 105.

53 *Tan Siew Eng*, *supra* note 30.

> *Eng* can be viewed as a specific application of this residuary discretion in what was … a much less egregious situation.[54]

Where circumstances justify, therefore, it is possible to overlook contractual deficiencies in an agreement while giving consideration to its substantive terms.[55]

C. *Prenuptial Agreement Subject to Scrutiny by Court*

TQ v. TR and Another Appeal established, as a core principle, that a prenuptial agreement is always subject to scrutiny by courts. This principle should encourage everyone to ensure that the agreement can stand up to such scrutiny so ultimately its substantive terms mirror the ideas of fairness and justice within the laws of division of matrimonial assets and maintenance upon divorce. His Honour concluded his judgment by repeating:

> [P]renuptial agreements are subject to the close scrutiny of the court …
>
> In so far as prenuptial agreements relating to the division of matrimonial assets are concerned, the governing provision is s 112 of the Act. In particular, the ultimate power resides in the court to order the division of matrimonial assets 'in such proportions as the court thinks just and equitable'. …
>
> [T]he common tenet that runs through all the above prenuptial agreements is that they are ultimately subject to the scrutiny of the courts. …[56]

The principle, then, respects spouses' autonomy but subordinates this to the achievement of just and equitable division of matrimonial assets and/or fair and reasonable maintenance upon their divorce.

VII. Conclusion

The ultimate result in *TQ v. TR and Another Appeal* may be less useful than the observations of law made therein. We await a case where spouses made a prenuptial agreement not to divide matrimonial assets where there is property available against which an order of division of matrimonial assets can bite. *TQ v. TR and Another Appeal* also involved a foreign prenuptial agreement between non-Singaporeans. We await a purely Singaporean case, involving a prenuptial marital agreement executed in Singapore between two Singaporean parties, to see how these principles will apply.

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54 *TQ v. TR and Another Appeal*, *supra* note 1 at para. 100.

55 If so, then why not bypass the contractual issues to directly assess whether the substantive term provides for 'just and equitable' division? The writer has suggested this: see Leong Wai Kum, *Principles of Family Law in Singapore* (Singapore: Butterworths, 1997) at 755-756 and Leong, *supra* note 2 at 111-112. Andrew Phang J.A. acknowledged the suggestion "has much force", *ibid*. at para. 99, but decided nevertheless to adopt the conservative approach towards marital agreements.

56 *Supra* note 1 at paras. 103 and 104.