Cost Engineers (SEA) Pte Ltd and another *v* Chan Siew Lun
[2015] SGHC 262

Case Number : Suit No 99 of 2011 (Taking of Accounts No 14 of 2013)

Decision Date : 19 October 2015

Tribunal/Court : High Court

Coram : Steven Chong J

Counsel Name(s) : Johnson Loo Teck Lee (Drew & Napier LLC) for the first and second plaintiffs; Sarbjit Singh Chopra, Ho May Kim, and Satinder Singh (Selvam LLC) for the defendant.

Parties : Cost Engineers (SEA) Pte Ltd — Lim Teck Poh — Chan Siew Lun

Trusts – Trustees – Account of profits

Res judicata – Issue estoppel – Consent judgment

19 October 2015 Judgment reserved.

Steven Chong J:

Introduction

1 Four years ago, the trial of this action took place before me. It principally concerned a claim by Cost Engineers (SEA) Pte Ltd ("the 1st plaintiff") for a declaration that the defendant held one third of the shareholding in a company, Tri-Nexus Pte Ltd ("Tri-Nexus"), on trust for it. In the course of the trial, it emerged that a key document which the defendant had relied on was tampered with. The date of a critical cheque, which was for payment of the increased share capital of Tri-Nexus, was deliberately altered to give the false impression that the increased share capital was personally funded by the two registered shareholders (the defendant and one Soh Cheow Yeng ("Soh")), instead of having been funded by Tri-Nexus on behalf of its three shareholders (*ie*, the two registered shareholders and the 1st plaintiff as equitable shareholder).

2 Immediately following the closing submissions, the defendant, perhaps unsurprisingly, consented to judgment in which he agreed to transfer half of his shareholding in Tri-Nexus (comprising 60,000 shares) to the 1st plaintiff. The consent judgment required the defendant to, *inter alia*, "provide an account to the 1st Plaintiff of all dividends and profits that the 1st Plaintiff is entitled to pursuant to the shareholding equitably owned by the 1st Plaintiff prior to this order for transfer" and to pay "all sums found due from the Defendant to the 1st Plaintiff upon the taking of the account".

3 Thereafter, various intervening interlocutory applications and adjournments regrettably delayed the assessment of the 1st plaintiff's claim, and the case eventually returned back to me for the taking of the accounts ("the assessment hearing") almost four years later. In the meantime, the dispute between the three shareholders led to investigations by the Corrupt Practices Investigation Bureau and the Inland Revenue Authority of Singapore ("IRAS"). It transpired during the trial that sham invoices were issued to facilitate the distribution of "profits" among the three shareholders. The three shareholders, *ie* the defendant, Soh, and the second plaintiff ("Lim") — who is effectively the *alter ego* of the 1st plaintiff — have since been charged for the falsification of accounts, which is an

offence punishable under s 477A of the Penal Code (Cap 224, 2008 Rev Ed). The criminal trial is still ongoing.

4 The assessment hearing has raised some interesting issues for determination. In response to the 1st plaintiff's demand for an account of the dividends and profits, the defendant claims that no dividends have been declared by Tri-Nexus, and, hence, that there is nothing to account for. A forensic accountant engaged by the 1st plaintiff pored over the accounts of Tri-Nexus, and identified various payments and expenses which were not "incurred in the ordinary course of business". The 1st plaintiff claims that these payments and expenses were wrongfully made and ought to be deemed as distributed profits of Tri-Nexus. On that premise, the 1st plaintiff seeks a share of the amounts paid out.

5 Is it permissible for the 1st plaintiff to claim for "dividends and profits" in this manner given that a shareholder is not entitled in law to "profits" of a company unless they are declared as dividends? Can the fact that the consent judgment provided for an account of "profits" as well as dividends confer the 1st plaintiff with a right to the profits of a company even though dividends were never formally declared? Does the consent judgment give rise to issue estoppel as regards the ambit of the expression "dividends and profits" even though no specific finding as to the meaning of this expression was made by the court? These somewhat unusual issues will be examined in the course of this judgment.

The consent judgment

6 The starting point for the assessment hearing is the consent judgment entered on 25 November 2011. I set out in full the terms of the consent judgment:

> IT IS THIS DAY ADJUDGED AND ORDERED that:
>
> 1. The Defendant does transfer to the 1st Plaintiff 60,000 ordinary shares in Tri-Nexus Pte Ltd.
>
> 2. The Defendant does execute all documents necessary for the compliance with the above transfer, failing which the Registrar of the Supreme Court shall be empowered to sign any such documents on the Defendant's behalf.
>
> 3. The Defendant does deliver up to the 1st Plaintiff, the complete accounting reports of Tri-Nexus Pte Ltd for the financial years from 2007 to 2010.
>
> 4. **The Defendant does provide an account to the 1st Plaintiff of all dividends and profits that the 1st Plaintiff is entitled to pursuant to the shareholding equitably owned by the 1st Plaintiff prior to this order for transfer.**
>
> 5. **The Defendant does pay to the 1st Plaintiff all sums found due from the Defendant to the 1st Plaintiff upon the taking of the account under (4) above.**
>
> 6. The Defendant does pay to the 1st Plaintiff interest on any sums ordered to be paid by the Defendant to the 1st Plaintiff.
>
> 7. The Defendant does pay to the 1st Plaintiff the costs of this action to be taxed if not agreed.

[emphasis added]

7 There is no dispute regarding the order to transfer the 60,000 ordinary Tri-Nexus shares. The 60,000 shares which were held on trust by the defendant have since been duly transferred to the 1st plaintiff. What divides the parties, however, is the import of paragraphs four and five of the consent judgment. Specifically, the crux of the disagreement between the parties concerns the meaning of the clause "dividends and profits that the 1st Plaintiff is entitled to pursuant to the shareholding equitably owned by the 1st Plaintiff". The 1st plaintiff claims half of all the payments made by Tri-Nexus to the defendant in the financial years ("FY") 2008 to 2011 ("the relevant period") as its rightful share of the "dividends and profits" owed under the consent judgment.

The defendant's case

8 It is helpful to first set out the defendant's case, because the 1st plaintiff's case is perhaps better understood as a response to the position the defendant is taking. The defendant submits that he has completely satisfied the consent judgment by transferring the 60,000 Tri-Nexus shares to the 1st plaintiff and by providing the accounting reports of Tri-Nexus. No dividends were declared by Tri-Nexus during the relevant period so the defendant did not receive any dividends pursuant to his shareholding of the 1st plaintiff's 60,000 Tri-Nexus shares. Therefore, there are neither any "dividends or profits" for the defendant to account for (under para 4 of the consent judgment) nor are there sums due from the defendant to the 1st plaintiff (under para 5 of the consent judgment).

The 1st plaintiff's case

9 The 1st plaintiff does not dispute the fact that no dividends were declared by Tri-Nexus during the material period. However, it asserts that the defendant is not merely required to account for the dividends officially declared by Tri-Nexus and received by the shareholders, but also *unofficial payouts*. According to the 1st plaintiff's case, the obligation to "provide an account…of all dividends and profits that the 1st Plaintiff is entitled to pursuant to [its equitable shareholding]" includes an obligation to provide an account of all "payouts" which the defendant had received as unofficial distributions of profits to shareholders. In support of its case, the 1st plaintiff argues that the defendant is precluded, under the doctrine of issue estoppel, from arguing the contrary because the consent judgment had already decided that the expression "dividends and profits" referred to, or at least included, "unofficial payouts". Further, counsel for the 1st plaintiff, Mr Johnson Loo submits that even if estoppel does not strictly arise to bar the defendant's present position, the 1st plaintiff is nevertheless justified in interpreting the consent judgment in this manner under the principles of contractual interpretation.

10 As for the exact sum the consent judgment requires the defendant to account for, the 1st plaintiff's position has shifted in the course of the assessment hearing. In his opening statement, Mr Loo, submitted that a sum of $1,745,539.06 was due from the defendant to the 1st plaintiff pursuant to the consent judgment. It is interesting to note how this sum was derived. As mentioned, the 1st plaintiff engaged a forensic accountant, Mr Aw Eng Hai ("the plaintiff's expert"), to pore through the accounting documents of Tri-Nexus to identify payments or expenses that were not incurred "in the ordinary course of business".

11 These are the payments and/or expenses which the plaintiff's expert considers not to have been incurred in the ordinary course of business:

(a) $2,177,000 to PDP International and PDP Technology Pte Ltd (collectively, "PDP") pursuant

to invoices rendered by PDP;

(b) $323,000 to a Hong Kong company, Emerald;

(c) $3,721 in travel expenses pursuant to invoices issued by Misa Travel Pte Ltd for air tickets for one Mr Cheng Sim Hup, one Mr Chung Teong Meng and the defendant;

(d) $360,590 to Trefoil Engineering Pte Ltd ("Trefoil");

(e) $2,996 and $1,200 for the renovation of properties owned by one Mark Roach and one Peter Vincent respectively;

(f) $211,000 to M/s Leo Fernando for the defendant's and Soh's legal fees in relation to the trial on liability in the present action, as well as the criminal investigations against them;

(g) $1,706,000 to the defendant and Soh as directors' fees;

(h) $480,000 to the defendant as director's salary;

(i) $65,000 to the defendant as director's bonus;

(j) $72,000 as salary to one Chan Siok Fung ("Chan"), Tri-Nexus' finance manager and the defendant's sister;

(k) $123,206.19 to the defendant, Soh and/or Chan as reimbursements for non-work related expenses.

This amounts to a total of $5,525,713.19.

12 Mr Loo submitted that the defendant and/or Soh have siphoned profits out of Tri-Nexus *via* these wrongful payments and expenses, artificially deflating Tri-Nexus's profits and thereby depriving the 1st plaintiff of its rightful share of the profits and dividends of Tri-Nexus. To determine the actual level of Tri-Nexus's profits during the relevant period, the payments and expenses not incurred in the ordinary course of Tri-Nexus's business have to be added back to Tri-Nexus's balance sheet profits of $2,829,904, arriving at a total of $8,335,617.19. Mr Loo submitted that a third of these "adjusted profits" amounting to $2,778,539.06 rightfully belong to the 1st plaintiff as shareholder. Thus, to calculate the sum which the defendant has to account to the 1st plaintiff for under the consent judgment, this sum should be taken as the starting point, and the profits that the 1st plaintiff has already received (*ie*, $1,033,000: see [27(b)] below) should be deducted to arrive at the sum $1,745,539.06. Indeed, this was the approach which was adopted by the plaintiff's expert.

13 The flaw of this approach in calculating the 1st plaintiff's rights to "dividends and profits" was immediately apparent to the defendant and to the court. To begin with, it is clear that based on the 1st plaintiff's own calculations, there were some payments which were made to third parties that did not appear to have ended up in the defendant's hands. Mr Loo could not explain why such payments received by third parties, including Soh (who is not a party to the action), could constitute "dividends and profits" for which the defendant is accountable to the 1st plaintiff.

14 After some probing and questioning from the court, Mr Loo eventually reframed his case and limited the quantum of the 1st plaintiff's claim to half of payments that were either *received by the defendant*, or which are unaccounted for and *believed to have been received by the defendant*.

15 Accordingly, the 1st plaintiff revised its claim. It now seeks half of the following sums, which it submits are sums the defendant had received from Tri-Nexus that have not been properly accounted for:

(a) $480,000, being excess director's salary paid to the defendant;

(b) $65,000, being excess director's bonus paid to the defendant;

(c) $425,000, being excess profits by way of director's fees paid to the defendant above and beyond what he was entitled to pursuant to the parties' agreement to distribute profits of $1.033m to each shareholder (see [27(b)] below);

(d) $29,000 paid to PDP, being the remainder of the PDP payments that have not been accounted for;

(e) $323,000 paid to Emerald, being sums which are unaccounted for and are believed to have been received by the defendant;

(f) $360,590 paid to Trefoil, being sums which are unaccounted for and are believed to have been received by the defendant.

This amounts to a total of $1,682,590, half of which is $841,295.

16 The 1st plaintiff's case is that the above sums received or believed to have been received by the defendant, notwithstanding their descriptions, were in reality distributed profits received by the defendant during the relevant period pursuant to his registered shareholding in Tri-Nexus. Thus, as the 1st plaintiff was the equitable owner of half (60,000) of the defendant's registered shares, it is rightfully entitled to half of the sums received by the defendant as its share of the "dividends and/or profits" and the defendant ought to be required to account for this sum. To make good this case theory, the 1st plaintiff accepts that it has the burden of demonstrating:

(a) First, that paras 4 and 5 of the consent judgment can bear the distinctive meaning it is advancing, *ie* that "dividends and profits" includes unofficial payouts for all purposes.

(b) Second, the payments to Trefoil and Emerald were in truth *received by the defendant* (even if on the face of the transactions, they were paid to Trefoil and Emerald).

(c) Finally, that all these payments were received by the defendant as *profits pursuant to his registered shareholding in Tri-Nexus*, half of which belongs to the 1st plaintiff, to whom he must give an account.

Issues

17 Having outlined the parties' respective positions, the following legal and factual issues arise for determination:

(a) What is the ordinary legal meaning of the clause "dividends and profits that the 1st plaintiff is entitled to pursuant to the shareholding [of the 60,000 Tri-Nexus shares] equitably owned by the 1st plaintiff" as found in para 4 of the consent judgment?

(b) Does the consent judgment give rise to an issue estoppel that "dividends and profits" in

the consent judgment includes unofficial payouts received by the defendant *qua* shareholder?

(c) If issue estoppel does not arise, do the principles of contractual interpretation nevertheless justify interpreting the consent judgment as entitling the 1st plaintiff to an account of all unofficial payouts received by the defendant *qua* shareholder?

(d) If the distinctive meaning of "dividends and profits" advanced by the plaintiff is accepted, did the defendant receive any "dividends and profits" *qua* shareholder-trustee of the 1st plaintiff's 60,000 Tri-Nexus shares?

What constitutes "dividends and profits"?

18 As a starting point, the term "dividends" in the context of a company is a term of art ordinarily capable of a specific legal meaning. As the House of Lords observed in *Soden and another v British & Commonwealth Holdings Plc and another* [1998] 1 AC 298 at 309G, "the meaning of dividends is clear, [it refers to]…the profits *declared* to be distributed to members" [emphasis added]. This is not disputed by Mr Loo. The upshot of the 1st plaintiff's case is that the phrase "dividends and profits" should not be interpreted in the strict legal sense but should instead include "unofficial payouts" which would not ordinarily be classified as "dividends and profits".

19 The heart of the present dispute pertains to the question of what "dividends and profits" the 1st plaintiff is entitled to from the defendant *qua* trustee pursuant to its equitable shareholding of the 60,000 Tri-Nexus shares. The answer to this question affects the scope of the defendant's obligation to provide an account to the 1st plaintiff. It would perhaps be profitable to first establish the ordinary legal meaning which para 4 of the consent judgment bears apart from the distinctive meaning which the 1st plaintiff seeks to put forward in this case.

2 0 *Prima facie*, any shareholder's legal entitlement to dividends and profits is governed by well-established principles of company law. As submitted by counsel for the defendant, Ms Ho May Kim and accepted by Mr Loo, the following propositions of law are uncontroversial:

(a) First, a shareholder generally has no direct right to the profits of a company or to compel a company to divide the whole of its profits amongst its shareholders: *Burland and others v Earle and others* [1902] AC 83 at 95.

(b) Second, a shareholder only has a right to receive money from the company when dividends are declared by the company in accordance with its articles of association: *Bond v Barrow Haematite Steel Company* [1902] 1 Ch 353 at 362, *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Rev 3rd Ed, 2009) at paras 12.84–12.89.

(c) Third, unless the articles of the company state otherwise, the company generally has no obligation to declare dividends: *Lim Kok Wah and others v Lim Boh Yong and others and other matters* [2015] SGHC 211 at [145].

(d) Fourth, the decision to declare dividends is a commercial decision of the company which the courts are reluctant to interfere with unless bad faith or improper purposes are demonstrated: *Lim Chee Twang v Chan Shuk Kuen Helina and others* [2010] 2 SLR 209 at [114].

21 Thus, ordinarily, a shareholder is only legally entitled to a share of the company's profits through dividends which have been declared by a company in accordance with the company's articles. This applies with equal force to an equitable shareholder. Given that the defendant *qua*

trustee, as legal owner of the shares, only has a right to receive profits by way of declared dividends, it must follow that the 1st plaintiff *qua* beneficiary correspondingly only has a right to require the defendant to account for the dividends he received.

22 Therefore, if the expression "dividends and profits" is interpreted in the strict legal sense, the 1st plaintiff's claim must fail since it is common ground that no dividends were ever declared.

23 Mr Loo submits that the phrase "dividends and profits that the 1st plaintiff is entitled to pursuant to [its equitable shareholding]" must be understood in the context of the liability proceedings which led to the consent judgment. He builds his case first on issue estoppel. He submits that, under the consent judgment, the phrase "dividends and profits" has a distinctive meaning. Thus, under the consent judgment, there are sums *apart from officially declared dividends* which the 1st plaintiff is entitled to pursuant to its equitable shareholding, and which the defendant as trustee has to account for and pay to the 1st plaintiff.

Issue estoppel arising from the consent judgment

1st Plaintiff's case on issue estoppel

24 Before examining the applicable legal principles, it is important to set out the precise case advanced by Mr Loo. He seeks to persuade this court that the phrase "dividends and profits" found at para 4 of the consent judgment does not bear its ordinary legal meaning. While it is not entirely clear what distinctive meaning Mr Loo seeks to ascribe to the phrase "dividends and profits" (as several meanings have been advanced: see [81] below), broadly speaking, Mr Loo's submission is that the phrase refers to or includes all payouts made to the shareholders from the funds of Tri-Nexus irrespective of whether they were formally declared as dividends. Mr Loo submits that, given the consent judgment, the defendant is estopped from denying this.

25 To properly understand the 1st plaintiff's case on how and why issue estoppel has arisen for consideration in the assessment hearing, it is important to briefly outline the issues and the respective parties' positions at the liability hearing. Tri-Nexus had an initial paid-up capital of $15,000 and it was common ground that the defendant, Soh, and the 1st plaintiff each contributed $5,000 to that sum. 15,000 ordinary shares were issued and the defendant and Soh each held 7,500 ordinary shares. Of the 7,500 shares, both the defendant and Soh each held 2,500 shares on trust for the 1st plaintiff. The dispute at trial pertained to the subsequent capital injection of $165,000 into Tri-Nexus which led to the issuance of 165,000 additional shares. Following this capital injection, the shareholdings of the two registered shareholders changed, with the defendant holding 120,000 shares and Soh holding the balance 60,000 shares.

26 The defendant claimed that the $165,000 capital injection came solely from his and Soh's own funds. If this was correct, the 1st plaintiff's equitable shareholding would have been diluted from one-third (5,000 out of 15,000 shares) to 2.77% (5,000 out of 180,000 shares). The defendant claimed that the injection of $165,000 came from two cheques issued by Soh. However, the 1st plaintiff claimed that the $165,000 came entirely from Tri-Nexus's profits which were equally distributed to the three shareholders (each of them received $55,000), albeit through unofficial means (through a payment of $165,000 against an invoice issued by PDP International). It is important to note that the 1st plaintiff did not plead that the "dividends" of $165,000 (or any other dividends distributed by Tri-Nexus) were *unofficially distributed*. On the contrary, the statement of claim gives the impression that the dividends were officially *declared*. The significance of this will be considered below. According to the 1st plaintiff, the parties had agreed that the sum of $165,000 would be re-injected into Tri-Nexus, increasing the paid up share capital to $180,000. The three shareholders would then be

entitled to 60,000 shares each. The parties also agreed that the defendant would hold 120,000 shares of which 60,000 shares would be held on trust for the 1st plaintiff. On that premise, the 1st plaintiff claimed half of all "dividends and profits" the defendant received from Tri-Nexus. At the trial, the defendant took the position that since no dividend of $165,000 was ever officially declared, the 1st plaintiff could not have contributed to the increased share capital.

27 With that background in mind, I now outline the main strands of Mr Loo's submissions in the assessment hearing:

(a) First, the order that the defendant transfer 60,000 Tri-Nexus shares to the 1st plaintiff (para 1 of the consent judgment) recognises the 1st plaintiff's equitable ownership of the said shares. In light of this recognition, the defendant must have conceded (as was the 1st plaintiff's case at trial) that a third of the $165,000 injected into Tri-Nexus should be credited to the 1st plaintiff. Given the facts as they were, this was only possible if the defendant had also conceded that the money injected back into Tri-Nexus came from unofficial payouts distributed to the shareholders (*via* PDP International), of which the 1st plaintiff was entitled to a third. Thus, by conceding to the 1st plaintiff's equitable ownership of the 60,000 shares, the defendant must be taken to have conceded that the 1st plaintiff, as one-third shareholder, was entitled to a third of all unofficial payouts distributed to shareholders and not just to declared dividends.

(b) Second, at the liability trial, it was common ground that there was an agreed profit distribution of $1.033m to each shareholder by Tri-Nexus. This distribution was made *via* several false PDP invoices as well as directors' fees paid to the defendant and Soh. The 1st plaintiff relies on the payments through the PDP invoices and director's fees as further evidence that Tri-Nexus had previously distributed profits to its shareholders *via* unofficial payments. Thus, Mr Loo submits that the defendant acknowledged and was fully aware of Tri-Nexus's *modus operandi* in relation to the distribution of profits (and in fact orchestrated it).

28 Based on the arguments outlined above, Mr Loo submits that the distinctive meaning of *"dividends and profits"* contended for by the 1st plaintiff, *ie* that it includes all unofficial payouts received by shareholders in addition to officially declared dividends, is a fundamental issue which was necessarily "concluded [in the 1st plaintiff's favour] by the consent judgment". In the present assessment hearing, the defendant does not deny the 1st plaintiff's equitable ownership of the 60,000 Tri-Nexus shares, nor does he deny that there was a distribution of $1.033m of Tri-Nexus's profits to each of the three shareholders. Thus, according to Mr Loo, it must follow that the defendant accepts that Tri-Nexus has had a history of distributing profits in a manner which is not strictly in accordance with its articles.

29 Ms Ho, however, disputes that the consent judgment is capable of giving rise to an issue estoppel as regards the meaning of "profits and dividends" under para 4 of the consent judgment.

The doctrine of issue estoppel

30 Before examining the operation of issue estoppel in the unique context of a consent judgment, it would be helpful to first consider how it operates in a situation when the court renders a final and binding decision on the merits. The applicable principles extracted from this analysis will have a bearing on the operation of the doctrine in the context of a consent judgment.

31 Issue estoppel operates when an issue of fact or law was *necessarily decided and concluded* in favour of one party in the earlier proceedings, and precludes the same issues from being reopened or submitted again for decision in subsequent proceedings between the same parties: *Halsbury's Laws of*

Singapore vol 10 (LexisNexis, 2013 Reissue) at para 120.183, affirmed in *Zhang Run Zi v Koh Kim Seng and another* [2015] SGHC 175 ("*Zhang Run Zi*") at [53].

32 The specific requirements that must be satisfied in order for a party to invoke the doctrine of issue estoppel are well-established. They have been laid down by the Court of Appeal in *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157 ("*Lee Tat 2005*") at [14]:

> (a) there must be a final and conclusive judgment on the merits of the issue which is said to be the subject of an issue estoppel;
>
> (b) the judgment has to be by a court of competent jurisdiction;
>
> (c) there must be identity between the parties to the two actions that are being compared; and
>
> (d) there must be an identity of the subject matter in the two proceedings.

This test has been applied in, *inter alia*, *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd and another and another appeal* [2009] 2 SLR(R) 814 at [165], and recently in *Zhang Run Zi* at [54].

33 Of particular significance, for present purposes, is the question as to how a court determines what was necessarily decided in a previous decision, and whether there is identity of subject matter. On this issue, the High Court in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*") helpfully distilled what this requirement entails. At [34]–[39] of *Goh Nellie*, Sundaresh Menon JC (as he then was) outlined the "discrete conceptual strands" that the identity of subject matter requirement encapsulates.

34 First, the issues must be identical in the sense that the prior decision must traverse the same ground as the subsequent proceedings and the facts and circumstances giving rise to the earlier decision must not have changed or should be incapable of change (*Goh Nellie* at [34]). In that case, the court's concern was that there may be certain findings of fact which may have to be revised in the light of new circumstances which are present at the time of the subsequent proceedings.

35 Second, the previous determination must have been fundamental and not merely collateral to the previous decision so that the decision could not stand without that determination (*Goh Nellie* at [35]). On this point, citing *Blair v Curran* (1939) 62 CLR 464, the court drew a distinction between issues which are "no more than steps in a process of reasoning", and those which are "so cardinal" that the decision "cannot stand without them" (*Goh Nellie* at [37]). Menon JC acknowledged that the distinction was a difficult one, and recommended that in cases which are not clear-cut, recourse be had to the principles underlying the doctrine of *res judicata* (*Goh Nellie* at [37]):

> … the assessment of which side of the line an issue falls should be approached from a commonsensical perspective, balancing between the important public interest in securing finality and in ensuring that the same issues are not repeatedly litigated on one hand, and on the other, the private interest in not foreclosing a litigant from arguing an issue which, in substance, was not the central issue decided by a previous court. …

36 Third, the issue should generally be shown to have been raised and argued. Where, in previous proceedings, the point was neither raised nor argued, and consequently, there was no actual

investigation of the point, issue estoppel would not apply, though the "extended" doctrine of *res judicata* might. As the Court of Appeal in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] SGCA 50 ("*RBS v TT International*") recently clarified at [101], "[s]trictly speaking, cause of action estoppel and issue estoppel apply only in situations where a litigant seeks to re-argue points which have already been the subject of a previous judicial decision in earlier proceedings between the same parties". For litigants who seek to "argue points which were not previously determined by a court or tribunal because they were not brought to the attention of the court or tribunal in the earlier proceedings even though they ought properly to have been raised and argued then…the "extended" doctrine of *res judicata* comes in" (*RBS v TT International* at [101]).

37 In my view, one theme that clearly emerges from *Goh Nellie* is that when courts are compelled to venture to the boundaries of the doctrine of *res judicata* and to decide whether it applies, consideration should ultimately be given to the principles underlying the doctrine, that is, the public interest of securing finality, weighed against the private interest of not impeding a litigant who wishes to pursue his case in court (see *Goh Nellie* at [37] and [39]).

38 A final point that should be noted is that in determining which issues were decided in previous proceedings, the court may "look not merely at the record of the judgment relied on, but at the reasons for it, the pleadings, the evidence…and if necessary other material to show what was the issue decided": *Carl Zeiss* at 965, cited in *Goh Nellie* at [42].

Issue estoppel in the context of consent judgments

39 There are two distinct legal questions which arise for consideration: first, can a consent judgment ever give rise to issue estoppel given that there is no "final and conclusive judgment *on the merits* of the issue"; and, second, if the answer is yes, what is the precise scope of that estoppel given that no findings would have been made by the court?

Can a consent judgment give rise to issue estoppel?

40 In England, it is well-established that a consent judgment may give rise to issue estoppel: see, *eg*, *Khan v Golechha International Ltd* [1980] 1 WLR 1482 ("*Khan*"), *SCF Finance Co Ltd v Masri (No 3)* [1987] 2 WLR 81 ("*SCF Finance*"). Until recently, that view did not appear to be controversial in Singapore.

41 In *Goh Nellie* at [29], the High Court opined that even if the order made in previous proceedings was a consent order, "this would not prevent it forming the basis of an issue estoppel so long as the order was final". The same position was adopted in *Jaidin bin Jaiman v Loganathan a/l Karpaya and another* [2013] 1 SLR 318 ("*Jaidin bin Jaiman*"). A pillion rider sued both a motorcyclist and the driver of the car for injuries he suffered in an accident in which all three parties were involved. Prior to the suit commenced by the pillion rider, judgment apportioning liability for the accident was entered by consent in proceedings between the motorcyclist and the car driver (the pillion rider was not involved). Under the consent judgment, the motorcyclist was to bear 40% of the liability whilst the car driver was to bear 60%. In deciding the separate claim brought by the pillion rider, one of the issues the court had to deal with was whether the apportionment in the consent judgment gave rise to issue estoppel as regards the issue of apportionment of liability between the motorcyclist and the car driver for the injuries caused to the pillion rider. In the course of answering that question in the affirmative, the High Court affirmed the proposition that "[t]he fact that an order is entered by consent would not prevent it forming the basis of an issue estoppel as long as the order was final" (see [5]).

42 Thus, both *Goh Nellie* and *Jaidin bin Jaiman* recognise that a consent judgment can give rise to issue estoppel. I should also mention that the Court of Appeal expressly recognised, in *Poh Huat Heng Corp Pte Ltd and others v Hafizul Islam Kofil Uddin* [2012] 3 SLR 1003 ("*Poh Huat Heng*") at [18], that "a judgment or order obtained by consent is final and can form the basis for the application of the doctrine of *res judicata*". Ms Ho however brought my attention to a recent decision of the High Court in *Low Heng Leon Andy v Law Kian Beng Lawrence (administrator of the estate of Tan Ah Kng, deceased)* [2013] 3 SLR 710 ("*Low Andy*") which appears to cast doubt on the correctness of this view.

43 In *Low Andy*, the defendant had previously commenced proceedings pursuant to O 81 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) for immediate possession of the HDB flat which the plaintiff was residing in. The plaintiff did not have title to the flat. The O 81 originating summons was settled and consent judgment was entered on terms which required the plaintiff to deliver vacant possession of the flat and for the defendant to abandon any claims against the plaintiff arising from the plaintiff's occupation of the flat. Subsequently, the plaintiff commenced an action against the defendant claiming for monetary compensation (rather than any sort of proprietary interest in the flat) on the basis of *proprietary estoppe*l. The High Court had to decide, *inter alia*, whether the consent judgment gave rise to an issue estoppel which precluded the plaintiff from claiming an interest in the flat. The defendant argued that the consent judgment had determined the defendant's entitlement to vacant possession of the flat and hence issue estoppel arose to preclude the plaintiff from asserting any interest in the flat, whether based on proprietary estoppel or otherwise.

44 In analysing the question of issue estoppel, the High Court referred to the requirements for establishing issue estoppel laid down in *Goh Nellie*, which cited *Lee Tat 2005*, and observed that the only requirement in issue on the facts was whether the consent judgment was a final and conclusive judgment on the merits of the originating summons (*Low Andy* at [49]). The High Court in *Low Andy* reasoned as follows:

(a) First, the court emphasised that the consent judgment was a "contractual consent order" which was entered into by agreement between the parties, and which terms were not altered by the deputy registrar (*Low Andy* at [50], [51], and [53]).

(b) Second, the court held that in making the consent order, there was "no final decision on the merits of the O 81 Application" (*Low Andy* at [54]). The deputy registrar "could not be said to have applied his mind to the case to ascertain whether the application or the prayers sought should be granted." Instead, he "was merely recording the terms agreed upon by the parties in the form of a consent order" (*Low Andy* at [54]).

(c) Third, the court held that "in relation to contractual consent orders, whether an issue is allowed to be re-litigated is determined by…the principles of contract law rather than issue estoppel" (*Low Andy* at [54]). Thus, the court held that issue estoppel was not a relevant doctrine in the context of consent orders (*Low Andy* at [55]).

45 It bears mention that, in line with *Low Andy*, the High Court also recently held, in *Soh Lay Lian Cherlyn v Kok Mui Eng* [2015] SGHC 196 ("*Soh Lay Lian Cherlyn*"), that a consent judgment could not give rise to issue estoppel because it did not constitute a final and conclusive judgment on the merits (at [11]). The court also opined that *Jaidin bin Jaiman* had been wrongly decided because it had failed to consider the decision of the Court of Appeal in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2009] 1 SLR(R) 875 ("*Lee Tat 2009*") wherein it was stated at [82] that issue estoppel did not apply to an issue "which has never been decided on the merits".

46 I shall consider each strand of the court's reasoning in *Low Andy* to determine if it justifies the conclusion that the doctrine of issue estoppel is inapplicable in the context of consent judgments before examining the reasoning in *Soh Lay Lian Cherlyn*. Given that the starting point of the reasoning in *Low Andy* was the requirement of a "final and conclusive judgment on the merits" as stated in *Lee Tat 2005*, it is perhaps helpful to commence the analysis from that perspective.

47 In *Lee Tat 2005*, the crux of the dispute concerned the extent to which residents of a condominium development had an easement over a neighbouring plot of land. The 2005 proceedings was the third round of litigation between the parties over the same easement. The main issue before the Court of Appeal in *Lee Tat 2005* was whether the appellant's claims in that round of litigation were barred by issue estoppel arising from the judgments delivered in the previous 1989 proceedings.

48 In this context, the Court of Appeal in its majority judgment laid down the requirements that must be met to establish issue estoppel (*Lee Tat 2005* at [14]). A closer reading of the decision in *Lee Tat 2005* would reveal that what was really in contention was whether the requirement of identity of subject matter was met. The other requirements of a "final and conclusive judgment on the merits", "court of a competent jurisdiction", and "identity between the parties" were expediently disposed of and found to be present on the facts (*Lee Tat 2005* at [14]). Specifically, if the court's treatment of whether there was a "final and conclusive judgment on the merits" is closely examined, it would appear that the court was satisfied that the requirement was met because "[t]he judgments relied upon were those in the 1989 proceedings", which, being judgments handed down by the High Court and then the Court of Appeal, were undoubtedly "final and conclusive judgment[s] on the merits". The Court of Appeal in *Lee Tat 2005* did not specifically direct its mind to the question whether a *consent judgment* could ever constitute a "final and conclusive judgment on the merits", and if not, whether that necessarily precludes issue estoppel from arising.

49 The same may be said of *Lee Tat 2009*, which was cited in *Soh Lay Lian Cherlyn* as authority for the proposition that a consent judgment did not give rise to issue estoppel because it was not a judgment on the merits (see [45] above). There, the Court of Appeal had to consider whether the issue claimed to be the subject of issue estoppel had actually been decided by the courts which heard the preceding three sets of proceedings involving the same parties. It is pertinent to note that in *none* of those previous actions involved a consent judgment. Thus, the Court never addressed its mind to the specific question of whether a consent judgment is capable of giving rise to issue estoppel and its observation that issue estoppel is only engaged when a matter has been "decided on the merits" cannot be taken to be conclusive of the question whether a consent judgment can give rise to issue estoppel.

50 I now turn to consider the court's reasoning in *Low Andy* proper. First, the court found that the consent judgment in that case was a "contractual consent order". While it is not entirely clear at first glance what the term means, some illumination may be gained from the distinction the court drew between the situation in *Khan* where the consent judgment was reached because one party "thought that his case was unsustainable" and "threw in his hand", and the situation where a consent order was entered into after negotiations "by agreement between the parties" (*Low Andy* at [51] and [53]). It appears that the High Court in *Low Andy* considered that a consent judgment entered on the basis of a concession on the merits by one party could give rise to issue estoppel, and was "markedly different from a consent order entered into by agreement" (*Low Andy* at [51]).

51 With respect, I have some difficulties with this distinction. First, there is typically scant or no evidence before the court, as in the present case, as to how or why the parties reached the agreement on the consent judgment. Short of an outright acknowledgment by one party that his case is unsustainable as in *Khan*, the court would be required to investigate into the motives and reasons

for the apparent concessions one party makes in the consent judgment, and whether it stems from an acknowledgment of the weaknesses on the merits. This was precisely what happened in *Soh Lay Lian Cherlyn* at [14]–[15] when the court embarked on an examination of the evidence adduced through the lawyers acting for the parties to ascertain the reasons why the consent judgment was entered into. If a consent judgment is final and binding between the parties, it would not be appropriate to probe the intentions of the parties or the reasons for agreeing to the consent judgment except for the purposes of *setting aside* the consent order (see [52] below). This may well lead to further disputes especially if the parties have different or unspoken reasons for doing so. Second, it is difficult to see why a consent judgment entered into because one party acknowledged the weaknesses in his case is a "decision on the merits" whereas a consent judgment entered into for other reasons (such as commercial expediency or lack of funds) is not. In either case, the *court* does not apply its mind to the merits of the action. Third, the distinction between a "contractual consent order" and a non-contractual consent order would be a difficult one to draw. It is not clear from *Low Andy* if only an outright concession before the court on the merits of the case would render a consent order "non-contractual". Must there be an "exchange" or consideration apparent on the face of the consent order in order for it to be "contractual"? What if one party consents not because he concedes the merits, but because he assesses that the litigation is no longer worth his while?

52 I clarify, however, that the distinction between a contractual and non-contractual consent order may be relevant in the context of an application to set aside a consent order. In such a situation, a *contractual* consent order cannot be set aside in the absence of a vitiating factor – see *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185 at 189, cited with approval in *Bakery Mart Pte Ltd v Ng Wei Teck Michael and others* [2005] 1 SLR(R) 28 at [12]. Therefore, in deciding whether a consent order can be set aside, it is necessary for the court to first determine the nature of the consent order, *ie* whether it is contractual or otherwise. With respect, such an inquiry is not relevant in the context of issue estoppel.

53 In my view, relying on the *provenance* of a consent judgment to determine whether an issue may be re-litigated pays insufficient regard to the principles underlying the doctrine of *res judicata* (*ie* interest in finality of litigation against the interest of litigants to have the full opportunity to litigate their case), which should guide the inquiry. It also overlooks the point that the key distinguishing characteristic of a consent judgment is that it was entered into by consent (regardless of *why* the parties consented to the judgment), rather than after a *judicial* determination of the merits.

54 A rejection of the distinction between a contractual and non-contractual consent order in the context of *res judicata* may not necessarily lead to the conclusion that consent orders can give rise to issue estoppel. This perhaps leads to a consideration of the second salient point made by the court in *Low Andy* — that the court, in recording a consent judgment, does not apply its mind to the *merits* of the action and, hence, does not make a final decision on the merits. Insofar as this observation recognises the reality that the court in a consent judgment does not judicially apply its mind to and pronounce on the merits of the case, I fully agree. I also agree that courts would be hard pressed to describe a consent judgment as a "final and conclusive judgment of the merits" as *Lee Tat* appears to require. However, in my view, I do not think this *necessarily* precludes a consent judgment from giving rise to issue estoppel.

55 It may be argued that if a consent judgment is deemed a "final and conclusive judgment of the merits" for the purposes of cause of action estoppel (in that it precludes the cause of action which it settles from being re-litigated), the same should apply to issue estoppel. However, this is where the third strand of the reasoning in *Low Andy* comes in. The High Court explained that parties to a consent judgment may not re-litigate the cause of action settled therein because of principles of contract law and the doctrine of merger, rather than the doctrine of *res judicata* which requires a

final and conclusive judgment on the merits. In support of this line of reasoning, the court relied on two Singapore authorities, *Indian Overseas Bank v Motorcycle Industries (1973) Pte Ltd and others* [1992] 3 SLR(R) 841 and *Woo Koon Chee v Scandinavian Boiler Service (Asia) Pte Ltd and others* [2010] 4 SLR 1213 ("*Woo Koon Chee*"), for the proposition that once parties have compromised a suit in a settlement agreement (which is no more than a contract between the parties), the original cause of action would cease to exist. This merger or supersession of the original cause of action takes place once the settlement agreement is entered into between the parties and does not depend on a consent judgment for its efficacy. Thus, the point made in *Low Andy* is that a cause of action ceases to exist following a consent judgment not because the consent judgment is a "final and conclusive judgment on the merits" (hence triggering the operation of *res judicata*), but simply because it is effectively a settlement agreement which supersedes the cause of action according to ordinary principles of contract law.

56 While the reasoning adopted in *Low Andy* does present a coherent narrative of the legal operation and effect of a consent judgment, I am of the view that this, on its own, does not provide an exhaustive explanation of how a consent judgment truly operates. In my view, while a consent judgment may not, strictly speaking, be a "final and conclusive judgment on the merits", it is nevertheless capable of forming the basis for the application of the doctrine of *res judicata* and giving rise to cause of action estoppel as well as issue estoppel as was held in *Poh Huat Heng* (see [42] above).

57 First, as discussed above, there are several local authorities such as *Goh Nellie* and *Jaidin bin Jaiman* which have held that as long as a consent judgment is *final*, it is capable of forming the basis of an issue estoppel. The logical extension of this must be that a *judgment on the merits* is not necessary for issue estoppel (or *res judicata* more broadly) to apply as long it is *final*.

58 I note that in *Soh Lay Lian Cherlyn*, the court doubted the decision in *Jaidin bin Jaiman* not only on the ground that there was no final and conclusive judgment on the merits but also on the basis that the requirement of an identity of parties had not been satisfied because the first action, unlike the second, did not involve the pillion rider. With respect, I think this objection takes too technical an approach to the requirement of an identity of parties. As was succinctly explained in *Goh Nellie* at [33], the focus of the inquiry into the identity of the parties is whether "the *principal players* in both *actions*… are effectively identical" [emphasis added]. In *Jaidin bin Jaiman*, the principal players — as far as the question of *liability* for the accident was concerned — were always the driver of the car and the motorcyclist. The pillion rider was both literally and figuratively a mere "passenger" who did not contribute to the accident at all. Thus, insofar as the key question of the apportionment of liability between the two parties who caused the accident, the requirement of identity of parties in both actions had been met, paving the way for a finding that issue estoppel had arisen to prevent the issue of apportionment from being re-litigated.

59 Second, there is clearly an important distinction to be drawn between a mere settlement agreement, and a settlement agreement which is then "incorporated as a consent judgment or order of the court" (*Woo Koon Chee* at [14]). While the Court of Appeal in *Woo Koon Chee* was concerned with the mechanics of enforcing a settlement agreement as opposed to a consent judgment, it is undeniable that the court recognised that a consent judgment was not a mere contract between the parties, but was instead a judgment or order of the court which consequently could be directly enforced without instituting a fresh action (*Woo Koon Chee* at [14]). At least for the purposes of enforcing a consent judgment, the court opined that "[i]t should make no difference whether a judgment or order was made by the court pursuant to a contested hearing or by consent of the parties" (*Woo Koon Chee* at [14]).

60 Third, the principles underlying the doctrine of *res judicata* compel the conclusion that issue estoppel can arise from a consent judgment. The principle that issues which were necessarily resolved and decided by a final judgment in previous litigation should not be re-litigated applies with equal force when a consent judgment is entered. It should make no difference whether a final decision was obtained through a judicial examination and pronouncement on the merits, or whether a final decision was obtained by the consent of the parties. In both cases, there is a real interest in disallowing the same issues which were raised and argued in previous proceedings from being re-litigated after being recorded as a court judgment. A party who has consented to a particular outcome on the merits cannot be said to be more deserving of a chance to re-litigate the issues that must have necessarily been "decided" in the other party's favour under the consent judgment.

61 Ultimately, as was observed in *Goh Nellie* at [37], in deciding whether an issue was "cardinal" or "merely collateral" to the judgment delivered, the court will have regard to both "the important public interest in securing finality and in ensuring that the same issues are not repeatedly litigated on one hand, and on the other, the private interest in not foreclosing a litigant from arguing an issue which, in substance, was not the central issue decided by a previous court."

62 Finally, it should be borne in mind that if a party does not wish to pursue the litigation any further, it is always open for it to negotiate a settlement agreement and a withdrawal of the suit (as opposed to a dismissal by consent as was the case in *SCF Finance* – see para [70] and [71] below) without any consent judgment being entered. In that situation, issue estoppel would not be applicable and the terms of the settlement agreement would indeed be construed as a contract and no more.

63 To conclude the discussion on *Low Andy*, it should be noted that the applicability of the doctrine of *res judicata* in the context of a consent judgment does not preclude the *concurrent* operation of the principles of contract law. In other words, the principles of contract law and the doctrine of *res judicata* are not mutually exclusive. A consent judgment may be construed as being both a contract and a judgment in law, attracting both the operation of contractual principles and the doctrine of *res judicata*. I should add that the court's holding in *Low Andy* that issue estoppel did not arise from the consent judgment was not pivotal to its decision since proprietary estoppel was not raised in the earlier O 81 proceedings. Thus, the requirement of identity of subject matter between the two proceedings would not have been satisfied in any event.

Scope of issue estoppel arising from a consent judgment

64 As mentioned above at [31], issue estoppel operates when an issue of fact or law was *necessarily decided and concluded* in favour of one party in earlier proceedings. Ordinarily, when a court comes to a decision on the merits of the case, its grounds should identify the issues which were necessarily decided and concluded in order for the final outcome to be reached. However, where a consent judgment is concerned, this is not a straightforward task. Indeed, this is the essence of the dispute between the parties in the present proceedings.

65 Determining the scope of issue estoppel ultimately feeds into the analysis of whether the identity of subject matter requirement is met. In my view, the same approach to determining the scope of issue estoppel should be applied irrespective of whether the judgment was entered by consent or otherwise. In this regard, the key inquiry is to determine which issues were necessarily decided and concluded in the previous proceedings. Once that is determined, it should then become sufficiently clear whether the issues in the present proceedings are identical to the issues that were decided in the previous proceedings.

66 On this question, I agree with *Goh Nellie* that only issues which are "fundamental and not

merely collateral to the previous decision so that the decision could not stand without that determination" will be covered by issue estoppel (*Goh Nellie* at [35]). However, it should be noted that the judgment need not contain an explicit finding on the issue for issue estoppel to arise. There have been cases, such as *Jaidin bin Jaiman*, where the issue claimed to be the subject of issue estoppel (apportionment of liability in that case) was expressly stated on the face of the consent judgment. However, the English authorities suggest that this is not always necessary for issue estoppel to arise. The determination of the issue may be *implicit* from the judgment.

67 In the case of *In re South American and Mexican Company, ex parte Bank of England* [1895] 1 Ch 37 ("*Re South American*"), the bank sued a company on an agreement under which the company agreed to pay another company's debt in four instalments. At the time of those proceedings, the first instalment had been paid and the second instalment was due. The company denied the existence of the underlying agreement. Subsequently, the parties entered into a consent judgment ordering the company to pay the bank the second instalment. In consenting to the judgment, the company's counsel stated in court that "[i]t must not be supposed that, if the case had gone on, I should have acquiesced in the view of the case presented by my learned friend…". The company was then wound up and the bank filed a proof of debt for the full outstanding debt under the agreement. The liquidator took the position that the consent judgment only proved the debt owing under the second instalment, but not the third or fourth instalments.

68 The English Court of Appeal had to decide, *inter alia*, whether the existence of the underlying agreement to repay the sums owed was an issue decided in the consent judgment, and hence the subject of issue estoppel. The liquidators argued that the judgment only decided the company's liability for the second instalment. In finding that the liquidators were indeed estopped from re-litigating the issue of whether there was an underlying agreement to repay the sums due thereunder, Lord Herschell LC said (at 50):

> … The truth is, *a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end*. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action. [emphasis added]

69 Lord Herschell emphasised that a "fair and reasonable interpretation" was to be given to the consent judgment and that issues which were "really involved in the action" could not be re-litigated. Thus, even though the consent judgment only expressly decided that the company had an obligation to pay the bank the second instalment of the loan, the court found that the consent judgment must also have necessarily decided the existence of the underlying agreement to repay all four instalments of the loan.

70 A dismissal by consent is also regarded as a consent judgment for the purposes of issue estoppel. In *SCF Finance*, the plaintiff had obtained a Mareva injunction against the defendant, and one of the assets which was subject to the injunction was a dollar bank account in the name of the defendant's wife. The wife applied to have the injunction set aside insofar as it related to the dollar account on the ground that she, and not the defendant, was the beneficial owner. Without withdrawing the application, the wife decided not to proceed with it. She stated through counsel that she did not concede the issue of ownership of the dollar account and expressly reserved that issue. Her application was thus *dismissed* by consent. The plaintiff eventually succeeded in his claim against the husband and applied for a garnishee order against the dollar account to execute the judgment. The wife opposed the garnishee on the ground that she was the owner of the dollar account. The question before the court was whether the wife was precluded by issue estoppel arising out of the

dismissal of her application to vary the Mareva injunction from asserting her ownership of the dollar account in the garnishee proceedings.

71 In this regard, the court came to the view that the ownership of the dollar account must have been finally determined by the dismissal of the wife's previous application because a decision on the issue, one way or the other, was a necessary step to the decision which the court would have had to make if the court had proceeded to hear the application on the merits (*SCF Finance* at 99H). The court further held that the attempt to expressly reserve the issue of ownership was ineffective on the facts (*SCF Finance* at 100E). Thus, even in a dismissal of an application by consent, the necessary steps leading to the dismissal, though not expressly stated, may be the subject of issue estoppel.

72 With these principles in mind, I now consider whether on the facts of the present case, an issue estoppel can be said to have arisen in respect of the meaning of "dividends and profits" in para 4 of the consent judgment.

Did the consent judgment decide that "dividends and profits" should bear a special meaning?

73 As I had observed at [64] above, identifying the issues which were necessarily decided and concluded in a consent judgment is not an easy task. Here, it is particularly complex. The 1st plaintiff's submission in effect is that the defendant's recognition of the 1st plaintiff's equitable ownership of the shares under para 1 of the consent judgment necessarily, though impliedly, entailed an acceptance that "dividends and profits" in para 4 of the consent judgment bears a meaning which is different from its strict legal meaning. To the best of my knowledge, the doctrine of issue estoppel has never been invoked in aid of such a construction. I will hence examine this novel application from first principles.

74 For issue estoppel to arise, the 1st plaintiff must be able to show that its interpretation of "dividends and profits that the 1st Plaintiff is entitled to pursuant to the shareholding equitably owned by the 1st Plaintiff" under para 4 of the consent judgment was an issue that was *necessarily decided and concluded* by the consent judgment itself. In my view, Mr Loo's submissions on this point do not quite hit the mark.

75 I first deal with Mr Loo's submission that because it was common ground at the liability trial that there was an unofficial profit distribution of $1.033m to each shareholder, issue estoppel therefore now bars the defendant from denying that "dividends and profits" in para 4 of the consent judgment refers to *all* unofficial payouts *for all purposes*. In my view, this submission is flawed. The fact that the parties had agreed at trial that there was an unofficial profit distribution of $1.033m does not necessarily entail that they also agreed that the expression "dividends and profits" in the consent judgment includes all unofficial payouts of profits howsoever arising. In this regard, it is important to recognise that the profit distribution of $1.033m to the three shareholders was not a "*necessary step*" in reaching the conclusion that the 1st plaintiff is a one-third shareholder of Tri-Nexus. That this is so is borne out by the fact that the 1st plaintiff's statement of claim did not even plead the $1.033m payout. The most that can be said is that the profit distribution of $1.033m was *evidence* which supported the 1st plaintiff's case that *it was a one-third shareholder*. This is no longer disputed by the defendant.

76 The other plank of Mr Loo's submission is more attractive and merits closer scrutiny. The argument is that in deciding that the 1st plaintiff is the equitable owner of 60,000 Tri-Nexus shares, the consent judgment necessarily decided that $55,000 of the $165,000 capital injection came from the 1st plaintiff. The only way this could be the case was if the 1st plaintiff's case theory that the $55,000 was unofficially distributed profits that belonged to it as one-third shareholder was true.

Correspondingly, the defendant's defence that no dividends were due to the 1st plaintiff because none had been officially declared must be unsustainable. A finding that the $55,000 was distributed profits to the 1st plaintiff as shareholder even though it was not properly declared as dividends was therefore a "*necessary step*" in finding that the 1st plaintiff was the owner of the 60,000 Tri-Nexus shares.

77 In my view, the highest Mr Loo can put the 1st plaintiff's case is that the consent judgment decided that the $55,000 was unofficially distributed as profits to the 1st plaintiff, and hence, *in that one instance*, the 1st plaintiff received Tri-Nexus's profits in an unofficial manner. However, it does not follow that the consent judgment therefore *decided* that, as between the parties, the expression "dividends and profits" would *always* include all unofficial payouts, whether they be made in the *past, present or future*. The fact that the parties loosely described the $55,000 in the pleadings and other court documents as dividends distributed to shareholders cannot lead one to the conclusion that the consent judgment necessarily defined the expression "dividends and profits" in relation to the distribution of the $55,000.

78 This should be contrasted with the facts in *Re South American* where, in consenting to the liability to pay the second instalment, it must necessarily follow that the company had accepted the *source* of that liability, *ie* the underlying agreement. In his speech, Lord Herschell observed that the consent judgment was "not a judgment… for the sum of £100,000 *at large*; it was a judgment for [the plaintiffs] on a claim of £100,000, *being part of a debt due*…" [emphasis added] (*Re South American* at 49). In other words, the judgment on the debt must bear reference to the basis of the admitted liability. As Mr Loo put it in his written submissions, "it was *impossible* for the Bank to recover its claim without the existence of the agreement" [emphasis added]. Therefore, the relevant inquiry is whether it was impossible for the 1st plaintiff to have succeeded in its claim for the ownership of the additional 55,000 shares without a finding that the $55,000 constituted "dividends and profits". To put it another way, the question is whether a finding that the $55,000 constituted "dividends and profits" was a "*necessary step*" in deciding the 1st plaintiff's ownership of the additional 55,000 shares.

79 In this regard, I have tested this submission by examining how I would have decided the issue as to whether the 1st plaintiff was the equitable owner of the additional 55,000 shares of Tri-Nexus if there had been no consent judgment. Based on the evidence, it would appear that the capital injection of $165,000 did not come from the personal funds of the defendant and Soh as alleged. Instead, it came from the profits of Tri-Nexus, and this fact was conceded by Soh at the trial. Thus, what in effect happened was that profits from Tri-Nexus were re-injected into the company to increase its share capital. Since the 1st plaintiff was undoubtedly a one-third shareholder of Tri-Nexus *prior* to the capital injection, any re-injection of Tri-Nexus's profits back into the company should be equally apportioned to the three equal shareholders, and should not change the proportions of their shareholdings in the company. This finding — that the $165,000 capital injection was to be equally credited to all three shareholders — would have been sufficient to grant the order of transfer under para 1 of the consent judgment. In short, a finding that the capital injection amounted to "dividends and profits" would not have been a "necessary step" for the 1st plaintiff to obtain the declaration that it is the equitable owner of the additional 55,000 shares in Tri-Nexus. It was not a finding which I would invariably have needed to make to grant the declaration. In the circumstances, I would have been slow to find that "dividends and profits" bore a meaning which was contrary to its strict legal meaning, especially since such a finding would not have been necessary for the purposes of deciding the ownership of the additional 55,000 shares.

80 Thus, in my view, it is untenable for the 1st plaintiff to argue that the consent judgment implicitly decided that "dividends and profits" under para 4 includes all forms of "unofficial payouts", howsoever arising. At most, it means that the defendant is estopped from denying that the 1st

plaintiff had made an equal contribution towards the capital injection for the purposes of the increased paid up capital.

81 There is a further insuperable obstacle to Mr Loo's submission. As Ms Ho has highlighted in her submissions, the meaning that the 1st plaintiff has ascribed to the phrase "dividends" and "profits" was not consistent throughout the liability trial or even during the assessment hearing. As mentioned at [26] above, the 1st plaintiff did not even plead the distinctive meaning of "dividends" it now asserts. Instead, it variously described "dividends and profits" as "*agreed* payments to the shareholders" [emphasis added], "share of profit", "payouts made to the shareholder", and profits which were "procured or caused to be paid" (this version was raised for the first time during the closing oral submissions). Thus, on one version of the 1st plaintiff's own case, the consent judgment would have decided that "dividends and profits" includes "*agreed* payments to shareholders". However, this would give rise to many problems.

82 In this connection, it is pertinent to mention that both the "distribution" of the $55,000 for the capital injection and the profit distribution of $1.033m to each shareholder were, by the 1st plaintiff's own case, "agreed payments to the shareholders". Given the agreement between the three shareholders that these two payments (the distribution of $1.033m and $55,000 to each shareholder) were to be equally made, it really did not matter how they were described so long as the distribution was in fact agreed. However, insofar as the sums which the 1st plaintiff is now claiming from the defendant are concerned, it is undisputed that *none* of them were "*agreed* payments to the shareholders". All of them are, by the 1st plaintiff's own case, wrongful or at the very least *disputed* payments to the defendant. Thus, even if I accept the 1st plaintiff's distinctive definition of "dividends or profits" as "*agreed* payments to the shareholders", its claim must still fail.

83 This argument only reinforces my earlier point that the consent judgment cannot possibly be taken to have *decided* that the phrase "dividends and profits" as used therein takes on the special distinctive meaning advanced by the 1st plaintiff. Even if it could, it is entirely unclear what that "special meaning" is, especially since by the 1st plaintiff's own case, it also refers to "agreed payments to shareholders", which is of no assistance to the 1st plaintiff at all.

84 Before leaving the question of issue estoppel, I should deal with a somewhat distinct submission made by Mr Loo that the defendant is estopped, by reason of the consent judgment, from asserting in the assessment hearing the "same defence" that there were no dividends declared in the technical sense of the word. It is true that at the trial on liability, the defendant had asserted that no dividends were ever officially declared in its defence. However, this fact was asserted in order to deny the 1st plaintiff's case that it contributed to the $165,000 capital injection *via* profits which Tri-Nexus had distributed to shareholders. The material issue was whether the 1st plaintiff had contributed to the subsequent capital injection, rather than whether the word "dividends" bore a technical or colloquial meaning for *all purposes*. In the present case, while the defendant similarly relies on the strict legal meaning of the word "dividends", his defence is entirely different from that relied on at the trial. He is not asserting that unofficial distributions of Tri-Nexus's profits were *never* made to shareholders. Neither is he denying that the 1st plaintiff contributed to the capital injection and hence is the owner of the additional 55,000 Tri-Nexus's shares. On these points, issue estoppel would undoubtedly arise. However, the defendant denies that he is required under the consent judgment to account for unofficial payouts. On the face of para 4 of the consent judgment, the defendant is only required to account for "dividends and profits" and no more. It is therefore strictly incorrect for Mr Loo to assert that the defendant is presently raising the "same defence" as he did at the liability hearing.

Contractual interpretation

85 Further and in the alternative, Mr Loo relies on the principles of contractual interpretation to persuade the court that para 4 of the consent judgment should be interpreted as requiring an account of all "unofficial payouts" received by the defendant *qua* shareholder because, on an objective assessment of the facts and circumstances leading to the consent judgment, that is what the parties must be taken to have intended.

86 In *Seiko Epson Corp v Sepoms Technology Pte Ltd and another* [2008] 1 SLR(R) 269 ("*Seiko*"), the appellant sued the respondents for patent infringement. In its defence, the respondents pleaded the defence of innocent infringement under s 69 of the Patents Act (Cap 221, 2005 Rev Ed), which provides that damages shall not be awarded if the defendant "proves that at the date of the infringement he was not aware, and had no reasonable grounds for supposing, that the patent existed." A consent judgment was eventually entered against the respondents in which they admitted liability and accepted that "there was to be an account of profits by the respondents". In accordance with the consent judgment, the respondents filed an account of profits. The respondents justified the limited period for which they rendered an account of profits on the ground that they had knowledge of the patent only when they were served with the appellant's statement of claim. The appellant applied to court for an order that the respondents file a further account of profits.

87 One of the issues before the Court of Appeal was whether the consent judgment was, "in addition to being final on liability, final on the applicable accounting period as well" (*Seiko* at [23]). The respondents submitted that the accounting period had not been settled and was to be determined at the account of profits hearing (*Seiko* at [24]). The Court of Appeal accepted that principles of contractual interpretation applied to the interpretation of the consent judgment (*Seiko* at [26]) and found that "an objective construction of the Consent Judgment indicated that it was final only on the issue of liability, with the specific accounting period… to be determined at a later stage" (*Seiko* at [27]). The court held that there was nothing in the factual matrix surrounding the consent judgment to justify the inference that the respondents had agreed to the date alleged by the appellant in its claim as the date of the infringement (see *Seiko* at [24] and [27]). Moreover, the court added, "it would have been illogical for the respondents, in agreeing to the Consent Judgment, to have also intended to have foregone their right to raise s 69(1) as, in the circumstances, this might have resulted in the respondents having to account to the appellant for profits over a longer period than the accounting period which would have applied had they not consented to judgment" (*Seiko* at [27]).

88 Following the approach of the Court of Appeal in *Seiko*, the question in the present case is whether the consent judgment was final as to the meaning of "dividends and profits" at para 4, or whether, on an objective interpretation of the consent judgment, the issue was left to be determined at the present assessment hearing.

89 In support of the position that the consent judgment was final on the meaning to be ascribed to the phrase "dividends and profits" and that it should be interpreted to bear the special meaning proposed by the 1st plaintiff, Mr Loo makes the following submissions:

(a) First, in the context of the litigation underlying and preceding the consent judgment, the 1st plaintiff had used "dividends" to refer to unofficial payouts. This was the case in both the statement of claim and in Lim's affidavit of evidence-in-chief.

(b) Second, the parties all treated unofficially distributed payouts as distributed "profits" from Tri-Nexus. In particular, it was common ground that the payment of $1.033m to each shareholder was treated as distribution of profits.

(c) Third, given that the consent judgment refers to "dividends *and profits*" [emphasis added], "profits" must mean something additional to dividends and should be interpreted to refer to unofficial payouts.

(d) Fourth, since it was clearly established that Tri-Nexus never officially declared dividends, the parties could not have intended for "dividends and profits" in the consent judgment to bear its strict legal meaning. There must be some "dividends" and "profits" to be accounted for. If the strict legal meaning of "dividends" was applied to para 4 of the consent judgment, it would result in an "absurd outcome which would have entirely undermined the 1st Plaintiff [sic] claim and the purpose of the Consent Order."

90 In response, Ms Ho submits that the following factors must be borne in mind:

(a) First, the main focus of the trial on liability was whether there was a trust over the 60,000 Tri-Nexus shares held by the defendant in favour of the 1st plaintiff. The defendant's duty to provide an account of dividends and profits was ancillary to the finding of such a trust.

(b) Second, the defendant had always maintained the strict legal meaning of "dividends". There is no evidence that the defendant had accepted the 1st plaintiff's colloquial meaning of "dividends" either in the consent judgment or at any stage during the liability trial.

(c) Third, the terms "dividends" and "profits" are not defined anywhere in the pleadings or in the consent judgment.

(d) Fourth, there is no necessity that there must be some dividends or profits to account for under para 4 of the consent judgment. There was no allegation at the liability trial that the defendant had received any dividends or profits *qua* trustee on behalf of the 1st plaintiff.

(e) Fifth, it is illogical and unreasonable to conclude that the defendant agreed to the colloquial definition of dividends when a shareholder is only entitled to dividends declared by the company.

91 I agree with Ms Ho's submissions that the consent judgment is not final on the meaning of the "dividends and profits" that the 1st Plaintiff is entitled to pursuant to his equitable shareholding. The meaning of this expression is a matter which was left to be determined by the court at the assessment hearing. I also agree that the consent judgment did not determine that the phrase "dividends and profits" should be accorded the distinctive meaning advanced by the 1st plaintiff. I arrive at this conclusion for the following reasons:

(a) First, it is clear that the trial on liability was singularly focused on establishing or denying the 1st plaintiff's equitable ownership of the additional 55,000 Tri-Nexus shares (the balance 5,000 shares was never in dispute). Any discussion of unofficial payouts or dividends took place in the context of proving that a third of the $165,000 capital injection came from the 1st plaintiff. There was no discussion or contemplation of the nature of the account the defendant would have to provide to the 1st plaintiff should such equitable ownership be established.

(b) Second, looking at the 1st plaintiff's *own pleadings*, it is not clear that its case was that the defendant had to provide an account of unofficial payouts he received *qua* shareholder. Paragraph 8(e) of the statement of claim refers to the 1st plaintiff's "corresponding entitlement to *dividends declared*" [emphasis added]. The use of the phrase "dividends declared" in the statement of claim provides a compelling reason for concluding that the plaintiff's claim was only

for dividends that were properly declared. That this is so is clearly borne out by the use of the qualifying words "corresponding entitlement" preceding "dividends and profits". The entitlement to dividends must *correspond* with the ownership of the shares. The pleadings do not suggest that "dividends declared" bears a meaning different from their ordinary legal meaning, or that the 1st plaintiff was seeking an account of all "unofficial payouts" paid to the defendant, howsoever arising. In response, Mr Loo emphasised that the statement of claim also referred to the $55,000 of unofficially distributed profits as "dividends declared" and, hence, clearly intended that "dividends declared" was to bear a colloquial meaning. In my view, if the 1st plaintiff's case was truly for an account of all *unofficial payouts* received by the defendant, it had to be expressly pleaded and separately provided for in the consent judgment, especially since this distinctive meaning does not accord with the strict legal meaning of "dividends and profits". Absent any clear words to the contrary, it would appear that the consent judgment only provided for a transfer of the 60,000 Tri-Nexus shares to the 1st plaintiff and for the 1st plaintiff's corresponding entitlement to *declared dividends* received by the defendant *qua* trustee in respect of those shares (if any).

(c) Third, I am not persuaded that the parties must have intended that there be *some* profits or dividends to account for in agreeing to para 4 of the consent judgment. Paragraph 15 of the 1st plaintiff's own statement of claim asserts that the defendant had failed to inform it "*if any* dividends have been declared by Tri-Nexus". This clearly contemplates the possibility that there may not be any declared dividends. It may well not make commercial sense for the 1st plaintiff to agree that the defendant's obligation under the consent judgment was to provide an account only of declared dividends if it knew that Tri-Nexus had never officially declared dividends. However, it bears mention that this possibility was itself contemplated by the 1st plaintiff to begin with, as can clearly be seen from the way it framed its case. I also find that there is no basis to hold that the defendant had agreed to the colloquial meaning of dividends that the 1st plaintiff now asserts the consent judgment bears, nor is there any evidence that the defendant would have consented to such a term had it been expressly proposed by the 1st plaintiff. If the 1st plaintiff had intended that the consent judgment bear such a meaning, it should have been expressly provided for.

(d) Fourth, while Mr Loo repeatedly urged me to find significance in the word "profits" (as opposed to "dividends") in para 4 of the consent judgment, I note that the word was only added in the relief portion of the statement of claim *via* an amendment made on the second day of trial. When the application to amend the statement of claim was before the court, the focus of the arguments was whether Lim could be added as a party to the suit. That was the primary purpose of the amendment application. There was no submission by the 1st plaintiff on the significance or purpose of adding the word "profits" to the relief. Given the circumstances under which the statement of claim was amended to include the word "profit", which was then reproduced in the consent judgment, I do not think it appropriate to draw the conclusion that the defendant must be taken to have agreed that the expression "profits" would bear a meaning that is separate and distinct from "dividends" and which encompasses any and all unofficial payouts. Furthermore, no distinctive meaning of "profits" was ever pleaded. Thus, as Ms Ho submits, the ordinary meaning of "an account of profits" in the context of a breach of trust should apply – *ie*, it should be interpreted as only requiring the defendant to disgorge all profits he had made in *breach of his duty as a trustee of the 60,000 shares*. In the present case, it is clear that any benefit the defendant has derived from the allegedly illegitimate payouts were not received in breach of his duty as trustee-shareholder, but rather, at best, in breach of his duty as a director of Tri-Nexus.

92 Given that the focus of the trial on liability was on the equitable ownership of the additional 55,000 Tri-Nexus shares, I find, as the court in *Seiko* did, that the parties intended for the scope of

the obligation to "provide an account of dividends and profits" under para 4 of the consent judgment to be determined at the assessment hearing. In my view, the order for an account by the defendant-trustee was merely consequential to the transfer of the 60,000 Tri-Nexus shares from the defendant to the 1st plaintiff, and does not require the defendant to account for all *unofficial payouts* he received. Ms Ho also urged the court to apply the principle of *contra proferentum* in interpreting the consent judgment. Given my decision, it is unnecessary for me to decide on the applicability or effect of this principle in this case.

93 Having concluded that no issue estoppel arises and that para 4 of the consent judgment does not bear the distinctive meaning advanced by the 1st plaintiff, I find that the defendant is only required to account for the dividends declared and received by him as trustee-shareholder of the 60,000 Tri-Nexus shares. In this respect, since it is common ground that no dividends were ever declared, the 1st plaintiff's claim for an account of the "dividends and profits" and for the consequential payment of such "dividends and profits" under paras 4 and 5 of the consent judgment must fail.

Whether the defendant received any unofficial payouts *qua* shareholder

94 Although I have determined that the defendant is not required to provide an account of *unofficial payouts* under the terms of the consent judgment, for completeness, I shall deal with the factual question of whether unofficial payouts were (a) in fact received by the defendant; *and* (b) received by the defendant *qua shareholder*.

95 As outlined at [15] above, the 1st plaintiff claims for *half* of those sums allegedly received by the defendant from Tri-Nexus.

96 I shall examine each item in turn to determine whether on the evidence before the court, the sums were in fact received by the defendant and if so whether they were received by the defendant as unofficial payouts of profits *qua* shareholder .

Director's salary and bonus

97 Mr Loo submits that the defendant paid himself an excess of $480,000 in director's salary and $65,000 in director's bonus. These sums therefore ought to be regarded as his receipt of payouts of profits from Tri-Nexus, half of which should belong to the 1st plaintiff. His case theory is premised on the following grounds:

(a) First, prior to the founding of Tri-Nexus, the three shareholders (Lim on behalf of the 1st plaintiff, Soh, and the defendant) had agreed that the defendant would only be entitled to a salary of $5,000 per month and that his annual bonus would be up to 12 months, subject to Tri-Nexus's performance and the approval of all shareholders. On that basis, Mr Loo submits that any salary and bonus received by the defendant above and beyond what the parties had agreed must be taken to be distributed profits from Tri-Nexus.

(b) Second, by a shareholder's resolution dated 1 January 2010, the defendant's salary was increased from $5,000 to $25,000 per month with effect from 1 January 2010. There was no legitimate reason for this substantial increment. Further, the whole of the purported "increment" for FY 2010 was paid in a lump sum of $240,000 on 28 February 2011, shortly after the defendant received a letter of demand from the 1st plaintiff. These circumstances suggest that the increment was not a legitimate salary increment, but was instead a means by which the defendant siphoned profits out of Tri-Nexus.

(c) There was no legitimate basis for paying the defendant bonuses of $60,000 in FY 2010 and $5,000 in FY 2011, given that Tri-Nexus reported a loss in FY 2011.

98 On its face, the defendant received these payments *qua* director of Tri-Nexus. No objective evidence of the alleged agreement to cap the defendant's salary at $5,000 per month was adduced before the court other than Lim's bald assertion. The defendant firmly denies any such founding agreement which, in my view, has not been proven by the 1st plaintiff. Further, as Ms Ho submits, based on the evidence before the court, both the salary increment and bonuses appear to have been paid pursuant to validly passed company resolutions. The 1st plaintiff has not been able to present any credible evidence beyond mere speculation to challenge the validity of these resolutions. Therefore, I find that these sums, legitimate or otherwise, were received by the defendant *qua* director, rather than as distributed profits *qua* shareholder.

Director's fees

99 Mr Loo also submits that the defendant received the $1.033m due to him under the profit-sharing arrangement partly *via* a PDP invoice for $250,000 and partly by way of director's fees. However, if one adds the director's fees the defendant received from 2009 to 2011 to the $250,000 the 1st plaintiff claims the defendant also received *via* PDP invoices, it would appear that the defendant received a total of $1.458m, or an excess of $425,000 above and beyond the $1.033m he was entitled to under the profit sharing agreement. Thus, Mr Loo submits, this excess sum must likewise be unofficial payout of profits received by the defendant *qua* shareholder.

100 The evidence does show that payment through director's fees was one way in which the defendant received his share of the $1.033m profits and this lends some credence to the 1st plaintiff's assertion that director's fees were a means by which the defendant received profits *qua* shareholder. However, all the payments of director's fees were supported by valid company resolutions. The mere fact that the defendant had previously received part of his distribution of profits *via* director's fees is in itself insufficient to ground a finding that the alleged "excess" $425,000 paid to the defendant were not intended to be genuine director's fees, but were instead intended as a means of further profit distribution to the defendant *qua* shareholder. Even if these payments of director's fees were not legitimate, it seems clear to me that, at best, the plaintiff might be able to make the case that they were procured by the defendant acting in breach of his duties as director in causing the resolutions authorising the payments to be passed. However, it does not support the conclusion that they were received by the defendant *qua* shareholder, and should be treated as an unofficial distribution of profits.

Payments to PDP, Emerald and Trefoil

101 The plaintiff's expert identified several payments to PDP, Emerald, and Trefoil as payments which were not made "in the ordinary course of business". These payments were all identified either because Tri-Nexus did not have any business dealings which would justify the work described in the invoices, because there was something suspicious about the invoice numbers or dates, or simply because there was no supporting documentation.

102 Without going into the details of each particular invoice, I agree with the plaintiff's expert's observation that something seems amiss. This is hardly surprising given the well-established fact that sham invoices have been issued by Tri-Nexus for the benefit of the 1st plaintiff (or Lim), the defendant, and Soh. In fact, this is the very reason for the ongoing criminal proceedings against the three of them (see [3] above). Insofar as some of the payments to Emerald are concerned, the evidence before the court is that these payments were allowed by IRAS as legitimate business

expenses of Tri-Nexus following its investigations. While the defendant's expert, Mr Farooq Ahmad Mann, acknowledged at the trial that IRAS may change its position on these payments if new information becomes available to suggest that the payments were not proper business expenses, the court can only operate on the information presently available. Thus, based on the evidence before the court, the 1st plaintiff has failed to prove that all of the Emerald payments were instead received by the defendant.

103 Notwithstanding the suspiciousness of the payments made to PDP, Emerald, and Trefoil, the 1st plaintiff has not produced sufficient evidence that these payments were ultimately received by the defendant (as opposed to, for example, Soh or by both of them) and, if so, that these payouts were received by the defendant *in his capacity as shareholder*. In fact, this possibility was expressly acknowledged by Mr Loo in his closing submissions where he stated that "these payments give rise to the possibility that they may have been made to either the Defendant *or to Soh* as pay-outs" [emphasis added]. Even if I were prepared to find that the payments were received by the defendant given he was in control of Tri-Nexus and may well have orchestrated these suspicious payments, I find it difficult to see how these payments can be considered payouts of profits received by the defendant *qua shareholder*. In my view, even if the payments to PDP, Trefoil and Emerald were indeed unauthorised or wrongful, this would simply be a case involving the breach of a director's duties. Nothing in the evidence can convert such a breach of duty into payouts of profits received by the defendant *qua* shareholder to which the 1st plaintiff as beneficiary of the trust shares may lay claim. As Ms Ho submits, it must be borne in mind that the account ordered in the consent judgment is not an account of Tri-Nexus's assets *at large*, but rather, it is an account of the *trust* assets.

104 Ms Ho helpfully raised the case of *Loh Sze Ti Terence Peter v Gay Choon Ing* [2008] SGHC 31 ("*Loh Sze Ti Terence Peter*"), where the High Court had to conduct a similar inquiry into sums which a trustee-shareholder (who was also a director in the company) had to account to the beneficiary for, pursuant to a decision that shares were held on trust. The High Court held that the trustee's role as a director and his role as a trustee of the shares cannot be conflated (*Loh Sze Ti Terence Peter* at [74]). The trustee's powers *qua* director were not held on trust for the beneficiary shareholder so the latter had no standing to sue the former for breach of director's duty (*Loh Sze Ti Terence Peter* at [46]). These observations apply with equal force in the present case. In an action for a breach of trust of shares, the 1st plaintiff as beneficiary-shareholder has no remedy against the defendant for breaches of his director's duties.

105 Finally, what distinguishes the profit sharing of $1.033m among the three shareholders and the distribution of $165,000 which was subsequently re-injected into Tri-Nexus from the allegedly wrongful payouts in this case is that, for the former payments, all three parties *agreed* to receive a share of Tri-Nexus's profits in this manner *in proportion to their shareholding*. In respect of the allegedly unauthorised payouts, quite apart from the fact that these payments were not agreed payouts (see [82] above), there is no evidence that the payments were made to the defendant *in proportion to his registered shareholding* of Tri-Nexus. In order for the parallel with the $1.033m payout and $165,000 distribution to work, the 1st plaintiff must establish that the other registered shareholder, Soh, likewise received an amount proportionate to his own shareholding in Tri-Nexus. Only then would the 1st plaintiff be able to show, by analogy with the profit-sharing of $1.033m and distribution of $165,000, that the allegedly wrongful payments were received by the defendant (and, consequently, Soh) were unofficial payouts of profits *to the shareholders corresponding to their respective shareholdings*. In other words, if the 1st plaintiff can only establish that the defendant received these payments which were not incurred in the ordinary course of business without proving that Soh, the other shareholder, had also received proportionate payments, the 1st plaintiff's case theory simply fails. However, there is no evidence before the court that Soh had received *corresponding* proportionate payments from Tri-Nexus *qua* shareholder.

106 Therefore, even if the consent judgment required the defendant to provide an account of all unofficial payouts of profits which he had received *qua* shareholder (which I have found otherwise), I find that the defendant has failed to prove, based on the evidence before me, that such unofficial payouts were received by him *in his capacity as shareholder*.

107 Finally, even if *any or all* of the above payments were not proper, the 1st plaintiff has other remedies against the directors of Tri-Nexus. Such improper payments cannot be translated into profits for distribution. In other words, a prior wrong by the defendant does not justify an improper method to distribute profits which is not in accordance with the articles of Tri-Nexus *absent* agreement by all the shareholders. I am not prepared to infer that such payments, even if wrongful, constitute unofficial payouts of profits received by the defendant *qua* shareholder for which the 1st plaintiff is entitled to half thereof.

Conclusion

108 Although the court, in the course of the assessment hearing, invited Mr Loo to consider the propriety of the 1st plaintiff commencing a derivative action under s 216A of the Companies Act (Cap 50, 2006 Rev Ed) for recovery of the allegedly wrongful payments to the defendant or other third parties which were not incurred in the ordinary course of business, it is unfortunate that the 1st plaintiff insisted on continuing with the case as it did. That is not to say that the 1st plaintiff would necessarily succeed in such a derivative action. But it would at least have relieved the 1st plaintiff from having to discharge the insurmountable burden of proving that the expression "dividends and profits" under the consent judgment bears a distinctive meaning which is contrary to its ordinary legal meaning. It is not clear why the 1st plaintiff would choose such a problematic route to prove its claim when there are other less challenging options available. As the 1st plaintiff may well pursue other alternative remedies, I shall say no more.

109 In conclusion, the 1st plaintiff's claim fails in its entirety. Costs fixed at $40,000 are awarded to the defendant plus reasonable disbursements to be agreed if not taxed.

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