IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 21

Civil Appeal No 78 of 2020

Between

Ong Han Nam

… *Appellant*

And

Borneo Ventures Pte. Ltd.

… *Respondent*

In the matter of Suit 1268 of 2016

Between

Borneo Ventures Pte. Ltd.

… *Plaintiff*

And

Ong Han Nam

… *Defendant*

JUDGMENT

[Contract] — [Contractual terms] — [Warranties]
[Res Judicata] — [Issue estoppel]
[Res Judicata] — [Extended doctrine of res judicata]

TABLE OF CONTENTS

Ong Han Nam
v
Borneo Ventures Pte Ltd

[2021] SGCA 21

Court of Appeal — Civil Appeal No 78 of 2020
Judith Prakash JCA, Chao Hick Tin SJ, Belinda Ang JAD
24 November 2020

8 March 2021

Chao Hick Tin SJ (delivering the judgment of the court):

Introduction

1 The core of this dispute centres on a plot of land of approximately 1.459 acres ("the Subject Land").[1] It is part of a larger piece of land situated in the Sembulan District, Kota Kinabalu, Sabah, spanning an area of about 95.58 hectares (238.63 acres) with title number 017544875 ("the Sembulan Land"). The leasehold interest in the Sembulan Land is vested in Sutera Harbour Golf and Country Club ("SHGCC"). In March 2014, the ownership of the ultimate parent company of SHGCC, Sutera Harbour Group Sdn Bhd ("SH Group"),[2] changed hands with 77.5% of the shareholding in SH Group being acquired by

---

1 Record of Appeal ("ROA") Vol. 5 Part 1, p 262 – Sale & Purchase Agreement for Sub-Divided Lot of TL017544875.

2 ROA Vol. 3 Part 9, p 143 - Ong Han Nam's Affidavit-Evidence-In-Chief ("Ong's AEIC") – Exhibit 43: Title Deed for the Sembulan Land.

the plaintiff-respondent ("Borneo Ventures"), from the defendant-appellant, Mr Ong Han Nam ("Ong"), pursuant to a Subscription Agreement dated 30 December 2013 ("the SA").[3] Ong gave certain warranties to Borneo Ventures in the SA. Borneo Ventures claims that there have been breaches of some of these warranties and thus seeks an indemnity from Ong for these breaches (see [8] below).

2 The present proceedings also come on the heels of a recently concluded Malaysian suit ("the Malaysian Suit") where SHGCC commenced proceedings in the Malaysian High Court in Kota Kinabalu against Ong and Omega Brilliance Sdn Bhd ("OBSB"), another company owned by Ong. SHGCC claimed that Ong, as SHGCC's director, had caused SHGCC to sell the Subject Land to OBSB allegedly at a gross undervalue of RM 1,000. As such, Ong had allegedly breached his fiduciary duties to SHGCC. Written grounds in that suit, dismissing SHGCC's claims, were released on 7 May 2018 ("the Malaysian Judgment").[4] SHGCC's appeal against that decision was also dismissed by the Court of Appeal of Malaysia.[5] SHGCC was not granted leave to appeal further to the Federal Court of Malaysia.[6]

3 The cumulative effect of the Malaysian Judgment and the dismissal of SHGCC's appeal by the Malaysian Court of Appeal, is that OBSB is legally the owner of the Subject Land. SHGCC is therefore estopped from denying OBSB's proprietary interest in the same. SHGCC was also directed by the Malaysian

---

3 ROA Vol. 5 Part 1, p 194 – Subscription Agreement dated 30 December 2013.

4 ROA Vol. 5 Part 22, p 88 - Suit No. BKI – 22NCvC – 21/2-2016 (Judgment 7 May 2018).

5 ROA Vol. 5 Part 22, p 155 – Civil Appeal No. S-02(NCvC)(W)-2349-11/2017 (Order of Court 28 September 2018).

6 ROA Vol. 5 Part 22, p 190 – Civil Application No. 08(f)-537-10/2018(S).

High Court to transfer the whole of its interest in the Subject Land to OBSB.[7] For the purposes of the present action in Singapore and this appeal, two substantive issues arise from the Malaysian Judgment. First, whether Borneo Ventures had indeed breached the warranties given in the SA. Second, whether the Malaysian Judgment binds Borneo Ventures either under the doctrine of *res judicata*, the principles of issue estoppel or abuse of process. Just to complete the picture, we should add that the Judge held that the Malaysian Judgment does not bind Borneo Ventures and that Ong had breached the warranties he gave in the SA. The present appeal is Ong's appeal against the decision of the Judge.

Facts

The parties

4 At all material times, Ong owned shares in many companies. He still does. One such company is SH Group, which is the holding company of Sutera Harbour Resort Sdn Bhd ("SH Resort"). SH Resort is, in turn, the parent company of five companies, one of which is SHGCC. Ong, through a British Virgin Islands incorporated company, was originally the sole owner of the SH Group, before Borneo Ventures' acquisition of 77.5% of the shares in SH Group.[8]

5 Borneo Ventures is a wholly owned subsidiary of GSH Corporation Limited ("GSH"), a publicly listed company in Singapore, helmed by one Mr Goi Seng Hui ("Goi").[9] Borneo Ventures acquired 77.5% of the shares in the

---

7 ROA Vol. 5 Part 20, p 292 – Suit No. BKI – 22NCvC – 21/2-2016 (Judgment 31 October 2017), as affirmed later in ROA Vol. 5 Part 22, p 155 – Civil Appeal No. S-02(NCvC)(W)-2349-11/2017 (Order of Court 28 September 2018)

8 *Borneo Ventures Pte Ltd v Ong Han Nam @ Edward Ong* [2020] SGHC 91 ("HC Judgment") at [3] – [7].

9 HC Judgment at [2].

SH Group for a consideration of about RM700m, pursuant to the SA.[10] This acquisition under the SA was preceded by a Term Sheet dated 18 October 2013[11] ("the Term Sheet", as modified by addenda dated 21 October 2013[12], 28 October 2013[13], 14 November 2013[14]) and a Disclosure Letter dated 18 March 2014 ("the Disclosure Letter").[15] The SA was eventually completed on 26 March 2014.[16]

Background to the dispute

6 We do not propose to recount all the facts as they have already been comprehensively set out in paragraphs [4] – [36] of the decision of the Judge. For present purposes, we need only set out the facts pertaining to (a) the Subject Land, (b) the purchase of the Subject Land by OBSB and (c) the SA under which Borneo Ventures acquired 77.5% of the shareholding of the SH Group. This account will sufficiently highlight the material facts giving rise to the dispute, and show why the Subject Land was left out of the asset pool that Borneo Ventures acquired through the SA.

7 The Subject Land houses a power plant ("the Co-Gen Facility") which was originally developed and owned by another one of Ong's companies ("PHSB"). The Co-Gen Facility supplied electricity to the SH Resort and some

---

10 ROA Vol. 5 Part 1, p 194 – Subscription Agreement dated 30 December 2013.

11 ROA Vol. 5 Part 1, p 155 – Term Sheet in relation to the Proposed Capitalisations and Proposed Acquisitions dated 18 October 2013.

12 ROA Vol. 5 Part 1, p 169 – 1st Addendum to Term Sheet in relation to the Proposed Capitalisations and Proposed Acquisitions dated 21 October 2013.

13 ROA Vol. 5 Part 1, p 174 – 2nd Addendum to Term Sheet in relation to the Proposed Capitalisations and Proposed Acquisitions dated 28 October 2013.

14 ROA Vol. 5 Part 1, p 185 – 3rd Addendum to Term Sheet in relation to the Proposed Capitalisations and Proposed Acquisitions dated 14 November 2013.

15 ROA Vol. 5 Part 2, p 4 – Disclosure Letter dated 18 March 2014 (typo in the Letter).

16 HC Judgment at [4].

parts of Kota Kinabalu *vide* a license granted by the Energy Commission.[17] From about 1998, PHSB paid rent to SHGCC for the use of the Subject Land.[18] The last tenancy agreement signed between them was on 1 December 2012[19] and that tenancy expired on 30 November 2013. During the term of this tenancy, on 12 July 2013, and pursuant to an asset sale agreement ("the ASA"), PHSB transferred ownership of the plant and machinery to OBSB in exchange for OBSB paying off PHSB's total debts to Bank Islam.[20] The Subject Land was expressly excluded from the ASA[21] and it remained a part of the Sembulan Land (and therefore SHGCC's property) until it was carved out in 2014.[22] Under a sale and purchase agreement dated 21 March 2014 ("the S&P"), SHGCC sold the Subject Land to OBSB for a nominal sum of RM1,000.[23] As a result of the S&P and the ASA, both the Subject Land and the assets of the Co-Gen Facility were consolidated under the ownership of OBSB.

8 While giving evidence at the trial below, Ong conceded that the existence of the S&P was never disclosed to Borneo Ventures prior to the completion of the transaction under the SA.[24] Such non-disclosure, according to

---

17 ROA Vol. 5 Part 10, p 41 – Letter from SHGCC to LSDS dated 28 January 2014

18 ROA Vol. 5 Part 1, pp 24 – 53 – Tenancy Agreements between SHGCC and PHSB dated 1 December 1999, 1 December 2000, 1 December 2001, 1 December 2002; HC Judgment at [13].

19 ROA Vol. 5 Part 1, p 113 – Tenancy Agreement between SHGCC and PHSB dated 1 December 2012.

20 ROA Vol. 5 Part 5, p 85 – Letter to PHSB Liquidators dated 26 March 2013.

21 ROA Vol. 5 Part 5, p 88 – ASA Conditions in letter dated 27 March 2013 (Condition (iv))

22 ROA Vol. 5 Part 10, p 91 – Letter from LSDS to SHGCC dated 1 October 2014.

23 ROA Vol. 5 Part 1, p 262 – Sale & Purchase Agreement for Sub-Divided Lot of TL017544875.

24 Appellant's Case at para 62.

Borneo Ventures, amounted to a breach of the warranties given by Ong in the SA. The relevant clauses of the SA are as follows:

9 Clause 6.1 of the SA reads:

> [SH Group], [SH Holdings], [SH Resort] and [Ong] hereby jointly and severally represent and warrant with [Borneo Ventures] in terms of the representations and warranties more particularly set out in Clauses 6.4 and in Schedule 2 hereto (such representations and warranties collectively referred to as '**Warranties'**), which representations and warranties shall form part of this Agreement and [SH Group], [SH Holdings], [SH Resort] and [Ong] each further represents and warrants that the Warranties shall be fulfilled, true and accurate at the date of this Agreement, and shall continue to be fulfilled, true and accurate at each of the Completion of the [SH Resort] Acquisition, Proposed Capitalisations and Proposed JVA Loan (as the case may be) in all respects as if they had been given afresh on such date.

10 Paragraph 18.2 of Schedule 2 states:

> The relevant companies within the Sutera Target Group (as identified in Schedule 4) (the '**Relevant Land Owners**') has good marketable title to the Land and is the beneficial and legal owner in sole possession of the Land from all encumbrances.

11 Schedule 4 states:

> … [SHGCC] is the sole legal and beneficial owner of the parcel of Land under 99 years lease of state land situated at Sembulan, District of Kota Kinabalu, Sabah held under Title No. 017544875 (expiring on 31 December 2091) with a total area measuring approximately 95.58 hectares (238.63 acres).

12 Paragraphs 4.1(c) and 4.1(g) of Schedule 2 state:

> Subject to any provisions to the contrary, whether express or implied, contained in this Agreement, between the date of this Agreement and Completion, the Sutera Target Group or [SH Group]:
>
> …

> (c) have not disposed of, and will not dispose of, any of its assets other than assets disposed of in the Ordinary Course of Business;
>
> …
>
> (g) have not except for inventory or equipment in the Ordinary Course of Business, sold, abandoned or made any other disposition of any of its properties or made any acquisition of all or any part of the properties, share capital or business of any other person; …

13 Paragraph 6.6(b) of Schedule 2 states:

> Arm's Length Dealings
>
> Each of the companies in the [SH Group] have not disposed, or agreed to dispose, of any assets, and has not provided or agreed to provide any services or facilities (including without limitation, the benefit of any licenses) which was or will be less than its market value, or otherwise than on an arm's length basis

14 Paragraph 11.1 and 11.2(a) of Schedule 2 respectively state:

> Contracts between the Companies and Vendors
>
> Save as disclosed in the Disclosure Letter, there are no existing contracts, arrangements, understandings or engagements to which any of the companies in the Sutera Target Group or [SH Group] are a party and in which [SH Holdings], [SH Group] or [Ong] and/or any director, officer, employee or shareholder of any of the companies in the Sutera Target Group of [SH Group] and/or any person connected to any of them is directly or indirectly interested.
>
> Contracts at Arm's length
>
> (a) There is no contract, arrangement or understanding to which any company in the [SH Group] are parties or by which they are bound which is not on entirely arm's length terms.

15 Further, under cl 8.1 of the SA, Ong was liable to indemnify Borneo Ventures for any losses suffered as a result of Ong's breaches of the warranties in the SA. The relevant portions of cl 8.1 state:

> [SH Group], [SH Holdings], [SH Resort] and [Ong] hereby jointly and severally and irrevocably covenant to keep the Investors

> fully and effectively indemnified against all actions, claims, costs, damages, deficiencies, demands, expenses, liabilities and losses (including all legal costs incurred on a full indemnity basis) that may be suffered incurred or sustained by the Investors in consequence of or in connection with:
>
> (a) any breach or inaccuracies of any of the Warranties;
>
> …
>
> (c) without prejudice to the generality of the foregoing, against any depletion of the assets of the [SH Group] and/or any entity of the Sutera Target Group resulting from any claim or demand made against [SH Group] and/or any entity of the Sutera Target Group in respect of any liability (including contingent liability) for which no provision has been made in the accounts of [SH Group] and/or any entity of the Sutera Target Group (as the case may be) or which has not been disclosed in writing to the Investors as at the date of this Agreement; …

16 It will be apparent from the provisions cited above that the warranties given by Ong under the SA may be grouped into three categories:

(a) the Land Warranty, comprising paragraph 18.2 of Schedule 2, read with Schedule 4 of the SA;

(b) the Asset Disposal Warranty, comprising paragraphs 4.1(c) and 4.1(g) of Schedule 2 of the SA; and

(c) the Arm's Length Warranty, comprising paragraphs 6.6(b), 11.1 and 11.2(a) of Schedule 2 of the SA.

17 There is also a limitation of liability provision in cl 8A.1(c)(i) of the SA, which states:[25]

> **8A. LIMITATION OF LIABILITY**

[25] ROA Vol. 5 Part 1, p 214 –Subscription Agreement dated 30 December 2013 at para 8A.

> 8A.1 The Investors agree and covenant with each of the Parties (other than the Investors) that, notwithstanding any provision of this Agreement to the contrary, any claim by an investor in respect of any breach of the Warranties or any other provision of this Agreement (hereinafter in this Clause referred to as a '**Claim'**) shall be subject to and/or limited by the following:
>
> …
>
> > (c) the Parties (other than the Investors) shall have no liability in respect of any claim by an investor if and only to the extent that:
> >
> > > (i) the fact, matter, event or circumstance giving rise to such Claim (a) has been disclosed to the Investors in the Disclosure Letter as a potential liability of or loss to any of the companies in the Sutera Target Group or (b) resulted (whether partly or entirely) from any matter done or omitted to be done at the request or with the approval of the Investors, or (c) resulted (whether partly or entirely) from a voluntary act, omission, or transaction carried out after the Completion of the [SH Resort] acquisition, Proposed Capitalisations and Proposed JVA Loan by the [SH Group] or Sutera Target Group, its directors, employees or agents or successors in title;
> >
> > > …

The decision below

18 In her consideration of the action, the Judge identified five issues:[26]

(a) whether Ong withheld the fact of the existence of the S&P from Borneo Ventures;

(b) whether PHSB had any proprietary interest in the Subject Land which was eventually transferred to OBSB (through the S&P);

(c) whether there had been a common expectation between SHGCC and PHSB that the party who developed the Co-Gen Facility on the

---

[26] HC Judgment at [223]

Subject Land would not only occupy it but also own the subject land in its totality ("the Common Expectation");

(d) whether in the Malaysian Suit, the Malaysian High Court ("the Malaysian Court"), in arriving at its decision, had been misled by Ong and as a corollary, whether the judgment in the Malaysian Suit would give rise to issue estoppel against Borneo Ventures; and

(e) whether Ong breached any or all of the warranties mentioned above, and which were pleaded in Borneo Venture's Statement of Claim.

19 On the first issue, the Judge found that Ong had deliberately withheld from Borneo Ventures information on the existence of the S&P. The Judge referred to the following matters in coming to her finding:[27]

(a) the surreptitious manner in which Ong arranged for the signing of the S&P and for it to be backdated to a date before the completion of the SA;

(b) Ong's failure to deliver a stamped copy of the S&P to Borneo Ventures or SHGCC (as vendor) in accordance with the instructions set out in the letter from the lawyers who had drafted the S&P;[28]

(c) the false answers given to the questions in the due diligence checklist raised by the lawyers acting for Borneo Ventures for the acquisition exercise;

---

27 HC Judgment at [237] – [240].

28 ROA Vol. 5 Part 10, p 89 – Letter from Jayasuriya Kah & Co. to Ong, dated 26 March 2014.

(d) Ong/OBSB's failure to provide statements of accounts relating to the loans taken out by PHSB; and

(e) The long intervening period between Ong's first instructions to his solicitors to draft the S&P (in April 2013) and the eventual transfer (only executed in March 2014).

20 The Judge found that Ong had intended to transfer the Subject Land out of SHGCC's ownership the moment an investor came on board. Since none of the prospective investors he was speaking to in early 2013 were interested, he had put the intended transfer on hold.[29] But when Borneo Ventures/GSH executed the Term Sheet and SA, Ong took immediate action to have the S&P signed and executed before the SA was completed.[30] The Judge took this as another example of Ong's duplicity.

21 On the second issue, the Judge found that PHSB did not at any time have a proprietary interest in the Subject Land.[31] The Judge relied on the following:[32]

(a) there were no documents pointing to or evidencing PHSB as having any proprietary interest in the Subject Land;

(b) the exchange of correspondence between SHGCC and Sabah's Land Survey Department that pointed to SHGCC being the only legal owner of the Subject Land;

---

29 HC Judgment at [239]

30 HC Judgment at [240]

31 HC Judgment at [241]

32 HC Judgment at [244]

(c) PHSB did not list any proprietary interest in the Subject Land in its statement of affairs following its liquidation in January 2012; and

(d) from 1998, PHSB paid rent to SHGCC for leasing the Subject Land. Though PHSB attempted to explain its reasons for doing so (allegedly for tax purposes), the Judge found the explanations unsatisfactory.

22 The third and fourth issue (whether there had indeed been a Common Expectation, as well as whether the Malaysian court had been misled in the Malaysian Suit) were related. The Judge took the view that material facts had not been disclosed in the Malaysian Suit.[33] Her Honour held that there had been no Common Expectation and that had those material facts been disclosed, the Malaysian court would have come to a different conclusion regarding the issue of the Common Expectation.[34]

23 In particular, the Judge relied on the following in holding that there was in fact no Common Expectation:

(a) Ong was the directing mind for both SHGCC and PHSB. A "common" expectation between the two companies would have entailed Ong "talk[ing] to himself"[35] and executing a plan that he had unilaterally devised. It was absurd to speak of a "common expectation" if the only understanding that Ong had was with himself.[36]

---

33 HC Judgment at [256].

34 HC Judgment at [160].

35 HC Judgment at [135] and [245] – [246].

36 HC Judgment at [135] and [245] – [248].

(b) PHSB had not relied on the Common Expectation, as was suggested.[37] The loans it had supposedly taken up to develop the Co-Gen Facility were either serviced by other entities owned by Ong[38] or not directed towards the development of the Co-Gen Facility at all.[39] These facts were not made known in the Malaysian Suit.

(c) Ong failed to inform Borneo Ventures or any of the GSH representatives about the Common Expectation because it never existed.[40]

(d) The actions that PHSB allegedly undertook in reliance on the Common Expectation it shared with SHGCC, did not involve OBSB and could not have involved OBSB because the latter was only incorporated on 7 February 2013. Therefore, OBSB could not have relied on any alleged Common Expectation and accordingly could not have taken over the benefit of any of PHSB's proprietary estoppel rights *vis* the Subject Land (if established at all).[41]

24 The Judge was also of the opinion that the Malaysian court had been misled. Her Honour found that the following facts had not been disclosed in the Malaysian Suit:[42]

---

37 HC Judgment at [247].

38 ROA Vol. 3 Part 9, p 166 - See "Irrevocable Letter of Instruction from [PHSB] to each of the Power Purchasers to remit all payment of Capital Contributions to Maybank…" under "Security"; see also ROA Vol. 3 Part 15, p 266 lines 17 – 25.

39 HC Judgment at [149].

40 HC Judgment at [251].

41 HC Judgment at [249].

42 HC Judgment at [256].

(a) PHSB did not pay off one of its loans ("the Maybank Loan")[43] by itself. It was instead repaid by three companies in the Sutera Group along with some of Ong's other companies.[44]

(b) One of the loans which PHSB took on to build the Co-Gen Facility ("the Bank Islam Loan")[45] was instead used as working capital.[46]

(c) Ong owned the company that was paid RM115m to construct the Co-Gen Facility.[47]

(d) Ong owned OBSB, which was his nominee to buy the assets of PHSB under the ASA.[48]

(e) For the purposes of the ASA, OBSB did not use its own money to settle PHSB's debts but had instead borrowed money from Sabah Development Bank to do so. By settling PHSB's debts, Ong was released from a personal guarantee.[49]

(f) The Co-Gen Facility had stopped supplying electricity to SH Resort in 2002 after just three years of operation. OBSB operated the Co-Gen Facility and provided electricity for Sabah Electricity Sdn Bhd ("SESB") (and through SESB, to the SH Resort) for just one year,

---

43 ROA Vol. 5 Part 2, p 41– Maybank's Letter of Offer dated 8 April 1997.

44 HC Judgment at [256(a)] and [142].

45 ROA Vol 5 Part 2, p 141 – Bank Islam's Letter of Offer dated 12 May 1999.

46 HC Judgment at [256(b)] and [149].

47 HC Judgment at [256(c)], [148] and [166].

48 HC Judgment at [256(d)]

49 HC Judgment at [256(e)] and [158] – [161].

ceasing operations in 2015, with the Co-Gen Facility remaining dormant since then.[50]

25 As for the fourth issue, the Judge declined to accept and recognise the judgment in the Malaysian Suit as she was of the view that the Malaysian court had been deceived "because of the fraudulent conduct of [Ong] encapsulated in his transferring the Subject Land (worth at least RM250,000 at market value according to [Borneo Ventures]) to OBSB for a nominal RM1,000, and in then withholding key facts from the Malaysian court" (see [24] above)[51] Accordingly, the Malaysian Judgment had been procured by fraud and the doctrine of *res judicata* could not apply.

26 The Judge was also of the view that even if the Malaysian Judgment was recognised, the extended doctrine of *res judicata* (which would preclude Borneo Ventures from raising issues that ought properly to have been raised and argued in the Malaysian Suit) would not apply. Her Honour found that since Borneo Ventures was exercising contractual rights under the SA which was subject to Singapore law, it could not, in any event, have been joined as a co-plaintiff in the Malaysian Suit.[52] Additionally, issue estoppel could not have applied because the plaintiffs *and* the issues to be litigated in the present action instituted by Borneo Ventures against Ong were different. The Malaysian Suit involved SHGCC suing OBSB and Ong over ownership of the Subject Land while the present matter involved Borneo Ventures suing Ong for breach of warranties under the SA.[53]

---

50 HC Judgment at [256(g)] and [155].

51 HC Judgment at [260].

52 HC Judgment at [265].

53 HC Judgment at [262].

27 Finally, in respect of the fifth issue (*ie,* whether Ong had breached the warranties given in the SA), the Judge found that since PHSB did not have a proprietary interest in the Subject Land (*ie,* that at all material times the Subject Land remained in the ownership of SHGCC), it thus formed part of the assets which Borneo Ventures acquired when it bought over 77.5% of the shares in the SH Group from Ong.[54] Accordingly, the Judge found that:[55]

(a) Ong had breached paragraphs 4.1(c) and 4.1(g) of Schedule 2 by disposing of the Subject Land under the S&P to OBSB.

(b) Ong had breached paragraphs 6.6(b), 11.1, and 11.2(a) of Schedule 2 by disposing of the Subject Land at a price that was clearly lower than its market value, and this disposal was certainly not on an arm's length basis as Ong was also a director of OBSB.

(c) Ong had breached paragraph 18.2 of Schedule 2 (read with Schedule 4) as OBSB had obtained an interest in the Subject Land under the S&P, and therefore, the statement in Schedule 2 that SHGCC was the sole legal and beneficial owner of the Sembulan Land (which included the Subject Land) was false at the time of completion.

28 Relatedly, the Judge also found that the limitation of liability clause under cl 8A.1(c)(i) of the SA could not apply. In order for the clause to apply, the fact, matter, event or circumstance giving rise to a claim must have been disclosed to Borneo Ventures. It is not in dispute that Ong never disclosed that PHSB had an interest in the Subject Land although the Judge went further to

---

54 HC Judgment at [266].

55 HC Judgment at [266].

also find that PHSB never had a proprietary interest in the land.[56] Moreover, the Judge also found that Ong and his employee, Lee Ken, had wilfully suppressed information on the subdivision exercise and the existence of the S&P.[57] Therefore, any oblique disclosure made in the Disclosure Letter would not have been sufficient to enable Ong to enjoy the protection accorded under cl 8A.1(c)(i).[58]

29 Consequently, the Judge ordered that there be:[59]

(a) an injunction to restrain Ong from completing the sale of the Subject Land for RM1,000 and/or from enforcing the S&P;

(b) a mandatory injunction that Ong procure OBSB to discharge/terminate the S&P forthwith;

(c) an award of damages, with an order that an inquiry be held before the Registrar to assess the damages due to Borneo Ventures for the losses that it suffered as a result of Ong's breaches of the warranties; and

(d) a costs order in favour of Borneo Ventures, for costs to be taxed on a standard basis which were to include $1,000 to account for Ong's late filing of a supplementary affidavit.

---

56 HC Judgment at [268].

57 HC Judgment at [278].

58 HC Judgment at [278].

59 HC Judgment at [283].

Issues to be determined

30 Besides the two substantive issues mentioned earlier (at [3]), there is a further question of whether the injunctions granted by the Judge were appropriate reliefs. As such, the issues which we will now examine are:

(a) whether there had been a breach of the warranties and this in turn would depend upon whether there had been adequate disclosure to Borneo Ventures of any transactions which might have suggested that the Subject Land was encumbered in any way;

(b) whether, in light of the Malaysian Suit, issue estoppel or the defence of abuse of process bars Borneo Ventures from litigating the issue of the Common Expectation; and

(c) what would be the appropriate reliefs to grant to Borneo Ventures as against Ong.

Adequacy of disclosure and breach of warranties

31 We will begin our consideration of the first issue by addressing whether Ong had breached all or any of the three warranties, namely, the Land Warranty, the Asset Disposal Warranty and the Arm's Length Warranty. This in turn calls for a determination of the scope of each of the warranty.

The Land Warranty

32 The Land Warranty affirmed that SHGCC was the sole legal and beneficial owner of the Sembulan Land, including the Subject Land. Ong argues that the Subject Land was in fact subject to PHSB/OBSB's proprietary interests, as those interests arose from the Common Expectation that the developer of the Co-Gen Facility would be the occupier, as well as owner, of the Subject Land.

This contention necessarily means that SHGCC was *not* the sole legal and beneficial owner of the Subject Land. If this contention is valid, that would mean that there was a breach of the Land Warranty. Moreover, even if PHSB/OBSB was found *not* to have had any proprietary interest in the land (as the Judge concluded), Ong would necessarily have breached the Land Warranty when OBSB obtained an interest in the Subject Land under the S&P.[60] In other words, whatever view one takes of PHSB/OBSB's proprietary interest in the Subject Land, there would have been a breach of the Land Warranty.

33 Therefore, in relation to this Land Warranty, the critical question is whether Ong had disclosed any supposed proprietary interest of PHSB in the Subject Land to Borneo Ventures prior to the completion of the SA. This disclosure is also important for Ong to be able to enjoy the benefit of the limitation of liability provided in clause cl 8A(1)(*c*)(i) of the SA.

34 On this disclosure point, we agree with the Judge's assessment. First, Ong has conceded that the S&P itself was never disclosed to Borneo Ventures.[61] Second, the Disclosure Letter did not make express reference to the S&P either.[62] Third, the documents disclosed during the due diligence exercise did not once make any direct reference to the S&P or to any transaction which contemplated SHGCC transferring legal title in the Subject Land to OBSB. Fourth, all the supposed references to PHSB/OBSB having a proprietary interest in the Subject Land were obscure and oblique.

---

60 HC Judgment at [266(c)].

61 Appellant's Case at para 62.

62 HC Judgment at [268].

35 Next, we turn to three documents on which Ong seeks to rely to establish his contention that there was sufficient disclosure.

36 The first document is a valuation report dated 24 April 2013 ("the 2013 Valuation Report") which was produced by Ong during the negotiations leading up to the SA.[63] The 2013 Valuation Report valued only part of the Sembulan Land, instead of the total area of 95.58 hectares.[64] This was because it excluded the land area occupied by the Sabah Electricity Board's substations and the Subject Land where the Co-Gen Facility was sited,[65] reducing the land under the actual occupation of SHGCC to only 94.9 hectares rather than the original 95.58 hectares. According to Ong, this was the real extent of SHGCC's land, and this fact had been conveyed through the provision of the 2013 Valuation Report.[66]

37 Like the Judge, we find this contention extremely dubious. Listing 94.9 hectares as SHGCC's effective land area in the 2013 Valuation Report was hardly proof that SHGCC did not own the Subject Land, much less that PHSB had a proprietary interest in the land. Indeed, the Subject Land was excluded from valuation not because the valuer had surveyed the Sembulan Land himself to determine SHGCC's assets, but because Ong himself had specifically instructed the valuer to exclude this portion.[67] Nowhere in the 2013 Valuation Report was it stated that the Subject Land belonged to another party.

---

63 ROA Vol. 5 Part 7, pp 138 – 230 – 2013 Valuation Report.

64 ROA Vol. 5 Part 7, pp 138 – 230 – 2013 Valuation Report.

65 ROA Vol. 5 Part 10, p 41 – Letter from SHGCC to LSDS dated 28 January 2014 explaining the different types of substations on the Sembulan Land.

66 Appellant's Case at para 38.

67 ROA Vol. 5 Part 7, p 143 – 2013 Valuation Report, "Terms of Reference"; ROA Vol. 3 Part 17, p 129 line 7 – p 131 line 3.

38 The second document is a Security Sharing Agreement dated 31 January 2002 ("the SS Agreement").[68] In short, the SS Agreement offered the Sembulan Land as security to SH Resort's and SH Group's creditors when their loans were restructured. Notably, the creditors disclaimed their rights in the Subject Land in the event that any action were to be taken to obtain an order for sale.[69] This arrangement stood in sharp contrast to the restructuring of the Maybank Loan given to PHSB. There, the Sembulan Land was put up as security as well. However, the charge created pursuant to the restructured Maybank Loan made no exclusions, *ie*, the Subject Land was not excluded from the security provided by SHGCC for the restructuring of the Maybank Loan.

39 According to Ong, the difference between the two arrangements demonstrated that PHSB had an interest in the Subject Land. Where security arrangements did *not* involve PHSB and its creditors (*ie,* the SS Agreement), any pledge of security excluded the Subject Land. Where arrangements *did* involve PHSB and its creditors (*ie,* the Maybank Loan), the Subject Land would not be excluded from the security, presumably because PHSB had the requisite interest in the land to offer it as security for its loans. Ong contends that these documents were available to the due diligence team of Borneo Ventures as the SA was being prepared. Accordingly, a comparison between the Maybank Loan and the SS Agreement would have revealed PHSB's proprietary interest in the Subject Land.

40 Again, we find the comparison drawn between the Maybank Loan and the SS Agreement to be strained and tenuous. In fact, it is not obvious that such

---

68 ROA Vol. 3 Part 1, p 211 – Letter from Yap Ee Ling to Lee Ken dated 23 December 2013.

69 ROA Vol. 5 Part 4, pp 65 – 67 – Letter of Disclaimer in favour of PHSB from MTB dated 29 January 2002.

a comparison was warranted at all. Moreover, the inferences that Ong urges us to draw are neither intuitive nor compelling. If PHSB's proprietary interest in the Subject Land is as obvious as he claims it to be, it is curious that such mental gymnastics are required to establish his case.

41 The third document that Ong relies on is a caveat lodged by Bank Islam ("the Bank Islam Caveat") dated 6 December 2010.[70] This relates to the Bank Islam Loan which was extended to PHSB under a letter of offer dated 12 May 1999.[71] As security, SHGCC undertook to execute a charge over the Sembulan and Subject Lands on PHSB's behalf. [72] Pursuant to this,[73] the Bank Islam Caveat was lodged over the Subject Land.[74] Ong claims that Bank Islam lodged the caveat to register *PHSB*'s interest in the Subject Land, which again was a recognition that PHSB had a proprietary interest in the Subject Land and was something which the due diligence exercise would have revealed to Borneo Ventures.[75]

42 As for this argument, we find it preposterous that Bank Islam would have lodged a caveat to protect *someone else*'s interest. If PHSB's interest were being protected, PHSB would have lodged the caveat. That not being the case, the Bank Islam Caveat cannot be taken to be an affirmation of PHSB's interest

---

70 ROA Vol. 5 Part 11, p 249 – Due Diligence Report Schedule 3A ("Overview of Real Property")

71 ROA Vol 5 Part 2, p 141 – Bank Islam's Letter of Offer dated 12 May 1999

72 ROA Vol. 5 Part 3, p 105 – SHGCC's Letter of Undertaking to Bank Islam dated 16 June 1999.

73 ROA Vol. 5 Part 5, p 20 – Letter from Bank Islam to MTB dated 19 October 2012; ROA Vol. 5 Part 4, p 269 – Letter from Bank Islam to KPMG dated 12 March 2012.

74 ROA Vol. 5 Part 11, p 247 – Due Diligence Report Schedule 3A ("Overview of Real Property")

75 Appellant's Case at para 82.

in the Subject Land.[76] We recognise that such a caveat could be interpreted to mean that Bank Islam believed PHSB had an interest in the Subject Land. Why else would Bank Islam have lodged a caveat against the land? But Bank Islam's belief said little about PHSB's *actual* proprietary interest in the Subject Land. In any case, this was just one possibility, bearing in mind that the security could well have been provided by SHGCC (the owner of the entire Sembulan Land), and that it is not uncommon for related parties to provide security for each other in loan situations. Moreover, even if we accepted that the Bank Islam Caveat evinced PHSB's interest in the Subject Land, it was unclear how this would suggest that *OBSB* had a similar interest in the Subject Land or how this amounted to a disclosure of the same.

43 For these reasons, we agree with the assessment of the Judge that Ong had not made any disclosure that PHSB had a proprietary interest in the Subject Land to enable Ong to enjoy the benefit provided under cl 8A(1)(*c*)(i) of the SA. No reasonable person in the position of Borneo Ventures would have thought that PHSB had such a proprietary interest in the Subject Land when the entire Sembulan Land was on record as belonging to SHGCC. We note that Ong was careful to have instructed the valuer, in preparing the 2013 Valuation Report, to exclude the Subject Land from valuation. But he, for reasons not disclosed, chose not to inform the valuer why that portion of the Land should be excluded from the valuation. We would ask the same question too – why did he not simply inform the representatives of Borneo Ventures that that portion of the land did not belong to SHGCC but to PHSB? We could not find any reasonable basis to disagree with the Judge who thought that the non-disclosure was part of Ong's plan to steal a march on Borneo Ventures by surreptitiously removing the Subject Land from SHGCC right before completion of the SA.

---

[76] Respondent's Case at para 32.

44 In the result, we agree with the Judge that there was a breach of the Land Warranty on Ong's part and that he is not entitled to enjoy the limitation of liability accorded under cl 8A(1)(*c*)(i) of the SA.

The Asset Disposal Warranty

45 As for the Asset Disposal Warranty, a plain reading of the relevant provisions would suggest that this warranty was really intended to prevent the sellers from dissipating the assets *of the company that was being sold*. If, instead, an asset was simply being returned to its rightful owner, such an act would not count as an asset disposal that breaches the warranty. Indeed, paragraphs 4.1(c) and 4.1(g) suggest that it is *SHGCC*'s assets that must have been "sold, abandoned, or [disposed of]", for there to have been a breach of the Asset Disposal Warranty. Therefore, the inquiry turns to determining whether the Subject Land was *SHGCC's* property. That further depends on whether the Malaysian Judgment's holding on that issue should be recognised or not. We address this below at [48].

The Arm's Length Warranty

46 As for the Arm's Length Warranty, the preliminary question would be whether the S&P was a transaction conducted at an arm's length. The requirement for transactions to have been conducted on an "arm's length" basis speaks to two main concerns. The first is taxation (see paragraph 6.6(b) of Schedule 2 of the SA). Transactions not conducted at an arm's length basis may be regarded as attempts to circumvent capital gains tax and other tax regulations. If such transactions are only discovered post-acquisition, the company may be liable to penalties for tax avoidance. The second concern is independence (see paragraphs 11.1 and 11.2(a) of Schedule 2 of the SA). Transactions not conducted at an arm's length basis may be regarded as attempts to enrich

related/connected parties at the expense of the company that is being acquired. Warranties such as those found in paragraphs 11.1 and 11.2(a) of Schedule 2 exist to protect purchasers in an acquisition, by ensuring that they do not inherit a shell of a company when the acquisition is completed.

47 In view of the mischief that the Arm's Length Warranty was designed to address, a proper characterisation of the S&P is critical. In other words, was it a mere formalisation of PHSB/OBSB's proprietary interest in the Subject Land (such an interest arising from proprietary estoppel founded on the Common Expectation) or was it an attempt by Ong to steal a march on Borneo Ventures by surreptitiously removing the Subject Land from SHGCC right before completion of the SA? This again, depends on whether the Malaysian Judgment's holding on PHSB/OBSB's proprietary interest in the Subject Land should be recognised. To this question, we now turn.

Recognition of Malaysian Judgment, issue estoppel and abuse of process

Recognition of the Malaysian Judgment

48 Before a foreign judgment is taken to be *res judicata*, the preliminary issue is whether it should be recognised at all: *Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermoda Transportasi TBK and another* [2016] 5 SLR 1322 ("*Humpuss*") at [65]–[66]. According to *Humpuss* at [67], under the common law, a foreign judgment will be recognised if: (a) it is a final and conclusive judgment of a court which, (b) according to the private international law of Singapore, had jurisdiction to grant the judgment and (c) if there is no defence to its recognition. The Judge found the first two elements

were fulfilled but declined to recognise the Malaysian Judgment on the ground that it had been procured by fraud.[77]

49 Broadly speaking, foreign judgments will not be recognised if they had been procured by one of two types of fraud. The first is extrinsic fraud (*eg,* bribery of a solicitor, counsel or witness, or collusion with a representative party to the prejudice of beneficial interest: *Eleven Gesellschaft Zur Entwicklung Und Vermarktung Von Netzwerktechonologien MBH v Boxsentry Pte Ltd* [2014] SGHC 210 ("*Boxsentry*") at [103]). This type of fraud may be simply pleaded without any special restrictions. The second type of fraud is intrinsic fraud (*eg,* fraud which is "imputed from alleged false statements made at the trial, which were met by counter-statements by the other side, and the whole adjudicated upon by the Court and so passed on into the limbo of estoppel by the judgment": *Hong Pian Tee v Les Placements German Gauthier Inc* [2002] 1 SLR(R) 515 ("*Hong Pian Tee"*) at [20]). Foreign judgments can only be challenged on the ground of intrinsic fraud if "fresh evidence has come to light which reasonable diligence on the part of the defendant would not have uncovered and the fresh evidence would have been likely to make a difference in the eventual result of the case": *Hong Pian Tee* at [30]. The distinction between the two types of fraud has been variously described as fraud going to the jurisdiction of the court (extrinsic fraud) and fraud going to the merits of the judgment (intrinsic fraud); perjury during discovery (extrinsic fraud) and perjury at trial (intrinsic fraud); or fraud taking place outside trial (extrinsic fraud) as opposed to within trial (intrinsic fraud): *Boxsentry* at [103] and [108].

50 We are of the view that no matter how Ong and OBSB's actions in the Malaysian Suit are characterised, they are not sufficient to justify denying

---

77 HC Judgment at [260].

recognition of the Malaysian Judgment. If the allegation was that there had been extrinsic fraud, it would have been a result of Ong and OBSB's failure to disclose all material facts at trial. The real question in such a situation would be whether such perjury *produced* the judgment given: *Boxsentry* at [108]. With respect, the Judge's catalogue of Ong's omissions does not sufficiently address the point whether the perjury produced the judgment or not.

51 For example, the Judge took the view that there was no Common Expectation because Ong was in charge of both PHSB and SHGCC at that time. According to her, it was meaningless to speak of a "common" expectation when the reality was that Ong was "talk[ing] to himself" and executing a unilaterally conceived plan (see [23(a)] above). The Judge found that this absurdity was not appreciated by the Malaysian court but did not analyse how any of Ong's omissions could have been the effective cause of the Malaysian court's finding.[78] In truth, the Malaysian court *did* appreciate the fact that Ong was in charge of both PHSB and SHGCC at the material time. It simply took a different view from the Judge. It felt that Ong's position in PHSB and SHGCC gave him "personal knowledge to testify to the truth of the fact of such a common expectation or assurance and its content".[79] This suggests that the Judge could not agree with the Malaysian court's findings, and not that the Malaysian court had been misled by any particular omission from Ong. In essence, there is a difference of opinion here.

52 The Judge also took the view that PHSB could not have relied on the Common Expectation since it had not personally repaid the Maybank Loan,

---

78 HC Judgment at [257].

79 ROA Vol. 5 Part 22, p 110 - Suit No. BKI – 22NCvC – 21/2-2016 (Judgment 7 May 2018) at lines 463 – 464.

which was instead repaid by some of Ong's other companies.[80] It is true that the Malaysian court was not apprised of PHSB's financial arrangements for repaying its loans. But with respect, the source of the funds should not matter. What is important is that PHSB took on debts and liabilities in reliance on the Common Expectation. That much is clear here. PHSB did take up the Maybank Loan to build the Co-Gen Facility and we are inclined to agree with the Malaysian court[81] that no party could have taken on such huge expense without assurance that they would at least own the land on which the expensive power plant was being built on.

53 In much the same vein, the Judge pointed to the fact that the money that OBSB had used to purchase PHSB's assets under the ASA came from another bank loan. This argument seems to be based on the premise that OBSB could not take over the benefit of the proprietary estoppel established in favour of PHSB *vis* the Subject Land. Again, it is true that the Malaysian court was not apprised of OBSB's financial arrangements to procure the money for this purchase. But again, we are not able to see why the source of funds should matter. The Malaysian court held that "[it] is inconceivable that someone would pay the redemption sum of RM33.6million for those assets unless the redeemer expects or is assured that the land on which the assets were constructed would belong to him."[82] This reasoning is not only logical, it is consistent with business sense and we do not see any flaw in it.

---

80 HC Judgment at [142].

81 ROA Vol. 5 Part 22, p 132 - Suit No. BKI – 22NCvC – 21/2-2016 (Judgment 7 May 2018) at lines 928 – 934.

82 ROA Vol. 5 Part 22, p 135 - Suit No. BKI – 22NCvC – 21/2-2016 (Judgment 7 May 2018) at lines 992 – 995.

54 Finally, the Judge evidently took a dim view of Ong's integrity. She pointed to the fact that Ong did not disclose to the Malaysian court that the Bank Islam Loan was for working capital, not the development of the Co-Gen Facility. Ong was also effectively enriching himself since he owned the construction company that was tasked to build the Co-Gen Facility. The Co-Gen Facility itself proved to be a flop since it only supplied electricity for three years under PHSB and one year under OBSB before halting operations completely. But all these facts simply do not go towards showing whether there was a Common Expectation, or whether there was reliance on the Common Expectation on the part of PHSB/OBSB. In other words, these omissions in our view, did not seriously hobble the Malaysian court's ultimate findings *vis-à-vis* the Common Expectation and the proprietary estoppel that was established on the facts before the Malaysian court.

55 If the suggestion is that the Malaysian Judgment had been procured by *intrinsic* fraud, we are similarly of the view that this has not been established. Intrinsic fraud can only be pleaded under special circumstances. There must be new evidence that emerged after trial and such evidence must have been beyond the reach of the complaining party's reasonable diligence. We cannot see how any of the additional evidence adduced (*eg,* the SS Agreement, the tenancy agreements between SHGCC and PHSB, the ownership structure of the company that built the Co-Gen Facility) was not discoverable or beyond the reach of reasonable diligence of either SHGCC or Borneo Ventures (which was in control of SHGCC at the time of the Malaysian Suit). Even if the evidence was fresh evidence that could not have been discovered at that stage, we are of the view that the new evidence would not have been material to the Malaysian court's findings. In that regard, we reiterate what has been discussed earlier at [50]-[54].

56 In our view, the Malaysian Judgment was *not* procured by fraud. There is therefore no bar to its recognition by our courts. We turn next to the question of whether the Malaysian Suit gives rise to *res judicata*. As Sundaresh Menon JC (as he then was) stated in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 (*"Goh Nellie*") at [17], "the umbrella doctrine of *res judicata* encompasses three conceptually distinct though interrelated principles." These are cause of action estoppel, issue estoppel, and the extended doctrine of *res judicata* (otherwise known as the doctrine of abuse of process). Cause of action estoppel was not pleaded and that was correct because the Malaysian Suit and the present proceedings involve entirely different causes of action. We move next to consider issue estoppel and the defence of abuse of process.

Issue Estoppel

57 In *Lee Tat Development Pte Ltd v Management Corporation of Strata Plan No 301* [2005] 3 SLR(R) 157 this court spelt out the four elements which must be present to raise issue estoppel (at [14] – [15]):

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

(b) that judgment must be of a court of competent jurisdiction;

(c) there must be identity of parties in relation to the two actions; and

(d) there must be an identity of subject matter in the two actions.

58 It is beyond question, and here we agree with the Judge, that the first two elements are fulfilled in the present case.[83] However, with respect, we are

[83] HC Judgment at [262]

unable to concur with the Judge on the other two elements, *ie*, identity of parties and identity of subject matter.

59 In *Goh Nellie,* the court there, having reviewed the authorities, stated (at [32]) that "the courts have not taken a narrow view of what [identity of parties] means". *Goh Nellie* further reiterated that issue estoppel may arise in civil actions between the same parties or their *privies* – see also *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 541. The Malaysian Suit and the present action involved common defendants. The plaintiffs in the respective actions are, however, different. The question, therefore, is whether SHGCC can be regarded as Borneo Ventures' privy. In that regard, "the required commonality is a direct interest in the subject matter of the litigation, a parallel or corresponding interest in that subject matter and not simply a financial interest in the result of the action": *China North Industries Investment Ltd v Ronald RC Chum & Ors* [2007] HKCU 2128 at [81]. What then, would qualify as a "direct interest in that subject matter"?

60 In *Canam Enterprises Inc. v Coles* 47 O.R. (3d) 446 (*"Canam"*), the plaintiff sued the defendant-solicitor who had previously represented the former in an unsuccessful action against a mortgagee. The defendant-solicitor was estopped from adding that mortgagee as a third party to the proceedings. In that case, the solicitor and his client had parallel interests in the subject matter of the litigation. Nordheimer J held, at [24], that:

> … the proper resolution of the issue may be tested by observing what would have occurred had [the plaintiff] been successful in the Mortgage action and avoided liability on the mortgage. There can be no doubt that [the defendant-solicitor] would have claimed the benefit of [the plaintiff's] success as relieving him from any possible liability to [the plaintiff]. If [the defendant-solicitor] could claim the benefit of [the plaintiff's] success, it

> seems fair that he should equally bear the burden of [the plaintiff's] failure…

61 In much the same way, had SHGCC succeeded in the Malaysian Suit against OBSB and Ong, Borneo Ventures would have been able to claim that there had been a contractually prohibited asset disposal and that there had been a contractually prohibited transaction conducted not at arm's length. These would have amounted to breaches of the Arm's Length and Asset Disposal Warranties. Borneo Ventures would, in other words, have been able to claim the benefit of SHGCC's favourable judgment against OBSB. In the circumstances, SHGCC is undoubtedly the privy of Borneo Ventures.

62 Borneo Ventures contends otherwise. It cites *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No. 301* [2009] 1 SLR(R) 875 ("*Lee Tat* 2009") at [51] for the proposition that "a person who litigates in different rights is in law separate persons" [emphasis in original omitted].[84] It then points to the fact that the Malaysian Suit involved SHGCC holding its director to account while the present matter involved Borneo Ventures enforcing its contractual rights. Identity of parties is therefore not established.

63 We disagree. The statement quoted in the preceding paragraph and cited from *Lee Tat 2009* is not applicable here. The question there was whether, notwithstanding the fact that the parties were *identical* in the two suits, they could be treated as separate persons in law. That was answered by reference to the nature of the rights which the parties sought to enforce in the two suits. Here, the query differs. The question is whether, notwithstanding the fact that the parties are *different* in the two suits, the law may treat them as the same. This is answered by considering whether there is a privity of interest between these

---

[84] Respondent's Case at para 74.

different parties in their respective suits. For the reasons discussed above, there certainly is privity of interest in the present matter. We would also like to add that it would be taking a myopic view to assert that the Malaysian Suit only concerned SHGCC and its attempt to hold its directors to account. That was only one aspect. The central question in that suit concerned the existence of a Common Expectation between SHGCC and OBSB which, if it existed, would in turn affect who had proprietary interest in the Subject Land. Indeed, in the suit, because of the eventual finding of the court on the central matter of Common Expectation, the issue of holding the directors of SHGCC to account did not arise.

64 Moreover, we are of the view that where group companies are concerned, the rules governing identity of parties (which already eschew excessively technical distinctions/formulations) should have regard to the special relationship which exists between those companies within the corporate structure. When such companies have demonstrably vested interests in each other or other close connections (for example, when they effectively share the same assets portfolio, as was the case here), those circumstances would be relevant factors for the court to take into account to determine whether there was privity of interest between them.

65 We will now pause to highlight certain facts of this case. At the time the Malaysian Suit was brought against Ong and OBSB, Borneo Ventures was already the majority shareholder (holding 77.5% of the shareholding) of SH Group. SHGCC was wholly owned by SH Group and was thus under the control of Borneo Ventures. Borneo Ventures was effectively conducting the claim made by SHGCC in the Malaysian Suit against Ong and OBSB. It lost. There was clear identity of interest between Borneo Ventures and SHGCC and the latter was clearly the privy of the former in the Malaysian Suit. It would be

unjust, and indeed in our view outrageous, that Borneo Ventures could still claim, in the present action, that it was not bound by the decision of the Malaysian Court on the question of PHSB/OBSB's proprietary entitlement to the Subject Land.

66 As for identity of subject matter, both suits (the Malaysian Suit as well as the present action) turned on the specific issue of who owned the Subject Land. The Malaysian Suit found that SHGCC owned it (legally speaking) but was estopped from enforcing its strict legal rights in relation to the Subject Land. As such, Ong had not breached his fiduciary duties to SHGCC when he agreed to transfer the Subject Land to OBSB for a nominal consideration. The present action also turns on whether PHSB/OBSB had a proprietary interest in the Subject Land. If PHSB/OBSB is found to have an interest in the Subject Land, it cannot truly be said that there had been a breach of either the Asset Disposal or Arm's Length Warranty (see [45] – [46] above). As such, we differ from the Judge and hold that there was identity of subject matter for the purposes of issue estoppel.

67 Borneo Ventures acknowledges that the Common Expectation came up in both the Malaysian Suit and in the present action. But it contends that the Common Expectation point was raised in the service of different arguments. In the Malaysian Suit, it was raised in order to determine OBSB's proprietary interest in the Subject Land. In the present proceedings, it was raised to ascertain Ong's state of mind in the lead-up to the SA. That is, whether Ong should have disclosed OBSB's proprietary interest to Borneo Ventures.[85] These being different matters, issue estoppel did not arise. We disagree. Borneo Ventures cannot cast doubt on the Common Expectation point without attacking the

[85] Respondent's Case at para 77.

Malaysian Judgment. The Common Expectation was a fundamental plank of the Malaysian Judgment. In fact, it was one of the elements that had to be established to make out a finding of proprietary estoppel, which was in turn the entire basis of the judgment. Any attempt to cast doubt on that finding (concerning the Common Expectation) is effectively an attempt to re-litigate the same point. Accordingly, we are not persuaded by Borneo Ventures' arguments on the question of identity of subject matter either.

68 Having established identity of parties and identity of subject matter, Ong has shown that he is entitled to raise the defence of issue estoppel.

Abuse of Process/Extended Doctrine of Res Judicata

69 As for the defence of abuse of process, the doctrine was best summarised in *Goh Nellie* at [41]: "where the issue ought to have been raised [in the earlier proceeding] and was not, it might nonetheless amount to an abuse of process subsequently to litigate that same issue".

70 The Judge rejected this defence because in her view Borneo Ventures could not have joined in as a co-plaintiff to SHGCC's claim in the Malaysian Suit. This was for two reasons.[86] First, the causes of action were different. The present matter involved Borneo Ventures enforcing its contractual rights under the SA. On the other hand, the Malaysian Suit concerned, *inter alia*, Ong's alleged breaches of fiduciary duties owed to SHGCC as its director. OBSB was joined as a co-defendant on the basis that it would have been privy to such a breach. Second, the applicable laws were different as well. The present action centred on the SA which was governed by Singapore law (per cl 12.15(a) of the

86 HC Judgment at [265]

SA).[87] The Malaysian Suit related to Ong's conduct in effecting a transfer of the Subject Land to OBSB. The law governing the transfer of the Subject Land, according to the doctrine of *lex situs*, would have been Malaysian law. For these reasons, the Judge took the view that the present action and the Malaysian Suit were fundamentally different proceedings. Ong, therefore, was not being sued twice over the same issues.

71 With respect, we disagree. The law relating to the doctrine of abuse of process was set out by this court in *Lim Geok Lin Andy v Yap Jin Meng Bryan and another appeal* [2017] 2 SLR 760 ("*Andy Lim*"). There (at [38]), the court affirmed that the legal test is a fact specific one, depending on all the circumstances of a case, including:

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

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

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

(d) whether there are other special circumstances that justify allowing the case to proceed.

Ultimately, the defence will be successfully raised where "*some connection* can be shown between the party seeking to relitigate the issue and the earlier proceeding where that essential issue was litigated, which would make it unjust to allow that party to reopen the issue" [emphasis in original] (at [44]). Repeated claims by the same plaintiffs or repeated claims against the same defendant are

87 At 1AB217.

not necessarily the critical factor. Fairness or oppressiveness, as demonstrated by the facts of the case, is the decisive factor.

72 In *Andy Lim*, the appellant ("Lim") had been subpoenaed as a witness in an earlier set of proceedings ("the 2010 Suit"). There, his testimony supported the plaintiff's ("Park") claim for a share of profits. Lim, in his testimony at those proceedings, had claimed that he too had been entitled to a share of the profits. The Judge dismissed Lim's bare assertion for lack of proof. This finding was affirmed by the Court of Appeal. When the 2010 Suit proceeded to consider the account of profits, Lim belatedly applied to intervene in the proceedings. Ultimately, this application was dismissed as well in *Andy Lim*.

73 *Andy Lim* supports a finding of abuse of process in the present action for two reasons. First, it recognised that the defence of abuse of process can be successfully invoked where the *same defendant* has been sued twice by different plaintiffs on identical issues which had already been determined in an earlier action: *Andy Lim* at [43]. That is plainly the case here too. Ong has defended the existence of the Common Expectation in two separate suits brought against him by two separate plaintiffs (SHGCC and Borneo Ventures). As stated earlier (at [63]), we regard Borneo Ventures' submissions on the Common Expectation as an unacceptable collateral attack on the Malaysian Judgment. Second, in *Andy Lim*, Lim's entitlement to a share of profits was "not strictly an issue" in the 2010 Suit. Notwithstanding this, his later attempt to re-litigate the issue was dismissed as an abuse of process. In the present action, the proprietary interest in the Subject Land was *squarely* an issue already decided in the Malaysian Suit. As stated in [65] above, Borneo Ventures was in fact conducting the Malaysia Suit on behalf of SHGCC. Borneo Ventures' attempt in the present action to relitigate the same issue is clearly oppressive to Ong and is an abuse of process.

74 Moreover, with regard to the Judge's reasoning (as stated above at [70]), we see no reason why Borneo Ventures could not simply have applied to join in the Malaysian Suit and requested the Malaysian court to apply Singapore law in relation to Borneo Ventures allegations of breaches of warranties given in the SA. If the concern was *forum non conveniens*, there were sufficient factors militating in favour of Borneo Ventures lodging its claims in Malaysia. For one, that would have housed all related proceedings in one setting, with the benefit of a full, holistic perspective on all aspects of the acquisition contemplated in the SA. Second, it is doubtful that initiating a claim in a Malaysian court would really give rise to serious inconvenience to Borneo Ventures (which is incorporated in Singapore). Yet, Borneo Ventures did not even attempt to litigate the entire matter in one forum.

75 In fact, Borneo Ventures' attempt to characterise the Malaysian Judgment as having been procured by fraud (when such an allegation was not even pleaded) runs contrary to its stated position all along. In the earlier stages of the present action in Singapore, it: (a) asserted that the issue of ownership was irrelevant to the present matter; (b) admitted that SHGCC was estopped from denying OBSB's proprietary interest; and (c) even *relied* upon the finding of the Malaysian court (that OBSB had a proprietary interest in the Subject Land) to assert that this "confirm[ed]" that Ong had breached the various warranties in the SA.[88]

76 For these reasons, we are of the view that Borneo Ventures' attempts to challenge the Malaysian court's finding on the issue of the Common Expectation were an abuse of process. For clarity, we do not regard the entire action in these courts as an abuse of process – it is not. Our opinion here is

---

88 Appellant's Case at para 170.

confined only to Borneo Ventures' arguments on the Common Expectation issue and the challenges to OBSB's proprietary interest in the Subject Land.

77 Accordingly, in light of the discussions at [48] to [76] above and recognising and accepting the Malaysian court's findings in relation to the issue of the proprietary interest in the Subject Land, we hold, contrary to the Judge's findings, that the Asset Disposal and Arm's Length Warranties were not breached and the claims of Borneo Ventures on those premises fail.

The appropriate relief

78 As found above at [32] and [44], the Land Warranty was breached and Ong could not avail himself of the protection of the limitation of liability clauses. To that extent, Borneo Ventures succeeds (albeit partially) in its action. The next question we need to consider is whether the Judge was correct to have granted to Borneo Ventures an injunction requiring Ong not to transfer the proprietary interest in the Subject Land to OBSB.

79 Generally, the contractual remedy for a breach of warranty is an award of damages: Robert Thompson, *Sinclair on Warranties and Indemnities on Share and Asset Sales* (Sweet & Maxwell, 9th Ed, 2014) at para 3-01. This will be the standard relief until and unless damages are shown to be an inadequate remedy: JD Heydon AC, M J Leeming, P G Turner, *Meagar, Gummow & Lehane's Equity Doctrines and Remedies* (LexisNexis, 5th Ed, 2015) at 20-030. Damages may be inadequate for a variety of reasons. The broad rule is that damages are inadequate where the subject matter of the contract is special and only specific performance can vindicate the (unfulfilled) expectation interest. Illustrative examples are contracts for the sale of land (which the law recognises has special value/meaning) or unique chattels (*eg,* rare china jars in *Falcke v Gray* (1859) 4 Drew 651 at 658; or prize-winning racehorses in *Borg v Howlett*

(1996) 8 BPR 15, 535 at 538). When a plaintiff establishes his entitlement to specific performance, he may seek to enforce contracts by injunctions (as Borneo Ventures has sought to do): I.C.F. Spry, *The Principles of Equitable Remedies – Specific Performance, Injunctions, Rectification and Equitable Damages* (Sweet & Maxwell, 9th Ed, 2014) at p 590.

80 In the present case, there is no proof that damages would be an inadequate remedy for the breach. The expectation interest remained substantially unaffected. As Goi (GSH's representative in the purchase) remarked, Borneo Ventures was "buying a 27-hole golf course, golf club and two hotels".[89] That was in substance, what it had intended to purchase. It has received all that. We appreciate that there could well be an argument that the SA contemplated the purchase of the Subject Land as well. Land, being of special value, is typically ordered to be transferred when a contract for the sale of such land falls through. But that would be assuming that SHGCC never intended to part with the Subject Land. Pertinently, in the Malaysian Judgment, it was held that the proprietary interest of the land lay with OBSB, not SHGCC. For the reasons set out in [48] to [76] above, we have recognised and accepted that finding. SHGCC cannot now, attempt to claim the land by a backdoor mandatory injunction. Indeed, the fact that the land was not part of the SA cannot truly be described as a 'loss'. The Subject Land was never intended to be part of the SA in the first place (again, a finding made in the Malaysian Judgment that we have accepted). What then was the true loss here? The breach of the Land Warranty represented a lost opportunity for GSH to bargain for a lower purchasing price on account of that as well as potential tax liabilities. Payment of damages would adequately address the losses.

---

89 Transcript 22 July 2019, p 35 lines 8 – 9.

Damages and Costs

81 In our view, the appropriate amount of damages should be based on the fair market value of the Subject Land at the time of purchase, with interest. This would have been the amount that would have been deducted from the acquisition price if GSH had been properly apprised of the fact that the Subject Land was not part of the deal. The award of damages should also have regard to any tax liability incurred by SHGCC on account of the S&P, and any tax penalties that SHGCC would be required to pay due to the S&P. Based on the figure so arrived at, Ong should only pay to Borneo Ventures 77.5% of the same, as under the SA, Borneo Ventures only acquired 77.5% of the shares of SH Group and the remaining still belong to Ong.

82 Awarding the full measure (rather than 77.5%) of the sums described above would result in both a windfall for Borneo Ventures and an excessively punitive result for Ong. Borneo Ventures, in purchasing shares in the SH Group, only paid for 77.5% of the company. That meant it was only purchasing 77.5% of the SH Group's assets. If the Subject Land had been inadvertently excluded from the purchase, it would mean that Borneo Ventures had been, in the most approximate sense, short-changed of 77.5% of the Subject Land. That is the loss which the damages should address. In a similar vein, any tax liability incurred by the SH Group due to the S&P would have been shouldered by all of its shareholders, in an amount proportionate to their respective shareholdings: Borneo Ventures would have shouldered 77.5%, while Ong would have taken on 22.5%. To make Ong pay Borneo Ventures for *all* of the tax liability incurred (*ie.* 100%) would have (a) overcompensated Borneo Ventures and (b) penalised Ong twice for the same wrongdoing. That would not be just. The fairer result is to apportion damages according to their respective shareholdings in the SH Group.

83 We therefore order an inquiry be held before the Registrar to assess (a) the damages due to Borneo Ventures and (b) the rate and period for which interest should be payable on the sum of damages awarded.

84 In view of the fact that Ong has succeeded in relation to the issues of the Disposal Warranty and the Arm's Length Warranty, as well as on the relief granted, we order that each party shall bear its own costs in relation to this appeal. As regards the question of costs at the trial, we think that the costs order made by the Judge ought to be adjusted with Borneo Ventures being entitled to only 50% of the costs at trial. As regards the costs of the Inquiry before the Registrar, we shall leave that to the Registrar, who will be best able to take into account the positions adopted by the parties on the matters he is tasked to inquire into and his eventual rulings on those matters.

Judith Prakash
Justice of the Court of Appeal

Chao Hick Tin
Senior Judge

Belinda Ang
Judge of the Appellate Division

Lem Jit Min Andy, Selvaratnam Sharmini Sharon, Poon Pui Yee and Zhuang Changzhong (Harry Elias Partnership LLP) for the appellant.
Teh Guek Ngor Engelin SC, Yeo Yian Hui Mark, Huen Hui Min Jessie and Lim Xiao Wei Charmaine (Engelin Teh Practice LLC) for the respondent.