IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 216

Originating Summons No 1339 of 2019 and Summonses Nos 5872 of 2019 and 138 of 2020

Between

Jethanand Harkishindas Bhojwani

… Plaintiff

And

Lakshmi Prataprai Bhojwani (alias Mrs Lakshmi Jethanand Bhojwani)

… Defendant

GROUNDS OF DECISION

[Equity] — [Remedies] — [Account]
[Res Judicata] — [Issue estoppel]
[Res Judicata] — [Extended doctrine of res judicata]
[Trusts] — [Trustees] — [Powers]

TABLE OF CONTENTS

INTRODUCTION **1**

FACTS **2**

THE PARTIES 2

THE WILL 3

EVENTS SUBSEQUENT TO THE TESTATOR'S DEATH 5

OS 1407/2017 7

CA 231/2018 8

DEED OF ADVANCEMENT 10

HC/S 1242/2019 11

DEED AND DEED OF APPOINTMENT 12

HC/SUM 138/2020 ..... **13**

OS 1339/2019 AND SUM 5872/2019 ..... **14**

THE APPLICATIONS 14

PARTIES' POSITIONS 15

ISSUES 17

RES JUDICATA 18

Issue estoppel *19*

Extended doctrine of res judicata *22*

Scope of the liberty to apply to the High Court *27*

ENTITLEMENT TO ACCOUNT 28

Effect of the Deed of Advancement *29*

Effect of the Deed and Deed of Appointment *30*

Consequences for the Wife's entitlement to the account.....*39*

Documents already obtained.....*43*

SCOPE OF THE DOCUMENTS 45

CONCLUSION.....47

Jethanand Harkishindas Bhojwani
v
Lakshmi Prataprai Bhojwani (alias Mrs Lakshmi Jethanand Bhojwani)

[2020] SGHC 216

High Court — Originating Summons No 1339 of 2019 and Summonses Nos 5872 of 2019 and 138 of 2020
Tan Puay Boon JC
9 March 2020

8 October 2020

Tan Puay Boon JC:

Introduction

1 HC/OS 1339/2019 ("OS 1339/2019") filed on 24 October 2019 was an application by the plaintiff, Jethanand Harkishindas Bhojwani, for a declaration that court orders that had been previously made in HC/OS 1407/2017 ("OS 1407/2017") were no longer operative, and, further or in the alternative, for a variation of the said orders. These orders in HC/ORC 50/2019 ("ORC 50/2019") pertained to the plaintiff's obligation to disclose certain documents to the defendant, Lakshmi Prataprai Bhojwani, in fulfilment of his obligation as trustee to give an account of the trust property to the defendant as beneficiary of the trust under the last will and testament ("the Will") of the late Harkishindas Ghumanmal Bhojwani ("the Testator"). As the parties have taken on different roles in various legal proceedings, and with the parties' consent, I

will refer to the plaintiff as the "Husband", and the defendant as the "Wife", although interim judgment has already been given in separate divorce proceedings.

2 The basis of the Husband's application in OS 1339/2019 was two sets of deeds that he had executed after the Court of Appeal made its decision in the appeal from OS 1407/2017 in CA/CA 231/2018 ("CA 231/2018"). On 3 October 2019, the Husband executed a "Deed of Advancement". On 10 January 2020, he further executed a "Deed" and a "Deed of Appointment". The Husband argued that by either of these sets of deeds, he had excluded the Wife as a beneficiary of the trust and was no longer liable to give an account to her. He also made further arguments relating to the Wife's alleged conduct, which I will detail below.

3 Having considered the parties' submissions, I granted the Husband's application in part, ordering the Husband to provide an account of the trust property by furnishing the documents set out in the document "P1" annexed to ORC 50/2019, but only for the period for which the Wife was a beneficiary, *ie*, until 9 January 2020, the day before the Deed and Deed of Appointment were executed. The Wife and Husband have filed an appeal and cross-appeal respectively. I now furnish the grounds for my decision.

Facts

The parties

4 The Husband's father, the Testator, was the patriarch of the Bhojwani family. He passed away in 2007 and was survived by three sons, namely the

Husband, Jaikirshin Harkishindas Bhojwani ("Mr Jaikirshin"), and Moti Harkishindas Bhojwani ("Mr Moti").[1]

5 The Husband was married to the Wife at the time that the Will was written and when the Testator passed away. The Wife had filed for divorce on 5 October 2017, and interim judgment was granted on 29 October 2018.[2] The Husband and Wife have three sons (collectively, "the Sons") – Devin Jethanand Bhojwani ("Mr Devin"), Dilip Jethanand Bhojwani ("Mr Dilip"), and Sandeep Jethanand Bhojwani ("Mr Sandeep")[3] – who featured in these proceedings, although they were not parties.

The Will

6 This case concerned trusts established under the Testator's Will.[4] Under the Will, the Testator's estate ("the Estate") was dealt with in various parts. Each of his three sons (including the Husband), was appointed as trustee of each of the different parts for the benefit of their immediate families.[5] In total, five discretionary trusts were constituted by the Will: (a) one under cll 4.1 and 4.2 for specific property in favour of Mr Moti's family; (b) one under cll 5.1 and 5.2 for specific property in favour of the Husband's family; and (c) three under

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1 Husband's 1st Affidavit dated 24 October 2019 ("HA1") at para 6.

2 Husband's Affidavit dated 20 August 2019 in CA 231/2018 (CA/SUM 92/2019) ("H's CA 231 Affidavit") at paras 23–24.

3 H's CA 231 Affidavit at para 9.

4 HA1 at p 27.

5 HA1 at para 7.

cl 7 for each of one-third of the residue of the Estate for the Husband, Mr Jaikirshin, and Mr Moti, to each hold on trust for their respective families.

7 The Husband was appointed as a trustee of a trust under cl 5.1 of the Will ("the Clause 5 Trust"). Clause 5.1(ii) defined "the beneficiaries" as, *inter alia*, the Wife and the Sons. The property in the Clause 5 Trust was defined under cl 5.1(iv) of the Will, and included the property at 32 Branksome Road, Singapore ("the Branksome Property"), and shares in various companies ("the Clause 5 Shares").[6]

8 Clause 5.2 of the Will, which was at the heart of the present dispute, reads as follows:

> I direct my trustee to hold the Trust Property upon trust for all or such one or more of the beneficiaries at such ages or times in such shares and upon such trusts for the benefit of all or any one or more of the beneficiaries as my trustee in his absolute discretion may by deed or deeds revocable or irrevocable at any time or times during the trust period appoint and in making any such appointment my trustee shall have powers specified in clause 3 above during the Trust Period.

The "Trust Period" was defined under cl 5.1(i) as a period of 30 years commencing from the date of the Testator's death.

9 Under cl 7(b) of the Will, the Husband was also appointed as trustee of a trust over one-third of the residue of the Estate ("the Clause 7(b) Trust"), in favour of the same class of beneficiaries above. The material parts of cl 7 read:

> I give, devise and bequest all the residue of my movable and immovable property of whatsoever nature and wheresoever

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6 HA1 at p 31.

> situate not hereinbefore specifically devised or bequeathed to my trustees to distribute as follows:
>
> …
>
> > (b) one-third (1/3) to my son JETHANAND to hold on trust for all or such one or more of the beneficiaries stipulated in clause 5.1(iii) hereinabove at such ages or times in such shares and upon such trusts for the benefit of all or any one or more of the beneficiaries stipulated in clause 5.1(iii) hereinabove as JETHANAND in his absolute discretion may by deed or deeds revocable or irrevocable at any time or times during the trust period as stipulated in clause 5.1(i) hereinabove appoint and in making any such appointment JETHANAND shall have powers specified in clause 3 above during the trust period as stipulated in 5.1(i) hereinabove …

Events subsequent to the Testator's death

10 The Testator passed away on 4 March 2007.[7] Mr Moti was granted probate on 12 February 2008: *Lakshmi Prataprai Bhojwani (alias Mrs Lakshmi Jethanand Bhojwani) v Moti Harkishindas Bhojwani* [2019] 3 SLR 356 ("*Moti*") at [17] (see [11] below). I set out, in summary form, what happened to the various assets in the Clause 5 and Clause 7(b) Trusts:

(a) On 1 August 2008, the Clause 5 Shares were transferred to the Husband: *Moti* at [18].

(b) On 12 October 2016, Mr Moti transferred the Branksome Property to the Wife at the Husband's request.[8] No deed was executed at the time under the Clause 5 Trust. It appeared that the Husband had

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7 HA1 at para 5.

8 H's CA 231 Affidavit at para 32.

simply requested Mr Moti to perform the transfer after the Sons agreed for the Wife to receive the Branksome Property: see the Court of Appeal's oral judgment in CA 231/2018 ("CA 231/2018 Judgment") at para 4.[9]

(c) As for the one-third of the residue of the Estate, it appeared that it would have been completely used to meet the expenses of the Estate: *Moti* at [20]. As no issue concerning the residue appeared to be raised in the present proceedings, I have addressed this in the manner stated at [32] below.

11 The Wife had applied to the High Court in HC/OS 1229/2017 for Mr Moti to give an account of the trust property: *Moti* at [1]. While those proceedings were not directly relevant to the present case, they formed an important part of the background. Judgment in that matter was given on 18 January 2018. The High Court found that Mr Moti, as executor of the Estate, owed the duty to account to the Wife for the following properties in the stated periods of time:

(a) the Branksome Property from 4 March 2007 to 12 October 2016 (when it was transferred to the Wife): *Moti* at [42];

(b) the Clause 5 Shares from 4 March 2007 to 1 August 2008 (when they were transferred to the Husband): *Moti* at [41]; and

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9 HA1 at p 62.

(c) one-third of the residue of the Estate from 4 March 2007 up to the point when it was completely used to meet the Estate-related expenses: *Moti* at [43].

12 That being said, the High Court then decided not to grant an order calling for an account, finding that Mr Moti had sufficiently discharged his duty in the course of making his affidavits for the court proceedings: *Moti* at [45]. Therefore, the Wife's application was dismissed. The appeal against that decision by the Wife in CA/CA 19/2018 was dismissed by the Court of Appeal on 27 February 2019.

OS 1407/2017

13 On 18 December 2017, the Wife filed the application in OS 1407/2017 seeking an account of the trust property in the Clause 5 and Clause 7(b) Trusts (collectively, "the Trusts") from the Husband. The High Court granted the Wife's application on the following terms recorded in ORC 50/2019 (as amended in HC/SUM 1941/2019):

> 1. The [Husband] is to provide an account of the trust property by furnishing the documents set out in the document marked 'P1' in its amended form.
>
> 2. The time frame for furnishing the documents is from 6 to 10 weeks, as set out in P1, to be completed by 3 months, in batches.
>
> 3. Where the documents do not exist, the [Husband] is to file an affidavit to state that fact and provide an explanation if necessary. This should be filed by the end of 3 months from the date of this order.
>
> 4. Liberty to apply.
>
> …

14 The annexed document, "P1", provided a list of documents which the Husband was to disclose to the Wife, and also provided corresponding deadlines for compliance for each category. ORC 50/2019 was the order in respect of which the Husband sought relief in the present proceedings.

15 At the hearing on 21 November 2018, the High Court gave brief reasons for its decision as follows:[10]

> On the basis that the [Wife] was a beneficiary until the time when the Branksome [P]roperty was transferred to her, she would be entitled to an account of the Trust Property up to that point.
>
> Although the [Husband] says that the [Wife] has ceased to be a beneficiary after the Branksome [P]roperty was transferred to her, there was no formal notice of the same. Nor has the [Husband] provided any authority to show that the effect of such a transfer would end the role of the [Wife] as a beneficiary. There are still other trust assets to be administered in the remaining 30 years of the trust period, and [Wife] therefore continues as a beneficiary until such time the trust is fully administered. Accordingly, she continues to be entitled to an account of the Trust Property.

CA 231/2018

16 The Husband appealed against the decision in OS 1407/2017. The Court of Appeal heard the appeal in CA 231/2018 on 17 September 2019 and affirmed the orders made. As the oral judgment had a significant role in the present dispute, I set it out in full here:[11]

> 1 We affirm the trial Judge's decision on the ground that the appellant had not exercised his absolute discretion to exclude the respondent from further trust assets 'by deed or

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10 Notes of Argument dated 21 November 2018 at p 7, ln 24–p 8, ln 4: HA1 at pp 55–56.

11 HA1 at pp 61–62.

deeds', as required under cl 5.2 of the will of the late Harkishindas G Bhojwani dated 20 October 2006.

2 The testator's conferment of absolute discretion on his 3 sons in the will makes sense because the testator was in fact entrusting all his properties to his 3 sons and giving his 3 sons absolute discretion and control over how they would distribute and manage the assets for each of their families. The divorce proceedings in 2017 between the appellant and the respondent could not have been in contemplation when the will was made in 2006.

3 The facts here are not about the respondent being excluded as a beneficiary – she was made a beneficiary of the entire value of the trust property in 32 Branksome Road, which we understand is worth more than $6m. The appellant says that he has decided that only the house will go to the respondent and all the other assets will go to their 3 sons although he has not decided in what proportions. The problem is that the appellant did not go by the route of a 'deed or deeds'. We disagree with the appellant's assertion that 'deed' merely means an act rather than a formal legal document.

4 It is clear that the appellant had not exercised his discretion in the manner asserted by him – that the house goes to the wife and nothing else – because the transfer was almost fortuitous. He asked Mr Moti to do the transfer after the 3 sons agreed to transfer the house to the respondent. Therefore, the appellant had not purported to exercise any discretion under cl 5.2 at all. On this basis, the respondent remains a beneficiary to the rest of the trust property and is therefore entitled to ask for an account of that trust property at the material time.

5 We affirm the trial Judge's orders on the range of documents. If there are difficulties encountered by the appellant in complying with the orders, he can go back before the trial Judge to modify the orders or to ask for further directions as may be necessary.

6 The timelines ordered by the trial Judge will run from today.

…

Deed of Advancement

17 Soon after that, on 3 October 2019, the Husband executed a document entitled: "Deed of Advancement". The material terms of the Deed of Advancement were as follows:[12]

> 1. In the exercise of the absolute discretion conferred on the Trustee under Clause 5.2 of the Testator's Will, **THE TRUSTEE IRREVOCABLY DECLARES AND DETERMINES** that:
>
> a. No. 32, Branksome Road, Singapore 439565 be allocated and distributed from the Trust, free from any and all encumbrances, to **LAKSHMI**;
>
> b. **LAKSHMI** shall receive no further distribution from any of the remaining Trust Property; and
>
> c. **LAKSHMI** has no further interest in any of the remaining Trust Property.
>
> [emphasis in original]

18 The Deed of Advancement was witnessed and signed. It bears noting that the Deed of Advancement only made reference to the Clause 5 Trust and the properties defined under cl 5.1(iv) of the Will.

19 On 8 October 2019, this Deed of Advancement was then sent by the Husband's solicitors to the Wife's solicitors, Mr Sandeep's solicitors, Mr Devin, and Mr Dilip.[13] On 24 October 2019, the Husband filed the application in OS 1339/2019, which made express reference to the Deed of Advancement.

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12 HA1 at pp 67–68.

13 HA1 at pp 70–85.

HC/S 1242/2019

20 On 3 December 2019, the Husband also filed a suit against the Wife, Mr Devin, Mr Sandeep, and the Wife's solicitors in the divorce proceedings, in HC/S 1242/2019 ("S 1242/2019"). In gist, the Husband claimed that he had kept various materials on his personal laptop, to which he had a right of confidentiality, which right was breached by the parties against whom the suit was brought.[14] Mr Devin and Mr Sandeep had allegedly taken his laptop and obtained data and documents on that laptop, which they then allegedly supplied to the Wife for the purposes of the divorce proceedings. The Husband also alleged that the solicitors, having been given the data, retained and used it in the divorce proceedings when they knew or ought to have known of the private and confidential nature of the data *vis-à-vis* the Husband. The Husband alleged that some of that data and documents touched on the property in the Trusts.

21 As part of S 1242/2019, the Husband had applied for and obtained an interim injunction order in HC/ORC 8158/2019 ("the Interim Injunction Order") on 6 December 2019. On 16 December 2019, the defendants in S 1242/2019 sought to set aside the Interim Injunction Order. In support of this application, Mr Devin and Mr Sandeep filed affidavits, which the Husband argued in the present proceedings contained admissions that the documents that they had taken from the Husband included documents that related to the Clause 5 and Clause 7(b) Trusts for which he was ordered to give an account in ORC 50/2019.[15] I will deal with this contention in detail below. It suffices to

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14 Husband's 2nd Affidavit dated 10 January 2020 ("HA2") at para 24.

15 HA2 at para 24(m).

note here that as of the date of the hearing in the present proceedings, S 1242/2019 was still pending determination and had not yet gone to trial.

Deed and Deed of Appointment

22 On 10 January 2020, the Husband executed a deed, entitled simply, "Deed", which was intended to be "in addition to the Deed of Advancement dated 3 October 2019", and which provided:[16]

> 1. In the exercise of the absolute discretion conferred on the Trustee under Clause 5.2 of the Testator's Will, **THE TRUSTEE IRREVOCABLY DECLARES AND DETERMINES** that:
>
> a. No. 32, Branksome Road, Singapore 439565 be allocated and distributed from the Trust, free from any and all encumbrances, to **LAKSHMI**;
>
> b. **LAKSHMI** shall receive no further distribution from any of the remaining Trust Property; and
>
> c. **LAKSHMI** has no further interest in any of the remaining Trust Property.
>
> [emphasis in original]

23 On that same day, the Husband executed a "Deed of Appointment". After making reference to the terms of the Clause 5 Trust stated in the Will, the Deed of Appointment stated as follows:[17]

> 1. In the exercise of the absolute discretion conferred on the Trustee under Clause 5.2 of the Testator's Will, **THE TRUSTEE REVOCABLY APPOINTS** that he holds all the remaining Trust Property upon Trust, for the benefit of only the following persons, absolutely:
>
> a. Devin;

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16 HA2 at p 371.

17 HA2 at pp 366–367.

> b. Dilip; and
>
> c. Sandeep.
>
> 2. The Trustee may revoke the appointment referred to in Clause 1 of this Deed, wholly or in part, by deed or deeds, at any time or times during the Trust Period, in accordance with Clause 5.2 of the Testator's Will.
>
> [emphasis in original]

24 The effects of the Deed of Advancement, the Deed, and the Deed of Appointment respectively are disputed in the present case.

HC/SUM 138/2020

25 Since the Deed and Deed of Appointment did not yet exist when OS 1339/2019 was first filed, the Husband filed HC/SUM 138/2020 ("SUM 138/2020") seeking leave to amend the originating summons. I heard the application for leave to amend at the same hearing as the substantive dispute. As there is no appeal against my decision to allow the amendment, I only set out my conclusion and its effect on the substantive dispute.

26 The application for leave to amend focused on a proposed amendment to prayer 2 of OS 1339/2019 as follows (the proposed amendment underlined):

> Pursuant to the Declaratory Relief set out in prayer 1 above, this Honourable Court makes the consequential Order that, the [Husband] shall not be required to furnish any account of the trust property under the Last Will and Testament of [the Testator] made on 20.10.06, to the [Wife], from 3.10.19 when the Deed of Advancement was made by the [Husband] <u>or 10.01.2020 when the Deed of Appointment and Deed were made by the [Husband], or such other date as this Honourable Court deems appropriate</u>.

27 On 9 March 2020, I allowed the application in SUM 138/2020, and proceeded to consider OS 1339/2019 and HC/SUM 5872/2019 ("SUM

5872/2019"), the latter being the Wife's striking out application, on the footing of the amended prayer. Pursuant to my directions, the Husband filed an amended OS 1339/2019 on 10 March 2020. Any reference to OS 1339/2019 in the following should be treated as a reference to the originating summons as amended.

OS 1339/2019 and SUM 5872/2019

The applications

28 In OS 1339/2019, the Husband sought the following reliefs:

> 1. A Declaration that the Order of Court No. HC/ORC 50/2019 made on 21.11.18 in Originating Summons No. HC/OS 1407/2017 ordering the [Husband] to provide an account of the trust property under the [Will] of [the Testator] made on 20.10.06, to the [Wife] by furnishing the documents set out in the document marked 'P1' annexed to HC/ORC 50/2019, is inoperative and of no effect.
>
> 2. Pursuant to the Declaratory Relief set out in prayer 1 above, this Honourable Court makes the consequential Order that, the [Husband] shall not be required to furnish any account of the trust property under the Last Will and Testament of [the Testator] made on 20.10.06, to the [Wife], from 3.10.19 when the Deed of Advancement was made by the [Husband] or 10.01.2020 when the Deed of Appointment and Deed were made by the [Husband], or such other date as this Honourable Court deems appropriate.
>
> 3. Further or alternatively, the Honourable Court orders that HC/ORC 50/2019 be modified or varied as follows:
>
> > a. The [Husband] shall not be required to furnish an account of and provide any document(s) relating to the trust property to the [Wife], as prayed for in various items/aspects in 'P1' in HC/OS 1407/2017, in respect of the interests of the parties' children.
> >
> > b. The [Husband] shall not be required to furnish an account of and provide any document(s) relating to the trust property to the [Wife], as prayed for in items 5, 7, 7A, and 8 of '**P1**' in HC/OS 1407/2017, in respect of the

> Companies listed in Clause 5.1(iv)(b) to (i) of the [Will] of [the Testator] made on 20.10.06.
>
> 4. Execution of HC/ORC 50/2019 be stayed, pending the hearing and final determination of prayers 1, 2, and 3 above.
>
> 5. The costs of and incidental to this application be provided for by this Honourable Court.
>
> 6. This Honourable Court makes such further or other Order or other direction as it deems fit and/or necessary.
>
> [emphasis in original]

29 After OS 1339/2019 was filed, the Wife filed SUM 5872/2019 applying for OS 1339/2019 and the Husband's affidavit in support dated 24 October 2019 to be struck out under O 18 r 19(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") and/or the court's inherent jurisdiction. Both SUM 5872/2019 and OS 1339/2019 were fixed to be heard together. Given how the case developed, the present grounds of decision deal with both OS 1339/2019 and SUM 5872/2019, although the emphasis is on the merits of the application in OS 1339/2019.

Parties' positions

30 The Husband's case was essentially that ORC 50/2019 should be declared inoperative because the factual substratum of that order had changed, as the Wife was no longer a beneficiary due to the effect of the Deed of Advancement and/or the Deed and Deed of Appointment.[18] In addition, the Husband argued that there was new evidence that had come to light that showed that the Wife already had access to the documents that she had sought in

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[18] Husband's Written Submissions for SUM 5872/2019 and OS 1339/2019 ("HWS") at para 13(a)–(b).

OS 1407/2017 (in the form of Mr Devin's and Mr Sandeep's alleged admissions referred to above at [21]). This would have rendered the order to give an account oppressive to the Husband and unnecessary, and, further, meant that OS 1407/2017 had been brought in abuse of process.[19] As a result, ORC 50/2019 should now be declared to be inoperative. In relation to prayer 3, the Husband raised the additional point that some of the companies, namely Shankar's Emporium Pte Ltd, Malaya Company Pte Ltd and Liberty Merchandising Company Pte Ltd ("the Live Companies") objected to providing the documents to the Husband for the purpose of disclosure to the Wife.[20]

31 The Wife objected to the application first on the ground that the matters raised were *res judicata*, both in terms of the Wife's entitlement to the account and in terms of the scope of the documents that the Husband was required to furnish. Relatedly, she argued that OS 1339/2019 was an abuse of process. She also argued that the Husband had misconstrued what modifications to the order the Court of Appeal in CA 231/2019 had allowed him to seek.[21] Second, the Wife argued that the Deed of Advancement, the Deed, and the Deed of Appointment were all invalid and defective. Hence, she remained a beneficiary of the Trusts. Third, in any event, the said deeds could not operate retrospectively to deprive her of the account of the Trusts that she was entitled to for the period in which she remained a beneficiary. That is, her alternative position was that even if she had been removed as a beneficiary, her entitlement

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19 HWS at para 13(c)–(e).

20 HWS at para 14.

21 Wife's Written Submissions for Written Submissions for SUM 5872/2019 and OS 1339/2019 ("WWS") at para 86.

to the account remained until the date of her removal.[22] Finally, she argued that the issues raised relating to the documents taken from the Husband (*ie*, the subject of S 1242/2019) were not relevant to the present proceedings.[23]

32 I note here that while the Clause 5 Trust and the Clause 7(b) Trust are distinct trusts under the Will, the parties focused their arguments on the Clause 5 Trust and the deeds executed by the Husband in October 2019 and January 2020 only made reference to cll 5.1 and 5.2 of the Will. Therefore, I considered this case on the footing of the arguments surrounding the Clause 5 Trust, but recognised that in the absence of any arguments specific to the Clause 7(b) Trust, my conclusion would affect the Trusts as a whole, subject to the effect of the deeds as circumscribed by their scopes.

Issues

33 It was not disputed by the parties that if the Wife remained a beneficiary of the Trusts, she would be entitled to an account and, hence, the documents under ORC 50/2019. This was the result of OS 1407/2017 as confirmed by the Court of Appeal in CA 231/2018. The central question in this case centred on how the court should deal with the changed circumstances arising from: (a) the Deed of Advancement dated 3 October 2019, or the Deed and Deed of Appointment both dated 10 January 2020; and/or (b) the evidence relating to the Wife's alleged possession of the documents relating to the Trusts.

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22 Transcript for 9 March 2020 at pp 29–30.

23 WWS at para 93.

34 I deal with the issues raised in the following sequence, noting that the resolution of the first issue may be dispositive of some of the remaining issues:

(a) What parts of the Husband's application should not be considered by reason of the principle of *res judicata*?

(b) Was the Wife's entitlement to the account and documents affected by:

(i) the Deed of Advancement, the Deed, and/or the Deed of Appointment?

(ii) the new evidence that suggested that Mr Devin and Mr Sandeep had obtained documents which included documents sought and ordered to be produced in OS 1407/2017?

(c) Should the scope of the documents be varied for the above reasons, and/or because the Live Companies have raised issues about providing such documents to the Husband?

Res judicata

35 The doctrine of *res judicata* consists of three "conceptually distinct but interrelated principles": (a) cause of action estoppel; (b) issue estoppel; and (c) the "extended doctrine" of *res judicata*, or the defence of "abuse of process": *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal and other matters* [2017] 2 SLR 12 ("*Turf Club Auto*") at [82]. Cause of action estoppel was not argued by the Wife in the present case, and, in any case, I did not think that the present proceedings were based on the same

cause of action as in OS 1407/2017. Therefore, I deal only with issue estoppel and abuse of process in this section.

Issue estoppel

36 The Court of Appeal identified four conditions for issue estoppel to apply (*Turf Club Auto* at [87]). First, there must be a final and conclusive judgment on the merits. Second, the judgment must be by a court of competent jurisdiction. Third, the two actions that are being compared must involve the same parties. Fourth, there must be identity of subject matter in the two proceedings. In the present case, the first, second, and third conditions were met. The only issue was whether there was an identity of subject matter in OS 1407/2017 (and CA 231/2018) and OS 1339/2019. As the Court of Appeal summarised in *Turf Club Auto* at [108], there are three further sub-requirements under the fourth condition:

> (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.
>
> (c) The issue should be shown in fact to have been raised and argued.
>
> [emphasis added]

37 The Husband raised two facts in the present case which he claimed constitute a change in the circumstances in relation to the Wife's entitlement to the account. First, he had executed the Deed of Advancement in October 2019 and the Deed and Deed of Appointment in January 2020. In my view, this was

a change in the facts and circumstances that rendered the subject matter of the present proceedings different from that of OS 1407/2017 and CA 231/2018. The Wife was correct to submit that the question of whether the Husband *had* verbally determined her interest in the Trusts was *res judicata*, since that was the very heart of this court's and the Court of Appeal's findings in the prior proceedings. However, that was a different question from whether, in October 2019 or January 2020, the deeds were sufficient to determine the Wife's interest in the Clause 5 Trust, *such that* the Wife was no longer entitled to the account ordered in ORC 50/2019. The Husband's application in OS 1339/2019 was based on facts that could not have existed when OS 1407/2017 and CA 231/2018 were being considered. Whether he was correct or wrong about the effect of the deeds, that was a matter that had not yet been adjudicated. In this sense, the mere fact that the Husband's argument, if correct, could result in the deeds having some form of retrospective effect did not mean that the subject matters of the two sets of proceedings were the same.

38 Second, the Husband raised the issue of the new evidence that Mr Devin and Mr Sandeep had allegedly taken the documents that the Wife sought in OS 1407/2017. The issues of whether the Wife already had access to the documents sought, and of whether this would amount to a reason against granting the order to account or a basis for claiming that OS 1407/2017 was brought in abuse of process, were not raised or considered in the prior substantive proceedings. Therefore, there was no identity of subject matter. Accordingly, the question of whether these issues *should* have been raised in the prior proceedings is a matter to be dealt with under the extended doctrine of *res judicata*.

39 Turning then to the scope of the documents, apart from the above two arguments, the Husband also raised the argument that the Live Companies, whose shares were included in the Clause 5 Shares, were not willing to disclose the documents to him for the purpose of furnishing them to the Wife. I found that issue estoppel applied to this issue. The issue of the scope of the documents to be disclosed was litigated in OS 1407/2017 and in CA 231/2018. As part of his argument that the scope of ORC 50/2019 was too broad, the Husband had contended that the documents within the Live Companies' possession were not in his power and control.[24] As part of that argument, the Husband then argued in his skeletal submissions before the Court of Appeal:[25]

> Further, the Live Companies have **objected** to the provision of the Corporate Documents to the [Husband], for onward provision to the [Wife] pursuant to the Order of 21.11.18 [*ie*, ORC 50/2019]. [emphasis in original]

The Court of Appeal went on to reject the Husband's contentions and affirmed the High Court's order on the scope of the documents. In my judgment, an issue estoppel arose against the Husband preventing him from now arguing *again* that the scope of documents should be modified because the Live Companies have objected to the provision of documents.

40 Issue estoppel also applied to the Husband's argument that the documents relating to the Sons should not be disclosed to the Wife. First, in the present case, there did not appear to be any new arguments which went specifically to this point. The various arguments raised as to the scope of the

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24 Husband's Skeletal Arguments in CA 231/2018 at paras 56–60: Wife's Bundle of Documents ("WBD") at Tab 14.

25 Husband's Skeletal Arguments in CA 231/2018 at para 61: WBD at Tab 14.

documents to be furnished were essentially the same as those relating to the Wife's entitlement to an account, or were directed to the documents relating to the Live Companies. However, none of these arguments showed why the proposed variation in prayer 3(a) of OS 1339/2019 should now be adopted. Second, the issue of whether the documents relating to the Sons should be disclosed was heavily contested in the prior proceedings. It was an argument that the Husband had raised on appeal in CA 231/2018, claiming that the Wife was only entitled to the documents that pertained to *her* interest, and that the Wife had no standing to seek the documents relating to the other beneficiaries, *ie*, the Sons.[26] Third, in the light of those arguments, the Court of Appeal then made a clear decision on this issue in affirming the High Court's orders on the range of documents. In my view, there was clearly an identity of subject matter, and the facts relating to this particular prayer were not shown to have changed. I therefore found that issue estoppel applied to prevent the Husband from seeking a modification of the order relating to documents which he claimed touched on the Sons' interests. Hence, the arguments surrounding the proposed variations in prayers 3(a) and 3(b) of OS 1339/2019 were barred by issue estoppel.

Extended doctrine of res judicata

41 Beyond issue estoppel, I also considered whether raising these arguments would constitute an abuse of process under the extended doctrine of *res judicata*. As the High Court stated in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [53]:

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[26] Appellant's Case in CA 231/2018 at paras 131–137: WBD at Tab 11.

> … [A] court should determine whether there is an abuse of process by looking at all the circumstances of the case, *including whether the later proceedings in substance is nothing more than a collateral attack upon the previous decision*; whether there is fresh evidence that might warrant re-litigation; whether there are *bona fide* reasons why an issue that ought to have been raised in the earlier action was not; and whether there are some other special circumstances that might justify allowing the case to proceed. The absence or existence of these enumerated factors (which are not intended to be exhaustive) is not decisive. In determining whether the ambient circumstances of the case give rise to an abuse of process, *the court* should not adopt an inflexible or unyielding attitude but *should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant*. … [emphasis added]

42 In respect of the Husband's claim that the deeds executed in October 2019 or January 2020 had changed the Wife's position, I did not find that there was an abuse of process, since those facts clearly arose after the prior proceedings. The fact that he was trying to achieve what he had failed to do before was not sufficient reason to conclude that there was an abuse of process, given that there was no rule prohibiting the Husband from executing the deeds in October 2019 or January 2020. Whether the deeds had the effect intended was, as I have already noted, a separate question from whether the present proceedings should be considered by the court.

43 I had more difficulty with the Husband's arguments concerning the allegations that Mr Devin and Mr Sandeep had taken his data and documents, and that the Wife thereby already had the documents that she then sought in OS 1407/2017. The issue here is that the underlying facts had already occurred before OS 1407/2017 was decided. On the Husband's own arguments, Mr Devin and Mr Sandeep had taken the data and documents from his personal

laptop sometime in 2015–2016.[27] The Husband argued that he could only raise the issue in the *present* proceedings because he had only discovered this when the Wife began using that information in the divorce proceedings. However, a closer examination of the facts undermined this argument.

(a) First, the Husband's affidavit dated 20 August 2019 filed in response to Mr Sandeep's application in CA/SUM 92/2019 ("SUM 92/2019") to be joined as a respondent in CA 231/2018 made clear reference to the allegation that Mr Devin and Mr Sandeep had taken his documents from the laptop to pass to the Wife:[28]

> 183. In fact, sometime between 2015/6 to 2018, Devin and Sandeep had respectively asked me for the use of my personal laptop on a few occasions, ostensibly to watch football games.
>
> It turned out that Devin and Sandeep had deceived me, because I verily believe that they surreptitiously accessed and downloaded **my personal information and documents from my personal laptop, without my permission**.
>
> 184. I verily believe that Devin and Sandeep then passed the information and documents obtained from my personal laptop without my permission, **to the Respondent** [the Wife] so that she could use the same in the divorce proceedings …
>
> [emphasis in original]

Hence, at the latest, in August 2019, *before* the appeal was heard in CA 231/2018, the Husband already had formed the belief that the Wife, through Mr Devin and Mr Sandeep, had obtained the documents from

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27 HA2 at para 24.

28 H's CA 231 Affidavit at paras 183–184.

him. Yet, the Husband did not raise this issue in the substantive arguments. Given that the Husband had such a belief before the appeal was heard, the proper course of action would have been to seek leave to adduce further evidence at that the appeal. While I recognise that the affidavits that the Husband was now relying upon were filed in December 2019, *after* the appeal was heard, the fact remained that he had already formed his belief as to the Wife's dealings with the documents (which had to be based on *some* evidence if he was willing to state this belief on affidavit), yet failed to raise any issue in the prior proceedings.

(b) Second, on the Husband's evidence, it was not clear that he was unable to raise the issue even at the first instance in OS 1407/2017. In that regard, the Husband's affidavits in the present proceedings did not show any reason why he would not have been able to uncover further evidence that the Wife, through Mr Devin and Mr Sandeep, had obtained the documents from his laptop. I note that based on the Husband's pleadings in S 1242/2019, the Wife had used information from his laptop as early as August *2018*, even before OS 1407/2017 was determined.[29]

44 The argument raised by the Husband was, in substance, a collateral attack on the prior decision. The argument effectively asked the court to re-exercise the discretion as to whether the order to account should be granted. As

[29] See Mr Devin's Affidavit in S 1242/2019 at para 49: HA2 at p 60.

the Husband couched his argument in the present proceedings, in the words of the High Court in *Moti* ([10] *supra*) at [44]:

> … [N]otwithstanding a beneficiary's entitlement to an account from his trustee, the court may in its discretion decline to make an order for the taking of accounts if it would be oppressive for the trustee to so account, or if there was some other good reason to so decline …

He had relied on the same principle in OS 1407/2017 and CA 231/2018, meaning that this question was part of the process by which the previous courts had arrived at their decisions. Yet, the Husband had failed to raise this particular issue as an argument against granting the account to the Wife, which he now argued justified a different result on the same principles.

45 Further, on the facts, I did not think that the Husband had sufficiently shown that he was truly unable to have raised this issue in the prior proceedings, and certainly, on his own admission in his affidavit for CA/SUM 92/2019, he already believed that the Wife had those documents before the hearing of the appeal. I could not find any *bona fide* reason for why the issue was not raised in the earlier proceedings. To allow the Husband to raise this issue in the present proceedings would effectively allow an unsatisfied litigant to re-open a case on the basis that "better" evidence of something that he already believed (but failed to raise) had arisen after the determination of the matter. The interest in finality of litigation and fairness to the Wife strongly supported my finding that this argument was an abuse of process under the extended doctrine of *res judicata*. In any case, I did not consider it unjust to prevent the Husband from raising the issues in this context – if the allegations are true, the Husband has rights against the Wife, Mr Devin, and Mr Sandeep, which can be enforced in S 1242/2019. I

therefore conclude that the Husband could not raise this issue in the present proceedings.

Scope of the liberty to apply to the High Court

46 As a final preliminary matter, I deal with the arguments concerning the Court of Appeal's statement in its judgment that:

> If there are difficulties encountered by the appellant in complying with the orders, he can go back before the trial Judge to modify the orders or to ask for further directions as may be necessary.

47 The Husband appeared to rely on this to argue that he had liberty to seek significant modifications to ORC 50/2019, including as to the Wife's entitlement to the account and the scope of the documents to be furnished. However, the key context for this sentence was the preceding one, which reads, "We affirm the trial Judge's orders on the range of documents." In that context, the Court of Appeal's statement that the Husband could "go back before" the High Court should be understood to be concerned only with the implementation and enforcement of ORC 50/2019, rather than as a blanket allowance to revisit even the Wife's entitlement to the account and documents. Specifically, I did not consider that this would, on its own, have otherwise enabled the Husband to apply for (a) a declaration that ORC 50/2019 was inoperative; and (b) that the entitlement to account ceased in October 2019 or January 2020. There was some scope for an application to modify the scope of the documents, but that had to be considered in the light of any difficulty that the Husband faced in compliance, not generally in terms of the Wife's entitlement to the documents. Further, a variation would still be in the discretion of this court, since the Court

of Appeal did not pre-determine that any variation application would necessarily succeed.

Entitlement to account

48 I turn then to the substance of the dispute in the present case. Having found that the Husband could raise the issue of how the deeds he executed in October 2019 and January 2020 affected the Wife's entitlement to an account, I first consider the effect of the various deeds on the Wife's interest under the Trusts, before dealing with how that, in turn, affected (or did not affect) the Wife's entitlement to an account.

49 Before addressing the specific deeds, I summarise the position of the Clause 5 Trust as it stood after the Court of Appeal's decision in CA 231/2018.

(a) The Clause 5 Trust was a discretionary trust which gave the Husband the *absolute discretion* to decide how to appoint the property under the said trusts to the class of beneficiaries defined under the cl 5.1(ii) of the Will: CA 231/2018 Judgment at para 2.

(b) The transfer of the Branksome Property to the Wife in 2016 was not, in and of itself, sufficient to determine her interest in the Clause 5 Trust, because the Husband had not exercised his discretion by way of a deed or deeds as required by cl 5.2 of the Will: CA 231/2018 Judgment at para 4.

Effect of the Deed of Advancement

50 In my judgment, the Deed of Advancement dated 3 October 2019 was not effective, under cl 5.2 of the Will, to determine the Wife's interest in the Clause 5 Trust. This is because the Deed of Advancement described itself as for "advancement", while cl 5.2 of the Will provided for the discretion to "appoint".

51 There is a distinction between the power of advancement and the power of appointment. As counsel for the Wife rightly pointed out, this distinction is an important one in the law of trusts. The power to appoint creates a beneficial interest in favour of one or more objects of the power: Lynton Tucker, Nicholas Le Poidevin & James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 19th Ed, 2015) ("*Lewin*") at para 30-002. The power of advancement, rather, allows the trustee to "anticipate the vesting in possession of an intended beneficiary's contingent or reversionary interest": *Lewin* at para 32-001 – in other words, it is concerned less with who is to benefit, but more with when that beneficiary will receive the benefit from the trust. I found the distinction helpfully summarised by the New Zealand Supreme Court of Wellington in *Kain v Hutton* [2008] 3 NZLR 589 ("*Kain*") at [32] and [33]:

> 32 … A power of appointment amongst discretionary objects (a special power) is a power to select whether and to what extent and at what time one or more of the discretionary objects will receive any part of the trust fund, perhaps with the result that other discretionary objects will miss out entirely. It is often under a modern trust deed the most significant or fundamental power which the trustees have at their disposal. In contrast, a power of advancement is a purely ancillary power enabling the trustees to anticipate, by means of an advance under it, the date of actual enjoyment by a beneficiary, and it can only affect the destination of the trust fund indirectly in the event of the beneficiary failing to attain a vested interest. …
>
> 33 The decision to be made on an *advancement* is, therefore, of a different character from a decision on an

> appointment: not whether the selected object is to benefit at all, but whether that person should receive his or her entitlement at an earlier time and possibly in a different manner and perhaps to the disadvantage of someone else who already has an interest in the fund. In the case of an *appointment* among discretionary objects, the other objects in that class ordinarily are not being deprived of anything more than their mere hope of an exercise of discretion in their favour. …
>
> [emphasis in original]

52 While the Deed of Advancement purported to be an exercise of the discretion under cl 5.2 of the Will, it was also referred to as a deed of *advancement.* The significant difference between an advancement and an appointment rendered it unsafe, in my view, to rely on the Deed of Advancement as an exercise of the power of appointment.

Effect of the Deed and Deed of Appointment

53 I turn, then, to the remaining deeds. I found that the Deed and Deed of Appointment were effective to determine the Wife's interest under the Clause 5 Trust. The Deed and the Deed of Appointment worked together to achieve this in a two-fold manner. First, the Deed irrevocably declared and determined that the Branksome Property was allocated and distributed to the Wife from the trust free from any and all encumbrances, and stated that the Wife shall receive no further distribution from the remaining trust property, and that she has no interest in any of the said property.[30] Second, the Deed of Appointment revocably appointed the remaining trust property (*ie*, the property other than the Branksome Property) to the Sons: Mr Devin, Mr Dilip, and Mr Sandeep.[31]

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30 HA2 at p 371.

31 HA2 at p 366.

54 The Wife made two points attacking the validity and effect of these two deeds. First, she argued that the Deed was not valid or executed in accordance with cl 5.2 of the Will because it dealt with the Branksome Property, which had been transferred to the Wife more than three years before the Deed was executed. As such, the Husband could not purport to exercise a discretion in relation to a distribution that was already made.[32] Second, the Deed could not purport to exclude the Wife from future distributions as the trustee could not bind his discretion as to the future, without appointing the remainder of the trust property.[33] Relatedly, in relation to the Deed of Appointment, the Wife highlighted that this was only a revocable appointment of the remainder of the trust property.[34]

55 I did not agree with the Wife's first argument that the Deed could not purport to be the exercise of discretion in relation to property that was already distributed. I accepted that because legal title to the Branksome Property was transferred to the Wife in 2016, that property was no longer part of the Clause 5 Trust and the Husband could not claim to be a trustee of that property in January 2020. However, I did not see any reason why the Husband, having directed Mr Moti to transfer the legal title to the Branksome Property to the Wife in 2016, could not in January 2020 declare his intention that the transfer should also be *treated* as a distribution of that trust property to the Wife. I would not go so far as to say that this could *retrospectively* re-characterise the transfer in 2016 as an appointment from that date, since that would quite substantially limit the utility

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32 WWS at para 83.

33 Transcript for 9 March 2020 at p 57, ln 2–17.

34 Transcript for 9 March 2020 at p 59, ln 1–8.

of the requirement that the discretion be exercised by "deed or deeds". There must be some role for the formality to play and I found that the appointment could only take effect from the date of the deed in question. That said, there was nothing in my view preventing the Husband from declaring a past act as *also being* an appointment with effect from the date of that deed.

56 In any case, I considered that the distribution of the Branksome Property to the Wife could be treated as a distinct question from whether the Wife could be excluded from the Clause 5 Trust prospectively by the Deed. In my judgment, the power of appointment under cl 5.2 of the Will gave the Husband the power to exclude the Wife from any future distribution of the trust property, regardless of whether this exclusion was accompanied by a distribution of the remainder of the trust property. I refer again to the wording of cl 5.2 of the Will as follows:

> I direct my trustee to hold the Trust Property upon trust for all *or such one or more of the beneficiaries* at such ages or times *in such shares and upon such trusts* for the benefit of *all or any one or more of the beneficiaries* as my trustee *in his absolute discretion may* by deed or deeds revocable or irrevocable at any time or times during the trust period *appoint* and in making any such appointment my trustee shall have powers specified in clause 3 above during the Trust Period. [emphasis added]

57 In the first line, there is express reference to the possibility that the trust may only be:

> … for all or *such one or more* of the beneficiaries … in such shares and upon such trusts for the benefit of all *or any one or more of the beneficiaries* as [the Testator's] trustee in his absolute discretion may by deed or deeds revocable or irrevocable at any time or times during the trust period appoint … [emphasis added]

That is, the Husband as trustee has been given the discretion to determine *who* among the class of beneficiaries defined by cl 5.1(ii) would be beneficiaries of

the trust over the trust property. There is no additional stipulation that this can only occur after property has been given to the beneficiary who is now being excluded, or that this must only be when all of the trust property is exhausted, as the Wife claimed. There is nothing in cl 5.2 of the Will that would enable the court to impose such a requirement.

58 It is a matter of sound practice and logic that, if the trustee is given the power to appoint one or some other number of beneficiaries (within a class of beneficiaries) as beneficiaries of the trust, he is also given the power to *exclude* one or some other number of beneficiaries from the trust. One is the corollary of the other. It would be extremely artificial and, in my view, contrary to the language and intent of a clause like cl 5.2 of the Will to prevent the trustee from doing so. Hence, even if the declaration in the Deed concerning the Branksome Property could not be treated as an appointment in favour of the Wife, I found that the Husband had the power to exclude the Wife from the trust over the remaining property, and that this power was exercised.

59 In this case, I did not need to decide if this could have been effected by the Deed alone, in the absence of the Deed of Appointment. Given that both deeds existed together, I considered their cumulative effect. I found that by (a) expressly excluding the Wife from any further interest in the remaining trust property; and (b) appointing the Sons as beneficiaries of a trust over the remaining trust property, the deeds were sufficient to exclude the Wife as a beneficiary. The fact that the latter was a revocable appointment was adequately met by the fact that the former was irrevocable. The revocability of the appointment under the Deed of Appointment could then be understood as leaving open the possibility of further altering the appointments as between

Mr Devin, Mr Dilip, and Mr Sandeep, but no longer with the Wife as a potential beneficiary of the trust property. By way of these deeds, and in exercise of the discretion under cl 5.2 of the Will, the Husband had excluded the Wife from the trust of the remaining property, and she was no longer a beneficiary.

60 I was also not persuaded by the Wife's argument that the deeds were invalid because the Husband could not bind his future exercise of discretion.[35] This was not a case where the Husband had fettered his future exercise of the power, but rather, was one where the power itself had been exercised. The only question was the scope of the power, which was governed by cl 5.2 of the Will, not whether the Husband had bound himself to exercising his discretion in a particular way in the future. And as for the scope of the power, the very reference to an "irrevocable" appointment in cl 5.2 of the Will meant that the exercise of the power at one point could have a permanent effect on the beneficiaries' entitlements for the remainder of the trust period.

61 While I based my decision primarily on the text of cl 5.2 of the Will, I was also confirmed in this understanding of the power of appointment by a number of cases that were not cited to me by parties. I set these cases out, however, as I considered them very helpful in dealing with the issues raised before me.

62 The most significant case is that of *Blausten v Inland Revenue Commissioners* [1972] 2 WLR 376 ("*Blausten*"), a decision of the English Court of Appeal. The dispute concerned the taxation of a settlement, whereby the

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[35] Transcript for 9 March 2020 at p 57, ln 3–8.

taxpayer had directed that various investments and the sum of £100 be held on trust for a specified class. That specified class included (*Blausten* at 379D): (a) the "wife widow children and remoter issue of the settlor"; (b) the brothers and sisters of the settlor and their children and remoter issue; and (c) the "spouses widows and widowers of any of the children and remoter issue aforesaid". It was understood, therefore, that the specified class included the taxpayer's wife or widow.

63 The material term governing the trustees' power of appointment in that case was as follows (*Blausten* at 382B):

> … or in writing appoint that the whole or any part or parts of such capital shall be held upon such trusts (either revocable or irrevocable) for the benefit of any one or more of the specified class (but not so as to confer any benefit during the lifetime of the settlor in the capital or income of the trust fund upon the wife of the settlor) and subject to such powers and discretions exercisable by any person or persons (other than the settlor acting solely) and generally in such manner as the trustees shall think fit but so that all interests so created shall vest within the trust period.

64 The question of whether the tax assessments was correct under the Finance Act 1958 (c 56) (UK) turned on whether (*Blausten* at 381H):

> … the trustees of the settlement had or might have power whether immediately or in the future and whether with or without the consent of any person to pay or apply to or for the benefit of the settlor's wife the whole or any part of the income or capital of the trust fund.

For present purposes, the material part of the judgment concerned the trustees' exercise of the power of appointment, whereby they (*Blausten* at 382F):

> … irrevocably appointed that thenceforth until the expiration of the trust period all the property from time to time representing the capital of the trust fund should be held upon *the like trusts*

> *and with and subject to the like powers and provisions* as were declared and contained in the settlement in all respects as if the same were therein repeated, *save only that* (a) in the *definition of the specific class contained in the second schedule to the settlement* ***the words 'wife widow' should be deemed to have been omitted*** and (b) in clause 2(A) [*ie*, the power of appointment] of the settlement there should be deemed to have been inserted after the words 'the specified class' where those words occur in the power to advance capital and in the power of appointment but not elsewhere the words 'and the widow of the settlor.' [emphasis added in italics and bold italics]

65 At first instance, Goff J had held that the appointment was not effective, finding that it was "simply an attempt to delete members from the specified class … and then to read in the widow of the settlor as a possible object of the discretionary trust, leaving her still with nothing but a spes" (*Blausten* at 383A). Buckley LJ recognised that the effect of the trustees' appointment was (*Blausten* at 383C–D):

> … to take the settlor's wife out of the specified class for the purposes of the discretionary trust and of the power to advance capital and of the power of appointment and to restore her to the class of persons in whose favour capital could be advanced or benefits could be conferred under an appointment as from the time when she might become the widow of the testator..

In his view, however, disagreeing with Goff J, the removal of the wife from the objects of the discretionary trust was entirely within the terms of the power of appointment, since it was an appointment for the capital to be held on trust for the benefit of the remaining members of the specified class. Hence, it was proper for the trustees to have resettled the trust on terms that excluded the wife from the class of beneficiaries during the lifetime of the settlor.

66 *Blausten* ([62] *supra*) was helpfully discussed by the Eastern Caribbean Court of Appeal in the British Virgin Islands, in the case of *Re New Huerto*

Trust (2015) 18 ITELR 447 ("*Re New Huerto Trust*"). Clause 2 of the trust deed in that case read (*Re New Huerto Trust* at [3]):

> THE Trustees STAND POSSESSED of the Trust Fund and the income thereof UPON DISCRETIONARY TRUSTS for the benefit of the Beneficiaries *or any one or more of them exclusive of the others* in such shares and proportions and subject to such terms and limitations and with and subject to such provisions for maintenance, education or advancement or for accumulation of income during minority or for forfeiture in the event of bankruptcy or otherwise and such other conditions *as the Trustees may from time to time appoint by Deed revocable or irrevocable executed before the Vesting Day*. [emphasis added]

67 The trustee had applied to court to sanction a proposed draft deed, which purported to exercise the power of appointment under cl 2 of the trust deed. In effect, the proposed draft deed declared the same trusts as the trust deed, with the variation that the definition of "Beneficiaries" was modified to exclude the settlor himself: *Re New Huerto Trust* at [6]. The central question on appeal was (*Re New Huerto Trust* at [23]):

> [W]hether a power of appointment in a trust deed authorising the trustee to appoint capital among named beneficiaries permits the trustee to exclude a named beneficiary from the objects of a discretionary trust, and to do so even in advance of appointing any capital to the other named beneficiaries.

68 After considering the case of *Blausten*, among other authorities, the court held (*Re New Huerto Trust* at [32]):

> If the trustee can validly appoint property among two or more objects of the trust while excluding altogether one or more objects, then there is no reason why the trustee cannot, in advance of appointing any property to the objects of the trust, use the power of appointment to exclude one of them from benefiting under the trust.

69 I found both *Blausten* and *Re New Huerto Trust* persuasive. These authorities reinforced my decision to find that the Deed and Deed of Appointment were sufficient to exclude the Wife from any further interest in the Clause 5 Trust, although, as I have stated, my decision was based primarily on the interpretation of cl 5.2 of the Will.

70 I summarise the above discussion. Since the Wife was not actually entirely excluded from the Clause 5 Trust, as she already received the Branksome Property and this, in my view, could be treated as an appointment from the date of the Deed onwards, this was simply a case of the power of appointment being exercised. *Blausten* ([62] *supra*) and *Re New Huerto Trust* ([66] *supra*) confirmed this result. In fact, the present case is *a fortiori* since the Wife was not merely being excluded from the trust, but had received property under the power of appointment. In any case, even if the transfer of the Branksome Property was not treated as an exercise of the power of appointment, these authorities also lead to the result that the Wife could be excluded from any interest in the Clause 5 Trust by an exercise of the power of appointment. For completeness, in this latter scenario, I note that s 23 of the Civil Law Act (Cap 43, 1999 Rev Ed) may be relevant (see also *Lewin* at para 30-025), but as parties have not addressed me on that provision, I say no more of it.

71 Therefore, I found that the Deed and Deed of Appointment were sufficient to exclude the Wife as a beneficiary of the Clause 5 Trust, beginning from 10 January 2020 onwards.

Consequences for the Wife's entitlement to the account

72 I turn to the question of how this affected the Wife's entitlement to an account. The Husband claimed that this meant that the Wife was no longer entitled to any account, even for the period when she remained a beneficiary. The Wife argued that she remained entitled to that account.

73 I agreed with the Wife. As I have already found, the Wife ceased to be a beneficiary of the Clause 5 Trust only from 10 January 2020 onwards. The Deed and Deed of Appointment did not have a retrospective effect to "back-date" this exclusion to any earlier date. The Husband appeared to recognise that the Wife was still a beneficiary until 10 January 2020, as he argued that the Wife was *no longer* a beneficiary from that date.[36] The Husband's primary argument was that there had been a change in the "basis or substratum" on which ORC 50/2019 was made, and that because the Wife was *no longer* a beneficiary, she could not receive an account of the trust *for when she had been* a beneficiary.

74 The Husband relied on the case of *Haw Par Bros (Pte) Ltd v Dato Aw Kow* [1971–1973] SLR(R) 813 ("*Haw Par Bros*") to support his argument that where the factual substratum of a prior court order had changed, the order could be rendered inoperative. I did not think the case stood for such a broad proposition. There, an inspection order had been previously made by the court under s 167(5) of the Companies Act (Cap 185, 1970 Rev Ed). The director in whose favour the order had been made was subsequently removed as a director. The question before the court was whether the order under s 167(5) continued

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36 HWS at para 64.

to be in force after the director was removed from that office. That turned on the proper interpretation of the statutory provision. In that case, the Court of Appeal held that s 167(5) was intended to support the *director's* right of inspection under s 167(3), and that the court therefore had no power to make an order requiring the company to open the records for inspection to an *ex-director*: *Haw Par Bros* at [13]. As for whether an order already made had continuing effect once the director was removed from office, the Court of Appeal also found that since the right of inspection under s 167(3) was limited to a present director, it followed that where an agent's right to inspect was granted under s 167(5), once the principal was no longer a director, the right to inspect under s 167(5) also ceased: *Haw Par Bros* at [14]. Hence, it is clear that the Court of Appeal's decision in that case had nothing to do with any *general* proposition that a prior order of court would *inevitably* be rendered inoperative because of a change in circumstances. The question was one of statutory interpretation and the scope of the court's order under a particular provision.

75 The subsequent decision of *Hoban Steven Maurice Dixon and another v Scanlon Graeme John and others* [2007] 2 SLR(R) 770 ("*Hoban*") at [43], approving of *Haw Par Bros*, did not establish such a general principle either. In that case, the judge had previously made an order in June 2004 directing the parties to appoint an expert to value the shares to facilitate an exit from the company. Importantly, the court order had used the word "purchase" and an option to purchase that was granted was held by the Court of Appeal to "imply that the parties and even the court thought that the subject shares had some value and that they should be subject to acquisition at that value": *Hoban* at [40]. The Court of Appeal therefore found that when the valuation had found that the shares were of nil value, the order in June 2004 would not be implemented and

had been rendered inoperative: *Hoban* at [42]. Once again, however, it bears noting that the decision turned on the interpretation of the court order and the effect of the nil valuation in the light of that interpretation. The decision does not stand for the broad proposition that any change in the factual substratum would result in the prior court order being rendered inoperative.

76 These two authorities appear to be founded on the scope of the court orders or authorising statutory provision, rather than on any discretion in the court to set aside a prior judgment or order. Turning to the latter, I acknowledged that the Court of Appeal has recently pronounced on the scope of the court's inherent power to set aside a prior court order in *Harmonious Coretrades Pte Ltd v United Integrated Services Pte Ltd* [2020] 1 SLR 206 at [40]:

> We therefore agree with the Judge that the court retains the residual discretion to set aside a judgment or court order so as to prevent injustice. However, we emphasise that this is not a licence to litigants to make frivolous applications to set aside judgments or court orders. The court's inherent power to set aside a judgment or court order should never become a back-door appeal or an opportunistic attempt to relitigate the merits of the case. One such situation where the court's inherent power could be justifiably invoked might be where the substratum or the very foundation of a court order has been destroyed, such that the continued existence or future performance of the court order would lead to injustice. …

It is clear that the court must be astute to analyse the facts before it, and that not every change is a change in the factual substratum of the order, nor would a change always lead to an injustice that should be cured by an exercise of the court's inherent jurisdiction.

77 Regardless of whether the principles relating to the interpretation of the court's order or the court's inherent jurisdiction are relied upon, I was unable to

agree with the Husband that ORC 50/2019 was rendered inoperative. There were two problems with the Husband's argument. First, in reality, there was no change in the factual substratum of ORC 50/2019. The order had been made on the basis that the Wife was a beneficiary of the trust. That had not changed, until January 2020, but for the period before the deeds were executed she was still a beneficiary. The order was *not* predicated on her *continuing to be a beneficiary* indefinitely, but was predicated on the fact that she *was* a beneficiary at the material times and therefore, by that status, was entitled to the account. The fact that she was a beneficiary had not changed, since the exclusion was effected only on 10 January 2020. There was therefore no reason to suggest that ORC 50/2019 was inoperative for the period leading up to January 2020. Second, in any case, the law itself recognises that an ex-beneficiary would have an interest in holding the trustee to an account for the period for which she was a beneficiary (*Lewin* at para 23-087). This is hence to be distinguished from *Haw Par Bros* where the statutory right to inspect was limited to a director and not to an ex-director. The present case was also distinguishable from *Hoban* since ORC 50/2019 was still workable even if the Wife was no longer a beneficiary from a certain date onwards. For the same reasons, there was also no basis for exercising any inherent jurisdiction in setting aside the order on the ground of injustice.

78 The highest, therefore, that the Husband's case could go – which the Wife conceded in the event that the deeds in January 2020 were found to be effective[37] – was that the Husband was no longer required to provide an account

[37] Transcript for 9 March 2020 at p 59, ln 22–24.

for the trust property in the Clause 5 Trust on and after 10 January 2020. I made that finding accordingly.

Documents already obtained

79 I have already held that the Husband was prevented by the extended doctrine of *res judicata* from raising the argument here that the court should find that ORC 50/2019 was inoperative to the extent that the Wife, through Mr Devin and Mr Sandeep, already had the documents sought in OS 1407/2017, which would have rendered the order oppressive and unnecessary (see [43]–[45] above). For completeness, however, even if I considered the merits of his argument, I would not have agreed with his contentions.

80 First, the basis for admitting Mr Devin's and Mr Sandeep's affidavits in the present case as evidence was not clear. They were not parties to the present proceedings. These statements would have been hearsay evidence, since it was the Husband's assertion that Mr Devin and Mr Sandeep had said in their evidence that they had taken the documents from his laptop. It was also unclear how these could then be proved against the *Wife*, who was not the same party as Mr Devin and Mr Sandeep.

81 Second, it was not clear to me how Mr Devin's and Mr Sandeep's actions could affect the Wife's entitlement to the account. The Husband argued that the Wife knew of their acts and that she had the documents, but the Wife maintained otherwise. The Wife asserted on affidavit that she was not aware of

the documents,[38] and although the Husband argued that this was not believable,[39] this was based on inferences that had to be drawn on evidence that was not clearly before the court. Indeed, given the factual dispute, and given that there was a pending suit in S 1242/2019, I was not prepared to make a finding on the Wife's involvement with the allegedly purloined documents.

82 Third, it was also not clear on the evidence what was the extent of overlap between the documents sought in OS 1407/2017 and the documents that the Wife allegedly had access to. At highest, there was Mr Devin's assertion that the documents taken from the Husband's laptop "*contain*[*ed*] documents which [the Husband had] been ordered to produce" [emphasis added] in OS 1407/2017 and CA 231/2018.[40] In his own affidavit in CA 231/2018 (for SUM 92/2019), the Husband only stated that "[*s*]*ome* of the information and documents … contain information about the trust property" [emphasis added].[41] However, this was certainly not the same as a claim that *all* of the documents sought in OS 1407/2017 were already taken from his laptop. In any case, since Mr Devin and Mr Sandeep allegedly took the documents in 2015–2016, the documents after that period remained to be disclosed as part of the Husband's duty to account to the Wife as a beneficiary. Given that there was no clear identity between the documents to be disclosed by virtue of ORC 50/2019 and the documents allegedly taken from the laptop, I did not consider that this factor

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38 WA3 at paras 25–29.

39 Transcript for 9 March 2020 at p 68, ln 1–14.

40 HWS at p 20; Mr Devin's Affidavit in S 1242/2019 at para 21 (HA2 at p 46).

41 H's CA 231 Affidavit at para 188.

was relevant in deciding whether the order to account ought to have been granted.

Scope of the documents

83 I have already found that issue estoppel prevented the Husband from now revisiting the issue of the documents relating to the Sons through prayer 3(a) of OS 1339/2019 (see [40] above) as well as the issue of the documents relating to the corporate documents raised in prayer 3(b) (see [39] above). For completeness, even if I had considered those arguments relating to prayer 3(b), I would not have made the order sought.

84 First, in my view, the present proceedings were not the appropriate forum to determine this issue. There was already a separate application brought by the Live Companies which was the more appropriate setting for determination. Before CA 231/2018 was heard, the Live Companies had applied in HC/SUM 3013/2019 ("SUM 3013/2019") filed in OS 1407/2017 to be joined to the proceedings as interveners. The Husband's initial position was that the Live Companies should have their concerns heard before the appeal, because if the Court of Appeal upheld ORC 50/2019, there might be issues with how the Husband was supposed to comply.[42] Considering that the appeal was going to be heard, the High Court adjourned SUM 3013/2019 to a date to be fixed after the appeal, as the decision in SUM 3013/2019 would have been rendered otiose

[42] Transcript (OS 1407/2019) for 11 July 2019 at p 108, ln 5–23: Wife's 1st Affidavit dated 22 November 2019 ("WA1") at p 147.

had the appeal been successful.[43] At the time of the hearing of OS 1339/2019 on 9 March 2020, SUM 3013/2019 was still pending determination, which would have addressed the Live Companies' concerns in relation to providing the documents to the Husband for the purposes of the ORC 50/2019. I did not consider it appropriate for the Husband to pre-empt the results of that application by filing OS 1339/2019 to deal with the very same issue of the documents relating to the Live Companies. As between the two, SUM 3013/2019 was the more appropriate forum in which to determine these questions, since that would pertain to the enforcement of ORC 50/2019 and the Live Companies' concerns, whereas OS 1339/2019 was heard without the benefit of the Live Companies' presence.

85 For completeness, I note that after judgment was given in these proceedings on 9 March 2020, the Live Companies also brought separate proceedings in HC/OS 365/2020 on 27 March 2020, which dealt with the same issues. In addition, leave was granted to withdraw SUM 3013/2019 on 9 April 2020. These developments have not affected anything decided in the present proceedings.

86 Second, in any case, any difficulty that the Husband faced could easily be resolved without variation or modification of ORC 50/2019. There was a difference between the Wife's *entitlement* to the documents and the implementation of ORC 50/2019 by the Husband. The issue relating to the Live Companies dealt only with the latter. The Husband could simply have stated on

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[43] Transcript (OS 1407/2019) for 11 July 2019 at p 113, ln 9–13 and p 118, ln 11–15: WA1 at pp 152 and 157.

affidavit that he was unable to obtain the documents in question, and it would be for the Wife to follow up with any necessary action. Varying the court order was inappropriate since it suggested that the Wife was no longer entitled in law to these documents. I therefore declined to make the order sought in prayer 3(b) of OS 1339/2019.

Conclusion

87 I summarise my conclusions as follows:

(a) I allowed the application in SUM 138/2020 to amend OS 1339/2019.

(b) Issue estoppel applied against the Husband's contention that ORC 50/2019 should be varied in the manner sought in prayers 3(a) and 3(b) of OS 1339/2019.

(c) The extended doctrine of *res judicata* applied against the Husband's argument that the Wife already had access to documents relating to the trust property because of Mr Devin's and Mr Sandeep's actions in taking the data and documents from the Husband's laptop.

(d) The Deed of Advancement dated 3 October 2019 was not sufficient to exclude the Wife as a beneficiary of the Clause 5 Trust. However, the Deed and Deed of Appointment dated 10 January 2020 were effective to exclude the Wife as a beneficiary of the Clause 5 Trust. That said, as she was a beneficiary until 10 January 2020, she remained entitled to the account up to and including 9 January 2020.

(e) Even apart from the extended doctrine of *res judicata*, I would not have varied ORC 50/2019 on the basis of the allegation that the Wife, through Mr Devin and Mr Sandeep, had allegedly obtained documents relating to the trust property.

(f) As for the Live Companies' objections and the Husband's potential difficulties in relation to those documents, even apart from issue estoppel, I did not consider this to be the appropriate proceedings in which to determine the question, and in any case, a variation of ORC 50/2019 was inappropriate since this was not a question of entitlement to the documents but of enforcement, and the Husband could raise these issues of compliance subsequently.

88 In the round, therefore, only prayer 2 of OS 1339/2019 could be granted. I made the order as follows:[44]

> [The] Husband is to provide an account of the trust property under the Last Will and Testament of Harkishindas Ghumanmal Bhojwani made on 20.10.06 to the Wife by furnishing the documents set out in the document marked 'P1' annexed to HC/ORC 50/2019 for the period when the Wife is a beneficiary, *ie*, until 9 January 2020, the day before the Deed of Appointment and Deed were executed on 10 January 2020.
>
> The documents are to be furnished within 30 days from the date of this order.

89 The costs of SUM 138/2020, SUM 5872/2019, and OS 1339/2019 were reserved to be dealt with together. The Husband had succeeded on his alternative position that the January 2020 deeds were sufficient to exclude the

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44 Minute Sheet for 9 March 2020.

Wife as a beneficiary and that she was no longer entitled to an account from 10 January 2020 onwards. The Wife was successful in arguing that the October 2019 Deed of Advancement was not sufficient to exclude her interest, that she remained entitled to the account ordered under ORC 50/2019 even though she was no longer a beneficiary from 10 January 2020 onwards, and that the remaining variations sought by the Husband should not be ordered. In the round, especially given that the Husband's own successful application was based on the amendment in SUM 138/2020 and that the Wife was successful in her submissions on the effect of the Deed and Deed of Appointment if they were valid, the Wife was the overall successful party. I therefore ordered that the Husband pay to the Wife the costs of OS 1339/2019, SUM 5872/2019 and SUM 138/2020 fixed at $9,000 and disbursements fixed at $3,000, and that the Husband is to bear the said costs and disbursements personally.

Tan Puay Boon
Judicial Commissioner

Liew Teck Huat, Kanapathi Pillai Nirumalan, Ow Jiang Meng Benjamin and Ho Jun Yang Joshua (He Junyang) (Niru & Co LLC) for the plaintiff;
Yeo Khirn Hai Alvin SC, Chang Man Phing Jenny, Gavin Neo Jia Cheng and Khoo Kiah Min Jolyn (WongPartnership LLP) for the defendant.
