

Case Note

CLARITY IN THE LAW OF VALID, VOID AND VOIDABLE NON-MUSLIM MARRIAGES

*Tan Ah Thee (administrators of the estate of Tan Kiam Poh
(alias Tan Gna Chua), deceased) v Lim Soo Foong*
[2009] SGHC 101

The High Court has decided that the provisions in the Women's Charter regulating the solemnisation of marriages are clear as to whether the resulting marriage is completely valid, completely void or voidable and as to the actions the two parties and strangers are entitled to take in any event. The decision is noteworthy.

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I. Introduction

1 The area of family law that demands clarity more than other areas is regulation of the solemnisation of marriage. No one should be left in any doubt as to whether he or she has become validly married. Having complied with the critical statutory requirements of solemnisation, no stranger should be able successfully to allege that there remains a problem that taints the validity of the marriage. It is somewhat worrying that so many fundamental principles needed to be clarified by the High Court, on appeal, in this application by strangers to the marriage under the Women's Charter¹ for a declaration of its invalidity.

II. The case

2 Tan Kiam Poh, deceased by the time of the application, married Mdm Koh with whom he had six children, which marriage was apparently loving until it was ended by Mdm Koh's death in 1994. The plaintiffs are two of these children. It was during their mother's wake

1 Cap 353, 1997 Rev Ed amended, in ways irrelevant to this discussion, by the Statutes (Miscellaneous Amendments) (No 2) (Act 42 of 2005).

that it was revealed that the deceased had previously had an extra-marital relationship with the defendant who gave birth to their son.

3 The defendant and son re-established their relationship with the deceased. They moved in to live with him. They systematically controlled him and his property and gradually shut the plaintiffs and siblings out.

4 The plaintiffs alleged that on 11 March 1996 the defendant, with the help of a lawyer, caused a marriage to be solemnised between herself and the deceased. He was then 81 years old, wheel-chair bound and suffering from Parkinson's Disease. On or about 5 January 2000, the defendant's son caused the deceased to execute a will which made provision for the defendant and himself to the total exclusion of the plaintiffs and siblings. The deceased died on 25 July 2000 at the age of 85.

5 The plaintiffs commenced proceedings for, *inter alia*, a declaration that the will executed around 5 January 2000 was invalid. The High Court made this declaration and ordered that the deceased's estate should, instead, be distributed according to the provisions of the Intestate Succession Act,² by s 7, r 2 of which the defendant (as the surviving widow) would succeed to one-half of the estate. The plaintiffs applied for and were granted Letters of Administration on 17 January 2008.

6 The present action was begun by the plaintiffs praying for the following reliefs:

- (a) A declaration that there was no valid and subsisting marriage between the deceased and the defendant; and
- (b) Further and/or in the alternative, a declaration that the marriage between the deceased and the defendant is null and void.

7 The plaintiff's statement of claim alleged three bases for the declaration of invalidity of marriage: (a) the marriage was voidable under s 106(a) of the Women's Charter as it was never consummated; (b) the marriage was void because it was procured by the actual or presumed undue influence of the defendant over the deceased and (c) the marriage ought to be found void for being a sham marriage against public policy as the defendant's sole or predominant motive in registering the marriage was to revoke the deceased's will.

2 Cap 146, 1985 Rev Ed.

8 The defendant applied to strike out the plaintiffs' writ of summons and statement of claim on the basis that the statement of claim disclosed no reasonable cause of action.³

9 The assistant registrar heard both parties. She struck out the claim of the marriage being voidable for non-consummation as she was of the view that only the parties to the voidable marriage may seek to avoid it. She, however, refused to strike out the other two bases for the claim that the marriage was void. Both parties appealed. The plaintiffs appealed against the first part of the assistant registrar's decision while the defendant sought to strike out the whole of the plaintiffs' action.

10 Judith Prakash J, in the appeal to the High Court, dismissed the plaintiffs' appeal and allowed the defendant's. The result was that the plaintiffs' statement of claim was struck out and their claim that their deceased father's marriage with the defendant was null and void was dismissed with costs. None of the three bases they alleged constituted a reasonable basis for the marriage to be declared null and void. Their father did leave the defendant his widow and she would, under the law of intestate succession, succeed to half of his estate. Mdm Koh's children thus won about half of their court adventures. They earlier succeeded in invalidating their father's will that would have shut them out completely but they did not now succeed in invalidating his marriage. That meant their father left a lawful surviving widow, who would take half his estate, and a surviving legitimated son,⁴ who (by s 7, r 3 of the Intestate Succession Act) would share the other half of the estate with them as the deceased's lawful children by his deceased first lawful wife.

11 This note discusses Judith Prakash J's decisions on the law of solemnisation of marriage. There are few decisions on this vital area within the family law in Singapore so the learned judge's is worthy of note. Indeed, the learned judge clarified several fundamental principles.

III. Women's Charter a code on solemnisation of non-Muslim marriages in Singapore

12 Judith Prakash J began her judgment with a broad pronouncement that has been repeated as the theme of her decisions, thus:⁵

3 *Je*, under the Rules of Court (Cap 322, R5, 2006 Rev Ed) O 18 r 19(1)(a).

4 Assuming the defendant's son, born out of the extra-marital affair she carried on with the deceased when he was married to Mdm Koh, was not legitimate at birth, he would have become legitimated upon his parents lawfully marrying vide the Legitimacy Act (Cap 162, 1985 Rev Ed) s 3.

5 [2009] SGHC 101 at [19].

In my judgment, the Charter provides a complete code on the law applicable to marriages in Singapore apart only from Muslim marriages which have their own separate regime. Accordingly, the status of any non-Muslim marriage that has been celebrated in Singapore has to be judged solely in accordance with the provisions of the Charter and there is no room for the court to apply any other standard. This is clear from the history of matrimonial legislation in Singapore and from the way in which the Charter itself has developed. In this connection, the preamble to the Charter is relevant. It declares that the purposes of this legislation are, among other things, 'to provide for monogamous marriages and for the solemnization and registration of such marriages' and 'to amend and consolidate the law relating to divorce'. Thus, the intention was to cover every aspect of a monogamous marriage solemnized in Singapore.

13 It is submitted that, not only is the learned judge correct in her pronouncement for reasons discussed below, it rightly puts into question a previous decision of the High Court in 1992 which suggested that there was also a personal Hindu marriage law in Singapore.

A. Unitary monogamous marriage law for non-Muslim Singaporeans

14 Judith Prakash J made reference to the process of enactment and the declaration of purpose within the long title to the Women's Charter to support her view that it is a code of marriage law for all non-Muslim Singaporeans. The author has traced the development of family law in Singapore from the creation of our legal system by the celebrated Second Charter of Justice 1826 to the 1959 review of the unsatisfactory state of having separate marriage laws for each ethnic and religious sector of the population that led to the Legislative Assembly enacting the Women's Charter.⁶ She has described the historical process as "to abolish the marriage laws existing then and substitute them with the unitary monogamous marriage law [that] was, essentially, taken from the Civil Marriage Ordinance".⁷ In elaboration she observed:⁸

The Women's Charter now regulates all non-Muslim persons in Singapore in the formation of marriage and the relationship between spouses. It also regulates all persons, non-Muslim and Muslim alike, in the relationship between parents and children and the economic

6 See Leong Wai Kum, *Principles of Family Law in Singapore* (Singapore: Butterworths, 1997) at pp 20–44. The original Women's Charter was Ordinance 18 of 1961, Laws of the State of Singapore.

7 See Leong Wai Kum, *Principles of Family Law in Singapore* (Singapore: Butterworths, 1997) at p 39. The Civil Marriage Ordinance was Cap 38, 1955 Ed of the Laws of the Colony of Singapore.

8 See Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2007) at p 889.

relationship of members in a subsisting marriage. The Women's Charter is supplemented by other statutes that regulate aspects of parent-child relationship. In regulating all aspects of marriage and family life of non-Muslim persons and some aspects of family life of Muslim persons in Singapore, the Women's Charter is the primary family statute in Singapore.

B. Scope of application of law of solemnisation of marriage in Women's Charter

15 Apart from the long title that Judith Prakash J cited, one may also take note of s 3 that expressly proclaims the reach of the Women's Charter over all persons in Singapore except for selected provisions within it that do not apply to persons who are Muslim or who have married under Muslim law thus:

(1) Except as otherwise provided, this Act shall apply to all persons in Singapore and shall also apply to all persons domiciled in Singapore.

(2) Parts II to VI [on solemnization of marriage] and Part X [on termination of marriage and ancillary applications] and sections 181 [deemed registration of marriage] and 182 [voluntary registration of marriage] shall not apply to any person who is married under, or to any marriage solemnized or registered under, the provisions of the Muslim law or of any written law in Singapore or Malaysia providing for the registration of Muslim marriages.

16 Of the import of these provisions, the author has observed:⁹

The non-Muslim family law [centred in the Women's Charter] is generally applicable to all persons in Singapore. Only those who are entitled to the privilege of being regulated by Muslim law are, in those areas where there is differentiated Muslim law, exempted from regulation by the non-Muslim law.

17 There are at least two implications of the Women's Charter being a code of solemnisation of non-Muslim marriages in Singapore. Judith Prakash J relied on the first as the reason for one of her decisions.

IV. Void marriage: Grounds in s 105 are exhaustive

18 One of the plaintiffs' arguments was that, if they could satisfy the court that their father had not given valid consent to his marriage with the defendant, the effect of this (apart from being a cause rendering the marriage voidable under s 106(c) of the Women's

⁹ See Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2007) at 878.

Charter) could further constitute a basis on which a court can declare the solemnisation null and void under s 105. The same cause, *ie*, lack of valid consent to marry, can both make the marriage void as well as voidable. The argument also meant that, despite s 105 expressly providing “[a] marriage ... shall be void on the following grounds only [where failure of valid consent is not listed]”, the provision is not exhaustive.

19 The plaintiffs’ claimed support by an academic opinion offered in a fairly old book¹⁰ written before the latest reform of the Women’s Charter in 1996.¹¹ The suggestion was that the opening words of the provision at the time of the book¹² were exhaustive only when the application was from either spouse seeking a judgment of nullity. The opening words did not necessarily require the provision to be exhaustive where the application, as in the instant case, was from strangers seeking merely a bare declaration of the invalidity of the particular marriage. It is trite that where a marriage is invalid in formation and therefore void *ab initio*, this conclusion is so whether or not the parties take any action to obtain a judgment of nullity from a court to declare the invalidity. It follows that an interested stranger to the marriage should be allowed to apply to a court for a bare declaration of the invalidity of the marriage. Where there is either an application from the parties to the marriage for a judgment of nullity or an application from a stranger for a bare declaration of invalidity of marriage,¹³ it is s 105 of the Women’s Charter that provides the grounds of invalidity of marriage.

20 Judith Prakash J rejected the argument and academic suggestion. The learned judge repeated the point that the Women’s Charter is a complete code on solemnisation of non-Muslim marriages in Singapore and a marriage celebrated between the plaintiffs’ father and the defendant could not be declared void under s 105 on any ground that is not listed in it.

21 It is submitted that the learned judge is correct in that s 105 must be read as it was written. It is crucial that there be certainty as to when a solemnisation of marriage is successful or, in the alternative, is a nullity. The premise is that only failure of compliance with, first, the

10 Tan Cheng Han, *Matrimonial Law in Singapore* (Singapore: Butterworths Asia, 1994) at pp 57–58.

11 Vide Act 30 of 1996 wef 1 May 1997 that, *inter alia*, improved s 105 to its current state.

12 *Ie*, the former s 99 of the Women’s Charter (Cap 353, 1985 Rev Ed) that started as well with the words “shall be void on the following grounds only”.

13 As to why the parties to the marriage should be required to seek a judgment of nullity rather than a bare declaration of invalidity of marriage, see Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2007) at pp 51–53.

statutory requirements of the process of solemnisation,¹⁴ or second, the statutory requirements of the parties possessing capacity to marry,¹⁵ renders the solemnisation invalid. Where two people have complied with the statutory requirements of the process of solemnisation and possess capacity to marry one another, they have a valid marriage. It cannot possibly be right that someone can allege, using a ground other than these, that it is nevertheless invalid.

22 While the plaintiffs did try to use two cases¹⁶ cited in that academic suggestion, it is submitted that they do not support the suggestion. Technically, in both cases, the courts did reach decisions that the solemnisations were invalid on grounds that were not listed in the then version of s 105. It must be noted, however, that the grounds used were nevertheless culled directly from the substantive statutory requirements of solemnisation.¹⁷ It was one of the deficiencies of the former version of s 105 that it did not include every statutory requirement of solemnisation of marriage that has since been rectified by the latest reform exercise.¹⁸ The cases must be appreciated to have simply drawn from the substantive statutory requirements of the parties' capacity to marry each other. It is disingenuous to use the cases to suggest that some ground or reason not directly within the statutory requirements of solemnisation (*ie*, not of s 22(1) of the process or ss 3(4), 5, 9, 10 and 12 of capacity to marry) can further be added to the list in s 105. The factor the plaintiffs were trying to use, namely, the failure of valid consent, is not among the requirements of s 22(1) nor capacity to marry.

A. *No personal Hindu marriage law in 1992*

23 Judith Prakash J's view of the Women's Charter as a code of solemnisation of non-Muslim marriage in Singapore provides reason to reconsider the decision in *Soniya Chataram Aswani v Haresh Jaikishin Buxani*.¹⁹

14 See the Women's Charter (Cap 353, 1997 Rev Ed) s 22(1) as reflected in s 105(a) discussed in Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2007) at pp 3–15.

15 See the Women's Charter (Cap 353, 1997 Rev Ed) ss 3(4), 5, 9, 10, 12 as reflected in s 105(a) discussed in Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2007) at pp 15 and 25–37.

16 *Lim Ying v Hiok Kian Ming Eric* [1992] 1 SLR 184; *Valberg Kevin Christopher v Heran bte Abdul Rahman* (OS No 1274 of 1990).

17 *Ie*, the requirement that parties be respectively male and female (that can be culled from several other provisions on solemnisation) and the requirement in s 3(4) that two Muslims cannot marry under the Women's Charter (Cap 353, 1997 Rev Ed).

18 Act 30 of 1996 wef 1 May 1997, substituted with the current s 105 that includes these two requirements.

19 [1995] 3 SLR 627 as discussed in Leong Wai Kum, "Solemnization of marriage: Conceptualisation and Statutory Interpretation" (1995) Sing JLS 283.

24 The parties were Hindus of the Sindhi community. In a solemn ceremony conducted by the official priest of the Sindhi Merchant's Association of Singapore before family and friends in a temple in Singapore in 1992, the parties thought they had solemnised a marriage. They cohabited as man and wife for some 22 months. It then became clear to them that their solemnisation was invalid for failing to comply with both of the requirements of the process of solemnisation in s 22(1) of the Women's Charter. Their solemnisation had not been authorised by the issue of a marriage licence and their priest was not a licensed marriage official. The female party applied for a judgment of nullity and, quite rightly, cited as ground s 105(a) of the Women's Charter, in particular its inclusion of s 22(1). The High Court dismissed her application for want of jurisdiction. Some of the reasons have since become irrelevant with the substitution of the former provision by the current s 93 of the Women's Charter.²⁰

25 Of continuing relevance are these words of G P Selvam J:²¹

At the hearing, the president of the Sindhi Merchant's Association, claiming to be an expert on Hindu law as applied to Singapore Sindhis, [testified that it] recognized only monogamous marriage. I rejected him as an expert on Hindu law. He had no qualification to be an expert on Hindu law. His knowledge is confined to the practice of a particular section of a community in Singapore and not Hindu law as such. Every Hindu marriage as such is potentially polygamous.

That apart the real obstacle to jurisdiction was not whether the personal law of the [female party] was monogamous but whether any such marriage was permitted in Singapore. [His Honour then found that the marriage in question was not permitted.]

26 While these words are not entirely clear, it may be fair to suggest that his Honour regarded the female party whom he had found to be a "Singapore citizen domiciled in Singapore" nevertheless to have recourse to a "personal law" of solemnisation of marriage in Singapore in 1992. His Honour suggested that she had thereby solemnised a Hindu marriage that was of the character of being "potentially polygamous".

27 The author has criticised these suggestions.²² Suffice it to note here that Judith Prakash J's view of the Women's Charter being a code of solemnisation of non-Muslim marriage in Singapore supports one

20 Although the author has suggested that, even on the state of the law of the court's matrimonial jurisdiction at the time, the court's decision is suspect; see Leong Wai Kum, "Solemnization of marriage: Conceptualisation and Statutory Interpretation" (1995) Sing JLS 283 at 288–290.

21 [1995] 3 SLR 627 at 629[D] and [E].

22 See Leong Wai Kum, "Solemnization of marriage: Conceptualisation and Statutory Interpretation" (1995) Sing JLS 283.

reason offered by the author why G P Selvam J's suggestion can be disagreed with. The author said of G P Selvam J's suggestion:²³

Ever since the enactment of the Women's Charter in 1961 there is only one marriage law applying to all non-Muslims in Singapore. The reason for the enactment of the Women's Charter was to create one non-Muslim marriage law in Singapore in place of the various marriage laws then. If there were a non-Muslim marriage formed by way of the Sindhi Hindu ceremony in 1992 it had to be a marriage under the Women's Charter. It cannot, possibly, be any other marriage. It bears remembering that the Women's Charter has always, even today, permitted the solemnization to follow the dictates of the Hindu, or any other, religion practised in Singapore. Section [23], in particular, allows the marriage official to choose to have the 'marriage solemnized ... according to such form and ceremony as ... the person solemnizing the marriage sees fit to adopt.' The ceremony itself being one in accordance with the Hindu religion does not make the solemnization any less one under the Women's Charter.

V. Valid marriage licence: Not affected by cause rendering marriage voidable

28 Judith Prakash J has also helpfully settled the proper breadth of the adjective "valid" describing the licence that authorises the solemnisation of marriage. This is a crucial point. The Women's Charter in s 22(1) provides:

Every marriage solemnized in Singapore shall be void unless it is solemnized (a) on the authority of a valid marriage licence issued by the Registrar ...

29 Of the lack of clarity, the author has said:²⁴

It is by no means absolutely clear what factors enter into the determination of whether a licence is 'valid'.

Two obvious determinants of the validity of the document arise from the statutory provisions permitting its issuance. One, the issuing authority must be that allowed by law; for the marriage licence this is the Registrar of Marriages²⁵ ... Two, each remains valid only for a limited duration of time; for the marriage licence this is three months from the date of notice of intention to marry²⁶ ...

Are there any other factors that reflect on the validity of the licence? In particular, does failure to comply with any of the other legal

23 See Leong Wai Kum, "Solemnization of marriage: Conceptualisation and Statutory Interpretation" (1995) Sing JLS 283 at 295.

24 See Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2007) at pp 8.

25 See the Women's Charter (Cap 353, 1997 Rev Ed) s 17(1).

26 See the Women's Charter (Cap 353, 1997 Rev Ed) s 18.

prescriptions of solemnization or failure of capacity on the part of either party to marry the other affect its validity?

[footnotes added]

A. **Lim Ying v Hiok Kian Ming Eric**

30 K S Rajah J in the High Court in *Lim Ying v Hiok Kian Ming Eric*²⁷ suggested that the answers to the two questions posed immediately above are both “yes”. In particular, because Lim Ying may not have given valid consent to marriage since she did not know that Eric Hiok was a transsexual when she gave such consent, this not only provided her with a cause that rendered their marriage voidable under s 106(c) of the Women’s Charter, it further had the effect of rendering the marriage licence they obtained no longer valid and they were therefore in breach of s 22(1) of the Women’s Charter. In other words, a fact that gives cause for a marriage being voidable can further be cause for the marriage licence not being valid, so that the solemnisation fails to comply with s 22(1). Just as the plaintiffs in the present application, K S Rajah J suggested that it is possible for a cause of the marriage being voidable to further cause the same marriage to be void *ab initio*.

31 The author has criticised this suggestion of K S Rajah J and Judith Prakash J has observed in similar vein. K S Rajah J’s suggestion may be more clearly analysed in two steps. The learned judge has thus further clarified these two aspects of the law of solemnisation of non-Muslim marriage in Singapore.

B. ***An operative mistake that vitiates consent to marry must be understood narrowly***

32 The argument of the failure of consent whether in contract (leading to the agreement being less than completely valid) or in tort (leading to an act that would have been authorised no longer being so) is an involved and tricky suggestion. At some risk of generalisation, it may be suggested that across both areas of law, the argument has come to be understood in fairly constrained ways. Permitting this argument, that is always made on hindsight, to readily succeed will cause upheaval to assumed obligations or in rendering acts to lose the authorisation that was believed to precede it.

33 In solemnisation of marriage the same is true. The law cannot too readily allow persons to claim that the apparent consent they gave to

27 [1992] 1 SLR 184 discussed at length in Leong Wai Kum, “Reform of the law of nullity in the Women’s Charter” (1992) Sing JLS 1, and of this particular point at 20–21.

marry the other person, on hindsight, was not valid or was tainted. There is no doubt that there is room for the argument but it must be kept within a tight rein. If not, there is danger that too many marriages will be found to have been solemnised with less than full consent to marry. While the failure of consent can be due to any reason, including an operative mistake, the author has observed:²⁸

Mistake is only operative where it completely undermines the consent to becoming married. It is not good enough if the mistake merely reduces the consent by a degree.

The courts have established that there can only be two mistakes that would undermine consent to marry completely. A mistake that destroys the plaintiff's comprehension of the nature of marriage as committing to the other party in marriage vitiates consent to marry. Similarly a mistake of the totality of the person of the other party also suffices.

34 Even if it were believed that Lim Ying did not know of Eric Hiok being a transsexual when she apparently gave consent to marry, this falls far short of mistake "of the totality of the person" that vitiates consent to marry. She is no more aggrieved than the rest of us who are bound to find out something or other of the person we married after the solemnisation of the marriage that, on reflection, causes us to pause to consider whether we really would want to marry him or her.

35 Judith Prakash J would agree with this analysis. The learned judge decided:²⁹

First, it is not at all clear that a lack of knowledge of the other party having been a transsexual and having gone through a sex change operation will amount to a lack of valid consent to the marriage. When two persons decide to get married, it is not inconceivable that they may be mistaken or unaware of some aspect of the other party's life or identity. This does not mean that they did not consent to marrying each other.

C. *Failure of consent does not invalidate marriage licence*

36 The second step in K S Rajah J's reasoning in *Lim Ying v Hiok Kian Ming Eric* is that, if Lim Ying did not give valid consent to marry Eric Hiok so that there is cause for rendering their marriage voidable, this further means that the marriage licence they obtained is not "valid" as required by s 22(1) of the Women's Charter. The marriage licence

28 See Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2007) at pp 70.

29 [2009] SGHC 101 at [51].

being invalid would then mean there was failure to comply with s 22(1) and thus form a ground for the solemnisation being void under s 105.

37 Judith Prakash J quoted the author's disagreement with this reasoning thus:³⁰

I agree with the position taken [by the author] as follows:

Even if Lim Ying's consent to marry Eric Hiok were undermined because she did not know of his medical or sexual condition, the failure of consent is, by the Women's Charter section 106, a ground only for granting a judgment that the marriage is 'voidable'. The marriage is not void in the way that marrying with a less than valid marriage licence would be. It is weak to use a ground that renders the marriage voidable as one factor that reflects on the validity of a licence. This will unnecessarily confuse the law that regulates the issue of the marriage licence with that of when a solemnized marriage is nevertheless voidable. The areas ought to be kept separate.³¹ The licence and the resulting solemnization can and should be regarded as valid even where a ground for annulment of the marriage as being voidable can be proven.

Not keeping these two areas separate fails to maintain a rational process of the solemnization of marriages. Persons who have duly obtained a marriage licence from the Registrar or a special marriage licence from the Minister and who solemnize their marriage within the licence's period of validity can still be left in doubt as to whether the licence was valid. They are entitled to be left with no doubt about this. They did obtain proper authorisation by their valid licence and they have thereby complied with the first critical prescription of solemnization. Whether their marriage is voidable for cause is a separate consideration and ought not to enter into the matter of obtaining valid authorisation for the solemnization.

38 With this, Judith Prakash J has settled an outstanding issue regarding the proper way to read s 22(1) of the Women's Charter. Only two factors reflect on the validity of a marriage licence.³² Nothing from the causes of a marriage being voidable, whether failure of valid consent or otherwise, undermines the validity of the licence obtained from the proper issuing authority and used within its period of validity.

30 [2009] SGHC 101 at [51].

31 See Leong Wai Kum, "Reform of the law of nullity in the Women's Charter" (1992) Sing JLS 1 at 20–21.

32 See Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2007) at pp 8–9.

VI. Laws of void marriage and voidable marriage are distinct

39 Judith Prakash J had to remind the plaintiffs of the fundamental principle that the laws of void and voidable marriage are distinct and must be kept separate. It would be wrong and chaotic if one can possibly use a ground from one of these distinct areas of law to lead to the effect within the other. As obvious as this should have been, the learned judge had to remind thus:³³

The ground of non-consummation is a ground for a voidable marriage under s 106 of the Charter and it is not a ground for finding a marriage void under s 105 thereof ...

The court, pursuant to its declaratory jurisdiction, may declare that a marriage was void *ab initio* on one of the grounds provided for in s 105 of the Charter. The declaratory jurisdiction ... does not extend so far as to allow the court to declare a voidable marriage prospectively void since, by doing so, the court would be altering the status of the marriage and altering a right rather than simply re-stating it.

Accordingly, in the present case which invokes the declaratory rather than the matrimonial jurisdiction, the court has no power to grant the plaintiffs' application for the voidable marriage between the deceased and the defendant to be made prospectively void.

VII. Voidable marriage: Improper motive must be related with failure of consent

40 Judith Prakash J also clarified the position on the plaintiffs' allegation that the defendant having an improper motive to marry their father rendered the marriage a "sham marriage" and that this is basis for the court to declare the marriage null and void. Repeating her core pronouncement that the Women's Charter is a code for solemnisation of non-Muslim marriages in Singapore, the learned judge decided that any argument that the solemnisation is null and void would only succeed if it is related to s 105 that exhaustively lays down all the grounds. Until this is achieved, it serves the plaintiffs' case naught to attribute all manner of impropriety to the defendant.

41 The learned judge also had to remind the plaintiffs that an argument relating to motive can have relevance upon the validity of solemnisation only where the improper motive leads to the failure of valid consent to marry so that the marriage is voidable. Improper motive can have no relevance within the law of void marriage. The learned judge recalled the decision of the House of Lords in *Vervaeke (formerly Messina) v Smith*³⁴ that "as horrible and sordid" as the

33 [2009] SGHC 101 at [23], [26] and [27].

34 [1983] AC 145.

marriage involved was to civilised folk “there is no room for mental reservations or private arrangements ... once it is established that parties are free to marry one another, have consented to the achievement of the married state and observed the necessary formalities”³⁵.

VIII. Voidable marriage: Only accessible by parties to the marriage

42 Judith Prakash J lastly clarified that the law of voidable marriage only applies as between the married persons. Only the husband or the wife in such a marriage can apply to court under s 104 of the Women’s Charter to prove one of the causes that render their marriage voidable under s 106 of the Women’s Charter in order to obtain a judgment of nullity. Upon so proving, by s 110(2) of the Women’s Charter, their marriage is declared void from the date of the award of the judgment. By this view of the law of voidable marriage, the plaintiffs had no reasonable cause of action. As strangers to the marriage, the plaintiffs were not entitled to try to prove that a voidable cause existed of their father’s marriage with the defendant. The cause was limited to the use only by their father and the defendant. It was thus irrelevant to their application whether their father’s marriage had been consummated and, if it had not, why not.

43 The learned Judge clarified that, not only is the law of void marriage distinctly different in substance from the law of voidable marriage, the laws are accessible to distinctly different groups of people. The former is accessible to both the two parties to the void marriage and to any stranger who can prove an interest in establishing that it was invalid. The latter is of concern only to the two parties to the voidable marriage and accordingly only accessible by them. Two reasons may be offered for the difference.

A. *Law of void marriage an intrinsic part of the law of solemnisation of marriage*

44 The law of solemnisation of marriage would not be complete if there were no sanctions for its breach. The most serious sanction is that the result is a void marriage, *ie*, a union that lacks legal validity. It will not be possible to ensure due compliance with the statutory requirements of the law of solemnisation if not for this most serious sanction for breach.

45 In contrast, the law of voidable marriage can be abolished without undermining the law of solemnisation. Indeed, the author has

35 [1983] AC 145 at 152.

suggested that the law may be more rational were this unwieldy concept³⁶ of a voidable marriage abolished.³⁷

B. Optional whether to act on voidable cause

46 The law of void marriage is not optional. Parties to the marriage suffer this most serious sanction for non-compliance with the most critical statutory requirements of solemnisation of marriage. Indeed, parties need not take any step for this sanction to kick in. Their marriage is void from the time they attempt their solemnisation and remains so forever. This also explains why an interested stranger is able to apply for a bare declaration of invalidity of an attempted solemnisation.

47 In contrast, the causes of a marriage being voidable are, by law, optional to the two parties. If they choose to act on the cause and do so within the limitations of time and other considerations under the law, they can “terminate” their marriage by the judgment of nullity declaring their solemnisation void from the date of the judgment. If they choose not to so act on the cause, their solemnisation continues as valid. This also explains why no stranger, however interested he may be, is allowed to apply to court to prove a marriage is voidable.

IX. Conclusion

48 By this decision, Judith Prakash J has helpfully clarified some aspects of the law of formation of marriage under the Women’s Charter and affirmed the fundamental principles. The learned judge’s decisions may be summarised, at some risk of being tautologous, as follows:

- (a) The Women’s Charter is a code of the law of solemnisation of non-Muslim marriages in Singapore.
- (b) The laws of void marriage and voidable marriage are distinct and must be kept separate.
- (c) Section 105 is exhaustive of the grounds that cause the solemnisation of a non-Muslim marriage to be null and void.
- (d) It follows that s 105 is also exhaustive of the bases for a bare declaration that a solemnisation of non-Muslim marriage is null and void.

36 See Leong Wai Kum, *Principles of Family Law in Singapore* (Singapore: Butterworths, 1997) at pp 325–329.

37 See, for example, Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2007) at p 59.

(e) Where s 105 is not proven, the solemnisation is perfectly valid.

(f) The proper reading of s 22(1) requiring the licence granted to authorise the solemnisation of a non-Muslim marriage to be valid does not include an argument from the law of voidable marriage.

(g) The law of voidable marriage is only accessible by the parties to the marriage.

(h) It follows that a stranger to the marriage, however interested, cannot use a ground within the law of voidable marriage as basis for a declaration that the solemnisation of a non-Muslim marriage is null and void.

49 The law ought to be clear. It is unacceptable that two people who have solemnised a marriage in compliance with the critical requirements of the statute should be left in any doubt as to whether they have a valid marriage. Keeping the fundamental principles that Judith Prakash J had occasion to affirm in mind will maintain clarity within the law of formation of non-Muslim marriage in Singapore. There is less chance of confusing what is required for a valid marriage from what makes it a void marriage and what causes it to be voidable at the parties' option.
