PRE-NUPTIAL AGREEMENTS IN MALAYSIA

Foo Yet Ngo·

I. The Meaning of 'Pre-Nuptial Agreements' in Malaysia

For the purposes of this article, we shall take a 'Pre-Nuptial Agreement' to mean a written contract made between parties prior to their marriage concerning primarily *the distribution of their assets* should the marriage fail for some reason; that is, the understanding of a Pre-Nuptial Agreement in English law at this time. The law governing marriage and divorce in Malaysia is contained primarily in a statute known as the Law Reform (Marriage and Divorce) Act 1976 (Act 164)[1] The statute, provides for the importation of English principles when deciding matrimonial cases in the Malaysian Courts.[2] When there are no express provisions in the LRA 1976, English law currently prevailing on a matter may be imported and applied in the Malaysian Courts to resolve the situation, subject to Malaysian common law and statutory provisions on divorce in the LRA 1976.

In the Malaysian Court of Appeal case of Ching Seng Woah v Lim Shook Lin[3], the court held that:

…whilst S 47 refers to English principles we should always keep in the forefront of our minds that when the Act [i.e the LRA] was first initiated we were

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[1] [hereafter "LRA 1976"]

[2] Section 47 LRA 1976 specifically provides:

"Subject to the provisions contained in this Part ['Part VI-Divorce'], the court shall in all suits and proceedings hereunder act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings." [emphasis added]

breaking new ground. It was then necessary to look to English case law because we had adopted much of the wording of the corresponding English statute. In the two decades which have since passed, we have injected enough local experience into the application of the provisions of Pt VI of the Act to become acutely aware that the differences between social and cultural aspirations with regard to marriage, divorce and welfare in England and Malaysia are such that much caution is called for before we adopt modern English attitudes. The measures we should take today to preserve the integrity of the Malaysian family when it is threatened by the calamity of divorce must be determined in the light of the Malaysian conditions. At best therefore the English reports should only be regarded as being of persuasive value or as case studies why the family as unit is progressively disintegrating in that country*..."*

II. The current English Position on Pre-Nuptial Agreements

Although the English Courts have traditionally not been receptive to Pre-Nuptial Agreements[4] this judicial view has changed somewhat dramatically in recent years, as illustrated by the two important cases. In *M v M (Pre-nuptial Agreement)*[5] it was held by Connell J that "…the Court should look at any such agreement and decide in the particular circumstances what weight should, in justice, be attached to it…The public policy objection to such agreements, namely that they tend to diminish the importance of the marriage contract, seem to me to be of less importance now that divorce is so commonplace*."*]Connell J then went on to conclude significantly that *"…*The marriage was fairly short. The prenuptial agreement in my view is relevant as tending to guide the court to a more modest award than might have been made without it. I reject outright the suggestion that it should dictate the wife's entitlement; but I bear it in mind nevertheless**.**"

In *K v K*[6] an even more decisive decision, the wife was awarded a lump sum of 120,000 pounds in accordance with the Pre-Nuptial Agreement entered into between the parties, despite the fact that the husband had assets of at least 25

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[3] [1997] 1 MLJ 109:-
[4] See e.g. of *F v F (Ancillary Relief: Substantial Assets) (1995) 2 F.L.R. 45* and *N v N (Jurisdiction: Pre-Nuptial Agreement) (1999) 2 FLR 745*),
[5] *(2002) 1 FLR 654*,
[6] *(2003) 1 FLR 120,*

million pounds. Roger Hayward Smith QC, sitting as a Deputy High Court Judge in the Family Division having categorically stated that:

> *"*Are there any grounds for concluding that an injustice would be done by holding the parties to the terms of the agreement? My answer is no; not insofar as capital for the wife is concerned**.** On the contrary, I think that injustice would be done to the husband if I ignored the agreement insofar as capital for the wife is concerned…Is the agreement one of the circumstances of the case to be considered under S.25 [of the English Matrimonial Causes Act 1973]?Yes. Does the entry into this agreement constitute conduct which it would be inequitable to disregard under S.25(2)(g)? Yes.

From the above, it is apparent that the current English legal position towards Pre-Nuptial is a permissive and receptive one in certain circumstances.

The provisions under which the English Courts have received Pre-nuptial Agreements have been in the exercise of its powers under Section 25 of the English Matrimonial Causes Act 1973[7] which sets out specifically matters which the Court shall take into account in making a financial provision order.[8], Such statutory provisions are not present in the Malaysian LRA 1976.

In *K v K* when considering the validity of a Pre-Nuptial Agreement under *Section 25* of the *MCA '73*, the court in *K vK* had distilled from various English authorities that courts, when considering whether the agreement is binding or influential, must have particular regard to the following:(a)whether the parties were properly advised as to its terms;(b)whether the parties signed the agreement willingly, without pressure;(c)whether there was full disclosure regarding assets;(d)whether either party exploited his or her dominant financial position;(e) the length of the marriage;(f)the contributions of a party to the marriage to the other party's wealth;(g)whether there were unforeseen circumstances arising since the agreement which would make it unjust to hold the parties to it?

[7] [hereafter "MCA '73**"**]**,**

III. The Malaysian Position on Pre-Nuptial Agreements

Because under Section 47, the English position would apply subject to the provisions in the *LRA 76 (Part VI-Divorce)*, the relevant provisions in the LRA 1976 regarding the division of matrimonial assets must be considered.

Although Malaysian Courts have yet to deal with Pre-Nuptial Agreements specifically, they have dealt with a number of other agreements pertaining to matrimonial proceedings, namely Deeds of Separation and Maintenance Agreements entered into after the marriage had already commenced (hereafter 'Post-Nuptial Agreements'). We believe some principles laid down in Malaysian judicial decisions concerning Post-Nuptial Agreements would be of assistance in determining some of the considerations the Malaysian courts would bear in mind when confronted with a Pre-Nuptial Agreement. For this reason, and for the sake of completeness, the following Article will be considering Malaysian judicial decisions regarding Post-Nuptial Agreements whenever relevant.

A. The Court's Power to Divide Matrimonial Assets

The specific provision in the Malaysian statute governing the Court's power to divide matrimonial assets when granting a decree of divorce or judicial separation is *Section 76 of the LRA*.

1. Matrimonial Assets

'Matrimonial assets' under *Section 76 of the LRA 1976* are not only restricted to those assets acquired by the parties "during the marriage" but also include "assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts."

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[8] In particular Section 25(2)(g) of the MCA '73.

Based on the aforementioned definition of matrimonial assets, judges have categorically ruled that properties that are gifted before marriage would not constitute matrimonial assets. Further, property that has been gifted to a spouse by a third party during the marriage has been , not to form a part of the matrimonial assets. In *N(F) v C* [9], the Judge held that:

> The undivided ½ share of the property derived from the respondent's deceased mother which was transmitted to the respondent in 1986 is not subject to division. It falls outside the confines of S 76(1) of the Act (the *LRA 1976*). It is not an asset acquired by the petitioner and the respondent by their joint effort in the form of money, property or work towards its acquisition. It was a gift by the respondent's deceased mother to her son. On this, I am in agreement with the textbook authors that a gift even acquired during the marriage to only one spouse should be excluded…"

In the exercise of the Court's powers when dividing matrimonial assets, S.76 LRA 1976 differentiates between 2 types of assets, assets acquired by joint efforts[10], and

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[9] *[*1997] 3 MLJ 855

[10] [S.76(1) & (2) LRA] provides:

> *(1)* The Court shall have the power, when granting a decree of divorce or judicial separation, to order the division between the parties of the assets acquired by them [i.e. the parties to the marriage] during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.
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> (2) In exercising the power conferred by subsection (1) the court shall have regard to –
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> (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

assets acquired by the sole effort of one of the parties[11]*:* Due to the express provisions in Section 76 LRA 1976, any Pre-Nuptial Agreement would not act to automatically supersede the court's jurisdiction in dividing matrimonial assets.

Indeed, in accordance with English principles as aforementioned, such agreements would only be evidence of the intention of the parties of the marriage in relation to the division of matrimonial assets should the marriage fail.

However, in considering whether the English principles are to be applied to Prenuptial Agreements, we must bear in mind the distinction between English law and Malaysian law, namely that Malaysian law does not contain the specific list of

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(b) any debts owing by either party which were contracted for their joint benefit;

(c) the needs of the minor children, if any, of the marriage,

and subject to those considerations, the court shall incline towards equality of division.

[11] *[S.76(4) LRA]* provide*s:*

Where assets are acquired during the marriage by the sole effort of one party to the marriage, the Court shall have regard to-

4…(a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;

(b) the needs of the minor children, if any, or the marriage;

and subject to these considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.]

factors set out in Section 25 of the English Matrimonial Causes Act 1973 allowing for the reception of prenuptial agreements.

A Prenuptial Agreement was considered by the Court in *K v K* as one of the circumstances under *Section 25* of the *MCA '73*, namely entry into the agreement constituted "conduct which it would be inequitable to disregard under S 25 (2)(g)" of the MCA 1973. In contrast, in Malaysia, save for the considerations set out in our Section 76 LRA '76, we do not have any of the specific provisions set out in Section 25 of the English MCA '73, especially Section 25(2)(g), to facilitate the reception of prenuptial agreements in Malaysia. Hence, where the factors set out in Section 76 LRA exist at the time of divorce, the prenuptial agreement will, in our view, not be considered.

However, where a marriage is of a relatively short duration, a prenuptial agreement may have some chance of being considered, particularly where most of the wealth in the family was brought into the marriage by one spouse. In such a case, the prenuptial agreement may be produced in the court as evidence of the intentions of the parties, especially where there is considerable wealth brought into the marriage by the other spouse.

B. The Court's retention of powers over maintenance agreements

The Malaysian Courts retain substantial power over the approval of agreements for payment in settlement of future claims for maintenance. Under Section 80 LRA 1976 which provides:

> An agreement for the payment, in money or other property, of a capital sum in settlement of all future claims to maintenance, shall not be effective until it has *been* approved, or approved subject to conditions, by the court, but when so approved shall be a good defence to any claim for maintenance

Further, Section 84 LRA 1976 provides that "subject to section 80, the court may at any time and from time to time vary agreements as to maintenance made between husband and wife… where it is satisfied that there has been any material change in

the circumstances and notwithstanding any provision to the contrary in any such agreement." [emphasis added]

Lastly, in relation to children, Section 97 LRA 1976 provides, "the court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child… notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and for the welfare or the child so to do."

C. Referral of all Agreements to the Court

Apart from the above, there is express provision in Malaysian statute for any agreement made between the parties to a marriage that relates to, arises out of, or is connected with divorce proceedings, to be referred to the Court for their opinion on the reasonableness of such an Agreement.[12]

A Deed of Separation was referred to the Court for consideration under this section in the Malaysian case of *Lim Thian Kiat v Teresa Haesook Lim Nee Teresa Haesook Dean & Anor*[13]

In that case, the Deed of Separation dealt with matters of maintenance, custody of the child, and matrimonial assets. The Court reached the opinion that:the provisions

[12] S.56 LRA 1976 provides**:**

"Provisions may be made by rules of court for enabling the parties to a marriage, or either of them, on application made either before or after the presentation of a petition for divorce, to refer to the court any agreement or arrangement made or proposed to be made between them, being an agreement or arrangement which relates to, arises out of, or is connected with, the proceedings for divorce which are contemplated or…have begun, and for enabling the court to express an opinion, should it think it desirable to do so, as to the reasonableness of the agreement or arrangement and to give directions, if any, in the matter as it thinks fit*."*

in the Deed concerning the maintenance of the Respondent and the children were held to be subject to the Court's approval being obtained under Section 80 LRA 1976 aforesaid before they shall become effective. Further that the LRA 1976 has specific provisions granting the Court power to vary any agreement entered into between the parties in respect of maintenance, notwithstanding any provision to the contrary in any such agreement under Section 84 LRA 1976 *"*where it is satisfied that there has been any material change in the circumstances." Under Section 97 LRA 1976, the Court similarly has the power to vary any agreement relating to the custody or maintenance of a child *"*where it is satisfied that it is reasonable and for the welfare of the child so to do."

> However, the Judge expressed the view that there are no provisions in the LRA1976 requiring that the Court's approval be sought for any agreement in relation to the division of matrimonial assets to become effective, as had been specifically provided for in relation to agreements regarding maintenance.The Judge said, "Neither under this section (S.76) nor pursuant to any other general sections of the Act is prerogative granted to the Court to vary such agreement or arrangement in respect of division of matrimonial assets*."*

The Court has the power under Section 56 LRA 1976 on the application of either party to a marriage which may be made before or after the presentation of a petition for divorce, to refer to the Court an agreement to enable the Court to express an opinion as to the reasonableness of the agreement and to give such directions if any, in the matter as it thinks fit.

In exercising its powers under Section 56 of the LRA 1976, the Judge in the *Lim Thian Kiat* case upheld the Deed of Separation as a perfectly valid agreement between the parties, as the terms were arrived at voluntarily and with the advantage of the wife possessing adequate legal advice.

In holding that the wife be bound by Clause 2(iii) of the Deed and accept US$500,000-00 as *"*full and final settlement of all her claims of matrimonial assets

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[13] [1997] 5 CLJ 358.

against the husband… in the event of a divorce", the High Court Judge applied the principles enunciated by Omrod LJ in the English decision in *Edgar v Edgar*[14]

> "To decide what weight should be given, in order to reach a just result, to a prior agreement…regard must be had to the conduct of both parties leading up to the prior agreement, and to their subsequent conduct in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of the agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue."

Section 56 LRA 1976 was in *pari materia* with [the then] Section 7 of the United Kingdom's Matrimonial Causes Act 1973.

The difference between a deed of separation and a prenuptial agreement is of course, that the deed of separation would have been entered into by the parties after the breakdown of the marriage and parties would have appraised and weighed their respective positions at the time of the breakdown, whereas a prenuptial agreement by its very nature is entered into prior to any legal relationship having begun.

However as seen in the *Lim Thian Kiat* any agreement, including a prenuptial agreement, may be referred to the Court. The principles which the Court will apply in

[14] (1980) 2 All ER 887 at 893:

considering an agreement would be subject to the distinctions the court will eventually draw between pre-nuptial and post-nuptial agreements.

D. ***Contracting Out of Statute or the Court's Jurisdiction***

In spite of the aforementioned principles it is axiomatic that the parties to a marriage cannot contract out of statutory provisions, and a clause in a Pre-Nuptial Agreement attempting to so contract out of Malaysian law would be void as being bad in law.

Indeed, case-law is very clear that any attempt made by parties to contract out of statutory provisions or the Court's jurisdiction would not be tolerated.[15]

Conclusion

In conclusion, whilst English authorities may be of persuasive effect in Malaysia, it is our view that Malaysian courts will be slow to accept prenuptial agreements in their entirety. Indeed, the Malaysian Courts' first duty would be to apply the *Malaysian* provisions regarding maintenance and matrimonial assets as set out above.. Significantly, the Malaysian provisions on the division of matrimonial assets, and more particularly the definition of a matrimonial asset and the considerations involved in dividing such, differ from the English provisions on the same. This would militate against the Malaysian adoption of English principles concerning Pre-Nuptial Agreements. Lastly, a Prenuptial Agreement would impinge on the Asian philosophy or attitude as regards the sanctity of marriage.

Notwithstanding the above, and despite the prevailing Asian attitude in favour of the institution of marriage, it is our view that the Malaysian Courts, if faced with a very short marriage involving an extreme amount of wealth, may be persuaded to consider a Pre-Nuptial Agreement to assist in arriving at a fair determination of the intention of the parties to the marriage with regards to the matrimonial assets.

[15] *See e.g.* Tan Kai Mee v Lim Soei Jin [1981] 1 MLJ 271).