IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 130

Suit No 322 of 2012 (Summons No 2927 of 2017)

Between

(1) Cheong Soh Chin
(2) Wee Boo Kuan
(3) Wee Boo Tee

… *Plaintiffs*

And

(1) Eng Chiet Shoong
(2) Lee Siew Yuen Sylvia
(3) C S Partners Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Res Judicata] — [Issue estoppel] — [Cause of action estoppel]

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Cheong Soh Chin and others
v
Eng Chiet Shoong and others

[2018] SGHC 130

High Court — Suit No 322 of 2012 (Summons No 2927 of 2017)
Vinodh Coomaraswamy J
27, 28 June 2017

28 September 2018

Vinodh Coomaraswamy J:

Introduction

1 In the liability phase of this action, I decided substantially in favour of the plaintiffs. I ordered, amongst other things, that the defendants account to the plaintiffs on the wilful default basis. I also dismissed the defendants' counterclaim for management fees and related expenses of about US$17m. On appeal, my decision was left largely undisturbed, although the Court of Appeal did allow the defendants' appeal in relation to one head of their counterclaim.

2 At the commencement of the accounting phase of this action, the parties raise a preliminary issue for my determination: whether the defendants are now entitled to argue that the parties entered into an overarching agreement under which the plaintiffs were to pay the third defendant's expenses.[1] The plaintiffs

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[1] Plaintiffs' written submissions (19 June 2017) at paras 4 – 6; Defendants' written

argue that the defendants are barred by the doctrine of *res judicata* from raising this issue again because it was decided against them at the liability phase of this action, both by me and by the Court of Appeal.[2] The defendants contest this, submitting that issue of whether there is an overarching agreement in relation to "expenses" has not yet been raised or disposed of by any court.[3]

3 After hearing the parties, I agree with the plaintiffs that the issue of whether there is such an overarching agreement is *res judicata*. Specifically, I have held that both cause of action estoppel and issue estoppel operate to prevent the defendants from raising the issue again. I have also held that the defendants are precluded from raising any arguments on the basis of contract or *quantum meruit* to resist any of the plaintiff's claims to falsify the account.

4 The defendants have appealed against my decision.[4] I now set out my detailed grounds.

Background facts

5 The facts of the parties' dispute are set out in detail in my judgment on liability in *Cheong Soh Chin and others v Eng Chiet Shoong and others* [2015] SGHC 173 ("*Cheong Soh Chin (HC)*"). They are also canvassed in the Court of Appeal's decision on liability in *Eng Chiet Shoong and others v Cheong Soh Chin and others and another appeal* [2016] 4 SLR 728 ("*Eng Chiet Shoong (CA)*"). It therefore suffices for me to set out the background to this dispute briefly.

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submissions (19 June 2017) at paras 1 – 2.

2 Plaintiffs' written submissions (19 June 2017) at para 6.

3 Defendants' written submissions (19 June 2017) at paras 3 – 6.

4 CA/CA 118/2017.

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6 The plaintiffs are the Wees, a family of high net worth individuals. The first plaintiff, Cheong Soh Chin, is the mother of the second and third plaintiffs, Wee Boo Kuan and Wee Boo Tee. The first and second defendants, Eng Chiet Shoong and Sylvia Lee, are husband and wife. They are experienced asset managers. The third defendant, C S Partners Pte Ltd ("CSP"), is a company incorporated by Ms Lee to provide "integrated services to families on wealth protection and wealth creation". I shall refer to all three defendants collectively as "the Engs".

7 In early 2004, the parties agreed to combine their capital and financial expertise in a project they called the "WWW Concept". The WWW Concept was intended to be a long-term and profitable collaboration for the Wees and the Engs. Under this concept, it was envisaged that the parties would find fledgling private equity ("PE") fund managers and provide them with seed capital to start new PE funds in which the parties would also invest. They would then participate in the fund managers' profits and also in the funds' profits.

8 The first step in the WWW Concept was for the parties to build a track record for themselves, in order to attract fledgling hedge fund managers. To do this, the Wees and the Engs decided to set up their own PE fund. This PE fund was to be a fund of funds, *ie* a fund which would invest its capital in other funds. The plan was that the Wees would provide the necessary capital for the initial PE fund and the Engs would provide the financial expertise. Once the PE fund had a good track record, it would become the first fund under the WWW Concept.

9 Subsequently, in 2004 and 2005, the Wees invested US$30m in five PE funds ("Initial PE Funds") and another US$100m in ten additional funds ("Additional PE Funds"). The Wees agreed to pay the Engs a management fee

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of 1.5% in respect of the Initial PE Funds. There was no similar agreement with respect to the Additional PE Funds.

10 In addition to investing their capital in these PE funds, the Wees also invested capital in five ventures which the Engs introduced to them. The ventures are known as Project Plaza, Project Sailfish, Project Red Spot, the Bahamas Fund, and the Kendall Court Fund.

11 The Wees' investments in the PE Funds and in these five ventures were held through a network of 24 special purpose vehicles ("SPVs"). Although these vehicles were established and maintained with the Wees' funds, all of the vehicles were set up and controlled by the Engs.

12 The relationship between the parties deteriorated and eventually broke down. In April 2012, the Wees brought this action against the Engs. The Wees sought, among other things, orders requiring the Engs to render an account and to return the assets which the Wees had entrusted to them. The Engs brought a counterclaim against the Wees for fees and expenses incurred in managing and administering the Wees' investments.

My decision in the liability phase **– Cheong Soh Chin (HC)**

13 In *Cheong Soh Chin (HC)*, I allowed the Wees' claim, holding that the Engs were indeed liable to account to the Wees and to pay to the Wees the sums which the account showed were due. I dismissed the bulk of the Engs' counterclaim, holding that the parties were not in the relationship of a service provider and client but were instead joint risk runners working together towards the WWW Concept (at [69]). I did, however, hold that the Engs were entitled to management fees of US$450,000 per annum for the Initial PE Funds. Accordingly, I ordered the Wees to pay these management fees up to the date

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that the Engs transferred the structures holding these funds to the Wees (at [77]–[78]).

14 As for the Additional PE Funds, I held that the Engs were not entitled to any management fees at all (at [81]). I held that there was no express or implied agreement that the Engs would be paid fees for the Additional PE Funds (at [83]). Additionally, I held that the Additional PE Funds were part of the WWW Concept and that the Engs had rendered their services in the expectation that they would be compensated for those services out of the eventual profits of the WWW Concept, if it succeeded. I therefore rejected the Engs' claim that they were entitled to an award of fees on a *quantum meruit* (at [86]–[87]).

15 I also rejected the Engs' claim for management fees and expenses for Project Plaza, both in contract and on a *quantum meruit* (at [96]–[106]). I held that the Engs were risk runners with respect to Project Plaza also, and that they expected to be compensated for their services and expenses but never took steps to negotiate and agree that compensation with the Wees. I held further that the parties had no overarching agreement under which the Wees were to meet all of the expenses incurred by the Engs in connection with Project Plaza (at [98]–[99]).

16 Lastly, I rejected the Engs' claim for breakup and facilitation fees. I found that the Wees never agreed to pay any such fees to the Engs (at [93]–[94]). I also rejected the Engs' claim for approximately US$320,000 for work done administering the Wees' other investments partly on the basis there was no evidence to suggest that any such work was actually done (at [107]).

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***Court of Appeal's decision on appeal* – Eng Chiet Shoong (CA)**

17 There was no appeal against my decision on the Wees' claim. But both parties appealed my decision on the Engs' counterclaim. The Engs appealed my dismissal of their counterclaim. The Wees appealed my order that they pay management to the Engs fees for the Initial PE Funds beyond the date on which they demanded the transfer of the PE Funds.

18 The Court of Appeal allowed the Wees' appeal on the counterclaim. It held that the Wees had to pay management fees only up to the date on which the Wees demanded the transfer, plus a period of reasonable notice. The court took into account the payments that the Wees had already made to the Engs between 2005 and 2009 and ordered the Wees to pay management fees for three further annual periods of 2009-2010, 2010-2011 and 2011-2012 (at [103]–[105]).

19 The Court of Appeal dismissed the Engs' appeal on the counterclaim in all respects save in relation to Project Plaza. The Court of Appeal reversed my finding that Project Plaza fell within the WWW Concept (at [62]) and held instead that the Engs were entitled to be paid A$2m for work done on Project Plaza on a *quantum meruit* (at [86] and [92]).

20 In all other respects, the Engs' appeal failed and the Court of Appeal left my findings in *Cheong Soh Chin (HC)* undisturbed (at [93]):

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> For the reasons set out above, we allow [the Engs' appeal] in part inasmuch as the Engs are entitled to be compensated for work done with regard to Project Plaza (albeit not with regard to the [Additional PE Funds]). *We decline to interfere with the Judge's findings on the other aspects of the Engs' counterclaim.* [emphasis added]

Issue to be determined

21 The parties now come before me in the accounting phase of this action. At a pre-trial conference, the parties drew my attention to the preliminary issue set out at [2] above. I directed that that issue be heard before I heard evidence in the accounting phase.[5]

22 Each party couches the preliminary issue slightly differently.[6] Counsel for the Wees couches it as follows:[7]

> In view of the HC Judgment and the CA Decision stating that there was no overarching agreement for the [Wees] to pay all of CSP's Project Costs and CSP's Internal Costs (the "Findings"), are the [Engs] precluded from asserting to the contrary (or otherwise estopped from asserting that there was an overarching agreement for the [Wees] to pay the same)?

On the other hand, counsel for the Engs couches it as follows:[8]

> Are the [Engs] precluded from asserting (or otherwise estopped from asserting) that there was an overarching agreement for the [Wees] to pay the costs and expenses incurred for the [Wees'] investments?

23 The Engs have couched the issue in the broadest terms. I will analyse it in those terms. The issue which I have to decide, therefore, is whether the Engs

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5 Certified Transcript (22 May 2017), p 9 (lines 2 – 3).

6 Plaintiffs' written submissions (19 June 2017) at paras 4 – 5; Defendants' written submissions (19 June 2017) at paras 1 – 2.

7 Plaintiffs' lead counsel's statement at p 3.

8 Defendants' lead counsel's statement at p 4.

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are now precluded from asserting that there was an overarching agreement for the Wees to pay the costs and expenses incurred by the Engs for the Wees' investments. The Wees contend that that issue is *res judicata* because the Court of Appeal and I have finally and conclusively determined that there was no such overarching agreement.[9] The Engs contend that whether there was an overarching agreement in relation to *expenses* – as opposed to *fees* – has not yet been argued before or decided by any court.[10]

24 The "overarching agreement" which the Engs contend exists is an agreement which is binding as a contract[11] and not simply a factual consensus reached between the parties which falls short of binding the parties as a contract.

Law on *res judicata*

25 I begin by setting out the law on the doctrine of *res judicata*. The doctrine comprises three principles: (a) cause of action estoppel; (b) issue estoppel; and (c) the "extended" doctrine of *res judicata* or the "abuse of process" defence (*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]). Although the three principles are distinct in application and focus, they are founded on two main considerations. The first is the public interest in achieving and upholding finality in litigation. The second is a party's private interest in not being vexed twice in respect of the same matter (*TT International* at [98]).

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9 Plaintiffs' written submissions (19 June 2017) at para 6.

10 Defendants' written submissions (19 June 2017) at paras 4 – 6.

11 Certified Transcript (27 June 2017), p 93 (lines 22 – 24).

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26 In addition, the three principles can be broadly placed in two categories (*TT International* at [105]). In the first category are the principles which apply where a point *has been previously determined* as between the parties by a court of competent jurisdiction. In the second category is the principle that applies where a point *has not been previously raised for determination but ought to have been* in earlier proceedings between the same parties before a court of competent jurisdiction.

27 I examine these two categories in turn.

Category one: cause of action estoppel and issue estoppel

28 In the first category, we have cause of action estoppel and issue estoppel. These two types of estoppel are similar in that they apply to prevent a party from raising a point that has been previously determined against it. The similarities between the two types of estoppel are evident from the significant overlap in the elements which a party who seeks to rely on either type has to establish. Those elements are as follows (*Zhang Run Zi v Koh Kim Seng and another* [2015] SGHC 175 ("*Zhang Run Zi*") at [40] and [54]):

(a) First, there must be a final and conclusive judgment on the merits.

(b) Second, there must be identity of cause of action (for cause of action estoppel) or of subject matter (for issue estoppel).

(c) Third, the earlier judgment must have been rendered by a court of competent jurisdiction.

(d) Fourth, there must be identity of parties.

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29 Even though the elements of the two types of estoppel overlap, the second element above shows that the focal point of each type of estoppel is different. In cause of action estoppel, the court is concerned with a "claim in the later proceedings [which] is identical to that which was determined in earlier proceedings between the same parties" (*TT International* at [100]). Bearing in mind the twin policy considerations on which the doctrine of *res judicata* is founded (see [25] above), the cause of action in the two proceedings will be "identical" so long as the later proceedings are founded on the same matrix of facts as had been placed before the court in the earlier proceedings (*Zhang Run Zi* at [49]–[50]). The emphasis is on *substance* as opposed to *form* (*Zhang Run Zi* at [44]), a second claim can be barred by cause of action estoppel even if the earlier claim is characterised or framed in different legal terms.

30 In issue estoppel, by contrast, the focal point is whether "some question of fact or law" was determined in earlier proceedings between the same parties (*TT International* at [100]). Thus, even where a party advances a different cause of action in the later proceedings, the party may very well be precluded by issue estoppel from raising an issue of fact or law in those later proceedings which had been determined between the parties in the earlier proceedings (*Zhang Run Zi* at [53]).

31 In this regard, Sundaresh Menon JC (as he then was) set out in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*") what amounts to "identity of subject matter" for the purposes of issue estoppel (see also *Zhang Run Zi* at [55]):

> (a) First, the issue raised in the two proceedings must be identical. This means that the earlier proceedings must have traversed the same ground as the later proceedings, and the facts and circumstances giving

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rise to the earlier decision on the issue must not have changed or must be incapable of change (*Goh Nellie* at [34]).

(b) Second, the determination of the issue in the earlier proceedings must have been fundamental to the earlier decision. In other words, it must be the case that the earlier decision would not be able to stand without the determination of the issue in question (*Goh Nellie* at [35]).

(c) Third, the issue must have been raised and argued in the earlier proceedings. But issue estoppel may still apply if the issue was raised but was either conceded or was not argued (*Goh Nellie* at [39]).

***Category two: "extended" doctrine of* res judicata**

32 In the second category is the "extended" doctrine of *res judicata*. This is also known as the "abuse of process" defence. This principle arguably has the widest application because it can be invoked even where the cause of action or the issue raised in the later proceedings was not raised or determined in the earlier proceedings (*Goh Nellie* at [41]).

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33 Given the width of its application, applying the extended doctrine of *res judicata* inevitably carries the risk that a party will be denied access to justice because it will be prevented from pursuing a genuine claim which it has never before pursued. The doctrine must therefore navigate the fine line between allowing a genuine claim to be litigated and preventing a party from being oppressed by repeated litigation. For this reason, the extended doctrine requires the court to examine all the circumstances of the case and to take into consideration the following non-exhaustive list of factors (*Goh Nellie* at [53]):

(a) whether the later proceedings are in substance nothing more than a collateral attack upon the earlier decision;

(b) whether there is fresh evidence that might warrant re-litigation;

(c) whether there are *bona fide* reasons why an issue that ought to have been raised in the earlier proceedings was not; and

(d) whether there are some other special circumstances that might justify allowing the later proceedings to continue.

Analytical framework

34 Given the different scope and application of the three principles, it is important to ascertain which one is applicable when a litigant seeks to invoke the *res judicata* doctrine to bar its opponent from raising a point. The court must first determine whether the point was decided earlier by a court of competent jurisdiction. In that event, cause of action estoppel and issue estoppel apply. If not, the question is whether the point ought reasonably to have been raised for decision in the earlier proceedings. If so, then the extended doctrine of *res judicata* applies (*TT International* at [103] and [105]).

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35 With those legal principles in mind, I now turn to the facts of the case at hand.

Can the Engs argue that there is an overarching agreement for the Wees to pay expenses?

36 In my judgment, both cause of action estoppel and issue estoppel operate to prevent the Engs from arguing now that there was an overarching agreement for the Wees to pay the costs and expenses incurred by the Engs for the Wees' investments. The judgments in the liability phase in both *Cheong Soh Chin (HC)* and *Eng Chiet Shoong (CA)* make it clear that the issue of whether such an overarching agreement exists has been determined as between these parties by a court of competent jurisdiction, and has been determined against the Engs. The judgments in the liability phase have also determined that the Engs cannot claim these costs and expenses on a *quantum meruit*.

***Decisions in* Cheong Soh Chin (HC) *and* Eng Chiet Shoong (CA)**

37 I begin my analysis by considering how the Engs' counterclaim was disposed of in the liability phase.

38 The Engs' counterclaim pleaded that that they had an implied agreement with the Wees that the Wees would pay the Engs "Management Fees and Related Expenses"[12] which they quantified at a figure approaching US$17m.[13] In the alternative, the Engs claimed that sum as a *quantum meruit* for these "Management Fees and Related Expenses".[14]

12 Defence and counterclaim of the 3rd defendant (Amendment No 3) (15 July 2013) at para 78.

13 Defence and counterclaim of the 3rd defendant (Amendment No 3) (15 July 2013) at para 80.

14 Defence and counterclaim of the 3rd defendant (Amendment No 3) (15 July 2013) at para 79A.

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39 In "deal[ing] with *all aspects* of the … counterclaim" [emphasis added] (*Cheong Soh Chin (HC)* at [109]), I found that there was no overarching agreement that the Wees would pay these "Management Fees and Related Expenses". I made this clear to the parties when they came before me to clarify the terms of my judgment.[15] I stressed that it was my finding that the Engs incurred expenses voluntarily and in the expectation that they would recoup their expenses out of the anticipated profits of the WWW Concept, if it succeeded. Having rejected any *overarching* agreement, I held that the Engs were entitled to recover expenses from the Wees only where they had a *specific* agreement with the Wees permitting them to do so:[16]

> I found in this case that the defendants were risk runners who incurred the expenses in the hope of recovering those expenses as part of the profits from the overall collaboration if it succeeded, *save for certain specific agreements where the plaintiff agreed to pay the defendants' expenses.* [emphasis added]

40 I then considered whether there was a specific agreement enabling the Engs to recover management fees and related expenses in relation to the Additional PE Funds. I held that the Additional PE Funds were part of the WWW Concept and that the Wees performed their services in relation to the Additional PE Funds "in anticipation of being compensated out of the profits" of the WWW Concept (at [87]). I accordingly held that the Engs were not entitled to recover these management fees and related expenses whether in contract (at [81]–[85]) or on a *quantum meruit* (at [87]):

> 81 … The [Wees] cannot be compelled to pay for these services unless they agreed expressly or impliedly to do so or unless, despite the absence of an agreement, they are obliged by the law of restitution to do so.
>
> …

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15 Plaintiffs' written submissions (19 June 2017) at para 18.

16 Plaintiffs' written submissions (19 June 2017) at para 18.

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> 83 I find that there is no basis for any such implied agreement [that the Engs are entitled to management fees in relation to the Additional PE Funds]. Insofar as it arises from the admitted agreement to pay fees of 1.5% per annum in respect of the [Initial PE Funds], the implied agreement advocated by the [Engs] contradicts the terms of that express agreement and is unsustainable.
>
> …
>
> 87 … [T]he evidence supports a finding that in regard to the Additional PE Funds, the [Engs] performed their services speculatively, *in anticipation of being compensated out of the profit in their overall venture, ie the WWW concept*. As such, the defendants were taking the risk that that prospect of future compensation would not materialise. Having knowingly and voluntarily taken that risk, they cannot now claim a restitutionary remedy as compensation for the consequences of that risk.
>
> [emphasis added]

41 I also considered whether there was a specific agreement enabling the Engs to recover *all* management fees and related expenses in relation to the Project Plaza. I held that Project Plaza was part of the WWW Concept and held that the Engs incurred all of the Project Plaza expenses as risk runners (at [106]):

> … [T]he [Engs] were risk runners. The risk that the [Engs] ran was the risk of the WWW concept failing to come to fruition and yielding the anticipated riches. Project Plaza being part of the WWW concept, the risk of Project Plaza… fell within the risk which the [Engs] ran in extending their services and incurring expenses speculatively, without a prior overarching agreement.

I accordingly held that the Engs were not entitled to recover *all* management fees and related expenses from the Wees in connection with Project Plaza whether under a specific agreement in contract or on a *quantum meruit* (at [99]-–[100]):

> 99 As for expenses, I accept…that there was no overarching agreement that the [Wees] were to meet all of the expenses incurred by the [Engs] in connection with Project Plaza, either directly or by way of reimbursement. Instead, *the evidence contradicts any such overarching agreement by showing that*

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> *they entered into specific agreements from time to time in relation to specific expenses on Project Plaza.*
>
> 100 … The very fact that there are specific agreements in place in this regard leaves no room for the operation of any overarching implied agreement or for a claim in restitution.
>
> [emphasis added]

42 In *Eng Chiet Shoong (CA)*, the Court of Appeal agreed with my finding that the WWW Concept included the Additional PE Funds. But it reversed my finding on Project Plaza, finding instead that Project Plaza *was not* part of the WWW Concept. The Court of Appeal rejected any agreement that the Engs would be remunerated for their work on Project Plaza (at [86]), but held that the Engs were entitled to A$2m in fees on a *quantum meruit* (at [92]).

43 The Court of Appeal declined to disturb any of my other findings in relation to the Engs' counterclaim (at [93]):

> … [W]e allow [the Engs' appeal] in part inasmuch as the Engs are entitled to be compensated for work done with regard to Project Plaza (albeit not with regard to the [Additional PE Funds]). We decline to interfere with the Judge's findings on the other aspects of the Engs' counter-claim.

It is notable that the Court of Appeal did not disturb my finding that there was "no overarching agreement for the Wees to foot all the expenses incurred by the Engs for Project Plaza" (at [22]). The two judgments in the liability phase read together establish that it has been finally and conclusively determined against the Engs that there was no overarching agreement of any kind.

44 Despite this, the Engs submit that they are not precluded from arguing again, in the accounting phase, that there *is* an overarching agreement. They raise a number of arguments which I address in turn.

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Distinction between "fees" and "expenses"

45 The first argument is premised on a distinction between "fees" and "expenses". The Engs argue that the word "fees" refers to profits earned or to be earned by them and that the word "expenses" refers to costs incurred by them.[17] They contend that neither the decision in *Cheong Soh Chin (HC)* nor in *Eng Chiet Shoong (CA)* expressly deals with the issue of "expenses". Therefore, the Engs submit, they are not precluded from arguing now that they have an overarching agreement with the Wees which allows them to subtract the *expenses* which they incurred in managing the Wees' assets before returning those assets to the Wees.[18]

46 The Engs' argument, however, ignores the fact that their failed counterclaim saw "expenses" as a component of the "fees" claimed. The Engs' counterclaim was for "Management Fees and Related Expenses" together of about US$17m. There was no distinction drawn between "fees" and "expenses".[19] Moreover, when cross-examined in the liability phase, the Engs' witnesses confirmed that their counterclaim for "fees" encompassed "expenses".

47 Mr Eng accepted in cross-examination that an agreement for the Wees to pay CSP's internal expenses would be inconsistent with an agreement for CSP to receive fees:[20]

> Q: If there's an arrangement for internal expenses of [CSP] to be paid, such as rental and some or all of the salaries

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17 Certified Transcript (27 June 2017), pp 83 (lines 18 – 25) to 85 (lines 1 – 4).

18 Defendants' written submissions (19 June 2017) at paras 27 – 31.

19 Defence and counterclaim of the 3rd defendant (Amendment no 3) (15 July 2013) at paras 77 – 80.

20 Certified Transcript (30 July 2013), p 17 (lines 4 – 10).

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> of [CSP's] staff, then this is *inconsistent with there being an agreement for [CSP] to receive fees*.
>
> A: That would be – that would be correct. That would be correct.
>
> [emphasis added]

48 So too, the senior manager of CSP,[21] Ms Elizabeth Eng, testified that CSP's claim for fees included staff expenses, and that the claim for fees would be reduced had the Wees paid the expenses of hiring the staff in question at the time those expenses were incurred:[22]

> Q: You're putting forward a claim for fees. Is that on the basis that you have paid, that is to say, [CSP] has paid for its own staff?
>
> A: I believe so, yes.
>
> Q: So if that premise were false, would that affect your claim for fees?
>
> A: *It includes staff expenses, I believe so.*
>
> Q: So if this was false, if in fact the staff were paid for by the client, would this affect your claim for fees?
>
> A: *It would reduce it.*
>
> [emphasis added]

49 The Engs' argument that their failed counterclaim covered only "fees" but not "expenses" fails. Their counterclaim was for both "fees" *and* "expenses". Both *Cheong Soh Chin (HC)* and *Eng Chiet Shoong (CA)* rejected the Engs' case that there was an overarching agreement entitling the Engs to recover both "fees" *and* "expenses". Thus, in *Cheong Soh Chin (HC)* at [109], I made the point that I had "dealt with *all aspects* of the…counterclaim" [emphasis added], *ie* rejecting the counterclaim for both "Management Fees" and for "Related Expenses". And although the Court of Appeal ordered the

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21 Elizabeth Eng's affidavit of evidence-in-chief (18 March 2013) at para 1.

22 Certified Transcript (9 September 2013), p 9 (lines 10 – 21).

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Wees to pay the Engs A$2m for Project Plaza, it also declined to interfere with my decision to reject all other aspects of the Engs' counterclaim (*Eng Chiet Shoong (CA)* at [93]). Accordingly, the question of whether there was an overarching agreement for both "fees" *and* "expenses" has been decided against the Engs. This argument therefore fails.

The Court of Appeal's reversal of my decision on Project Plaza

50 The second argument that the Engs make is in relation to Project Plaza.[23] They submit that the issue of an overarching agreement that the Wees would pay all Project Plaza expenses was not determined conclusively in the liability phase because the Court of Appeal reversed my finding that Project Plaza was part of the WWW Concept.

51 To summarise again, I found that Project Plaza fell within the WWW Concept and that there was no overarching agreement that the Wees would pay all Project Plaza fees and expenses. But I noted that the Engs *could have* claimed Project Plaza fees and expenses on a *quantum meruit* if they had not been risk runners (*Cheong Soh Chin (HC)* at [106]):

> If the [Engs] had not been risk runners in extending services and incurring expenses in connection with Project Plaza… I would have held that it was open to them, in principle, to recover compensation for those services and expenses on a *quantum meruit*.

On appeal, my finding that Project Plaza was part of the WWW Concept was reversed by the Court of Appeal, and the Engs were awarded A$2m as "a reasonable sum for the [Engs'] fees" (*Eng Chiet Shoong (CA)* at [92]).

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23 Defendants' written submissions (19 June 2017) at paras 21 – 26.

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52 Here, the Engs rely on my observation that they could have claimed on a *quantum meruit* if I had not found that they were risk runners.[24] In this regard, they also rely on my decision in *Petroships Investment Pte Ltd v Wealthplus Pte Ltd (in members' voluntary liquidation) (Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd and another, interveners) and another matter* [2018] 3 SLR 687 ("*Petroships*"). They submit that *Petroships* stands for the proposition that where an appellate court's reasoning renders a first-instance court's finding of fact no longer necessary for the appellate court's ultimate decision, that finding of fact can no longer give rise to an issue estoppel even if the ultimate decision which the Court of Appeal arrives at is identical to the ultimate decision arrived at by the High Court. And in this case, because the Court of Appeal in *Eng Chiet Shoong (CA)* found that Project Plaza was not part of the WWW Concept and made no express finding on the question of "expenses" when awarding the *quantum meruit* of A$2m, the Engs submit that the Court of Appeal has left it open for the Engs to argue now that there was an overarching agreement that the Wees would bear the *expenses* for Project Plaza.[25]

53 I disagree. First, the fundamental premise of this argument is that the Engs drew a distinction between "fees" and "expenses" when advancing their counterclaim in the liability phase. I have already rejected that premise (see [49] above). Bearing this in mind, it is my view that the A$2m that the Court of Appeal awarded to the Engs as a "reasonable sum for the fees" of Project Plaza includes an element for the expenses (*Eng Chiet Shoong (CA)* at [92]).

54 Second, it bears emphasising that the Court of Appeal did not reverse my finding that there was no overarching agreement that the Wees would pay

[24] Certified Transcript (27 June 2017), pp 48 (lines 9 – 25) to 49 (line 1).

[25] Defendants' written submissions (19 June 2017) at paras 24 – 26.

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management fees and related expenses for Project Plaza. On the contrary, the Court of Appeal clearly held in connection with Project Plaza that "it would be somewhat artificial to locate an implied contract between the parties" (*Eng Chiet Shoong (CA)* at [86]). It was therefore held that the Engs could recover only on a *quantum meruit*, and that A$2m was a reasonable sum (*Eng Chiet Shoong (CA)* at [92]).

55 Contrary to the Engs' contention, the issue of whether there is an overarching agreement under which the Engs can recover all of their Project Plaza expenses has been finally and conclusively determined against the Engs in the liability phase, even though the Court of Appeal reversed my finding on whether Project Plaza was part of the WWW Concept.

Different questions in the main trial and in the accounting phase

56 The third argument that the Engs make is that the issue before the court in the liability phase is different from the issue now before the court in the accounting phase.[26] They argue that in the liability phase, the issue was whether the Engs had a right to recover the expenses they had incurred either in contract or restitution. In contrast, in the accounting phase, the issue is whether the Engs have a basis to deduct these expenses from the sums for which they have to account to the Wees.

57 In this regard, counsel for the Wees refers me to the Court of Appeal case of *Lim Teck Cheng v Wyno Marine Pte Ltd (in liquidation)* [1999] 3 SLR(R) 543 ("*Lim Teck Cheng*").[27] In that case, a director breached the duties he owed to a company and was ordered to account to the company for the profits

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[26] Certified Transcript (27 June 2017), pp 86 (lines 17 – 25) to 87 (lines 1 – 3).

[27] Plaintiffs' written submissions (19 June 2017) at paras 45 – 47.

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he had made from the sale of two vessels. In the accounting phase, the director sought to adduce evidence to establish the price at which one of the vessels had been sold. The evidence was disallowed by the trial judge on the basis that the issue of the price had been determined at the main trial and the director thus could not re-open the issue. The Court of Appeal agreed with the trial judge, and held that the director was prevented by issue estoppel from re-opening the issue (*Lim Teck Cheng* at [17]–[18]).

58 In view of *Lim Teck Cheng*, I agree with counsel for the Wees that this argument does not take the Engs very far. It is true that the question posed at the liability phase of this action is conceptually different in law from the question being posed at the accounting phase. But the difference is a matter of form and not one of substance. However it is couched, the question is still whether there was an overarching agreement on fees and expenses. And as examined above at [37]–[41], this is a question that has already been determined against the Engs in *Cheong Soh Chin (HC)* and *Eng Chiet Shoong (CA)*. It is thus impermissible for the Engs to try and re-open the issue of whether there was such an agreement now, in the accounting phase.

Contradictory positions taken by the Wees

59 Finally, the Engs contend that the Wees took a contradictory position before the Court of Appeal in *Eng Chiet Shoong (CA)* by submitting that "the question of which party is to bear the expenses in relation to the investments is a question to be decided at the taking of account".[28] The Engs argue that that the Wees should therefore not be permitted to resile from that position now by

[28] Defendants' written submissions (19 June 2017) at para 33; Respondents' case (CA 97/2014) (26 November 2015) at paras 121 – 124.

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invoking the doctrine of *res judicata* to prevent the Engs from arguing this question.

60 The Engs did not advance a particular proposition of law to support this argument. But they presumably rely on the principle against allowing a party to approbate and reprobate. That principle operates to prevent a party from resiling from a previous position. Indeed, the courts generally take a dim view of a party who demonstrates "inconsistent attitudes" in taking "stark shifts in positions from previous proceedings" (*Likpin International Ltd v Swiber Holdings Ltd and another* [2015] 5 SLR 962 at [61]).

61 This argument can be easily dismissed. As counsel for the Wees submitted, the point that the Wees now make is not that the Engs are estopped from arguing *on any basis* that the Wees should bear these expenses. The point that the Wees make is that the Engs are estopped from arguing that the Wees should bear these expenses *because* there was an *overarching agreement* between the parties to that effect.[29] Certainly, this is made clear from the Wees' printed Case before the Court of Appeal, where they submitted that "the Engs cannot recover expenses other than those *specifically agreed*" [emphasis added].[30]

Conclusion

62 For these reasons, I hold that the Engs are precluded in the accounting phase of this action from arguing that there is an overarching agreement between the parties entitling the Engs, as a matter of contract, to deduct the costs and expenses which they incurred in managing the Wees' investments when

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29 Certified Transcript (27 June 2017), pp 97 (lines 6 – 25) to 98 (lines 1 – 15).

30 Respondents' case (CA 97/2014) (26 November 2015) at para 125.

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rendering their account of those investments. I also hold that the Engs are precluded from relying on a *quantum meruit* to justify any such deduction. That is not to say, however, that the Engs cannot raise *other* grounds for deducting these expenses when rendering their account. But the question of whether there was an overarching contractual agreement or there is an entitlement to do so on a *quantum meruit* is not one that can be revisited.

Vinodh Coomaraswamy
Judge

Philip Jeyaretnam SC, Foo Maw Shen, Chu Hua Yi, Ooi Huey Hien and Jasmine Yong (Dentons Rodyk & Davidson LLP) for the plaintiffs; Koh Swee Yen, Jared Chen, Ho Wei Jie, Jill Ann Koh Ying and Lim Yangyu (WongPartnership LLP) for the defendants.

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