IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 21

Civil Appeal No 168 of 2015 and Summons No 16 of 2016

Between

(1) TURF CLUB AUTO EMPORIUM PTE LTD
(2) SINGAPORE AGRO AGRICULTURAL PTE LTD
(3) KOH KHONG MENG
(4) TURF CITY PTE LTD
(5) TAN CHEE BENG

… *Appellants/Respondents*

And

(1) YEO BOONG HUA
(2) LIM AH POH
(3) TEO TIAN SENG

… *Respondents/Applicants*

Civil Appeal No 171 of 2015 and Summons No 17 of 2016

Between

(1) TAN HUAT CHYE

… *Appellant/Respondent*

And

(1) YEO BOONG HUA
(2) LIM AH POH
(3) TEO TIAN SENG

… *Respondents/Applicants*

JUDGMENT

[Res Judicata] — [Issue Estoppel]
[Contract] — [Breach]
[Contract] — [Contractual Terms] — [Implied Terms]
[Contract] — [Discharge] — [Breach]

Turf Club Auto Emporium Pte Ltd and others
v
Yeo Boong Hua and others and another appeal and other matters

[2017] SGCA 21

Court of Appeal — Civil Appeals No 168 and 171 of 2015 and Summonses No 16 and 17 of 2016
Sundaresh Menon CJ, Chao Hick Tin JA and Judith Prakash JA
10 March 2016

22 March 2017 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

1 This case puts to the test the familiar axiom that even a bad settlement is better than a good trial.

2 Settlement and litigation involve different risk paradigms. Litigation brings with it risks and uncertainty but accompanying that might be the prospect of a more complete vindication; settlement on the other hand is expected to deliver certainty though this often comes with compromise. Yet, certainty is not guaranteed. Whether a settlement does in the end deliver certainty will depend, among other things, on whether the parties are sincerely

committed to it and whether their agreement satisfactorily addresses the essential variables. If there is no such commitment or if the agreement between the parties is poorly drafted, settlements may even spawn further litigation.

3 The action that led to the present appeals concerns a consent order that was entered into on 22 February 2006 by, among others, some of the appellants and all of the respondents in the appeals before us to settle certain minority oppression actions in respect of two companies. More than ten years on, the parties are still disputing the construction of the consent order. In the court below, the respondents were successful in setting aside the consent order and reinstating the underlying minority oppression actions. The appellants have appealed against that decision.

The factual background

The parties

4 The five appellants in Civil Appeal No 168 of 2015 ("CA 168") are Mr Koh Khong Meng ("Koh KM"), Mr Tan Chee Beng ("Tan CB") and three companies. The three companies are:

(a) Turf Club Auto Emporium Pte Ltd ("TCAE"), which was previously known as Turf Club Auto Megamart Pte Ltd;

(b) Turf City Pte Ltd ("TCPL"); and

(c) Singapore Agro Agricultural Pte Ltd ("SAA").

5 The appellant in Civil Appeal No 171 of 2015 ("CA 171") is Mr Tan Huat Chye. He is the father of Tan CB and is referred to by the parties and in

this judgment as "Tan Senior". We will refer to the appellants in both appeals collectively as "the Appellants".

6 CA 168 and CA 171 involve the same three respondents, Mr Yeo Boong Hua, Mr Lim Ah Poh and Mr Teo Tian Seng. We will refer to them as "the 1st Respondent", "the 2nd Respondent" and "the 3rd Respondent" respectively and collectively as "the Respondents".

7 TCAE and TCPL, both of whom are appellants in CA 168, are nominal parties to these proceedings. They are also the very subject of the proceedings, and of the minority oppression actions that had led to the consent order. They were set up as part of a joint venture that was entered into by the other appellants and the Respondents as well as some others. We will refer to them as "the JV Companies". The Respondents are minority shareholders in the JV Companies, while Koh KM and SAA are majority shareholders. Tan CB in turn is a director of, and controls, SAA.

The formation of the JV Companies

8 The joint venture involved a large plot of land of about 557,000m^2 in Bukit Timah ("the Site"). The Site used to be a part of the former Bukit Timah Turf Club. On 5 January 2001, the Singapore Land Authority ("the SLA") (which was then known as the Singapore Land Office) invited tenders for the lease of the Site. The tender notice and advertisements put up by the SLA indicated that the tenure of the lease was to be for a period of "3+3+3 years".

9 The SLA received only two bids for the lease in the tender exercise. The first bid was submitted by the Respondents through their joint venture vehicle, Bukit Timah Carmart Pte Ltd ("BTC").

10 The second bid was tendered by five individuals, Tan Senior, Tan CB, Koh KM, one Ng Chye Samuel ("Samuel Ng") and one Ong Cher Keong ("Ong CK"), and their bid was submitted in the name of SAA. We will adopt the terminology used in the court below, and refer to these five individuals as "the SAA Group" even though not all the individuals were involved in SAA. Only Tan CB and Ong CK were directors and shareholders of SAA. Tan Senior used to be a director and shareholder, but had sold his shares to Tan CB and ceased to be a director in February 2001, a month before the tender. Neither Koh KM nor Samuel Ng was involved in SAA. They were Tan Senior's business partners in a separate company that sublet spaces to car dealerships.

11 We should also highlight that two members of the SAA Group — Samuel Ng and Ong CK — are not parties to the present set of appeals. Samuel Ng had not taken any substantive role in the proceedings from the outset. Ong CK defended the action below, and initially filed an appeal (Civil Appeal No 173 of 2015 ("CA 173")) but the appeal was deemed withdrawn after the time for the filing of the requisite documents lapsed.

12 The joint venture arose out of a chance meeting between the Respondents and three members of the SAA Group (Tan Senior, Tan CB and Koh KM) at the office of the SLA when the two groups had each gone to submit their bids on 2 March 2001. A conversation started between them as Tan Senior and Koh KM were acquainted with the 3rd Respondent. Having established that they had each submitted or was planning to submit a bid, the discussion turned to the possibility of their jointly developing and operating the Site regardless of who, between them, won the bid. The identity of the bidders and their bid amounts were released later on the same day. BTC had

submitted a bid of $260,000 per month while SAA's bid was for $390,000 per month.

13 Six days later, on 8 March 2001, the parties met at Punggol Marina. At this meeting, Ong CK presented a business plan ("the Business Plan"), which set out the following salient points:

(a) All eight individuals, including Tan CB, were to be shareholders and directors of a company that would be set up for the proposed joint venture.

(b) Most of the construction and professional works in relation to the Site would be managed by Goodland Development Pte Ltd ("Goodland"), a company controlled by Tan CB, and Architects Group Associates Pte Ltd ("AGA"), a company controlled by Ong CK.

(c) The Site would be leased from the SLA "for Commercial Use for a period of 3 years + 3 years + 3 years" with effect from April 2001.

14 These discussions culminated in the parties signing a memorandum of understanding ("the MOU") on the same day. The salient terms of the MOU are as follows:

(a) The "First Party" (which referred to the Respondents) and the "Second Party" (which referred to Koh KM, Samuel Ng, Tan Senior and SAA or its nominees) were the parties to the joint venture.

(b) A new company would be incorporated to develop and operate the Site, and the parties would jointly operate the project with the First

Party holding 37.5% of the shares of this company and the Second Party holding 62.5%.

(c) Only shareholders would be deemed to be directors of the new company that would be formed.

(d) The project manager for the "whole project during the duration of the full lease" would be AGA and Goodland.

The MOU bore the signatures of the Respondents, Samuel Ng, Tan Senior, Koh KM, Tan CB and Ong CK.

15 Although the MOU envisaged that the joint venture would take place through the incorporation of only one company, two companies (the JV Companies) were eventually created. It is common ground that there was at least one oral agreement between the parties that altered the MOU to that end. However, before the trial judge ("the Judge"), the parties disputed whether they had agreed to other changes or to any additional terms (see [15]–[16] of the judgment below, which is reported as *Yeo Boong Hua and others v Turf Club Auto Emporium Pte Ltd and others* [2015] SGHC 207 ("the Judgment")). The Judge did not think it was necessary to make a finding on this. The Respondents have not pursued the existence of the oral agreements or the additional terms on appeal.

16 The first of the JV Companies, TCPL, was incorporated on 9 April 2001 while the second, TCAE, was incorporated on 25 April 2001. At the time of incorporation, Tan Senior and Ong CK were the sole directors of the JV Companies. Subsequently, on 25 June 2001, the Respondents and the other members of the SAA Group were also appointed as directors of TCPL. As for

TCAE, the 3rd Respondent, Tan CB and Koh KM were appointed as directors on 23 October 2001, 9 February 2002 and 28 February 2004 respectively.

17 It was envisaged that part of the Site would be developed as a used car centre and another part would be developed into a shopping mall. The former would be operated by TCAE and the latter by TCPL. TCAE and TCPL were to be responsible for the renting or licensing of the individual lots or units to the ultimate tenants or licensees. Their main source of revenue would come from the rent or fees payable by these ultimate tenants or licensees. The JV Companies would also be responsible for the cost of developing and operating the Site, and would pay SAA an aggregate monthly rent consisting of two components – the amount of the rent that was due to the SLA and a further 3% of that rental amount as a premium.

18 On 25 April 2001, the SLA informed SAA that its bid was accepted. In a letter addressed to SAA, the SLA stated as follows:

> …
>
> The term of the tenancy will be three (3) years (excluding rent-free period) with option to renew for a three (3)-year term plus a further option for a three (3) year term, subject to rental revision at prevailing market rate and new tenancy terms and conditions. The grant of the options is at the absolute discretion of the Collector of Land Revenue. … [emphasis in original]

19 On 10 July 2001, the SLA and SAA entered into a tenancy agreement at a rent of $390,000 per month for three years from 1 September 2001 ("the 2001 Head Lease").

20 On the same day, SAA entered into separate sub-tenancy agreements ("STAs") respectively with TCAE and TCPL for a period of three years less

one day from 1 September 2001. We will refer to these two STAs as "the 2001 STAs". Under the 2001 STAs, the JV Companies were to each pay SAA a rent of $195,000 per month (this being half the rent due to the SLA) plus 3% of the gross monthly rent or licence fees that they would receive from the ultimate tenants or licensees (as opposed to 3% of the rental amount payable to the SLA as originally agreed (see [17] above)). The 2001 STAs contained an "Option to Renew" that provided the JV Companies with two options to renew the three-year tenancy at a revised rent and on conditions to be determined by SAA for a further period of three years each, subject to the condition that the SLA renewed the lease with SAA.

21 The JV Companies in turn entered into sub-sub tenancy and license agreements with the ultimate tenants or licensees ("the SSTAs"). The letter of offer for the SSTAs stated that "the license period shall be [three years] less [seven days] from date of notice to take possession with an option to renew for another [three years] plus a further option for a [three-year] term". The letter also stated that the grant of the options would be at the absolute discretion of the SLA. Given the context, this likely meant that the options to renew the SSTAs were, like the STAs, subject to the condition that the SLA renewed the head lease with SAA.

The commencement of the Consolidated Suits

22 While the Site was being developed, the relationship between the parties deteriorated. The Respondents became concerned over the financial affairs of the JV Companies. This led them to appoint PricewaterhouseCoopers LLP on 17 April 2002 to review the accounts and finances of the JV Companies. While that was afoot, the SAA Group passed a

resolution to remove the Respondents as directors of TCPL at an annual general meeting that was held on 16 August 2002.

23 This eventually led to the 1st and 2nd Respondents commencing Originating Summons No 1634 of 2002 ("OS 1634") on 15 November 2002 to seek, among other relief, an order to restrain TCPL from amending its Articles of Association and calling an extraordinary general meeting. All the Appellants save for TCAE and Tan CB were named as defendants in OS 1634. The 3rd Respondent was initially named a defendant but was subsequently added as a plaintiff. Following the bankruptcy of Tan Senior on 29 August 2003, the Respondents did not actively pursue OS 1634 against him. They contend that this was because they thought that they had to obtain leave of the court before they could do so.

24 Some two years after the commencement of OS 1634, on 25 August 2004, the Respondents commenced Suit 703 of 2004 ("Suit 703") against TCAE, SAA and Koh KM. Suit 703 and OS 1634 were consolidated on 28 January 2005. We refer to them collectively as "the Consolidated Suits". Tan CB and Ong CK were not parties to either suit.

25 In the meantime, the 2001 Head Lease expired in September 2004. On 10 September 2004, the SLA renewed the lease of the Site with SAA for a period of three years from 1 September 2004 ("the 2004 Head Lease"). The rent was reduced to $260,000 per month in the light of the poor economic conditions that prevailed at that time. The 2004 Head Lease contained a "Renewal of Tenancy" clause that stated that the SLA may at its absolute discretion grant a tenancy for a further term of three years subject to new terms and conditions and revision of rental.

26 On the same day, SAA entered into STAs with the JV Companies each for a period of three years less one day from 1 September 2004 at $130,000 per month and 3% of the monthly income from the rental or licence fees that would be earned by each company ("the 2004 STAs"). The rent reduction in the 2004 Head Lease was therefore passed down to the JV Companies in the 2004 STAs. However unlike the 2001 STAs (see [20] above), the 2004 STAs did not expressly include an option for the JV Companies to renew the STAs on expiry. The Respondents maintained before the Judge that they were not consulted on the terms of the 2004 STAs because the JV Companies were controlled by members of the SAA Group. The Judge did not make a finding on this point and the parties do not seem to be pursuing any issue relating to this on appeal.

The Consent Order

27 The parties managed to reach a settlement before the Consolidated Suits went to trial. At the material time, the Respondents who had brought the Consolidated Suits were represented by AsiaLegal LLC ("AsiaLegal") and the defendants of the Consolidated Suits (namely, TCPL, TCAE, SAA, Samuel Ng, Koh KM and arguably Tan Senior – see [28] below) were represented by Rajah & Tann LLP ("R&T"). We will refer to the defendants of the Consolidated Suits as "the Defendants (Consolidated Suits)".

28 A consent order encapsulating the terms of their settlement ("the Consent Order") was recorded before Choo Han Teck J on 22 February 2006. It is disputed whether Tan Senior was a party to the Consent Order and whether he was represented by Tan CB. On the one hand, the terms of the Consent Order cover Tan Senior. But on the other hand, Tan Senior argues

that he was not involved in the Consolidated Suits or the negotiation of the Consent Order after his bankruptcy.

29 The Consent Order sought to address the concerns raised by the Respondents in the Consolidated Suits and end the joint venture by extricating *either* the Respondents *or* the SAA Group from the JV Companies. This was to be done through three main steps:

(a) first, KPMG Business Advisory Pte Ltd ("KPMG BA") would be engaged to carry out an investigation into the financial affairs of the JV Companies in order to address the Respondents' concerns;

(b) second, an independent valuer, KPMG Corporate Finance Pte Ltd ("KPMG CF"), would be engaged to conduct an independent and fair valuation of the shares in the JV Companies; and

(c) third, the parties would hold a closed bidding exercise.

It was agreed that the higher bidder would purchase the shares of the lower bidder, and that those behind the lower bid would then resign as directors of the JV Companies. It was also agreed that if the Respondents were the higher bidder, the Defendants (Consolidated Suits), in particular SAA, would use their best endeavours to transfer the head lease with the SLA, which was in SAA's name, to the JV Companies.

30 The Consent Order stipulated timelines for the investigation, valuation and bidding exercise to take place. Unless the parties agreed in writing to any changes, the investigation and valuation were to be completed within 60 days of the date that KPMG BA was appointed. The decisions, findings and conclusions of KPMG CF were to be contained in a written report ("the

Valuation Report") a week thereafter, and the bidding exercise was to be carried out within 28 working days from the receipt of the Valuation Report. The bids were to be submitted to KPMG CF, which would reveal the bids and facilitate the transfer and registration of the shares to the winning group. If all had gone according to the timelines envisaged in the Consent Order, KPMG CF would have released the Valuation Reports by 2 July 2006.

31 However, the Valuation Reports were issued only on 10 August 2007. The delay of more than 13 months arose because the parties could not agree on the payment of the fees of a quantity surveyor to replace the original quantity surveyor who no longer wished to be involved in this exercise. The parties blame each other for the delay. KPMG BA eventually informed the parties on 3 August 2007 that it would proceed to finalise the Valuation Reports in the absence of any objection from either party to the completion of the valuation exercise without the appointment of a quantity surveyor so as not to protract the matter any further.

32 Although the Valuation Reports were issued in August 2007, the JV Companies were valued as at 31 May 2006. This was more than a year *before* the issuance of the reports. TCPL was valued at $1.33 per share while TCAE was assigned a "nil" value. Notably, the Valuation Reports did not take into account the earning capacities of the JV Companies in the period after the expiry of the 2004 Head Lease. This was because SAA did not inform either KPMG BA or KPMG CF (collectively referred to as "the KPMG Entities") that the tenancy agreement between the SLA and SAA would be renewed for another three years upon the expiry of the 2004 Head Lease at the end of August 2007. SAA and the SLA had agreed in principle to the renewal of the 2004 Head Lease as early as 8 September 2006. The new tenancy agreement

("the 2007 Head Lease") had been formally entered into on 22 May 2007, more than two months before the release of the Valuation Reports. Unaware of these developments, the KPMG Entities stated at para 5.6 of the Valuation Reports that the uncertainty over the renewal of the 2004 Head Lease "raise[d] concerns regarding the viability of [TCPL and TCAE] to operate as a going concern, and hence raise[d] questions about [their] future earning capacity".

33 Until the Valuation Reports were released, the Respondents were not aware of what information the Defendants (Consolidated Suits) had provided to the KPMG Entities. On receiving the Valuation Reports from KPMG BA, the Respondents learnt for the first time that the future earning capacities of the JV Companies had not been taken into account in the valuation.

34 On 17 August 2007, AsiaLegal wrote to KPMG BA copying R&T and others. It expressed shock that the SAA Group had not informed the KPMG Entities whether the 2004 Head Lease would be renewed, and called for revised valuation reports to be issued in the light of this omission.

35 KPMG BA replied on 22 August 2007, stating that the assumptions made in the reports would have to be revised and new valuation reports would have to be issued if it were indeed the case that the 2004 Head Lease had been renewed. It stated that if there was no such renewal, the Valuation Reports would stand as final and conclusive.

36 The next day, R&T replied KPMG BA, copying AsiaLegal, stating that while the 2004 Head Lease had been renewed, the STAs with the JV Companies had not been renewed or granted. AsiaLegal responded on 25 August 2007 asking R&T to confirm if SAA would renew the STAs with the JV Companies within two days. It took the position that the non-renewal of the

STAs would constitute a breach of cl 11 of the Consent Order. AsiaLegal also reiterated in this letter that the Valuation Reports had to be revised.

37 R&T replied on 29 August 2007 indicating that SAA would not renew the STAs with the JV Companies. R&T stated that it disagreed that the Consent Order extended to the renewal of the 2004 Head Lease or that SAA had an obligation under the Consent Order to renew its sub-tenancies with the JV Companies. R&T conveyed that its clients' position was that there was no need to revise the Valuation Reports and that the bidding exercise should proceed based on the existing Valuation Reports before the deadline that had been stipulated in the Consent Order.

38 On the same day (29 August 2007), KPMG BA wrote to the parties ("the KPMG August Letter"). It expressed the view that the Valuation Reports should be revised because the confirmation by the Defendants (Consolidated Suits) that the 2004 Head Lease had been renewed meant that the information that had been provided to KPMG CF were materially inaccurate. It further stated its view that given that the function of the valuation was to facilitate the compromise between the parties, the altered facts called into question the functional integrity of the valuation and whether it had met its purpose of facilitating the compromise between the parties.

39 However, in the light of the persistent reluctance of the Defendants (Consolidated Suits) for the Valuation Reports to be revised, KPMG BA subsequently informed the parties two weeks later on 12 September 2007 ("the KPMG September Letter") that notwithstanding its views as to the reliability of the reports, the parties remained bound by the Valuation Reports and the

bidding exercise had to proceed until and unless they were able to reach an agreement for a new report to be issued.

Subsequent litigation between the parties leading up to the present appeals

40 A day later, on 13 September 2007, the Respondents filed Summons No 4117 of 2007/X ("SUM 4117") seeking, among other things, an order that the Valuation Reports be revised to take into account the 2007 Head Lease. SUM 4117 was later amended, and the amended form of it ("the Amended SUM 4117") was filed on 25 January 2008. In the Amended SUM 4117, the Respondents asked that the Consent Order be "clarified and/or varied" to remedy the breaches of the Consent Order and for a revaluation exercise to be conducted based on the new terms. In particular, the Respondents asked for cl 9(g) of the Consent Order to be amended to expressly provide that SAA would assign the 2007 Head Lease to the JV Companies if the Respondents won the bidding exercise. They also sought the insertion of a new cl 9(g)(ii) to provide that in the event the SLA was not agreeable to the transfer of the 2007 Head Lease, SAA was to grant STAs to the JV Companies on identical terms as the 2007 Head Lease and was also to transfer all SSTAs between it and the ultimate tenants to the JV Companies.

41 The Amended SUM 4117 was heard and dismissed by Choo J whose judgment is reported as *Yeo Boong Hua and others v Turf City Pte Ltd and others and another suit* [2008] 4 SLR(R) 245 ("the SUM 4117 Judgment"). Choo J held that there was a preliminary issue in the way of the Respondents' application, which was that the court did not have jurisdiction to vary the Consent Order. He also expressed the view that any allegation of breach ought to have been brought in a separate action. Choo J, however, went beyond the issue of jurisdiction and further discussed the allegations of breaches of the

Consent Order. In this respect, he observed (at [11]) that "upon a proper construction of the Consent Order … [the] allegations are unfounded because no such obligations existed on the part of the defendants". In the present appeals and before the Judge, the Appellants rely heavily on the observations of Choo J, specifically those set out at [16]–[26] of the SUM 4117 Judgment, to argue that the Respondents are precluded from re-litigating the issue of breach as this had already been argued before, and decided by, Choo J in the Amended SUM 4117.

42 The Respondents did not appeal against Choo J's dismissal of the Amended SUM 4117.

43 On 3 November 2008, the Defendants (Consolidated Suits) filed Summons No 4848 of 2008/P ("SUM 4848") for an order that the bidding exercise be held on 15 December 2008. The Respondents resisted this by filing Summons No 5373 of 2008/J ("SUM 5373") on 5 December 2008 for an order that the bidding exercise not proceed. Both applications were heard by Choo J.

44 Before Choo J heard the applications in respect of the bidding exercise, the Respondents commenced Suit No 27 of 2009 ("Suit 27"), which is the subject of the present appeals, on 8 January 2009 against the Appellants, Ong CK and Samuel Ng. We refer to the defendants of Suit 27 collectively as "the Defendants (Suit 27)". The Respondents sought in Suit 27 to set aside the Consent Order on grounds of repudiatory breach, frustration, mistake, breach of fiduciary duties, conspiracy and knowing assistance. Three of the Defendants (Suit 27), namely SAA, Tan CB and Koh KM, advanced a

counterclaim against the Respondents seeking an order that the bidding exercise proceed.

45 On 12 January 2009, Choo J dismissed the Respondents' application in SUM 5373 and ordered that the bidding exercise was to proceed. In his grounds of decision released a month later (see *Yeo Boong Hua and Others v Turf City Pte Ltd and Others and Another Suit* [2009] SGHC 34 ("the SUM 4848 GD")), Choo J explained that the fact that the Respondents had commenced a fresh suit against the Defendants (Consolidated Suits) did not mean that the bidding exercise should be stayed. He held that the Respondent's alleged new cause of action should proceed independently. The Respondents appealed against this decision in Civil Appeal No 6 of 2009/Z. The Court of Appeal reversed Choo J's decision on 7 July 2009. The bidding exercise thus did not take place.

46 In the subsequent months, the Defendants (Suit 27) applied to strike out Suit 27 on the ground, among others, that it disclosed no reasonable cause of action. An assistant registrar struck out all the claims, save for the claim based on frustration, on 19 November 2009. The decision of the assistant registrar was later upheld by Choo J on 7 April 2010. The Respondents appealed against Choo J's decision in Civil Appeal No 71 of 2010 ("CA 71").

47 Before CA 71 was heard, the Respondents' new set of solicitors from Central Chambers Law Corporation applied to the Court of Appeal for leave to amend its statement of claim. On 11 February 2011, the Court of Appeal granted leave for the Respondents to file and serve an amended statement of claim. This, in effect, meant that CA 71 was allowed.

48 With that, Suit 27 was fixed for a 15-day trial before Choo J. However, during a hearing held on 17 October 2012, Choo J directed the parties to tender written submissions on several issues before he would decide whether oral evidence was necessary. Choo J wanted the parties to address (a) the grounds on which the Respondents were relying to set aside the Consent Order; and (b) the different consequences that would flow in the event that the Consent Order was set aside and in the event that it was not set aside.

49 The parties duly filed their written submissions. On 2 November 2012, Choo J dismissed Suit 27 without hearing oral evidence (see his decision, reported as *Yeo Boong Hua and others v Turf Club Auto Emporium Pte Ltd and others* [2012] SGHC 227). For the third time, the Respondents appealed against Choo J's decision. The appeal was allowed on 3 July 2013 and the Court of Appeal directed that the matter was to be remitted to the High Court to be heard before a different judge.

50 This was how Suit 27 came before the Judge, whose decision is the subject of these appeals. The trial was conducted over 38 days. On 6 August 2015, the Judge allowed the Respondents' claim in Suit 27 and dismissed the counterclaim that had been brought by three of the defendants.

The decision below

51 The Judge began by considering the preliminary question as to whether Choo J's decision in the SUM 4117 Judgment gave rise to an issue estoppel in respect of the construction of the Consent Order and the Respondents' allegations of breaches in Suit 27. He concluded that issue estoppel did not arise.

52 Thereafter, the Judge addressed the main claims and held that the Consent Order ought to be set aside for two distinct reasons: (a) it was inoperative; and (b) the Defendants (Consolidated Suits) had committed repudiatory breaches of cll 5 and 11 as well as of an implied term of the Consent Order. On the basis that the Consent Order should be set aside, the Judge ordered that the Consolidated Suits be revived and reinstated. The Judge then made consequential orders granting leave to the Respondents to add Tan CB, Ong CK and Tan Senior (who is no longer a bankrupt) as defendants in the Consolidated Suits ("the Consequential Orders"). The Judge also dismissed the counterclaim that the bidding exercise should be proceeded with.

53 The parts of the Judgment that are relevant to the present appeals can be broadly analysed under the following heads:

(a) no *res judicata* arising from the SUM 4117 Judgment;

(b) the grounds to set aside the Consent Order;

(c) the dismissal of the counterclaim; and

(d) the Consequential Orders and observations on the conduct of Tan CB.

We summarise each in turn.

No res judicata arising from the SUM 4117 Judgment

54 The Judge first considered whether Choo J's decision in the Amended SUM 4117 gave rise to an issue estoppel on the question of (a) whether the Consent Order obliged SAA to pass the benefit of the 2007 Head Lease to the

JV Companies by granting them sub-tenancies ("the Non-Renewal Issue"); and (b) whether the Consent Order imposed an obligation on SAA to disclose the fact that it had obtained the 2007 Head Lease to the KPMG Entities ("the Non-Disclosure Issue").

55 The Judge concluded that Choo J's views in the SUM 4117 Judgment on the Non-Renewal Issue and the Non-Disclosure Issue were not intended to be final and conclusive on the merits as they were *obiter* and were aimed only at showing the Respondents that in Choo J's view there was no purpose in their commencing a fresh action for breach of the Consent Order. The Judge also noted that Choo J could not have intended his decision in the Amended SUM 4117 to be final and conclusive as Choo J had expressed the *unqualified* view in the SUM 4848 GD (at [2]) that Suit 27 "should proceed independently" (see [45] above). The Judge further held that in any case, Choo J's decision to reject the Respondents' application in the Amended SUM 4117 rested ultimately on the preliminary issue of his lack of jurisdiction to vary the Consent Order and his observations on the breach of the Consent Order "were not fundamental" to his decision.

The grounds to set aside the Consent Order

56 The Judge then held that there were two grounds to set aside the Consent Order. The first basis was that the Defendants (Consolidated Suits) had committed repudiatory breaches of the Consent Order:

(a) by breaching cl 11 of the Consent Order in that they altered the "status quo" by appropriating the benefit of the 2007 Head Lease for themselves;

(b) by breaching an implied term in the Consent Order that pending full performance of the Consent Order, SAA would not appropriate the benefit of the 2007 Head Lease for themselves ("the Implied Term"); and

(c) by breaching cl 5 of the Consent Order in that they failed to disclose the 2007 Head Lease and thus hindered KPMG CF's discharge of its duties.

57 The second and separate basis for the setting aside of the Consent Order was that the Consent Order had been rendered inoperative. The Judge relied on the decision of this court in *Hoban Steven Maurice Dixon and another v Scanlon Graeme John and others* [2007] 2 SLR(R) 770 ("*Hoban*") for the proposition that a consent order can be set aside *ab initio* on the basis that it had been rendered inoperative. The Judge clarified that this basis for setting aside would stand even if there were no repudiatory breach committed by the Defendants (Consolidated Suits) and even if an issue estoppel had arisen over the issue of the alleged breaches of Consent Order out of Choo J's decision in the SUM 4117 Judgment.

The dismissal of the counterclaim

58 Having decided that the Consent Order was to be set aside on the basis of a repudiatory breach and because it had been rendered "inoperative", the Judge dismissed the counterclaim that had been brought by three of the defendants seeking an order that the bidding exercise proceed.

The Consequential Orders and observations on the conduct of Tan CB

59 The Judge then made the following consequential orders in relation to the reinstatement of the Consolidated Suits:

(a) The Respondents were granted leave to join Tan CB and Ong CK as defendants in the Consolidated Suits, which would be revived as a consequence of the Judge's decision, because he found that Tan CB and Ong CK had signed the MOU and entered the joint ventures in their personal capacities.

(b) The Respondents had the right to name Tan Senior as a defendant in the Consolidated Suits because Tan Senior, having provided no evidence to show that he had suffered prejudice, could not rely on the doctrine of laches and estoppel by conduct. The Judge also found that the doctrines of waiver by election and abuse of process were not made out on the facts. The Judge also found that Tan Senior was a party to the Consent Order.

(c) The residual claims advanced by the Respondents (namely those for breach of fiduciary duty and conspiracy) would be subsumed in the Consolidated Suits, which would be reinstated as a consequence of the Judge's decision.

60 In the concluding paragraph of his decision, the Judge observed that "it seem[ed] clear" that Tan CB had perjured himself in either Suit 27 or Suit No 51 of 2012 as he had given different accounts in the two proceedings as to which party had paid for the renovations of the premises at the Site.

Issues before this court

61 The parties whom the Judge found against, save for Samuel Ng who did not contest the suit, appealed against his decision. This led to the filing of the following appeals:

(a) CA 168 by TCAE, TCPL, SAA, Koh KM and Tan CB (collectively referred to as "the Appellants (CA 168)");

(b) CA 171 by Tan Senior; and

(c) CA 173 by Ong CK.

As stated at [11] above, CA 173 was deemed withdrawn after Ong CK did not abide by the timelines for the filing of the requisite documents for the appeal. Thus, only CA 168 and CA 171 are before us.

62 CA 168 raises the following issues:

(a) whether *res judicata* arose such that the Respondents are estopped from arguing that the 2007 Head Lease was within the fold of the Consent Order by reason of the SUM 4117 Judgment;

(b) whether the Judge was correct to hold that there had been repudiatory breaches of cll 5 and 11 of the Consent Order and of the Implied Term;

(c) whether the Judge was correct to hold that the Consent Order can be set aside *ab initio* and that the Consolidated Suits can be revived as a result of the breaches;

(d) whether the court has a residual discretion to set aside or not to enforce the Consent Order;

(e) whether the Judge was correct to hold that the Consent Order could be set aside on the basis that it is "inoperative";

(f) whether the Judge was correct to have dismissed the counterclaim for the bidding exercise to be proceeded with; and

(g) whether Tan CB should be joined as a party to the Consolidated Suits even if the Consolidated Suits were revived.

63 CA 171 concerns two main issues – whether the Judge was correct in finding that Tan Senior had been rightly joined as a defendant to Suit 27 and further, that Tan Senior could be sued in the Consolidated Suits if the suits were revived.

64 Apart from the two appeals, there are also two summonses before us. These are Summonses No 16 and 17 of 2016, which we will refer to as "SUM 16" and "SUM 17" respectively. These summonses are filed by the Respondents and are in relation to the replies that had been respectively filed by (a) the Appellants (CA 168), save for Tan CB; and (b) Tan CB and Tan Senior.

65 In SUM 16, the Respondents argue that paras 1–90 and paras 98–103 of the reply filed by the Appellants (CA 168), save for Tan CB, should be struck out as they are in breach of O 57 r 9A(5B) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC"). In SUM 17, the Respondents are seeking an order that the entire reply jointly filed by Tan Senior and Tan CB be struck out for the same reason.

The parties' arguments

Arguments raised by the Appellants (CA 168)

66 The Appellants (CA 168) contend that the Respondents are estopped by Choo J's findings in the SUM 4117 Judgment from asserting that the Defendants (Consolidated Suits) had breached the Consent Order by not granting sub-tenancies to the JV Companies after SAA had obtained the 2007 Head Lease. They submit that the Judge had erred in construing Choo J's intention as to the finality of his views on the construction of the Consent Order in the SUM 4117 Judgment.

67 They further argue that the Consent Order has not been breached because cl 11 (and cl 9(g)) of the Consent Order cannot be construed to encompass the 2007 Head Lease. They submit that the use of the word "present" in cl 11 of the Consent Order must mean that the clause encompassed only the 2004 Head Lease and the 2004 STAs, which were in existence at that time. As for the Implied Term, the Appellants (CA 168) submit that the Judge's implication of the term which brought the 2007 Head Lease within the ambit of the Consent Order amounted to re-writing the Consent Order. Additionally, they argue that cl 5 of the Consent Order did not require the Defendants (Consolidated Suits) to proactively disclose documents and that therefore, there had been no breach of the Consent Order by the Defendants (Consolidated Suits) in failing to disclose the 2007 Head Lease to the KPMG Entities.

68 Next, they argue that even if the Judge's decision on the repudiatory breaches is upheld, the Judge was nonetheless wrong to have held that the Consent Order could, as a result, be set aside *ab initio* and that the

Consolidated Suits should be revived. They submit that this finding contradicts the basic contractual principle that a contract may only be rescinded *ab initio* (that is to say retrospectively and from the outset) as opposed to being terminated *de futuro* (that is to say prospectively and only in respect of future rights and obligations) where there is a defect in the formation of the contract.

69 As for the Judge's alternative finding that the Consent Order can be set aside on the ground that it was inoperative, the Appellants (CA 168) argue that the Consent Order is not inoperative because it remains possible for the parties to bid for the JV Companies based on the Valuation Reports and the JV Companies could be wound up if no bids are lodged. They further point out that assuming the Respondents do not lodge a competing bid, they would have to pay the Respondents close to $1m for their shares in TCPL, which was not only not a "nominal sum" but a very attractive return given that the Respondents had each invested only $78,000 in the JV Companies. The Appellants (CA 168) argue that their counterclaim for the bidding exercise to be proceeded with should thus have been allowed.

70 Lastly, they argue that the Judge was wrong to grant leave for Tan CB to be joined in the Consolidated Suits because Tan CB was neither a party to the joint venture nor a member of the JV Companies. They further argue that the Judge was wrong to have found that Tan CB had perjured himself. In our judgment, this last issue has no relevance to the present appeals and there is thus no need for us to consider it.

Arguments raised by Tan Senior in CA 171

71 Tan Senior's main arguments in CA 171 are that the Judge erred in holding that (a) he was a party to the Consent Order; and that (b) he could not avail himself of the doctrine of laches and estoppel by conduct as he did suffer prejudice as evidenced by the fact that as a man in his seventies, he was having to face "torturous litigation" despite being unable to recall most facts and not having "retain[ed] most of his documents" after his bankruptcy. He argues that for these two reasons, he should not have been joined as a party to Suit 27 and *a fortiori* to the Consolidated Suits, even if the suits were revived.

Arguments raised by the Respondents in CA 168 and CA 171

72 The Respondents argue that the SUM 4117 Judgment did not give rise to an issue estoppel in relation to the construction of the Consent Order. They maintain that Choo J dismissed the Respondents' application in the Amended SUM 4117 on the basis of his lack of jurisdiction.

73 In relation to the issue concerning the alleged repudiatory breaches, the Respondents argue that the Judge was correct to have found a breach of cl 11 of the Consent Order because the 2007 Head Lease was part of the "status quo" referred to in the clause. They also submit that the Judge was correct to have found a breach of cl 5 of the Consent Order in the failure of the Defendants (Consolidated Suits) to disclose the 2007 Head Lease to the KPMG Entities. In this regard, they highlight that Tan CB had himself agreed at trial that the grant of the 2007 Head Lease was information that would be important to the bidders.

74 The Respondents further argue that two additional grounds could be relied on to affirm the Judge's finding that there was a breach of cl 11 of the Consent Order. They argue, first, that notwithstanding the Judge's decision not to make a finding on this issue, there was ample evidence that the parties to the joint venture had agreed on a "back to back" arrangement, which required SAA to grant STAs to the JV Companies so long as it held the head lease to the Site ("the Back to Back Arrangement"). They submit that the Back to Back Arrangement would also bring the 2007 Head Lease within the "status quo", which would in turn mean that cl 11 was breached when SAA obtained the 2007 Head Lease without correspondingly granting the STAs to the JV Companies.

75 Their second additional ground was that SAA (and thus the Appellants) had disrupted the *status quo* and thus breached cl 11 by misappropriating the assets belonging to the JV Companies. They submit that the alleged misappropriation ("the Misappropriation") took the form of the diversion of the revenue streams of the JV Companies by transferring the SSTAs from the JV Companies to SAA and by transferring the cash deposits held by the JV Companies to SAA.

76 As for the Judge's finding that the Consent Order could be set aside on the ground that it was inoperative, the Respondents argue that the Consent Order had been rendered inoperative as the "bidding exercise [would be] meaningless" because the JV Companies were "virtually worthless". They argue that as the Consent Order was made on the underlying basis that the commercial viability of the JV Companies would be preserved, the fact that the JV Companies have now ceased to be commercially viable amounted to a supervening event that has removed the utility of the bidding exercise, thus

rendering the Consent Order inoperative. They further argue that the Misappropriation, which has resulted in a loss of value of the JV Companies, was yet another supervening event that rendered the Consent Order inoperative.

77 The Respondents rely very heavily on *Hoban* to argue that setting aside the Consent Order on the grounds that it is inoperative would have the effect of returning the parties to the position they were in before the Consent Order was signed, thus reviving the Consolidated Suits. They do not seem to have addressed the other argument made by the Appellants (CA 168), which is that even if there were repudiatory breaches of a contract, this would not result in the contract being set aside *ab initio*.

78 As for the Judge's decision to allow the Respondents to join Tan CB as a party to the Consolidated Suits, the Respondents contend that the Judge was correct to find that Tan CB signed the MOU in his personal capacity and not merely on behalf of SAA. They argue that in any case, Tan CB was a director of the JV Companies and may therefore be sued in a minority oppression action as he was involved in the oppression.

79 In relation to Tan Senior's appeal in CA 171, the Respondents argue that Tan Senior was a party to the Consent Order as he was a named party to it and had taken no steps to remove his name as a party to the same. They also argue that Tan Senior's defences of laches, estoppel by conduct and waiver by election had to fail because he had not shown (a) any positive act on the part of the Respondents that would constitute abandonment; or (b) any evidence that "significant prejudice" had been caused to him.

Our decision

80 We begin our analysis with the question of whether an issue estoppel had arisen. This has an important bearing on all the findings of the Judge that concern the alleged repudiatory breaches of the Consent Order.

Whether an issue estoppel has arisen

The doctrine of res judicata

81 A final judicial pronouncement by a competent court creates legal barriers to re-litigation. In the common law, these barriers are encapsulated in the doctrine of *res judicata*. The doctrine of *res judicata* is justified by two main considerations: (a) first, the public interest that there be finality in litigation; and (b) second, the private interest that no person should be proceeded against twice on the same matter (see *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] 5 SLR 1104 ("*TT International*") at [98]).

82 As we observed in *TT International*, the doctrine of *res judicata* can be said to consist of three conceptually distinct but interrelated principles. These are: (a) cause of action estoppel; (b) issue estoppel; and (c) what is known as either the "extended" doctrine of *res judicata* or the defence of "abuse of process".

83 Cause of action estoppel holds that when a cause of action has been determined by a court of competent jurisdiction to exist or not to exist between the same parties, that outcome may not be challenged by either party in subsequent proceedings (see *Thoday v Thoday* [1964] P 181 ("*Thoday*") at 197

per Diplock LJ (as he then was)). As we observed in *TT International* (at [99]), the central inquiry here is directed at whether the later action, which is not by way of a permitted appeal, is in substance a direct attack on an earlier decision made in relation to a disputed matter between the same parties. Cause of action estoppel may apply even if the claimant had no cause of action in the traditional sense.

84 Issue estoppel is of wider application than cause of action estoppel. It operates even when the *cause of action* in the earlier action and that in the later action are not identical, as long as some issue (of fact or law) which is necessarily common to both had been decided on the earlier occasion and is binding on the parties (see *TT International* at [100]).

85 The "extended" doctrine of *res judicata*, which was set out in the seminal decision of *Henderson v Henderson* (1843) 3 Hare 100 (at 114–115), extends cause of action estoppel and issue estoppel to preclude a party — in the absence of "special circumstances" — from raising in subsequent proceedings matters which were not, but could and should have been, raised in the earlier proceedings.

86 We again reiterate the observations we made in *TT International* (at [103]) that it is important to determine precisely which of the three principles of *res judicata* — cause of action estoppel, issue estoppel or the "extended" doctrine of *res judicata* — applies on the facts of a case because they necessitate different approaches. The present appeals involve only issue estoppel, and it is to that that we now turn.

87 In *Lee Tat Development Pte Ltd v MCST Plan No 301* [2005] 3 SLR(R) 157 ("*Lee Tat*") we held (at [14]–[15]) that the following requirements had to be met in order to establish an issue estoppel:

(a) there must be a final and conclusive judgment on the merits ("the First Requirement");

(b) that judgment must be by a court of competent jurisdiction ("the Second Requirement");

(c) the two actions that are being compared must involve the same parties ("the Third Requirement"); and

(d) there must be identity of subject matter in the two proceedings ("the Fourth Requirement").

88 It is undisputed that the Second Requirement and the Third Requirement are satisfied in respect of the SUM 4117 Judgment and the proceedings in Suit 27. The issue before us is whether the Judge was correct in holding that the First and the Fourth Requirements are not satisfied on the facts. We thus focus on these two requirements, but before we turn to that, it will be helpful to recapitulate the content and context of the SUM 4117 Judgment.

Content and context of the SUM 4117 Judgment

89 In the Amended SUM 4117, the Respondents prayed for the following:

(a) that the Consent Order be "clarified and/or varied" to provide expressly that SAA would assign the 2007 Head Lease to the JV Companies should the Respondents win the bidding exercise. In the

event that the SLA was not agreeable to the transfer, SAA was to grant sub-tenancies to the JV Companies on identical terms as the 2007 Head Lease and it was also to transfer all SSTAs between SAA and the ultimate tenants to the JV Companies; and

(b) that a revaluation exercise be conducted based on these terms and any additional fees payable to KPMG CF in relation to the re-issuance of the Valuation Reports be paid by SAA and Koh KM.

90 In the written submissions tendered by the Defendants (Consolidated Suits), they raised the following arguments to resist the Respondents' application:

(a) The Amended SUM 4117 should be dismissed because the court had no jurisdiction to grant orders sought by the Respondents.

(b) Even if the court had jurisdiction, the clarification had to be pursued by way of a fresh originating process and not through a summons within the Consolidated Suits.

(c) The Amended SUM 4117 would in any case fail on the merits.

The central argument of the Defendants (Consolidated Suits) in relation to the Amended SUM 4117 was that Choo J had no jurisdiction to grant the variations sought by the Respondents. Their *alternative* submission (in the event Choo J held that he did have jurisdiction) was that the application should nonetheless be dismissed on the merits.

91 It is therefore unsurprising that Choo J in fact dismissed the Amended SUM 4117 on the basis that he had no jurisdiction. He further observed that

any allegation of breach of the Consent Order had to be pursued by way of a separate action instead of being advanced as a ground to *vary* the Consent Order. His precise observations were as follows (at [11] of the SUM 4117 Judgment):

> **Jurisdiction**
>
> …
>
> 11 Both [*Fivecourts Ltd v JR Leisure Development Co Ltd* 2000 WL 1421246 (QBD)] and [*Ropac Ltd v Inntrepreneur Pub Co (CPC) Ltd* [2001] CP Rep 31] recognise that whilst there may be exceptional circumstances where a court may interfere with a consent order (*eg*, granting an extension of time), in general, *a consent order represented a contract with which the court has no jurisdiction to interfere, save in circumstances in which the court has to interfere with a contract*. This contractual underpinning of a consent order has been adopted locally by MPH Rubin J in *CSR South East Asia Pte Ltd v Sunrise Insulation Pte Ltd* [2002] 1 SLR(R) 1079. The plaintiffs argued that the amendments are necessary to remedy the following breaches of the Consent Order by the defendants:
>
> (a) the defendants entered into the 2007 Head Lease with the [SLA] but allowed the sublease with the [JV Companies] to expire; and
>
> (b) the defendants failed to disclose that: (i) SAA had entered into the 2007 Head Lease; and (ii) that the 2004 Head Lease contained an option to renew but the sublease to the [JV Companies] did not.
>
> *Any allegation of breach of the Consent Order ought to be brought in a separate action*. Nonetheless, it will become apparent upon a proper construction of the Consent Order that both allegations are unfounded because no such obligations existed on the part of the defendants.
>
> [emphasis added]

92 Although the conclusion that the court had no jurisdiction to vary the Consent Order was sufficient to dismiss the Respondents' application, Choo J did then go on to discuss the merits of the alleged breaches that had been raised by the Respondents and expressed the view that there was no breach.

This is clear both from his final sentence at [11] which is set out in the preceding paragraph, as well as his observations in the subsequent parts of the SUM 4117 Judgment, which we set out as follows:

> 19 … The object of the entire Consent Order was simply to *preserve the then-existing* tenancies through cl 11 whilst the valuer prepared the valuation reports for the valuation exercise. … This machinery contemplated by the parties in the Consent Order does not go so far as to prohibit the defendants from entering into the 2007 Head Lease nor mandate a pro-active renewal of the sublease.
>
> …
>
> 24 The issue of non-disclosure raised at [11] above also falls away once we scrutinise cll 4 and 6 of the Consent Order closely. Both clauses do not impose a mandatory obligation on the defendants to volunteer full disclosure. …
>
> 25 Another issue raised by the plaintiffs is that SAA breached cl 11 of the Consent Order by sending out letters in July 2007 (before the valuation reports were released) to the ultimate operators stating that their "lease" would be assigned to SAA and that their security deposit would be transferred from the [JV Companies] to SAA with effect from 1 September 2007. This allegation is an allegation of a breach of the Consent Order which similarly should be the cause in a separate action. …
>
> [emphasis in original]

93 It is therefore evident that Choo J did make some observations in the SUM 4117 Judgment in respect of the Respondents' claim that the Defendants (Consolidated Suits) had breached the Consent Order. The key question is whether this constitutes an issue estoppel. As we summarised earlier, this turns on whether the First Requirement and the Fourth Requirement as set out in *Lee Tat* are met (that is, whether Choo J's observations constituted a final and conclusive judgment on the merits and whether there was identity of subject matter in the Amended SUM 4117 and in Suit 27). We examine each of these questions in turn.

Whether the First Requirement was met

94 As observed in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [28], finality for the purposes of *res judicata* refers to a declaration or determination made by a court of a party's liability and/or his rights or obligations leaving nothing else to be judicially determined. The High Court in *Goh Nellie* went on to observe that whether the decision in question is a final and conclusive judgment on the merits may be ascertained from the intention of the judge as gathered from the relevant documents filed, the order made and the notes of evidence taken or arguments made (see also the observations of the High Court in *Alliance Entertainment Singapore Pte Ltd v Sim Kay Teck* [2006] 3 SLR(R) 712 at [23] ("*Alliance Entertainment*")). Generally, where a court expressly states that the dismissal of an action is without prejudice to another action being brought (such as in *Alliance Entertainment*), the decision of the court would likely not be final and conclusive for the purpose of issue estoppel. Such an express reservation by the court would usually suffice to indicate that the decision was not intended to be final and conclusive.

95 Counsel for the Respondents, Mr Adrian Tan ("Mr Tan"), submits that the Judge was correct to have found that Choo J's holding on the proper construction of the Consent Order was not meant to be final and conclusive. He submits that Choo J had dismissed the Amended SUM 4117 on the basis that he did not have the jurisdiction to vary the Consent Order in the manner sought by the Respondents and his subsequent observations on the construction of the Consent Order in the SUM 4117 Judgment were merely *obiter*. Mr Tan further submits that this interpretation of Choo J's decision is supported by subsequent events, such as (a) Choo J's observations in the SUM

4848 GD that the Respondents' "alleged new cause of action should proceed independently"; and (b) the fact that when Suit 27 was subsequently placed before Choo J, he reviewed the merits of the claim afresh and did not hold that issue estoppel applied.

96 Mr Kelvin Poon ("Mr Poon"), who acts for the Appellants (CA 168) save for Tan CB who had changed solicitors prior to the filing of the Appellants' Reply, argues that Choo J's findings in respect of the proper construction of the Consent Order were essential to his decision to dismiss the application in the Amended SUM 4117. Mr Poon argues that Choo J in fact accepted that he *had* jurisdiction to vary or clarify the Consent Order, but decided that he would *not* exercise that jurisdiction since on a proper construction of the Consent Order, there was no basis to find that the Defendants (Consolidated Suits) had breached the Consent Order because (a) the Consent Order did not encompass the 2007 Head Lease; and (b) there was no obligation to disclose the 2007 Head Lease.

97 Mr Poon also takes issue with the interpretation adopted by the Judge and the Respondents in respect of Choo J's observation at [11] of the SUM 4117 Judgment that "[a]ny allegation of breach of the Consent Order ought to be brought in a separate action". He submits that this did not mean that Choo J considered that the Respondents *could* bring another action to *again* ventilate the issue of breach. Instead, he submits that Choo J was simply observing that the Respondents *should* (or *ought to*) have done so, before going on to hold (also at [11]) that such an action would in any event be doomed to fail because "it [would nonetheless] become apparent upon a proper construction of the Consent Order that both allegations [of breach were] unfounded because no such obligations existed on the part of the [Defendants (Consolidated Suits)]".

98 Mr Poon's final submission on this point is that the Judge was wrong to have assumed that the "alleged new cause of action" in Choo J's decision in the SUM 4848 GD (see at [95] above) encompassed the Non-Renewal Issue and the Non-Disclosure Issue. He argues that this assumption is erroneous because at the time of Choo J's decision, the Respondents' claim in Suit 27 did *not* include these two issues and thus Choo J could not have been referring to them.

99 In our judgment, the Judge was correct to hold that Choo J's construction of the Consent Order was not final and conclusive on the merits. We agree with the Judge and the Respondents that Choo J's observations were *obiter*, and that Choo J did not intend these to be final, conclusive and binding on the Respondents. When the SUM 4117 Judgment is viewed in the light of the submissions that were filed in relation to the Amended SUM 4117 as summarised at [90] above, it becomes evident that Choo J had accepted the primary submission of the Defendants (Consolidated Suits) and disposed of the Amended SUM 4117 on the basis of his lack of jurisdiction, although he then went on to make some further observations. Having already determined that he did not have jurisdiction, he could not have intended to also make a final and binding pronouncement on the rights of the parties in respect of those issues over which he had already decided he had no jurisdiction. In this regard, we do not agree with Mr Poon that Choo J's observations in respect of the proper construction of the Consent Order were either essential or necessary to his decision on his jurisdiction to vary or clarify the Consent Order. Choo J's holding was simply that in the absence of exceptional circumstances which would allow the court to interfere with a contract, he did not have the jurisdiction to vary the Consent Order.

100 Further, like the Judge, we find it telling that Choo J twice stated in the SUM 4117 Judgment that any allegation of breach had to be ventilated independently in a separate action. The first occasion is at [11] of the SUM 4117 Judgment, and the second is at [25] of the decision where he was specifically addressing cl 11 of the Consent Order. Mr Poon, as we have noted at [97] above, argues that Choo J was merely expressing his view as to what *should have been done* and not what the Respondents could go on and do after his decision had been rendered. While we accept that this is a possible interpretation of Choo J's statements in the SUM 4117 Judgment, we note that Choo J himself did not qualify his observations in this way.

101 We turn next to the Judge's view that Choo J's intentions as to the finality of his observations in the SUM 4117 Judgment can also be objectively gleaned from Choo J's subsequent decision in the SUM 4848 GD. Choo J observed as follows in the latter decision (see [45] above):

> 2 The plaintiff thus applied to set aside the consent order or a re-valuation of the shares. This was disallowed by the High Court and the decision was upheld by the Court of Appeal. The defendant then applied for the consequential order that the bidding process be ordered to proceed. The plaintiff applied for a stay of that application on the ground that they had commenced a fresh suit against the defendant. I dismissed the plaintiff's application for stay and granted the defendant's application to proceed with the bidding process for the shares. The defendant's present application was a formal end to a long dispute. *The plaintiff's alleged new cause of action should proceed independently.* I therefore granted the defendant an order in terms to proceed with the bidding process. [emphasis added]

102 As observed by the Judge (at [111]–[113] of the Judgment), the following points should be noted in relation to this passage:

(a) First, the Amended SUM 4117 — which appears to be what Choo J was alluding to in the first sentence — was not an application to set aside the Consent Order; it was an application to vary the terms of the Consent Order.

(b) Second, contrary to the second sentence in the passage, no appeal was filed in relation to the decision to dismiss the Amended SUM 4117.

(c) Third, while Choo J may have described the Respondents' application in SUM 5373 as "an application for stay", SUM 5373 was instead for an order that the bidding exercise could not and should not proceed because they had commenced Suit 27 (see [44] above).

103 We have highlighted the penultimate sentence in the foregoing passage where Choo J observed that the Respondents' "alleged new cause of action should proceed independently". It is undisputed that the words "new cause of action" referred to Suit 27, which had just been filed by the Respondents. What is in dispute is whether at the time of Choo J's decision in SUM 4848, Suit 27 encompassed the causes of action in relation to the Non-Renewal Issue and Non-Disclosure Issue, which the Appellants (CA 168) now maintain are foreclosed by issue estoppel. The Appellants (CA 168) argue that the Respondents did not, at that time, contend in Suit 27 that the Defendants (Consolidated Suits) had breached the Consent Order by misappropriating the 2007 Head Lease or by failing to disclose the 2007 Head Lease to the KPMG Entities. They argue that the Respondents' case at the material time was only that the Defendants (Consolidated Suits) had breached certain alleged implied terms by failing to disclose to the KPMG Entities certain information and documents.

104 If the Appellants (CA 168) are correct in this contention, Mr Poon would be correct in his submission that the Judge was wrong to have attributed to Choo J the suggestion that Suit 27 *in its present form* (which includes these issues) should proceed independently.

105 Having examined the relevant statement of claim for Suit 27, which was filed by the Respondents on 8 January 2009, we accept Mr Poon's submission that Suit 27 — as pleaded at the material time — did not cover the Non-Renewal Issue and the Non-Disclosure Issue that were discussed in the SUM 4117 Judgment. The Respondents argue that paras 21.1.1 and 24.2 of the statement of claim had brought these two issues into play. However, as pointed out by Mr Poon, para 21.1.1 makes no mention of any breach of cll 11 or 9(g) of the Consent Order or of any breach that was constituted by a misappropriation of the 2007 Head Lease. Seen in the context of the entire statement of claim, para 21.1.1 refers only to an alleged breach by the Defendants (Consolidated Suits) of certain alleged implied terms of the Consent Order by failing to disclose certain information and documents to the KPMG Entities. As for para 24.2, the allegation that is found there is of a conspiracy to deprive the Respondents of the benefit of the 2007 Head Lease. While the 2007 Head Lease features in that paragraph, Mr Poon correctly points out that the Respondents did not plead anything there to suggest that the alleged conspiracy was premised on a breach of certain clauses of the Consent Order.

106 We therefore agree with Mr Poon insofar as his argument is that the Judge had wrongly assumed that Choo J, by the words in italics at [101] above, had held in the SUM 4848 GD that Suit 27, *in its present form*, should proceed independently notwithstanding his earlier decision in the Amended

SUM 4117. However, we do not think that this affects the Judge's overall conclusion on this issue for two reasons:

(a) First, looking at the SUM 4848 GD, which consists of only two paragraphs, Choo J's conclusion was a straightforward one to the effect that the application by the Defendants (Consolidated Suits) in SUM 4848 for the bidding process to proceed should be allowed as it was to effect a "formal end to a long dispute" and any dispute over the possible breach of the Consent Order should proceed independently. The most that can be said of the SUM 4848 GD in these circumstances is that it is neutral to the question of whether an issue estoppel arises by reason of Choo J's earlier decision in the SUM 4117 Judgment.

(b) Second, and in keeping with our first observation, even if we take the case of the Appellants (CA 168) at its highest and disregard the observations made by Choo J in the SUM 4848 GD, this only means that the Judge was not in a position to rely on this additional ground to bolster his conclusion that the First Requirement is not met. However, the other grounds that the Judge did rely on remain and, in our judgment, are sufficient to support his conclusion that no issue estoppel arises.

107 For these reasons, we uphold the Judge's finding that the First Requirement is not met. This is, in itself, sufficient to dismiss the argument by the Appellants (CA 168) that an issue estoppel had arisen over the issues of repudiatory breach. But for completeness, we briefly set out our views in relation to whether the Fourth Requirement was met.

Whether the Fourth Requirement was met

108 In *Goh Nellie*, the High Court held that the Fourth Requirement that there must be an identity of subject matter in the two proceedings encapsulates three further sub-requirements, which can be summarised as follows:

(a) 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;

(b) 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, and this analysis should be approached from the perspective of common sense; and

(c) the issue should be shown in fact to have been raised and argued.

Ultimately, as summarised in *Goh Nellie* at [37], the court making such an assessment should bear the following in mind:

> … [T]he 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*. … [emphasis added]

109 It follows from this that the Fourth Requirement does not require that there be a *complete* identity of all the issues in dispute and relief sought. Rather, it is sufficient that the prior decision traverses the same essential

ground as the subsequent decision. In the context of this case, it is thus immaterial that the relief sought in the Amended SUM 4117 was a variation of the Consent Order while that in Suit 27 was to set aside the Consent Order.

110 In the present case, the relevant inquiry in respect of the Fourth Requirement may be narrowed to a determination of whether Choo J's observations as to the construction of the Consent Order were fundamental to his decision in the Amended SUM 4117. For the reasons set out at [99] above, we have held that Choo J's observations in respect of the Respondents' allegations of breach were not fundamental to his decision in the SUM 4117 Judgment, which was ultimately premised on his lack of jurisdiction. It follows from this that that decision does not traverse the same ground as the present action which rests centrally on the construction of the Consent Order and whether it had been breached.

111 Therefore, this is yet a further ground for finding that the issues raised in this appeal are not foreclosed by issue estoppel. We therefore uphold the Judge's decision on this issue.

Whether there were repudiatory breaches of the Consent Order

112 We turn to consider whether the Judge was correct in his construction of the Consent Order and his subsequent determination that the Defendants (Consolidated Suits) had breached cl 11 of the Consent Order and the Implied Term in respect of the Non-Renewal Issue, and cl 5 of the Consent Order in relation to the Non-Disclosure Issue.

Whether there was a breach of cl 11 of the Consent Order

113 We first set out the two clauses — cll 11 and 9(g) of the Consent Order — that were material to the Judge's conclusion that there was a breach of cl 11. Clause 11 of the Consent Order states as follows:

> The [Respondents] and the [Defendants (Consolidated Suits)] undertake not to do anything or cause anything to be done which would in any way *affect, vary and/or alter the status quo of the [JV Companies]*, both in terms of on-going liabilities/obligations to which the [JV Companies] are subject to, and *assets and/or benefits which the [JV Companies]* ***presently*** *enjoy*, including but not limited to doing anything to affect the *head lease* between [SAA] and the [SLA] and sub leases ***presently*** *entered into* between [SAA] and the [JV Companies]. In particular, the [Respondents] and [Defendants (Consolidated Suits)] undertake that in respect of the respective *sub leases* ***presently*** *entered into* between the [JV Companies] and [SAA], the [Respondents] and [Defendants (Consolidated Suits)] and/or their agents and/or employees and/or servants shall not do anything that would alter or affect the said sub leases including doing anything to effect, procure or cause the termination of the said agreements. [emphasis added in italics and bold italics]

Clause 9(g) provides as follows:

> Further, in the event that the Sole Bidder or Higher Bidder are the [Respondents], the [Defendants (Consolidated Suits)], in particular [SAA], shall use its best endeavours to facilitate and procure the assignment / transfer / novation of [SAA's] head lease with the [SLA], to the [JV Companies] (subject always to the consent, if required, of [the SLA]).

114 Mr Poon places great emphasis on the use of the word "presently" in cl 11 of the Consent Order. He submits that the language that was chosen in no sense contemplates any right of the JV Companies to the 2007 Head Lease or any obligation on the part of SAA to grant fresh STAs to the JV Companies once the 2004 STAs expired. To further support this submission, Mr Poon points to cl 5(b) of the Consent Order, which provided that KPMG CF should

take into account, among other things, "the future earning capacities of the [JV Companies] including but not limited to the expected revenue and income from the *remaining tenure* of the [STAs] entered into by the [JV Companies] respectively with [SAA]" [emphasis added]. His point, presumably, is that the Consent Order was concerned only with the state of affairs until the end of the 2004 Head Lease.

115 Mr Poon further submits that the Judge was wrong to have inferred from cl 9(g) of the Consent Order that the "status quo" referred to in cl 11 encapsulated the benefit of the 2007 Head Lease. He contends that the Judge misconstrued the 2004 Head Lease (at cl 2.1) as having granted SAA a "right of first refusal" or a "right to negotiate" in respect of any renewed lease that the SLA may grant over the Site. He further argues that even if the 2004 Head Lease included a "right to negotiate", this arose only *if* the Respondents won the bidding exercise *and if* the SLA consented to the assignment of the 2004 Head Lease pursuant to cl 9(g) of the Consent Order. It thus did not follow that the JV Companies had a right to the benefit flowing from the 2007 Head Lease or the right to the corresponding sub-tenancies being granted by SAA.

116 Mr Tan, on the other hand, submits that the Judge was correct because the clauses in the Consent Order, including cll 9(g) and 11, are to be viewed in the light of the fact that the parties had always contemplated a nine (3+3+3) year lease of the Site. Mr Tan contends that the 2007 Head Lease therefore could not fairly be divorced from the contemplation of the parties at the time the parties entered into the Consent Order.

117 As stated at [74]–[75] above, Mr Tan raises two additional grounds which he submits would further support the Judge's holding that cl 11 of the

Consent Order had been breached. The first was the existence of the Back to Back Arrangement between the parties; the second was the Misappropriation by SAA of the assets of the JV Companies. Mr Poon's response to these two grounds is that no such Back to Back Arrangement existed and that the issue of the Misappropriation was neither pleaded nor substantiated on its merits.

118 In our judgment, to understand the scope of cl 11 of the Consent Order and to determine whether it was breached, we must first examine the context and the *status quo* that prevailed at the time the Consent Order was entered into in February 2006.

119 In this regard, we agree with the Judge (see the Judgment at [141]) that the parties, from the outset, had contemplated a nine-year arrangement in respect of the head lease with the SLA. To begin with, the parties must have understood that barring any exigency or change in policy or circumstances, the SLA would grant SAA a lease over the Site for a total period of nine years. The tender notice issued by the SLA on 5 January 2001 described the tenure of the lease as "3+3+3 years" and the duration of the period of the contract was stated as "([f]rom) 1 September 2001 (Sat) ([t]o) 30 August 2010 (Mon)". The letter of acceptance sent by the SLA to SAA on 25 April 2001 stated that "[t]he term of tenancy will be [three years] (excluding rent free period) with option to renew for a three (3)-year term plus a further option for a three (3) year term", though there was a caveat that the grant of the options was at the discretion of the Collector of Land Revenue (that is, the SLA). Thereafter, each time the three-year tenancy expired in 2004 and again in 2007, an extension was granted as a matter of course. The SLA did not hold a fresh tender each time that it renewed the lease with SAA. Further, the SLA also described SAA's enquiry on whether the 2007 Head Lease would be granted

as a "request to *renew* the *third and final term* of 3-year tenancy" [emphasis added].

120 The fact that the parties contemplated a nine-year lease with the SLA, barring any change of circumstances, can also be seen from the terms of the STAs that SAA concluded with the JV Companies as well as those of the SSTAs that the JV Companies entered into with the ultimate tenants or licensees. For instance, as set out at [20] above, the 2001 STAs contained in para 7 of Schedule 1 an "Option to Renew" that provided the JV Companies with *two* options to renew the STAs for a further period of *three years each*, with the caveat that this was subject to SAA first obtaining a renewal of its lease with the SLA. The letters of offer from the JV Companies to the ultimate tenants, as set out at [21] above, also stated that the licence period would be for three years (less seven days) with "an option to renew for another three (3) years plus a further option for a three (3) year term". Even leaving aside the question of whether the Back to Back Arrangement existed, in our judgment, the evidence on the whole establishes that the parties to the joint venture were operating on the premise that, barring any change of circumstances or policy on the part of the SLA, the lease of the Site would be for an overall period of nine years, made up of three terms of three years.

121 We therefore agree with the Respondents that it would be artificial and incorrect to separate the 2007 Head Lease from the 2004 Head Lease and treat the two as unrelated and wholly independent. The parties — and for that matter, the SLA — never saw the head lease as being three distinct tenancy agreements; they regarded it as a single lease that was broken into three terms where at the end of each term, the lease would be renewed if all was in order.

The fact that the renewal of each term would be subject to the SLA's discretion does not change this essential character of the lease.

122 It follows from this that, as the Judge found, one of the benefits of the 2004 Head Lease was the ability to take up, or at the very least to negotiate with the SLA for, the third and final term of the lease, which is the 2007 Head Lease. This was clearly a benefit that had commercial value, and which existed at the time the Consent Order was entered into. The Appellants (CA 168) (save for Tan CB, who was not involved in the proceedings at the time) had themselves taken the position before Choo J that the holder of the 2004 Head Lease held such a benefit. Their submissions on this point were as follows:

> … Currently, the [2004 Head Lease] has a remaining term of approximately 1 ½ year [*sic*]. *In addition, it can hardly be disputed that [SAA], as the present tenant of the [Site], will be able to renegotiate for a fresh lease with the [SLA]. These factors have commercial value, and an appropriate commercial value ought to be ascribed to them by professional valuers.* It is untenable for the Plaintiffs to insist upon the [2004 Head Lease] being transferred for "nominal" consideration. After all, the [2004 Head Lease] is an asset belonging to [SAA], which value stands to be determined properly and in accordance with legitimate valuation principles. If it is required to transfer its interest in the [2004 Head Lease] to the [JV Companies], it is only proper that the [JV Companies] should pay adequate consideration to [SAA] for the same. [emphasis added]

123 Furthermore, at the trial before the Judge, Tan CB accepted in cross-examination that the holder of the 2004 Head Lease would inevitably have such a benefit. In fact, Tan CB conceded that it was inconceivable for the 2004 Head Lease to be held by one party and for the 2007 Head Lease to be held by another.

124 In our judgment, this would also explain the need for cl 9(g) of the Consent Order. Clause 9(g), which has been set out in full at [113] above, states that in the event the Respondents won the bid, the Defendants (Consolidated Suits), in particular SAA, shall use its best endeavours to facilitate the assignment or transfer or novation of SAA's head lease with the SLA. We agree with the Respondents that cl 9(g) would make little sense if the "head lease" there referred only to the 2004 Head Lease and not its attendant benefits such as the right to negotiate for the 2007 Head Lease.

125 We therefore cannot agree with Mr Poon's submission that all that the Consent Order, specifically cl 11, does is to protect the *existing* leases and sub-leases (which is to say only the 2004 Head Lease and the 2004 STAs). In our judgment, at the time that the Consent Order was entered into and up to the time of the expiry of the 2004 Head Lease, the *status quo* — which cl 11 provides cannot be varied or altered by the parties — extended to the *benefit to negotiate for* the 2007 Head Lease. In the event that the joint venture was not dissolved in accordance with the Consent Order *before* the expiry of the 2004 Head Lease and only *after* the 2007 Head Lease was granted — which is the situation the parties are now in, the *status quo* would necessarily include the *benefit of* the 2007 Head Lease. We therefore do not think that it is correct or fair to adopt Mr Poon's narrow construction of the word "presently" that features in cl 11. In our judgment, such a narrow construction would rob these clauses of their intent and meaning.

126 We therefore agree with the Judge's finding that the Defendants (Consolidated Suits) breached cl 11 of the Consent Order when they altered the *status quo* by acquiring the 2007 Head Lease for themselves without granting sub-tenancies to the JV Companies.

127 We also agree with the Judge that the breach of cl 11 of the Consent Order is repudiatory in nature because the JV Companies would be "empty shells" without the STAs which were their main source of revenue. In any event, we note that the Appellants (CA 168) have not disputed that if the failure to grant sub-tenancies to the JV Companies constituted a breach of the Consent Order, it would amount to a repudiatory breach. As we have found for the Respondents, we do not see the need to address the two additional grounds that they have raised, namely the Back to Back Arrangement and the Misappropriation by SAA.

Whether there was a breach of the Implied Term

128 We proceed, for completeness, to consider whether the Judge was correct to hold that there was an implied term in the Consent Order that SAA would not appropriate for itself the benefit of the 2007 Head Lease pending full performance of the Consent Order. The Implied Term was relied on by the Judge as an alternative basis to support his decision in the event his construction of cl 11 (and cl 9(g)) of the Consent Order was erroneous. The Implied Term arises in the context of the parties not having contemplated that the bidding exercise would take place *after* the expiry of the 2004 Head Lease.

129 In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp*") (at [101]), we outlined three steps for determining whether a term is to be implied in fact into a contract ("the three-step test"). Pursuant to the three-step test, the court would only imply a term when:

(a) there is a gap in the contract;

(b) it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy; and

(c) the term is one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at the time of the contract.

130 We agree with the Judge that there is a gap in the Consent Order because the parties had not provided for what should be done in the event that the bidding exercise was not carried out within the timelines laid down in the Consent Order. Specifically, they did not consider the steps that should be taken in respect of the 2007 Head Lease if, for some reason, the bidding exercise were to take place *after* the expiry of the 2004 Head Lease. The parties do not dispute that this scenario was not expressly considered and that they did not envisage such a long period of delay in the issuance of the Valuation Reports.

131 We turn to consider whether, in these circumstances, it is necessary in the business or commercial sense to imply the Implied Term in order to give the Consent Order efficacy. In our judgment, the Judge was correct to have found that the Consent Order was structured in such a manner as to allow the group that valued the JV Companies more to gain control of them, and the group that valued the JV Companies less to receive a sum of money which would be greater than the value that the latter had themselves ascribed to the JV Companies (see the Judgment at [165]). Contrary to Mr Poon's submission, we find no indication in the Consent Order or from the circumstances prevailing at the material time that the purpose of the Consent Order was "primarily to end the joint venture". Ending the joint venture was

an important, but not the sole nor the *most* important, purpose of the Consent Order. The Consent Order was specially crafted to ensure that the parties would *both* obtain a result that would in all likelihood be satisfactory to them because of the value that they subjectively ascribed to the JV Companies. In this connection, it is clear to us that the parties were bidding for the JV Companies with the view of one party operating them as a going concern, unless both parties decided for some reason not to submit a bid.

132 It is also important to bear in mind, as we have stated at [119] above, that the parties had a common understanding, from the outset, that the lease with the SLA over the Site would run for nine years in total. It was thus within the parties' knowledge that barring any unforeseen change of circumstances, the SLA would renew the lease of the Site for a further three years after the 2004 Head Lease expired.

133 Bearing this context in mind, we agree with the Judge that it is necessary in the business or commercial sense to imply a term that would allow the parties to be able to meaningfully bid for the JV Companies even in the situation which the parties had not provided for, namely where the bidding exercise had not been concluded before the expiry of the 2004 Head Lease. Without the Implied Term which prohibits the Defendants (Consolidated Suits) from appropriating the benefit of the 2007 Head Lease (including the sub-tenancies that were later entered into with the ultimate tenants) for themselves, the purpose of the Consent Order and of the bidding exercise would be defeated because the value of the JV Companies would be severely compromised without the STAs (and the SSTAs that flowed from these).

134 We therefore disagree with Mr Poon's submission that the Consent Order retains its efficacy without the Implied Term because the parties could nonetheless proceed with the bidding exercise. This ignores the reality that the value of the JV Companies would be significantly diminished, if not altogether lost, in such circumstances and the Consent Order cannot then be said to be efficacious given that its purpose would have been thwarted.

135 Mr Poon's alternative submission is that the gap can be filled by cl 10 of the Consent Order, which, he submits, provides that the JV Companies would be liquidated if no bids were submitted in the bidding exercise because the parties viewed them as being valueless. His argument is essentially that even if such a gap existed, the Consent Order would still be efficacious because cl 10 allows the parties to apply to court to wind up the JV Companies if there are no bids. In response, Mr Tan submits that cl 10 does not fill the gap and is merely a "generally-worded 'liberty to apply' provision" which gives the parties the option of applying to wind up the JV Companies.

136 Clause 10 of the Consent Order states as follows:

> That the parties be at liberty to apply in respect of the ancillary issues relating to the winding up of the [JV Companies], if any.

In our judgment, it is not correct to say that cl 10 provides that the JV Companies *would be* liquidated if no bids were submitted. As pointed out by Mr Tan, cl 10 merely affords the parties the liberty to apply in connection with any winding-up of the JV Companies. This has nothing to do with the gap that we have earlier identified, which pertains to the duties of the parties in the event the bidding exercise is not completed by the time of the expiry of the 2004 Head Lease. In our judgment, Mr Poon's submission does not address

the key point, which is that the *purpose* of the Consent Order would be thwarted — and thus the Consent Order would be rendered inefficacious — in the absence of the Implied Term. We do not see how cl 10 can be said to preserve the efficacy of the Consent Order in such circumstances. We should add for completeness that we do not think that the Implied Term would *contradict* cl 10 or any other clause in the Consent Order, although we do not understand Mr Poon to be making such an argument.

137 Given the context that we have outlined above, we are satisfied, as we have already noted, that any arrangement which allows SAA to appropriate the benefit of the 2007 Head Lease for itself would destroy the entire basis on which the parties were approaching the bidding exercise. We are therefore also satisfied that it was necessary for business efficacy to imply a term to proscribe this from happening.

138 Our observations on the business efficacy of the Implied Term segue into the last step of the test on the implication of terms. We are satisfied that in the light of the understanding of the parties in respect of the joint venture and the Consent Order, the parties would have responded "Oh, of course!" if the officious bystander had asked them at the time the Consent Order was entered into whether SAA should be prohibited from appropriating the benefit of the 2007 Head Lease pending the performance of the Consent Order, should the 2004 Head Lease expire before then.

139 To the extent that Mr Poon submits that the Defendants (Consolidated Suits) would not have agreed to the Implied Term, we find that these are self-serving assertions made with hindsight and in the light of the commercially advantageous position that they now find themselves in. The implication of

terms is an exercise undertaken by the court to fill an essential gap in the contract with due regard to what the parties *would be presumed to have intended* (see *Sembcorp* at [93]). We are thus concerned only with an objective assessment of what the presumed intentions of the parties would have been at the time the contract was entered into. The *subjective* assertions by parties *after* a dispute has arisen cannot affect this analysis.

140 For these reasons, we uphold the Judge's finding that the Defendants (Consolidated Suits) had breached the Implied Term when they procured SAA to appropriate the benefit of the 2007 Head Lease for themselves pending the performance of the Consent Order by not entering into STAs with the JV Companies and instead entering into STAs with the ultimate tenants. There is again no dispute that such a breach is repudiatory in nature.

Whether there was a breach of cl 5 of the Consent Order

141 We turn to the last alleged breach, which concerns cl 5 of the Consent Order. Unlike the breaches of cl 11 and the Implied Term which concern the Non-Renewal Issue, the alleged breach of cl 5 of the Consent Order concerns the Non-Disclosure Issue. Clause 5 of the Consent Order states as follows:

> [KPMG CF] shall have unfettered and absolute discretion in conducting the Valuation Exercise as [it] deems fit and the [Respondents] and [Defendants (Consolidated Suits)] *undertake not to interfere, impede, obstruct, or do anything to prevent or hinder [KPMG CF's] discharge of [its] duties in respect of the Valuation Exercise*. … [emphasis added]

142 Mr Poon's submissions in respect of the alleged breach of cl 5 of the Consent Order are straightforward. First, he argues that cl 5, when viewed in the light of the entire Consent Order (in particular cll 4 and 6), did not place a duty of active disclosure on the parties. Next, he argues that the Defendants

(Consolidated Suits) should not be faulted for not having provided information that the KPMG Entities had never asked for, given that the KPMG Entities had "unfettered and absolute discretion" in the conduct of the valuation exercise. Lastly, he argues that in any event, the Consent Order did not encompass the 2007 Head Lease and there was thus no obligation to disclose it to the KPMG Entities. The last submission clearly cannot stand in the light of our finding above that the 2007 Head Lease and its attendant benefits were encompassed by the Consent Order. We therefore deal with Mr Poon's other arguments.

143 In our judgment, Mr Poon's arguments do not directly meet the case that has been put forward by the Respondents. The Respondents do not rest their case on the contention that the Defendants (Consolidated Suits) had a duty to actively disclose the information in question and had breached this duty; rather, their principal argument is that the Defendants (Consolidated Suits) had *hindered* the KPMG Entities from discharging their duties to *accurately* value the JV Companies' assets and liabilities for the purposes of an intended bidding exercise *by* not disclosing the existence of the 2007 Head Lease to them, and have *therefore* breached their undertaking in cl 5.

144 There is clear evidence to show that the lack of disclosure of the 2007 Head Lease was an impediment to the KPMG Entities in their undertaking of the tasks. The KPMG Entities themselves expressed the view that their work had been hindered when they stated that the functional integrity of the valuation had been compromised *because* the information provided was materially inaccurate, in that the obtaining of the 2007 Head Lease had not been disclosed. This was first conveyed in the KPMG August Letter (see [38] above), where KPMG BA said as follows:

…

> In our view, the terms of [the Consent Order] would only be meaningful to the parties if the conclusions reached in our Valuation Reports are based on relevant factual information.
>
> *The [Defendants (Consolidated Suits)'] recent confirmation of the renewal of the [2004 Head Lease] makes it clear to us that the facts provided to [KPMG CF] were materially inaccurate.* The function of the valuation is to facilitate the compromise between the parties which is recorded in [the Consent Order]. *The altered facts therefore call in issue the functional integrity of the valuation and whether it has met its purpose of facilitating the compromise between the parties.*
>
> In the circumstances, we are of [the] view that the Valuation Reports should be revised, as a result of the [Defendants (Consolidated Suits)'] confirmation.
>
> …
>
> [emphasis added]

In the KPMG September Letter, KPMG BA reiterated that the functional integrity of the Valuation Reports had been compromised as a result of the failure to disclose the grant of the 2007 Head Lease (see [39] above).

145 In fact, we also note that Tan CB himself agreed in cross-examination that the terms of the Consent Order would only be meaningful if the conclusions reached in the Valuation Reports were based on relevant and accurate factual information. He conceded that the failure to reveal the 2007 Head Lease would affect the valuation of the JV Companies. He eventually also conceded that the fact that the 2007 Head Lease had already been acquired was a piece of important information. The evidence given by Tan CB shows that the Defendants (Consolidated Suits) were alive to the fact that the failure to disclose the 2007 Head Lease would hinder the discharge of the duties of the KPMG Entities.

146 Given the foregoing, we cannot see how the Defendants (Consolidated Suits) can maintain that their omission to inform the KPMG Entities of the

2007 Head Lease did not hinder the KPMG Entities' discharge of their duties. The Defendants (Consolidated Suits) cannot absolve themselves of all responsibility by simply stating that they were only obliged to provide information that was specifically sought by the KPMG Entities which had "unfettered and absolute" discretion in the conduct of the valuation exercise. The scope of the undertaking made by the parties to the Consent Order "not to interfere, impede, obstruct, or do anything to prevent or hinder" the KPMG Entities' discharge of their duties is clearly not as narrow as the Defendants (Consolidated Suits) make it out to be. In our judgment, by withholding information that they ought reasonably to have contemplated would be material to the KPMG Entities' discharge of their duties, the Defendants (Consolidated Suits) did breach cl 5 of the Consent Order and we therefore uphold the Judge's finding to this effect.

147 As the failure to disclose the 2007 Head Lease in breach of cl 5 of the Consent Order fundamentally compromised the Valuation Reports, which were a cornerstone of the Consent Order, we also agree with the Judge that this breach was repudiatory in nature.

Conclusion on the issue of the repudiatory breaches

148 For these reasons, we hold that the Defendants (Consolidated Suits) had breached cll 5 and 11 of the Consent Order and the Implied Term and that all of these breaches were repudiatory in nature. We will refer to these three breaches as "the Repudiatory Breaches". We turn next to consider whether the Judge was correct to have found that the Consent Order can and should be set aside *ab initio* as a result of the Repudiatory Breaches.

Whether the Consent Order can be set aside as a result of the Repudiatory Breaches

149 Mr Poon argues that even if the Judge was correct to have found that the Consent Order had been breached and the breaches were repudiatory in nature, he was wrong to set aside the Consent Order on that basis because such breaches would, as a matter of law, only permit a termination of the Consent Order by the Respondents with *prospective* effect. He submits that the Consolidated Suits cannot be revived because they had effectively been superseded by the Consent Order, which had enshrined the parties' settlement.

150 Mr Tan did not appear to have directly addressed this contention. Instead, his submissions focused on the following contentions: (a) that the Judge's alternative finding — that the Consent Order should be set aside because it was inoperative — is correct; and (b) that in the alternative, pursuant to its inherent power under O 92 r 4 ROC and on the basis of *Airtrust (Singapore) Pte Ltd v Kao Chai-Chau Linda* [2014] 2 SLR 693 ("*Airtrust (Singapore)*"), the court has the residual discretion to set aside a contractual consent order where this is necessary to prevent injustice.

151 We respectfully disagree with the Judge on this issue as we do not see any basis upon which it would be possible to set aside the Consent Order *ab initio* on the basis of the Repudiatory Breaches. As pointed out by Mr Poon, the Respondents must establish a vitiating factor on the facts before the Consent Order, which is contractual in nature, can be declared void *ab initio* (see *Cost Engineers (SEA) Pte Ltd and another v Chan Siew Lun* [2016] 1 SLR 137 at [52] and *Bakery Mart Pte Ltd v Ng Wei Teck Michael and others* [2005] 1 SLR(R) 28 at [11]). The Respondents have not pointed to any operative vitiating factor. In fact, it is not their case that any such vitiating

factor is present. Where a contractual consent order, such as the present one, is discharged for breach, it is terminated *prospectively* and the parties are released from *future* performance: Dominic O' Sullivan, Steven Elliott & Rafal Zakrzewski, *The Law of Rescission* (Oxford University Press, 2008) at para 1.02; and *Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd and another appeal* [1992] 2 SLR(R) 834 at [20]–[21].

152 Further, as we observed in *Indian Overseas Bank v Motorcycle Industries (1973) Pte Ltd and others* [1992] 3 SLR(R) 841 at [13]–[20] (endorsing *Halsbury's Laws of England* vol 37 (4th Ed) at para 391 and several case authorities), a settlement agreement which has been entered into for good consideration has the following effects:

(a) it puts an end to the proceedings, which would thereby be spent and exhausted;

(b) it precludes the parties from taking any further steps in the action, except where they have provided in the settlement agreement for liberty to apply, in the same action, for the purpose of enforcing the agreed terms; and

(c) it supersedes the original cause of action altogether.

153 Indeed, as further noted in David Foskett, *Foskett on Compromise* (Sweet & Maxwell, 8th Ed, 2015) ("*Foskett*") at para 8–01 and *Thoday* at 197–198, if a settlement is embodied in a consent judgment, the underlying causes of action are merged in the judgment. New causes of action then arise from the existence of the settlement agreement because the natural inference is that the parties' common intention is that the consent order should thereafter

govern their relationship in respect of the disputed matters with which they had been previously engaged.

154 The only caveat to this would be where the settlement agreement itself permits recourse to the original claim in the event of a breach of its terms. If so, and if a breach is subsequently committed, the innocent party may then proceed with the original claim (see the observations of the High Court in *The "Dilmun Fulmar"* [2004] 1 SLR(R) 140 at [7] that an agreement of compromise would discharge all original claims and counterclaims unless it *expressly* provides for their revival in the event of breach; see also *Foskett* at para 8–07 and *Korea Foreign Insurance Co v Omne Re Sa* [1999] 1 Lloyd's Rep. I.R. 509).

155 In our judgment, the Consent Order cannot be set aside and the Consolidated Suits cannot be revived notwithstanding the Repudiatory Breaches. It is clear from cl 1 of the Consent Order that the Consent Order unequivocally and immediately compromised the Consolidated Suits. Clause 1 states as follows:

> The terms of this Order shall constitute a full and final settlement of all claims that the [Respondents] may have against [the Defendants (Consolidated Suits)], howsoever arising out of or in relation to the [Consolidated Suits].

156 The original causes of action in the Consolidated Suits were superseded upon the making of the Consent Order, and the original claims were discharged by the Consent Order, which did *not* expressly provide for the revival of the claims in the event of a breach. The clear language of cl 1 of the Consent Order also militates against an interpretation that the compromise of the Consolidated Suits was conditioned on the parties performing the terms of the Consent Order. Contrary to the Judge's finding, we are satisfied that the

Repudiatory Breaches only had the effect of *prospectively* terminating the parties' agreement and releasing the parties from *future* obligations. We therefore consider that the Judge was wrong to have found that the Consent Order could be set aside on this basis.

Whether the court has a residual discretion to set aside or not to enforce the Consent Order

157 We turn to Mr Tan's alternative submission, which is that a consent order differs from a normal contract and the court retains a residual discretion to set it aside. This was not one of the grounds relied on by the Judge to set aside the Consent Order.

158 For this submission, Mr Tan relies on O 92 r 4 of the ROC, which states that nothing in the ROC limits or affects the inherent powers of the court to make any order as may be necessary to prevent injustice or an abuse of the process of the court. He also relies on the High Court decision in *Airtrust (Singapore)*, where it was held (at [23]) that the court retains a residual discretion pursuant to O 92 r 4 of the ROC to vary or set aside a contractual consent order.

159 With respect, we do not agree with the position taken by the High Court in *Airtrust (Singapore)*. While we agree, for the reasons we go on to set out, that the court has a residual discretion *not to enforce* contractual or consensual "unless" orders or other consensual procedural orders, as has been established in a line of authorities, such a discretion does not, in our judgment, extend to contractual consent orders that relate to the substantive issues in the case and the substantive rights of the parties, much less to *set aside* such orders.

160 The view that the court may have a residual discretion not to enforce a contractual or consensual "unless" order was articulated in an earlier High Court decision in *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 ("*Wellmix Organics*"). There, an unless order pursuant to which the defendant was to file his affidavits of evidence-in-chief by a certain date ("the Unless Order") had been issued by a court. The defendant subsequently breached the Unless Order and the plaintiff proceeded to enter interlocutory judgment against him. The defendant applied to set aside the interlocutory judgment, but his application was dismissed by an assistant registrar. The matter came before the High Court on appeal. The key issue before the High Court was whether the Unless Order was an unless order that had been made by consent. The court held (at [103]) that the order was an "ordinary" unless order and not an unless order that was made by consent. As there was no contract between the parties in respect of the Unless Order, the court could vary or alter it without the parties' consent (at [28]−[30]). The court found that while the defendant's action was intentional, it was neither contumelious nor contumacious but was due to a misunderstanding. The court therefore allowed the defendant's appeal on the basis that the breach in that case did not warrant imposing the harshest of consequences (at [103] and [107]).

161 Although that was sufficient to deal with the appeal, the court in *Wellmix Organics* went on to observe that even if the Unless Order had been made by consent, the court had a residual discretion not to enforce it and it would thus have found in favour of the defendant on this ground as well. The court began its analysis of this issue by discussing the decision of the English Court of Appeal in *Purcell v F C Trigell Ltd* [1971] 1 QB 358 ("*Purcell*") which also involved a consent unless order. Lord Denning MR observed in

Purcell (at 363–364) that while a consent unless order cannot be set aside, the court might "in its discretion, vary or alter [an order] even though made originally by consent" because the court always has a control over *interlocutory* orders.

162 After discussing several authorities and the ambit of the court's power under O 92 r 4, the court in *Wellmix Organics* held that an unless order made by consent, whilst technically a contract between the parties, would have the draconian effect of allowing one party to wholly deprive the other of its legal rights in the context of litigation. Therefore even where such an order has been agreed upon between the parties, there may arise certain special circumstances where it would nevertheless be unjust for the party in whose favour the consent order operates to insist on its enforcement in the absence of a high degree of intentionally contumacious or contumelious conduct of the other party (at [90]). The court held that such a discretion may be premised on the inherent powers of the court pursuant to O 92 r 4 of the ROC, and that in the final analysis, this is essentially an aspect of the court's power to retain ultimate control over its *own procedure*. This follows from the fact that an unless order is, after all, part of the court's procedural armoury and is not concerned with the substantive merits of the case (at [91]). It was also emphasised that an unless order, whether by consent or otherwise, deals with the litigation process and, on this score, the courts ought to retain the final say (at [91]).

163 Insofar as *unless orders* that are made by consent are concerned, we agree with the analysis in *Wellmix Organics* that the court retains a residual discretion *not to enforce* the order because an unless order is primarily concerned with its procedure and yet it may bring with it draconian

consequences affecting the substantive rights of the parties. There is, however, no conceptual basis for extending such a discretion to a contractual consent order that encapsulates a settlement agreement covering the substantive causes of action between the parties, much less to *set aside* such orders (in this regard, we would also add that even in the context of consent unless orders, case authority indicates that the discretion does not extend to *setting them aside* (see *Purcell* at 363–364, discussed above at [161])). In our judgment, this is so for the following reasons:

(a) The competing policy of finality in settlement agreements would militate against the court having a residual supervisory power over such agreements because even if the court might well not exercise such a power save in exceptional cases, its mere existence might open the floodgates by encouraging parties to bring an action to reopen matters resolved by agreement.

(b) Parties incorporate a contractual agreement within a consent order of court because they wish to be able to enforce the judgement in the event of non-compliance without having to institute a fresh action. It is not the case that they do so to enable the court to exercise some form of supervisory jurisdiction in relation to the consent order.

(c) Any factor that undermines the consent of one party to a contractual consent order should be rationalised within the existing common law vitiating factors. There is no justification for applying a different rule just because the agreement has been encapsulated within a consent order.

(d) Where parties have consented to a consent order and their consent remains untainted by a recognised vitiating factor, fairness lie in favour of holding the parties to what they have agreed.

164 The foregoing discussion has been premised on contractual or consensual *unless orders* because that was the nature of the order in these cases. But we can see no reason for distinguishing between consensual unless orders and other *procedural* orders that are reached by consent, insofar as such orders are concerned purely with the procedures of the court and not with the substantive rights of the parties. Save in such a category of cases (that is, cases involving procedural orders), the court, in our judgment, has no residual discretion to vary or not to enforce a contractual consent order in the absence of an available vitiating factor that is recognised in contract law. We should add, however, that these observations would not apply where there are statutory provisions that provide otherwise. For instance, these observations would not apply to consent orders that relate to ancillary matters in matrimonial proceedings, which fall within the Women's Charter (Cap 353, 2009 Rev Ed) (see, for example, ss 119 and 129 of the Women's Charter, which provide, respectively, that the court may, at any time and from time to time, vary the terms of any agreement between the parties that relate to maintenance or the custody or care and control of a child).

Whether the Consent Order can be set aside on the ground that it is inoperative

165 We turn to consider whether the Consent Order can be set aside on the ground that it is inoperative. This is the alternative ground that the Judge relied on to set aside the Consent Order and revive the Consolidated Suits.

166 This issue received brief treatment by the Judge. He referred to our decision in *Hoban*, where it was held that the parties would be restored to the *status quo ante* and that the litigation in that case would be resumed when the valuation order there was declared to be inoperative on account of a "nil" valuation. The Judge held that similarly, the Consent Order in the present case was inoperative because there was "nothing left to bid for" as the 2004 and 2007 Head Leases had run their course (see [192]–[194] of the Judgment). Given that the Judge (and the Respondents) relied heavily on *Hoban* for this proposition, it is apposite for us to begin by analysing that decision in some detail.

167 In *Hoban*, the appellants sued the respondents for minority oppression. Shortly after the commencement of the hearing, the parties indicated that they no longer wanted the court to determine the issue of liability in respect of the minority oppression action as all they really wanted was an equitable exit from the company. Following this, the parties agreed on the terms of reference for the valuation of the shares in the company ("the Shares"), and the appointment of an expert to do the valuation. They also agreed that the expert's valuation would be final. They could not, however, agree on six issues, including the date of valuation and whether the Shares should be valued on a minority basis. The trial judge heard the parties on these issues, and ultimately made an order ("the Valuation Order"), directing the parties to proceed with the appointment of an expert to value the Shares. The Valuation Order included a condition allowing the trial judge to adjust the expert's valuation, taking into account any "non-pecuniary material circumstances".

168 An expert was duly appointed to value the Shares. The expert found the net asset value of the company to be negative. He therefore valued the

shares as having "nil" value. The appellants then applied for the trial judge to adjust the expert's valuation on the basis of the respondents' oppression. The trial judge declined to intervene and upheld the expert's valuation on the ground that the parties had agreed not to raise the issue of liability. He further held that it would have been wholly inappropriate for the court to interfere with the expert's valuation as the parties had expressly agreed that it would be final.

169 The appellants appealed to the Court of Appeal, which held that the liability issue could no longer be litigated and that the expert's valuation was final. However, the court held that the trial judge had not determined if he should exercise his discretion to adjust the valuation. The case was therefore remitted to him for this purpose. After a trial, during which parties tendered evidence including fresh evidence from two witnesses on the offers that had been made by third parties, the trial judge found that there was no basis for him to vary the expert's valuation as there were no non-pecuniary material circumstances which would enable him to do so. The appellants again appealed this decision, arguing that the trial judge had erred in not adjusting the "nil" valuation by taking into account the various prices that had been offered by third parties to buy the Shares.

170 The Court of Appeal affirmed the trial judge's decision not to adjust the "nil" value of the Shares. Separately, the court invited the parties to submit written arguments on whether the expert's "nil" valuation had rendered the Valuation Order inoperative, which would in turn have the effect of restoring the parties to their legal positions prior to the making of the Valuation Order as if the order had never been made.

171 After considering the parties' arguments, the court took the view (at [40]) that the use of the word "purchase" in the Valuation Order implied "that the parties and even the court thought that the [Shares] had some value and that they should be subject to acquisition at that value", especially when seen in the light that the intention of the trial judge was to provide an "equitable exit mechanism" for the appellants. Ultimately, the court took the view (at [42]) that the "nil" valuation for the Shares meant that the Valuation Order could not be implemented as the Shares could not be "purchased". Therefore, the Valuation Order had become inoperative. The court held as follows, at [46]:

> Accordingly, we declare that the [Valuation Order] has become inoperative by reason of the legal fact that the [Shares] could not be purchased by the First and Second Respondents at nil value. This means that the parties are restored to the *status quo ante*, as if the [Valuation Order] had never been made.

172 In our judgment, *Hoban* is distinguishable from the present case. It seems to us that the Valuation Order in *Hoban* was an order made by the trial judge, albeit premised on a broad agreement between the parties, as opposed to a truly contractual consent order. We note that the court ultimately decided on the parameters of the Valuation Order which the parties had not been able to agree on. It is also telling that the Court of Appeal observed at [41] that it would be wholly unreasonable and unjust to attribute to *the trial judge* — rather than to the parties as would be expected if the order was truly a contractual consent order — an intention that the Shares should be effectively given away if they were assessed as having a "nil" value. If the Valuation Order was indeed not a contractual consent order but an ordinary order of court, the court's decision that it was empowered to set it aside would be uncontroversial. In our judgment, this was the true basis of the decision in *Hoban* and on this basis, it does not assist the Respondents.

173 We therefore disagree with the Judge that the Consent Order can be set aside by reason of it being "inoperative".

The remedies that should flow from the Repudiatory Breaches

174 It follows from our findings above that there is no basis to set aside the Consent Order or to revive the Consolidated Suits. While the Judge was correct to have found that there were repudiatory breaches, the remedy that he awarded was, with respect, not correct. We thus reverse that aspect of the Judge's decision. This leads us to the question of whether, and if so, how, the alternative relief pleaded by the Respondents can be granted. However, as this issue was not properly ventilated in the submissions before us, we will hear the parties before coming to a decision on this.

175 The parties are therefore directed to appear before the Registrar for further directions. We will hear the parties further on the question of exactly what remedial orders we may and should make in the light of our findings. In this regard, the parties are to address us on the following questions, without prejudice to such other issues as the parties may seek our ruling on:

(a) What remedies should flow from the Repudiatory Breaches that we have found were committed?

(b) Without prejudice to the generality of the previous question, is there scope for the imposition of damages on the basis set out in *Wrotham Park Estate Co. Ltd v Parkside Homes Ltd and Others* [1974] 1 WLR 798?

(c) Which parties may be made subject to any remedial orders that we may order? In particular, can and should Tan Senior and Tan CB be held liable?

Whether the counterclaim should be dismissed

176 It remains for us to consider whether the Judge was correct to have dismissed the counterclaim that was advanced by three of the Appellants (CA 168) seeking an order that the bidding exercise proceed should be dismissed. Given our findings that the Consent Order has been terminated prospectively as a result of the Repudiatory Breaches by the Defendants (Consolidated Suits) and that the parties are no longer bound by any obligation to proceed with the bidding exercise under the Consent Order (at [156]), there is no conceivable basis for us to order that the bidding exercise continue. We therefore uphold the Judge's decision to dismiss the counterclaim.

The Consequential Orders made by the Judge

177 Finally, the Appellants have also taken issue with the Consequential Orders made by the Judge, namely that Tan CB and Tan Senior can and should be added as parties to the Consolidated Suits (see [70]−[71] above). Given our finding that the Consolidated Suits cannot be revived, there is no need for us to consider the merits of the Consequential Orders.

Our decision in respect of CA 171

178 It is necessary, however, for us to come to a decision on the principal issue in CA 171, which is whether Tan Senior should have been joined as a defendant to Suit 27. Counsel for Tan Senior, Mr Irving Choh ("Mr Choh"), makes the following three key points on appeal:

(a) First, he submits that as Tan Senior was not a party to the Consent Order, Suit 27 — which was brought primarily to set aside the Consent Order — should not have been brought against him and should have been dismissed as against Tan Senior.

(b) Second, he submits that given that the Respondents had elected not to pursue Tan Senior for more than five years, it is inequitable and an abuse of process for them to sue Tan Senior in Suit 27 and thus the suit should have been dismissed as against Tan Senior. Specifically, he submits that the Respondents had elected to waive their rights against Tan Senior, or were guilty of laches or estoppel by conduct.

(c) Third, he submits that by extension of his previous argument, it would also be inequitable for the Respondents to sue Tan Senior in *the Consolidated Suits* even if the suits are revived as a result of the court's decision.

As observed in the preceding paragraph, the third point is now moot in the light of our finding that the Consolidated Suits cannot be revived. We therefore deal only with the first two points.

179 On the first point, the focus, in our judgment, should not be on whether Tan Senior was a party to the Consent Order but on whether he was rightly joined as a defendant to Suit 27. In this regard, we agree with Mr Tan that Tan Senior was rightly joined as a defendant in Suit 27 because his rights and interests would be affected if the Consolidated Suits were revived and this was one of the remedies that the Respondents were seeking. As set out in Jeffrey Pinsler, SC, *Singapore Court Practice 2014* vol I (LexisNexis, 2014) at para 15/4/1, all appropriate parties to a dispute should, as far as possible, be before

the court at the same time so that there may be a proper and complete determination of all issues and a comprehensive adjudication of all affected interests (see also the observations in *Tan Yow Kon v Tan Swat Ping and others* [2006] 3 SLR(R) 881 at [44]). The underlying reason for this, apart from efficiency and convenience, is that a party whose interests and rights would be affected must be afforded the opportunity to be heard before a decision is made.

180 As for the second point, we are not satisfied that the defences of laches, waiver and estoppel by conduct are made out. Mr Choh seeks to persuade us in respect of these defences on the ground that Tan Senior has allegedly suffered significant prejudice because (a) he would have to face litigation despite being of advanced years; (b) he is unable to recall many of the events; and (c) he did not retain most of the documents after his bankruptcy. We agree with the Judge that these are bare assertions which were unsupported by evidence. More importantly, we do not think that these grounds, even if made out, would suffice. Nothing exceptional has been raised to convince us that Tan Senior should not have been joined in Suit 27. For completeness, we also observe that Mr Choh did not take any issue with the limitation period of the claims and so we say nothing on that.

181 As for the doctrine of waiver by election, Tan Senior has failed to put forward any evidence that the Respondents had "clearly and unequivocally" communicated to him that they would not revive any action against him throughout and after his bankruptcy. Tan Senior has, on the facts, only been able to establish that the Respondents had *suspended* the enforcement of their right to sue him in the light of his bankruptcy. Tan Senior's name from the writ was never deleted and he was even named as a party to the Consent

Order. We are also unable to see how the Respondents' actions against Tan Senior can amount to an abuse of process. The circumstances of this case are clearly different from that of *Morris v Wentworth-Stanley* [1999] 1 QB 1004 ("*Morris*"), on which Mr Choh relies for this submission. In *Morris*, the English Court of Appeal found that the plaintiff's prosecution of fresh proceedings against the defendant was an abuse of process because the plaintiff had in fact *deleted* the defendant's name from the original action without reserving the right to sue her later. In contrast, there were no active steps taken by the Respondents in the present case to remove Tan Senior from the Consolidated Suits.

182 We therefore dismiss Tan Senior's appeal in CA 171, insofar as his arguments pertain to the inclusion of him as a party to *Suit 27*.

Conclusion on the appeals

183 In the premises, we dismiss CA 171. CA 168 is also dismissed, save that we reverse the Judge's order to set aside the Consent Order and revive the Consolidated Suits. As explained above, we do not agree that such a remedy can be granted in the light of the Repudiatory Breaches or on the basis that the Consent Order is inoperative. As for SUM 16 and SUM 17, we make no orders in relation to them since we do not think that the outcome of these summonses would have any bearing on the outcome of the appeals.

184 As set out at [175] above, we will hear the parties on the remedies that should flow from our findings. We will also hear the parties on costs and on any other consequential matters.

Post-hearing stay applications (*per* Sundaresh Menon CJ sitting as a single judge in the Court of Appeal)

185 Lastly, I briefly address the applications for a stay of execution that were heard by me on 5 April 2016 after this court reserved judgment in relation to CA 168 and CA 171 on 10 March 2016. These applications have no bearing on the merits of CA 168 and CA 171 but they concern a point of practice.

186 The stay applications arose out of two summonses filed by Tan CB and Koh KM respectively. On 21 March 2016, Tan CB filed Summons No 36 of 2016 ("SUM 36") and Koh KM filed Summons No 37 of 2016 ("SUM 37") (together, "the CA Stay Applications"). In SUM 36, Tan CB prayed for the following:

> (a) that the bankruptcy application in HC/B 546 of 2016 made against him by the Respondents be stayed pending the outcome of CA 168; and
>
> (b) alternatively, that all execution of proceedings be stayed pending the outcome of CA 168.

187 Koh KM prayed for similar orders in SUM 37 in respect of the bankruptcy application that had been brought against him. His prayers were as follows:

> (a) that the interim costs and disbursements orders made against him on 11 December 2015 be stayed pending the outcome of the appeal in CA 168; and

(b) further and/or in the alternative, that the bankruptcy proceedings instituted by the Respondents against him in HC/B 547 of 2016 be stayed pending the outcome of the appeal in CA 168.

188 The context to the filing of SUM 36 and SUM 37 was as follows. On 11 December 2015, the Judge made an order that Tan CB, Koh KM and SAA were to pay $800,000 ($500,000 as costs and $300,000 as disbursements) to the Respondents ("the Interim Payment Order"). This led to the filing of Summons No 6189 of 2015 ("SUM 6189") by Tan CB and Summons No 119 of 2016 ("SUM 119") by Koh KM and SAA (together, "the Interim Payment Order Stay Applications") seeking a stay of execution of the Interim Payment Order pending the outcome of CA 168. The Judge dismissed the Interim Payment Order Stay Applications on 18 January 2016.

189 The Respondents thereafter issued statutory demands against Koh KM and Tan CB on 4 February 2016 for the sum of $806,542.03, being the amount that the two were jointly and severally liable to pay the Respondents by reason of the Interim Payment Order.

190 On 19 February 2016, Koh KM filed Summons No 785 of 2016 ("SUM 785") to restrain the Respondents from proceeding with the statutory demand against him pending the outcome of the appeal in CA 168 and Tan CB filed Summon No 784 of 2016 ("SUM 784") asking that all execution of proceedings be stayed pending the decision in CA 168.

191 The Judge dismissed SUM 784 and SUM 785 on 7 March 2016. The dismissals by the Judge of SUM 784, SUM 785, SUM 6189 and SUM 119 shall be referred to collectively as "the Stay Dismissals".

192 The bankruptcy application against Tan CB was served on him on 10 March 2016 and that against Koh KM was served by way of substituted service on 20 March 2016. Both bankruptcy applications were to be heard on 7 April 2016. This was the background against which Tan CB and Koh KM filed the CA Stay Applications on 21 March 2016 (see [186] above).

193 I heard the CA Stay Applications on 5 April 2016. The key issues in the CA Stay Applications were as follows:

(a) whether this court had the jurisdiction to stay the bankruptcy applications pending the outcome of CA 168 ("the Jurisdiction Issue"); and

(b) assuming issue (a) above is answered in the positive, whether the court should exercise its discretion to stay the bankruptcy applications pending the outcome of CA 168 ("the Merits Issue").

194 In relation to the Jurisdiction Issue, Mr Poon referred me to O 57 r 15(1) of the ROC, which provides as follows:

> **Stay of execution, etc. (O. 57, r. 15)**
>
> 15.—(1) Except so far as the Court below or the Court of Appeal may otherwise direct —
>
> (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below; and
>
> (b) no intermediate act or proceeding shall be invalidated by an appeal.
>
> (2) On an appeal from the High Court, interest for such time as execution has been delayed by the appeal shall be allowed unless the Court otherwise orders.

Mr Poon suggested that O 57 r 15(1) of the ROC provides that an application for stay of execution can be made either to the court below or the Court of Appeal. However, Mr Poon also acknowledged that the application would generally have to have been first made to the court below by reason of O 57 r 16(4) of the ROC, which provides as follows:

> Whenever under these Rules an application may be made either to the Court below or to the Court of Appeal, it shall not be made in the first instance to the Court of Appeal, except where there are special circumstances which make it impossible or impracticable to apply to the Court below.

195 Mr Poon argued, in my view correctly, that the applications relating to the Stay Dismissals that had been heard and dismissed in the court below were in substance similar to the CA Stay Applications. Therefore, the requirement in O 57 r 16(4) has been satisfied and this court could therefore hear the CA Stay Applications.

196 Mr Tan, on the other hand, argued that the court's jurisdiction to stay a bankruptcy application is provided for in s 64(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("the BA"), which reads as follows:

> **Power of court to stay or dismiss proceedings on bankruptcy application**
>
> **64.**—(1) The court may at any time, for sufficient reason, make an order staying the proceedings on a bankruptcy application, either altogether or for a limited time, on such terms and conditions as the court may think just.

197 Mr Tan submitted that the word "court" in s 64(1), read with s 2 of the BA, refers to the High Court, and that the Court of Appeal would only have jurisdiction by way of an appeal from the decision of the High Court pursuant to s 8(1) of the BA. The thrust of Mr Tan's argument was that while this court might have the jurisdiction and power to grant a general stay of execution, it

did not have the same general jurisdiction in relation to bankruptcy applications, where it could only exercise appellate jurisdiction. While s 64(1) of the BA deals with the "power to stay" as opposed to the "jurisdiction to stay", this in itself did not completely undermine Mr Tan's argument because s 3 of the BA states that the High Court shall, subject to any other written law, "be the court having jurisdiction in bankruptcy under [the BA]".

198 As I pointed out to Mr Tan in the course of oral arguments, a general stay of execution in respect of all related proceedings that this court may grant would, in any case, bring within its fold the bankruptcy applications. To put it another way, if I were to grant a general stay of execution, perhaps subject to certain terms, it would not have been possible for Mr Tan, on behalf of his clients, to proceed with the bankruptcy application. On considering this, Mr Tan accepted that this court would have the jurisdiction to hear the CA Stay Applications. I was satisfied that I had the jurisdiction to grant the CA Stay Applications for the following reasons:

(a) if this court were to grant a general stay pending the release of its decision in CA 168 and CA 171, the effect of the general stay, among other things, would be to stay the bankruptcy applications;

(b) since an application had been made to the High Court for a stay of execution of the Interim Payment Order, and again after the statutory demands had been served, and since the applications had been rejected by the High Court (see the Stay Dismissals at [191] above), there was concurrent jurisdiction in the Court of Appeal to consider and grant the stay if it deemed this appropriate pursuant to O 57 r 15(1) of the ROC; and

(c) in those circumstances, this court's jurisdiction to stay the bankruptcy applications as part of its general jurisdiction to stay execution pending the appeals existed alongside the specific jurisdiction of the High Court to stay the bankruptcy proceedings.

199 In relation to the Merits Issue, Mr Choh informed the court that Tan CB was willing to pay the amount in the Interim Payment Order (including interest) ("the Debt Amount") into court. Mr Tan informed the court that he was amenable to the CA Stay Applications being granted if the Debt Amount was paid to his firm to be held on his undertaking pending the outcome of the appeals. Mr Choh was agreeable to this position. After hearing the parties, I exercised my discretion to grant the CA Stay Applications subject to certain conditions, which are set out at [200] below. I took into account the following factors in the exercise of my discretion:

(a) Tan CB had offered to make a payment into court or to Mr Tan's firm to secure in full the Debt Amount.

(b) This court had heard the appeals and its judgment would be released in due course.

(c) The least prospect for any possible injustice was secured by a stay in the circumstances and on the basis of payment being made into court or to Mr Tan's firm by Tan CB. The Respondents stood to get their money absolutely, almost immediately and without a risk of non-recovery if they succeeded in the appeals. On the other hand, Tan CB and Koh KM would get their money back, also almost immediately if they succeeded in the appeals.

200 As a condition of the grant of the CA Stay Applications, I ordered that the Debt Amount be paid with interest by Tan CB and Koh KM to Mr Tan's firm, Morgan Lewis Stamford LLC, by 4pm on 6 April 2016. The payment was to be made upon Mr Tan's undertaking that the Debt Amount would not be disbursed to the Respondents until further order by this court in the appeals.

Sundaresh Menon	Chao Hick Tin	Judith Prakash
Chief Justice	Judge of Appeal	Judge of Appeal

Kelvin Poon, Avinash Pradhan and Alyssa Leong (Rajah & Tann Singapore LLP) for the 1st to 4th appellants in Civil Appeal No 168 of 2015;
Irving Choh and Melissa Kor (Optimus Chambers LLC) for the 5th appellant in Civil Appeal No 168 of 2015 and the appellant in Civil Appeal No 171 of 2015;
Adrian Tan, Ong Pei Ching, Yeoh Jean Wern, Lim Siok Khoon and Joel Goh (Morgan Lewis Stamford LLC) for the respondents.