IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 133

Suit No 1274 of 2015 (Summons No 4732 of 2019)

Between

CKR Contract Services Pte Ltd

… *Plaintiff*

And

(1) Asplenium Land Pte Ltd
(2) Sia Wee Long
(3) SCDA Architects Pte Ltd
(4) Chan Soo Khian
(5) Kan Fook Seng
(6) Rich-Link Construction Pte Ltd
(7) Rider Levett Bucknall LLP
(8) RLB Consultancy Pte Ltd
(9) Lam Chye Shing

… *Defendants*

JUDGMENT

[Civil Procedure] — [Striking out]
[Civil Procedure] — [Pleadings] — [Striking out]
[Res Judicata] — [Issue estoppel] — [Identity of issues]
[Res Judicata] — [Cause of action estoppel] — [Identity of causes of action]
[Res Judicata] — [Extended doctrine of res judicata]

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v
Asplenium Land Pte Ltd and others

[2020] SGHC 133

High Court — Suit No 1274 of 2015 (Summons No 4732 of 2019)
Ang Cheng Hock J
2, 9 March 2020

29 June 2020 Judgment reserved.

Ang Cheng Hock J:

1 This judgment concerns an application by the first defendant (Summons No 4732 of 2019) to strike out the action brought by the plaintiff against it in Suit No 1274 of 2015 ("Suit 1274") under O 18 r 19(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC").[1] It was fixed and heard together with a similar application taken out by the second defendant to strike out the action against him (Summons No 5859 of 2019),[2] but that latter application was withdrawn in the course of the hearing.[3]

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1 SUM 4732/2019 from [1] to [4].

2 SUM 5859/2019 from [1] to [3].

3 Minute Sheet of 9 March 2020 at p 1.

2 In Suit 1274, the plaintiff has brought proceedings against the first to ninth defendants for the torts of lawful means conspiracy and unlawful means conspiracy, and against the first and second defendants for the tort of intimidation.[4] In its striking out application, the first defendant's main contention, in gist, is that the plaintiff's claims should be struck out because they have already been dealt with in the arbitration brought by the plaintiff (see [16] below), and the claims in this suit are thus barred by the principles of *res judicata*.

3 The striking out application which is the subject of the present judgment should not be seen in isolation, but in its proper context. It is the latest salvo in a long-running dispute arising from a building and construction project where the plaintiff was appointed and later terminated as the main contractor.[5] As will be outlined below, the longstanding nature of this dispute between the plaintiff on the one hand and the project developer and consultants on the other, has engendered an entire series of pronouncements and findings by, *inter alia*, an arbitral tribunal and the Courts, and it is against this backdrop that the present application is brought.[6]

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4 Statement of Claim (Amendment No. 1) ("ASOC") from [19] to [19C] and from [94] to [96].

5 ASOC at [17B].

6 First Defendant's Skeletal Submissions ("1DSS") from [29] to [55].

Background

Dramatis personae

4 Given the number of defendants, it will be useful to first set out the *dramatis personae* involved in Suit 1274.

5 The plaintiff, CKR Contract Services Pte Ltd, was appointed as the main contractor for a condominium project known as the Seletar Park Residences ("the Project") from 15 January 2013. Its appointment as the main contractor was terminated on 24 October 2014.[7]

6 The first defendant, Asplenium Land Pte Ltd, was the developer for the Project, and is a subsidiary of Tuan Sing Holdings Pte Ltd.[8] The first defendant had been incorporated for the development of the Project. The second defendant, Sia Wee Long ("Mr Sia"), was an employee of Tuan Sing Holdings Pte Ltd and was, at the material time, the project manager of the Project.

7 The third defendant, SCDA Architects Pte Ltd, was the architectural firm engaged as the Project's architects.[9] At the material time, the fourth and fifth defendants were employees of the third defendant. The fourth defendant, who remains employed by the third defendant, was the architect named as the Qualified Person for the Project, and the fifth defendant also worked on the Project as an architect. In the course of this judgment, for convenience, I will refer to the third to fifth defendants as "the architects".

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7 Plaintiff's Skeletal Submissions dated 28 February 2020 ("PSS") at [3].

8 PSS at [4].

9 PSS at [5].

8 The sixth defendant, Rich-Link Construction Pte Ltd, was engaged by the first defendant to replace the plaintiff as the main contractor for the Project after the first defendant had terminated the plaintiff's services in October 2014.[10]

9 The seventh defendant, Rider Levett Bucknall LLP, was the firm of quantity surveyors engaged for the Project.[11] The eighth defendant, RLB Consultancy Pte Ltd, is a related company of the seventh defendant. The ninth defendant, Lam Chye Shing, is an employee of the seventh defendant and was the designated Quantity Surveyor for the Project. The seventh, eighth, and ninth defendants were involved in the replacement tender process through which the sixth defendant was engaged to replace the plaintiff as main contractor for the Project. For context, the seventh defendant is in the business of providing property and construction consultancy services, while the eighth defendant is in the business of providing consultancy and project management services in the construction industry. The seventh and eighth defendants have the same registered address, and the nine registered partners of the seventh defendant are also directors and shareholders of the eighth defendant.

Background to the disputes

10 A brief chronology of the relevant facts is as follows.

11 On 15 January 2013, the plaintiff and first defendant entered into a contract ("the Contract") concerning the development of the Project.[12] The first

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10 PSS at [6].

11 PSS at [8].

12 ASOC at [8].

defendant had engaged the plaintiff as the main contractor to carry out building and construction works for the Project. Three points bear note in relation to the Contract:

(a) The value of the Contract upon the plaintiff's appointment as main contractor was S$88,063,838.00 (the "Contract Sum").[13] The commencement date of the Project was 21 January 2013, and the scheduled completion date was 20 January 2015.

(b) The Contract incorporated the Singapore Institute of Architects' Articles and Conditions of Building Contract (Lump Sum Contract) 9th Edition (Reprint August 2011) (the "SIA Conditions") and the Supplemental Articles and Conditions of Contract.[14]

(c) Pursuant to the Contract, a performance bond was procured by the plaintiff in favour of the first defendant in the sum of S$8,806,383.80 (being 10% of the Contract Sum).[15]

12 On 24 October 2014, the plaintiff was terminated as main contractor of the Project by the first defendant pursuant to a Notice of Termination issued that very day.[16] The Notice of Termination was issued on the basis of two Termination Certificates issued by the third defendant and signed by the fourth defendant.[17] The first of these certificates ("Certificate No. 260") was issued on

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13 ASOC at [8].

14 ASOC at [9].

15 ASOC at [12].

16 ASOC at [19].

17 1DSS from [23] to [25].

the basis that the plaintiff had failed to proceed with the Project with due diligence and expedition for one month even after the third defendant had issued it a notice to do so ("Notice 260") pursuant to cl 32(3)(d) of the SIA Conditions on 11 September 2014. The other Termination Certificate ("Certificate No. 262") proceeded on the basis that the plaintiff had failed to comply with various architect's directions ("ADs") issued by the architects within one month after the third defendant had issued it a notice to do so ("Notice 262") pursuant to cl 32(3)(h) of the SIA Conditions on 11 September 2014. For completeness, I note that two other written notices pursuant to cll 32(3)(e) and 32(3)(h) respectively of the SIA Conditions, Notice 261 and Notice 265, had been issued by the third defendant. However, these two other written notices were not relied upon by the third defendant as the bases for the issuance of Termination Certificates.[18] I shall refer to Notices 260, 261, 262 and 265 collectively as "the Notices".

13 For ease of reference, cll 32(3)(d) and 32(3)(h) of the SIA Conditions, pursuant to which Notices 260 and 262, and subsequently Termination Certificates No. 260 and 262 respectively were issued, are set out below:

> 32(3) The Architect may issue a Termination Certificate on any one of the following grounds:
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> […]
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> (d) if the Contractor has wholly suspended work without justification or is failing to proceed with diligence and due expedition, and following expiry of 1 month's written notice from the Architect to that effect has failed to take effective steps to recommence work or is continuing to proceed without due diligence or expedition as the case may be;
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> […]

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18 PSS at [12].

> (h) if the Contractor has refused or failed following 1 month's written notice by the Architect to comply with any written direction or instruction of the Architect which he is empowered to give under any clause of these Conditions, including instructions under Clause 29.(3) of these Conditions
>
> […]

14 Following the plaintiff's termination in October 2014, a replacement tender exercise was held and a new contractor, the sixth defendant, was appointed to complete the Project.[19]

15 On 4 November 2014, consequent to the termination of the Contract, the first defendant made a call on the performance bond for the full sum. While the call amount was subsequently reduced by the first defendant to around S$7.7 million, a second call was made on the performance bond for the remaining balance of approximately S$1.1 million about a year later, after the completion of the Project.[20]

16 On 10 November 2014, the plaintiff commenced arbitral proceedings ("the Arbitration") against the first defendant pursuant to the parties' arbitration agreement in cl 37 of the SIA Conditions.[21] The arbitration clause provided that any dispute between the parties arising out of the Contract was to be "referred to the arbitration and final decision of a person to be agreed by the parties". The parties agreed to appoint Mr Chow Kok Fong (the "tribunal" or "arbitrator") as the sole arbitrator.[22] The Arbitration was bifurcated into two phases – a liability

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19 1DSS at [27].

20 1DSS at [28], PSS at [13].

21 1DSS at [20].

22 1DSS at [29].

phase and a quantum phase.[23] The liability phase of the Arbitration ran from 10 November 2014 to 14 February 2018, and two awards were issued in this regard.

17 The first of these two awards, Partial Award 1, was dated 11 October 2017. It extensively set out the tribunal's findings on liability on the matters in dispute and ran to 757 pages. The arbitrator noted in the award that it is "common ground that the central issue in the arbitration is whether [the first defendant] validly terminated the contract when it issued its Notice of Termination on 24 October 2014. [The plaintiff] alleges that [the first defendant] had wrongfully terminated the Contract as it had no valid grounds to do so, while [the first defendant] contends that it was entitled and had validly done so".[24] In the result, the arbitrator found substantially for the first defendant and decided that the first defendant had validly terminated the Contract.[25] The second award, Partial Award 2, was dated 14 February 2018, and awarded costs to the first defendant for the liability phase against the plaintiff in the sum of S$4,162,000.[26]

18 The Arbitration then proceeded to the quantum phase. The hearing took place from 20 August to 30 August 2018.[27] The tribunal issued Partial Award 3 on 9 April 2019. Corrections to Partial Award 3 followed on 26 April 2019 and 15 May 2019. In Partial Award 3, the tribunal found that the plaintiff was,

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23 1DSS at [33].

24 Partial Award 1, Chapter 2, at [108].

25 PSS at [14].

26 1DSS at [113(a)].

27 1DSS at [37], Affidavit of Lee Sien Liang Joseph dated 28 August 2019 ("LSLJ") in HC/OS 976/2019 at [17].

inter alia, liable to the first defendant for liquidated damages for delay, and for damages arising from the first defendant's valid termination of the Contract, comprising mainly the increased costs for the completion of the Project because of the replacement contract the first defendant entered into with the sixth defendant, and various other back-charges the first defendant was entitled to impose. However, in view of the amount already received by the first defendant pursuant to its call on the performance bond, the tribunal found that there was a net balance owing from the first defendant to the plaintiff in the amount of S$6,405,536.34 (the "Award Sum"). This net balance reflected the fact that the first defendant had been "over-paid" pursuant to the call on the performance bond, and the over-payment therefore had to be repaid to the plaintiff.[28]

19 Partial Award 4 was issued on 3 July 2019 to deal with costs related to the quantum phase.[29] As a result of an unaccepted Calderbank letter that had been issued by the first defendant to the plaintiff prior to the quantum phase hearing, the tribunal concluded in this award that only net costs of S$124,217.39 were payable by the first defendant to the plaintiff.[30]

20 On 15 December 2015, more than a year after the plaintiff had commenced arbitration against the first defendant and while the liability phase of the Arbitration was still pending, the plaintiff commenced Suit 1274 against the nine defendants outlined from [6] to [9] above. The first to sixth defendants took out applications for a stay of Suit 1274. These were resisted by the

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28 LSLJ at [23].

29 Third affidavit of William Nuraslim alias Liem dated 23 September 2019 ("3WL") from pp 1831 to 1866.

30 1DSS at [113(c)].

plaintiff, which argued that Suit 1274 should be allowed to proceed. Notably, counsel for the plaintiff conceded during the course of the hearing of the stay applications that, if the plaintiff succeeded in the Arbitration, the plaintiff would discontinue Suit 1274.[31] After hearing the arguments, Judith Prakash J (as she then was) granted a case management stay of the proceedings against all nine defendants, pending the outcome of the Arbitration.[32]

21 After the issuance of Partial Award 4 and the conclusion of the Arbitration, the plaintiff obtained leave to amend its Statement of Claim in Suit 1274, which had originally been filed on 30 December 2015.[33] The plaintiff filed its amended Statement of Claim on 9 September 2019 and wanted to proceed with the Suit. In the amended Statement of Claim, the plaintiff outlined the three causes of action set out at [2] above.[34]

22 The first and second defendants, on 23 September 2019 and 22 November 2019 respectively, filed the applications to strike out the plaintiff's claims. I heard both applications together. As already mentioned, the second defendant's striking out application was withdrawn in the course of the hearing on 9 March 2020, with no order as to costs. It appeared to me that some resolution had been reached between the plaintiff and the second defendant. True enough, on 16 March 2020, the plaintiff discontinued its action against the second defendant. I further noted that on 1 April 2020, the plaintiff also discontinued its action against the third to fifth defendants.

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31 Minute Sheet of 12 April 2016 for SUM 168/2016 and ors at p 5.

32 1DSS at [32].

33 See ASOC and 1DSS at [41] and [42].

34 ASOC at [3].

Other legal proceedings

23 As alluded to above, the present applications are but the latest skirmish in what has proven to be an extended campaign of legal proceedings. I will briefly outline the other proceedings below.

24 First, the Arbitration formed the most substantive aspect of legal proceedings between the plaintiff and first defendant and is the central focus of the arguments for striking out.[35] As described above, the Arbitration was protracted. Spanning a period of around five years, the bifurcated arbitration involved four Partial Awards, many days of hearing, and multiple rounds of submissions before the arbitrator. A total of 55 witnesses gave evidence during the Arbitration, and no fewer than 93 witness statements were tendered as evidence.[36] The first defendant called, at the Arbitration, representatives of all the nine defendants in this Suit 1274, who are the alleged co-conspirators, to give evidence, and they were cross-examined by the plaintiff.[37] These representatives called as witnesses included, *inter alia*:[38]

(a) The second defendant,

(b) Mr Lau Kah Kyn Edward, who is a former director of the third defendant;

(c) The fourth defendant;

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35 1DSS at [34] and [37].

36 1DSS at [34].

37 1DSS at [35].

38 1DSS from [35(a)] to [35(b)(vi)].

(d) The fifth defendant;

(e) Mr Loi Teck Han, who is the General Manager of the sixth defendant; and

(f) The ninth defendant, who is a director and shareholder of the seventh and eighth defendants.

25 A total of three applications to the High Court (in HC/OS 1263/2017, HC/OS 293/2018, and HC/OS 976/2019) for leave to appeal on questions of law arising from three of the four Partial Awards were made by the plaintiff.[39] HC/OS 293/2018 was eventually withdrawn by the plaintiff prior to its determination, while the other two applications were dismissed. Apart from the three applications by the plaintiff for leave to appeal on questions of law arising from the Arbitration, one such application (in HC/OS 1269/2017), for leave to appeal on questions of law arising from Partial Award 1, was made by the first defendant. This application was wholly discontinued before its determination.[40]

26 Second, around 14 January 2015, after the plaintiff had commenced the Arbitration against the first defendant, the plaintiff initiated separate proceedings in HC/S 37/2015 ("Suit 37") against the seventh, eighth, and ninth defendants.[41] Suit 37 entails claims for, *inter alia*, negligence in the conduct of the replacement tender exercise, the assessment of the tender returns, and the computation of the sum claimed by the first defendant on the performance bond

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39 1DSS at [109].

40 Notice of Discontinuance dated 15 October 2018 filed in HC/OS 1269/2017.

41 1DSS at [49].

(see [11(c)] above).[42] The seventh and ninth defendants, as professional quantity surveyors, had been instructed by the first defendant to conduct and supervise the replacement tender exercise, to evaluate the tender returns (the bids) submitted by the tenderers, and to recommend which tender return to accept for award of the replacement contract. The eighth defendant had been instructed by the first defendant to assess the tender returns in the replacement tender in respect of the tenderers' resources and scheduling proposals. The crux of the allegations against the seventh to ninth defendants in this Suit are that they carried out their work in a negligent manner.[43]

27 Third, CA 179/2017 was an appeal by the plaintiff filed on 28 September 2017 against a decision of the High Court in favour of the first, seventh, eighth, and ninth defendants in an interlocutory order made in relation to the non-disclosure of privileged documents in Suit 37.[44] The first defendant was not a party to Suit 37 but had intervened in the plaintiff's application for discovery in that Suit for the purpose of opposing the disclosure of those privileged documents. The Court of Appeal eventually dismissed the plaintiff's appeal against the judge's decision.

28 Fourth, on 6 April 2018, over two years after the plaintiff had commenced the Arbitration, it commenced HC/S 349/2018 against the third and fourth defendants.[45] Specifically, the plaintiff alleged that the third and fourth

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42 1DSS at [49] to [51].

43 Statement of Claim (Amendment No. 1) in Suit 37 at [1], [4B], and [8].

44 1DSS at [263].

45 1DSS at [52].

defendants were liable in the tort of deceit for issuing wrongful ADs, Notices, and Termination Certificates.

29 I note that Suit 37 and Suit 349 remain pending as at the time of this judgment's release. The plethora of legal proceedings I have outlined above provide further context to the present suit and the application I have to determine.

The applicable legal principles

The law on striking out

30 O 18 r 19(1) of the ROC provides that the Court can order pleadings to be struck out where they:

(a) Disclose no reasonable cause of action or defence (O 18 r 19(1)(*a*));

(b) Are scandalous, frivolous or vexatious (O 18 r 19(1)(*b*);

(c) May prejudice, embarrass or delay the fair trial of the action (O 18 r 19(1)(*c*)); or

(d) Are otherwise an abuse of process of the Court (O 18 r 19(1)(*d*)).

31 The principles governing the application of O 18 r 19(1) of the ROC are fairly well-established. Broadly, it would only be in "plain and obvious" cases that the power of striking out should be invoked: *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 ("*Gabriel Peter*") at [18]. This is anchored on the judicial policy to afford a litigant the right to institute a *bona fide* claim before the courts and to prosecute it in the

usual way unless the case is wholly and clearly unarguable: *Tan Eng Khiam v Ultra Realty Pte Ltd* [1991] 1 SLR(R) 844 at [31].

32 A more recent restatement of the position on striking out is as outlined by the authors of *Singapore Civil Procedure 2020, vol 1* (Chua Lee Ming gen ed) (Sweet & Maxwell, 10th ed, 2020) ("*Singapore Civil Procedure 2020*") at [18/19/6] that "[t]he claim must be obviously unsustainable, the pleadings unarguably bad and it must be impossible, not just improbable, for the claim to succeed before the court will strike it out".

33 Each limb of O 18 r 19(1) of the ROC provides a separate and distinct basis for the Court's exercise of its power to strike out pleadings: *The "Bunga Melati 5"* [2012] 4 SLR 546 ("*The Bunga Melati*") at [31].

34 Turning to the first limb of O 18 r 19(1) of the ROC, that the pleadings disclose no reasonable cause of action, the Court of Appeal held in *Ng Chee Weng v Lim Jit Ming Bryan and another* [2012] 1 SLR 457 at [110] that:

> … The draconian power of the court to strike out a claim at the interlocutory stage under limb (*a*) of O 18 r 19(1) [of the ROC] can only be exercised when it is patently clear that there is no reasonable cause of action on the face of the pleadings. …

35 The principle that striking out is only appropriate in fairly narrow and constrained grounds also applies in relation to the second limb of O 18 r 19(1) of the ROC, that the pleadings are scandalous, frivolous or vexatious. The phrase "frivolous and vexatious" refers to actions which are obviously unsustainable or wrong, or which show a lack of purpose or seriousness in the party's conduct of proceedings: *The "Osprey"* [1999] 3 SLR(R) 1099 at [8]. In *The Bunga Melati* at [39], the Court of Appeal further elucidated that a "plainly or obviously" unsustainable action is one which is either:

> …
>
> (a) *legally unsustainable*: if 'it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks'; or
>
> (b) *factually unsustainable*: if it is 'possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance … '.

36 The third limb of O 18 r 19(1) of the ROC addresses situations where the pleadings may prejudice, embarrass or delay the fair trial of the action. I accept the view of the authors of *Singapore Civil Procedure 2020* at [18/19/13] that a liberal interpretation of what might "prejudice, embarrass or delay the fair trial of the action" should be adopted, though this will no doubt depend on the individual facts of each case (see also *Tong Seak Kan and another v Jaya Sudhir a/l Jayaram* [2016] 5 SLR 887 at [30]).

37 In *Gabriel Peter* ([31] *supra*) at [22], the Court of Appeal clearly set out the ambit of the phrase "abuse of process of the Court". I do not propose to reproduce the Court of Appeal's views in full, save to note that the phrase "has been given a wide interpretation by the courts", "includes considerations of public policy and the interests of justice", "will depend on all the relevant circumstances of the case", and that the "bringing of an action for a collateral purpose" has been "judicially acknowledged as an abuse of process".

38 In the present application, all four limbs of O 18 r 19(1) of the ROC have been relied on to justify the striking out of the plaintiff's claims.

The principles on res judicata

39 The central basis of the present application is that the matters raised by the plaintiff in Suit 1274 have *already been decided* by the arbitrator and/or

ought to have been raised by the plaintiff in the Arbitration. The argument is that the doctrine of *res judicata* precludes the plaintiff from raising these claims and that the plaintiff's claims should accordingly be struck out.

40 In the case of *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*"), Sundaresh Menon JC (as he then was) outlined at [17] to [25] that the doctrine of *res judicata* encompasses three conceptually distinct though interrelated principles – cause of action estoppel, issue estoppel, and the extended doctrine of *res judicata*.

41 The first subspecies under the umbrella of *res judicata* is cause of action estoppel. As the Court noted at [17] of *Goh Nellie*, cause of action estoppel prevents a party from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties.

42 In *Zhang Run Zi v Koh Kim Seng and another* [2015] SGHC 175 ("*Zhang Run Zi*") at [67], George Wei JC (as he then was) set out the requirements for cause of action estoppel as follows:

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

(b) The court pronouncing the earlier judgment must have been a competent court;

(c) Identity of parties; and

(d) Identity of causes of action.

It bears note that the first three requirements as set out at (a) to (c) above are *in pari materia* with the first three requirements for issue estoppel (see [44] below).

43 The second subspecies of *res judicata* is issue estoppel. In *BNX v BOE and another matter* [2017] SGHC 289 ("*BNX v BOE*"), Vinodh Coomaraswamy J observed at [125] that issue estoppel precludes a party from re-litigating an *issue* and applies where a litigant raises *a question of fact or law* which has already been determined by a court of competent jurisdiction. Issue estoppel applies, per *Zhang Run Zi* at [53], even where the causes of action in question are not the same in the new proceedings as they were in the previous proceedings. In *BNX v BOE*, the judge struck out the plaintiff's claims for fraudulent misrepresentation on the basis of, *inter alia*, issue estoppel, because the issue as to whether certain representations had been made had already been raised and decided at an earlier arbitration. For completeness, I note that the unsuccessful plaintiff in *BNX v BOE* appealed to the Court of Appeal, which dismissed the appeal.

44 The requirements for issue estoppel are fourfold and are set out at [14] to [15] of the Court of Appeal's judgment in *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157. The majority of the Court of Appeal held that the following requirements have to be met to establish an issue estoppel:

(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 between the parties to the two actions that are being compared; and

(d) There must be an identity of subject-matter in the two proceedings.

45 The third subspecies of *res judicata*, known as the "extended doctrine of *res judicata*", has also been referred to as the defence of abuse of process: *BNX v BOE* at [127] and *Goh Nellie* ([40] *supra*) at [41]. The extended doctrine of *res judicata* has its origins in the seminal decision of Sir James Wigram VC in *Henderson v Henderson* [1843] 3 Hare 999 at 114, and has been developed incrementally in both England and Singapore. In *Lim Geok Lin Andy v Yap Jin Meng Bryan and another appeal* [2017] 2 SLR 760, the Court of Appeal made the following observations at [39]:

> 39 The prominence of the rule in *Henderson* was recently re-affirmed in the United Kingdom Supreme Court case of *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited (formerly known as Contour Aerospace Limited)* [2013] UKSC 46. Lord Sumption observed (at [25]) that:
>
> > Res judicata and abuse of process are juridically very different. *Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation.*
>
> [Emphasis added in italics]

46 The Court of Appeal went on at [44] to observe that:

> It seems to us that the common thread linking the decisions relating to the doctrine of abuse of process is the courts' concern with managing and preventing multiplicity of litigation so as to ensure that justice is achieved for all. … It is important to also emphasise not only the *fact-sensitive* nature of the

> inquiry that is entailed in apply the rule in *Henderson* but also the *strict limits* within which such a rule will be applied … the court will exercise its discretion in such a way as to strike a balance between allowing a litigant with a genuine claim to have his day in court on the one hand and ensuring that the litigation process would not be unduly oppressive to the defendant on the other …
>
> [Emphasis original]

47 The policy reasons underlying the doctrine were further examined in *Antariksa Logistics Pte Ltd and others v Nurdian Cuaca and others* [2018] 3 SLR 117 ("*Antariksa Logistics*"), where George Wei J expressed the view (at [82] of that judgment) that the doctrine aims to bring finality to litigation and avoid multiplicity of proceedings. This promotes the public interest of efficiency and economy in the conduct of litigation, and also prevents litigants from being oppressed and unfairly harassed by legal proceedings. At [77] of *Antariksa Logistics*, Wei J outlined the test for the extended doctrine of *res judicata*. Specifically, the focus is on whether, "in all the circumstances, a party is abusing the process of the court by seeking to raise before it an issue *which could have been raised before*" (emphasis added). The Court may also consider other factors, including whether there are *bona fide* reasons an issue that ought to have been raised in the earlier action was not raised, and whether, holistically speaking, the later proceedings are in substance nothing more than a collateral attack on the previous decision.

48 What is evident from my summary of the applicable legal principles is that the extended doctrine of *res judicata*, unlike cause of action estoppel and issue estoppel, is based on a more pragmatic rationale of not allowing parties to repeatedly come to court for matters which should have been dealt with in earlier proceedings. The extended doctrine is more concerned with the proper administration of justice than the fact that parties' rights have been extinguished

by reason of an estoppel. Cause of action estoppel and issue estoppel are unified on the basis that they address considerations which had in fact been raised in earlier proceedings, but the extended doctrine of *res judicata* goes beyond that to consider points which *should have* been raised, but were not in fact raised.

The key issues

49 The main issue for my determination is whether, on a holistic assessment, there is a proper basis to strike out the plaintiff's three heads of claim, notwithstanding the high threshold that must be crossed in order to warrant doing so. In deciding this point, I will consider each of the plaintiff's heads of claims in turn.

50 In relation to the plaintiff's claims for lawful and unlawful means conspiracy against the first to ninth defendants, my analysis centres on whether these claims are barred by the doctrine of *res judicata* in all its three iterations as outlined at [40] above, and thus whether they should be struck out under O 18 r 19(1)(*b*) and/or (*d*) of the ROC.

51 In relation to the plaintiff's claim against the first and second defendants in the tort of intimidation, I will consider the plaintiff's revised position on that claim (see [122] below), as well as the first defendant's arguments to have the revised claim struck out on all four limbs of O 18 r 19(1) of the ROC.

The plaintiff's claims for the torts of lawful and unlawful means conspiracy

52 The plaintiff's claims for lawful and unlawful means conspiracy have consistently centred on two factual situations, as illustrated by its initial Statement of Claim (filed on 30 December 2015):

> 17. However:
>
> > (a) From early 2014, [the second defendant] used the Project to make unlawful demands for monetary gratification from [the plaintiff], and improperly interfered with and/or influenced [the third, fourth, and/or fifth defendants'] administration of the Contract in order to exert improper pressure on [the plaintiff] and/or to manufacture a case for a premature termination of the Contract; and
> >
> > (b) After the Contract was wrongfully terminated by [the first defendant], [the first defendant] conspired and/or combined with [the third, fourth, fifth, sixth, seventh, eighth, and/or ninth defendants] to make inflated, improper and/or unjustifiable claims for monies from [the plaintiff] purportedly pursuant to the termination of the Contract, *inter alia*, to trigger a call on the Performance Bond and put [the plaintiff] in financial peril.

53 The plaintiff's present claims in conspiracy are grounded on the same two factual matrices, as outlined in its Statement of Claim (Amendment No. 1) dated 9 September 2019 ("ASOC"), save that the claims have been amended to reflect the arbitrator's finding that the Contract had been validly terminated. Before me, counsel for the plaintiff described these two factual matrices as two "sub-plots" to the conspiracy it was alleging, as follows:

(a) The first "sub-plot" pertains to the plaintiff's allegations of a conspiracy between, *inter alia*, the first to fifth defendants to procure the issuance of ADs and Notices which eventually gave rise to the first defendant's termination of the Contract.

(b) The second "sub-plot" concerns the plaintiff's allegations of a conspiracy between, in particular, the first, second, sixth, seventh, eighth and/or ninth defendants to structure the replacement tender in such a manner as to ensure the appointment of the sixth defendant as the replacement contractor, and, more significantly, to maximise costs and

> thereby inflate the amount claimable from the plaintiff following the first defendant's termination of the Contract.

It bears note that the first "sub-plot" goes towards the allegedly wrongful issuance of ADs and Notices giving rise to termination of the Contract. The second "sub-plot", by contrast, goes towards the manner in which the replacement contract was procured and priced. The latter, unlike the first "sub-plot", deals with events *after* the termination of the Contract.

54 It would be clear from my description of the two "sub-plots" above that each "sub-plot" is actually a separate cause of action for conspiracy. Specifically, each "sub-plot" describes a standalone conspiracy, and each of the two "sub-plots" therefore provides a factual basis for claims in lawful and unlawful means conspiracy. Viewed in totality, it would be more accurate, technically, to identify *four* claims in conspiracy by the plaintiff. These are claims in lawful and unlawful means conspiracy arising from the first "sub-plot", and further claims in lawful and unlawful means conspiracy arising from the second "sub-plot". The specific unlawful means being alleged in the first "sub-plot" refer to the issuance of wrongful and unwarranted ADs, Notices and Termination Certificates, while the unlawful means asserted in relation to the second "sub-plot" appear to include acts targeted at having the sixth defendant appointed as the replacement contractor for the Project, as well as the inflation of the increased costs of completing the Project payable by the plaintiff.

55 In this application, I am not being asked to assess the merits of the distinction between the pleaded cases of lawful and unlawful means conspiracy. In any event, in my view, it is not necessary to distinguish between lawful and unlawful means conspiracy for the purposes of my analysis of the striking out

application, whether for the first or second "sub-plot" of conspiracy. This is because, as I will go on to explain, the main thrust of the striking out application is that the issues of (a) whether there is *agreement* between the various alleged conspirators, and (b) whether the plaintiff has suffered any *recoverable loss* from those conspiracies, have both already been decided in the Arbitration. Hence, the first defendant argues, the doctrine of *res judicata* bars the bringing of *all* these conspiracy claims in these proceedings. As these issues of agreement and loss are critical elements of *both* lawful and unlawful means conspiracy, my conclusions on *res judicata* will determine whether the claims on these sub-plots should be permitted to go to trial, regardless of the type of conspiracy they relate to.

56 In seeking to strike out the plaintiff's claims in conspiracy, the first defendant relies on all three subspecies of *res judicata* outlined in *Goh Nellie* ([40] *supra*).[46] Given the commonality between cause of action estoppel and issue estoppel outlined at [48] above, I will consider those two subspecies of *res judicata* first, before moving on to consider, if necessary, the extended doctrine of *res judicata*.

57 As a subsidiary argument, the first defendant also argues that the plaintiff's claims for conspiracy ought to be struck out on the basis that the plaintiff's pleadings do not disclose any particulars about the alleged agreement entered into between the conspirators, *ie*, that the pleadings fail to particularise the essential elements making up the conspiracy, whether lawful or unlawful.[47] However, this subsidiary argument was not the focus of the oral submissions in

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46 1DSS at [98] to [199].

47 1DSS at [208] to [220].

the hearing before me. This is quite understandable, given that a striking out application based on insufficiency of pleadings can, in most cases, be answered by the Court granting leave for the respondent to amend its pleadings, with a sanction of costs. There is often little profit to be gained in such applications, save to improve the state of the pleadings. I will deal with this subsidiary argument if it becomes necessary for me to do so, that is, if I find that the arguments on striking out on the basis of *res judicata* fail.

58 I note for completeness, and as already mentioned, that the plaintiff has discontinued the action against the second to fifth defendants. My analysis on the plaintiff's claims in conspiracy focuses, in any event, only on the first defendant's application for striking out the claims that have been brought against it.

The first "sub-plot"

59 The first defendant argues that the plaintiff's claims in conspiracy arising from the first "sub-plot" should be struck out on the basis of cause of action estoppel, as well as issue estoppel. The first defendant further argues that the remedies claimed in relation to the first "sub-plot" had already been sought in the Arbitration.

Cause of action estoppel

60 The crux of cause of action estoppel is, as the plaintiff pithily points out in its submissions, that a party will be barred from asserting or denying a cause of action that has already been determined by a competent court in previous

litigation between the parties (see also above at [41]).[48] The four requirements for cause of action estoppel, as outlined by the Court in *Zhang Run Zi*, have been set out above (see [42] *supra*).

61 The first requirement is satisfied as Partial Award 1 is a final and conclusive determination of the parties' disputes on their merits. The parties commenced the Arbitration pursuant to the arbitration clause they had agreed to at cl 37 of the SIA Conditions, and the resolution of the disputes is described in the clause as being subject to the "final" decision of the arbitrator. For completeness, I set out the relevant portion of the arbitration clause below:

> Any dispute between the [first defendant] and the [plaintiff] as to any matter arising under or out of or in connection with this Contract or under or out of or in connection with the carrying out of the Works and whether in contract or tort, or as to any direction or instruction or certificate of the Architect or as to the contents of or granting or refusal of or reasons for any such direction, instruction or certificate shall be referred to the arbitration and final decision of a person to be agreed by the parties …

The Arbitration dealt extensively with the parties' contentions on the various claims that were put forward by the plaintiff. In the process, voluminous factual and expert evidence on the contested issues was heard by the tribunal.[49]

62 My view that the Arbitration is a final and conclusive determination on the merits is buttressed by the fact that, as outlined at [24] above, all of the applications for leave to appeal questions of law arising from the Arbitration have been rejected or withdrawn. As the Court of Appeal observed in *AKN and*

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48 PSS at [33].

49 1DSS at [34].

another v ALC and others and other appeals [2016] 1 SLR 966 ("*AKN*") at [57], "[j]ust as finality is of significance to the courts, so too is it of importance to arbitration. Thus, the courts will typically not rehear matters that have already been determined in arbitration …". The Court of Appeal thus accepted in principle that arbitration awards can be final and conclusive determinations for the purposes of invoking *res judicata*. In any event, I note that the plaintiff does not appear to contest the finality and conclusiveness of the awards issued in the Arbitration.

63 Turning to the second requirement, I accept that the tribunal was a competent tribunal with jurisdiction over the parties. This flows from the fact that there was a valid and enforceable arbitration agreement between the parties, and a tribunal was constituted in accordance with the parties' arbitration agreement. The plaintiff does not appear to challenge this point, and any challenge by the plaintiff would in any event be inconsistent with its own acts recognising the validity and competence of the tribunal. These acts include acting in accordance with awards made by the tribunal.[50]

64 The third requirement is that there must be identity of parties. As Steven Chong J (as he then was) pointed out in *Cost Engineers (SEA) Pte Ltd and another v Chan Siew Lun* [2016] 1 SLR 137 at [58], albeit in the context of issue estoppel:

> I note that in *Soh Lay Lian Cherlyn*, the court doubted the decision in *Jaidin bin Jaiman* not only on the ground that there was no final and conclusive judgment on the merits but also on the basis that the requirement of an identity of parties had not been satisfied because the first action, unlike the second, did not involve the pillion rider. ***With respect, I think this***

[50] 1DSS at [113].

> ***objection takes too technical an approach to the requirement of an identity of parties. As was succinctly explained in Goh Nellie at [33], the focus of the inquiry into the identity of the parties is whether 'the principal players in both actions … are effectively identical'.*** In *Jaidin bin Jaiman*, the principal players – as far as the question of *liability* for the accident was concerned – were always the driver of the car and the motorcyclist. The pillion rider was both literally and figuratively a mere 'passenger' who did not contribute to the accident at all. Thus, in so far as the key question of the apportionment of liability between the two parties who caused the accident, the requirement of identity of parties in both actions had been met …
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> [Emphasis in italics original, emphasis in bold italics added]

I see no reason, in principle, why the above approach should not equally apply in the case of cause of action estoppel.

65 The view that "[i]dentity of parties is not viewed narrowly" is also echoed at [40] of *Tan Bee Hoon (executrix for the estate of Quek Cher Choi, deceased) and another v Quek Hung Heong and others* [2015] SGHC 229. In a similar vein, this Court also concluded in *Goh Nellie* at [33] that, notwithstanding the fact that the parties to both actions were not exactly identical, identity of parties existed because "the principal players in both actions … are *effectively* identical" (emphasis added).

66 In this context, I am of the view that it would be simplistic to take the position that there is no identity of parties *purely because* the Arbitration only involved the plaintiff and first defendant, while Suit 1274 includes other defendants. This formalistic approach should be eschewed in favour of recognising that the allegations in relation to the first "sub-plot" mainly concern the plaintiff on one side, and the first defendant on the other. The second to fifth defendants are said to have conspired with the first defendant against the plaintiff for this first "sub-plot". It is the first defendant which is at the centre

of the conspiracy because, according to the plaintiff, it is the party that wanted to get rid of the plaintiff as the main contractor, and which had enlisted the help of the architects to achieve this end by the issuing of the relevant Notices and Termination Certificates. Further, it is the first defendant that stands to gain the most financially from this first "sub-plot". In my judgment, the principal players in both actions are effectively identical, and the requirement of identity of parties is met on the instant facts.

67 Turning to the final requirement, that there is identity of causes of action, it was observed at [44] of *Zhang Run Zi* ([42] *supra*) that:

> In coming to this view, I noted the emphasis that previous authorities on cause of action estoppel have placed on the substance of the subject matter of the cause of action, rather than mere differences or similarities in the form of the action. In particular, previous authorities have placed focus on the identity of the *facts pleaded,* rather than the *legal points or forms of action* raised.
>
> [Emphasis original]

68 The Court then went on to consider a number of authorities, and distilled the principle outlined therein as follows, at [49]:

> The above cases clearly demonstrate that the requirement of an identity of cause of action is satisfied as long as the plaintiff seeks to rely on the *same matrix of facts* which were the subject of previous proceedings. It does not matter that legally speaking, the claims are characterised differently. Parties cannot, normally, re-open proceedings over the *same set of facts*.
>
> [Emphasis original]

69 In *Zhang Run Zi*, the Court went on to strike out the plaintiff's claims on the basis, *inter alia*, that cause of action estoppel applied, notwithstanding the fact that the heads of claim relied on by the plaintiff in *Zhang Run Zi*

(namely, misrepresentation and breach of contract) were not expressly pleaded in the earlier proceedings: [72] to [74] of *Zhang Run Zi*.

70 I agree with the reasoning in *Zhang Run Zi* that, in ascertaining the identity of causes of action, reference should be had to the *substance* of the claims and the facts relied upon, and not the *form* of the cause of action invoked. In my view, this means that the task of the Court is to examine the matrix of factual allegations that the plaintiff is relying on to support its claim to relief, and to determine whether the same set of factual allegations was raised and adjudicated upon in the previous proceedings. The Court does not simply accept the labels applied by the parties to the claims in the later legal proceedings. In other words, the fact that the claim in the Arbitration is a claim for breach of contract, while the plaintiff raises claims for conspiracy in the present proceedings, is not determinative of whether cause of action estoppel can apply.

71 For the first "sub-plot", there are two central bases upon which the first defendant asserts that identity of causes of action is present. First, the plaintiff is relying on materially the same facts to establish the first "sub-plot" in Suit 1274 as it sought to rely on to establish a wrongful and unjustifiable termination of the Contract in the Arbitration. Second, the plaintiff is, in effect, seeking the same remedies as it was seeking in the Arbitration. I examine these arguments below.

72 In seeking to establish its claim for conspiracy in relation to the first "sub-plot" in Suit 1274, the plaintiff pleads, *inter alia*, in its ASOC the following facts to establish that claim:

(a) First, the plaintiff asserts that, in the first quarter of 2014, the second defendant made unlawful demands for monetary gratification

from the plaintiff. It further asserts that many invalid ADs were issued by the architects (whether at the direction of the second defendant or otherwise), and that the plaintiff was *flooded* with "an excessively high number of ADs in August and September 2014" by the second, third, fourth, and fifth defendants.[51]

(b) The plaintiff then outlines a further series of instances in its ASOC where the second plaintiff had allegedly demanded monetary gratification from it.[52] This leads to the key claim made by the plaintiff that, "(d)ue to [the second defendant's] failure to obtain the monetary gratification that he sought … [the second defendant] and the other Defendants (or any two or more of them) did conspire in the manner pleaded … above".[53]

(c) The plaintiff then proceeds to outline in its ASOC the *effects* of the alleged conspiracy.[54] These include claims that the first, second, third, fourth and/or fifth defendants had "conspired and or combined with each other to cause a Notice of Termination dated 24 October 2014 to be issued to [the plaintiff] and the Contract to be terminated".[55]

(d) The plaintiff also provides further particulars of how the conspiracy came to fruition, namely through the issuance of ADs by the

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51 ASOC at [17].

52 ASOC from [19D] to [23].

53 ASOC at [23A].

54 ASOC from [19] to [19C].

55 ASOC at [19A].

third defendant.[56] One such AD, which the plaintiffs alleged to be unwarranted, was AD 42 of 2014, which required the plaintiff to remove already constructed brickwalls and replace them using a "full English bond".[57] Other such particulars include allegedly increasing the rate of ADs being issued as the date which the first defendant "purported" to terminate the Contract approached. The plaintiff further set out a table outlining how the number of ADs issued had increased from eight in February 2014 to 39 in September 2014.[58]

(e) The plaintiff finally ties together the various elements of the tort of conspiracy and asserts that Termination Certificate 262 issued by the first defendant was "in furtherance of the conspiracy pleaded above".[59]

The endpoint of the plaintiff's pleadings in Suit 1274 in relation to this first "sub-plot" is clear. In gist, the plaintiff asserts that the defendants came together in pursuance of a conspiracy to cause the plaintiff loss, carried out the conspiracy by causing the issuance of wrongful and unwarranted ADs, and finally issued the Notices, two of which eventually gave rise to Termination, in furtherance of the conspiracy.

73 The facts relied in relation to this first "sub-plot" in Suit 1274 are *strikingly similar* to those relied on in the Arbitration concerning the termination of the Contract. As the plaintiff itself recognises, the "Central Issue in the

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56 ASOC at [24].

57 ASOC at [24].

58 ASOC at [40(a)].

59 ASOC at [78].

Arbitration was whether Asplenium had validly terminated the Contract" (emphasis original) and "(w)hether the [third defendant] had, in the course of issuing the relevant Architect's Directions, Notices and the Termination Certificates, acted under improper pressure and interference by [the second defendant] or any other person acting on behalf of the [first defendant] and/or failed to act in accordance with his duties as an Architect".[60]

74 To further elaborate, one of the main facets of the plaintiff's case in the Arbitration for damages for breach of contract was that the first defendant had wrongfully repudiated the Contract by acting on, *inter alia*, Termination Certificate 262 issued by the third defendant when many of the ADs referred to in that termination certificate as not having been complied with were in fact invalid ADs *because* the first and/or second defendant had pressured the third defendant to issue them. Put another way, the third defendant had not acted *impartially or independently in the exercise of its own judgment* in deciding to issue many of the ADs, but had allowed itself to be influenced and pressured by the first defendant and its employees or agents, such as the second defendant, in doing so. As a result, these ADs set out in Termination Certificate 262 were invalid and could not be relied on as bases for the issuance of that termination certificate.

75 A review of the plaintiff's Statement of Case (Amendment No. 2) in the Arbitration ("SOCA") shows that the plaintiff relied on the following facts in the Arbitration in support of its cause of action that the first defendant had committed repudiatory breach of contract in terminating the Contract:

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[60] Third Affidavit of Goh Yong Hock dated 30 December 2019 ("GYH3") at [9].

(a) First, the plaintiff asserted that the first defendant had not validly terminated the Contract because there was no basis to issue the Termination Certificates relied on to terminate the Contract (see [12] above). The plaintiff asserted that the third defendant had no basis to issue Termination Certificate No. 260, and that notwithstanding the plaintiff already having taken all reasonable and available steps towards proceeding with diligence and due expedition in respect of the works, "the Architect nevertheless proceeded to issue Termination Certificate [No. 260] on the basis of the [plaintiff's] alleged non-compliance with Notice 260".[61] The plaintiff also averred in the SOCA that "[a]ny allegation that the [plaintiff] had failed to comply with the Architect's specific written directions is completely without basis and is strictly denied".[62] The plaintiff went to address ADs in relation to the brickwalls constructed as part of the Project.[63] The plaintiff's analysis of the brickwall issue formed the bulk of its analysis in relation to Termination Certificate No. 262, and the plaintiff further alleged in the SOCA that "several of the ADs issued by the [third defendant] did not relate to 'defects' *per se*, but rather were issued in respect of works that were still in progress", and that the "so called alleged defects, in any event, were frivolous and inconsequential".[64]

(b) Second, not only did the plaintiff assert that the Termination Certificates were issued without basis, it went on to allege that the third

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61 SOCA from [38] to [41].

62 SOCA from [42] to [45].

63 SOCA from [46] to [72].

64 SOCA at [73].

defendant had not acted independently in issuing the ADs.[65] In the SOCA, the plaintiff further claimed that "(d)uring the course of the Project, [the second defendant] had control over the issuance of ADs by the Consultants".[66]

(c) Third, the plaintiff alleged that the second defendant made several unlawful demands for monetary gratification,[67] and that these demands, among other things, "precluded the [first defendant] from relying on the effect and consequences of such acts on the progress of the Project Works to terminate the contract".[68]

As is evident from the above, the plaintiff's SOCA setting out its claim for breach of contract in the Arbitration centred on claims that (a) many of the ADs were without basis and had been improperly/wrongfully issued by the third defendant, (b) the third defendant had not acted independently in issuing the ADs, but was acting in concert with or under the influence of other parties, and (c) the second defendant's wrongful acts contributed to the limited progress of work on the Project and therefore could not be a basis for the first defendant to terminate the Contract.

76 At the arbitration hearing and in its submissions to the tribunal, as noted in Partial Award 1, part of the plaintiff's case was that:[69]

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65 SOCA at [77].

66 SOCA at [78].

67 SOCA from [97] to [99].

68 SOCA at [99A(e)].

69 Partial Award 1, Chapter 3, at [1].

> [T]he termination of its employment under the Contract was set up by [the first defendant] working 'hand in glove' with the Architect 'to orchestrate the backdrop for an ostensibly legitimate contractual termination'.

More pointedly, the plaintiff argued before the arbitrator that:[70]

> [T]he Architect worked 'hand in glove' with [the first defendant] to procure [the plaintiff's] termination by 'flooding' [the plaintiff] with ADs in August 2014.

77 The arbitrator devoted an entire chapter in his Partial Award 1 titled "Improper Pressure and Undue Influence" to deal with this aspect of the plaintiff's case. He specifically considered the allegations in relation to the improper pressure exerted on the third defendant by the first defendant and its agents or employees.[71] He concluded that the actions of the second defendant, as agent of the first defendant, did not establish that "improper pressure or undue influence" had operated on the third defendant for the issuance of the ADs and Notices which eventually formed the basis of Termination Certificates 260 and 262.[72] He also concluded separately that the conduct of the first defendant's CEO Mr William Liem did not have any effect on the third defendant's decisions to issue the ADs, Notices, and the Termination Certificates.[73] In all instances when it came to the issuance of ADs, the arbitrator found that the third defendant had acted independently and impartially, even though in certain situations it might have acted without due care and skill when a few of the ADs were issued. The arbitrator eventually concluded:[74]

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70 Partial Award 1, Chapter 3, at [165].

71 Partial Award 1, Chapter 3, at p 171.

72 Partial Award 1, Chapter 3, at [107].

73 Partial Award 1, Chapter 3, at [298] and [340].

74 Partial Award 1, Chapter 3, at [476].

> The Tribunal is satisfied that the ADs in this arbitration (including those which are held to be invalid or inappropriate as premises for termination) did not result from any dishonesty on the part of the Architect and the Consultants *or scheme of conspiracy between the Architect, Consultants and [the first defendant].*
>
> (Emphasis added)

78 I find that a comparison between the essential facts grounding the cause of action in the Arbitration for breach of contract and the cause of action in Suit 1274 for conspiracy, insofar as the first "sub-plot" in concerned, makes clear that they are materially similar, particularly in the following respects.

79 First, the key fact being relied on by the plaintiff in both Suit 1274 and the Arbitration is that the ADs issued by the third defendant were invalid and/or improper. In order for the plaintiff to have succeeded in its claim for breach of contract in the Arbitration, it was necessary for the arbitrator to have found that several ADs had been improperly issued because of illegitimate pressure exerted by the first and/or second defendant. The plaintiff's case in relation to the first "sub-plot" in this Suit 1274 is fundamentally similar – that the ADs were improperly issued pursuant to a conspiracy between, amongst others, the first to fifth defendants. The impropriety of the ADs is central to both causes of action.

80 Second, the notion that the third defendant was not independent is another essential similarity in both causes of action. The alleged non-independence of the third defendant was specifically relied on in the Arbitration to undermine the validity of the ADs issued, while the assertion that the architects were part of the first "sub-plot" in Suit 1274 *by definition* precludes

their independence and impartiality.[75] This latter point, in particular, is one which troubles me and for which the plaintiff's counsel was not able to satisfactorily address in his submissions before me. Put simply, since the arbitrator had found in his Partial Award 1 that the architects had acted independently and properly in the issuance of the ADs, how then is it possible for the plaintiff to argue that the first defendant had conspired with the architects to procure the wrongful issuance of the ADs without *necessarily* running into the estoppel that operates by reason of the arbitrator's decision on this point?

81 Third, the second defendant's acts in demanding monetary gratification were raised in the Arbitration, and now again in these proceedings. In the action for breach of contract in the Arbitration, the plaintiff claimed that the second defendant's acts, *inter alia*, improperly pressured or influenced the third defendant to issue the ADs, interfered with the plaintiff's progress on the Project, and/or constituted improper acts by the first defendant, which precluded the first defendant from relying on those acts to terminate the Contract.[76] In the alleged first "sub-plot" in Suit 1274, the second defendant's acts and the responses from the plaintiff are framed as having been a reason the second defendant sought to conspire with the other defendants to issue improper ADs.

82 All three of these aspects of the plaintiff's complaints were adjudicated upon in the Arbitration. While the tribunal recognised that some of the ADs were in fact invalid because they were, for example, not matters that should be properly covered by an AD or that the third defendant had been mistaken as to the facts when it issued the AD, he found that there was no basis to assert that

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75 SOCA at [77].

76 SOCA at [99A(e)].

any of the ADs that were issued were the result of illegitimate pressure or interference on the part of the first defendant or its agents. The arbitrator found that, at all times, the architects acted independently and were not influenced in their decisions concerning the ADs. Significantly, the arbitrator found that there were a number of ADs which were valid and which had *not* been complied with by the first defendant. These ADs provided sufficient basis for the issuance of Termination Certificates 260 and 262, which in turn permitted the first defendant to lawfully terminate the Contract with the plaintiff.[77] The tribunal also rejected any suggestion that the architects had acted improperly in collusion with the first defendant, and indicated that while they had occasionally erred, there was not enough to suggest that they had done so pursuant to any improper purpose or pressure in relation to the issuance of any of the ADs.[78] Further, the tribunal also accepted that the second defendant had behaved improperly in relation to the monetary gratifications that he sought, but that these acts did not cause the third defendant to issue invalid and unwarranted ADs.[79]

83 It can therefore be seen that, on all the above-mentioned aspects of the factual matrix relied upon, all three of which were central to the claims for breach of contract in the Arbitration and the claims for conspiracy in relation to the first "sub-plot" as pleaded in this suit, fundamental similarities exist.

84 I then consider the remedies to which the plaintiff claims to be entitled arising from these facts. It appears to me that the reliefs sought by the plaintiff

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77 PSS at [14]. See in particular Partial Award 1 from [3.469] to [3.467], at WL3 from pp 1034 to 1036.

78 WL3 from pp 1034 to 1036.

79 WL3 at p 1034.

in relation to the first "sub-plot" in Suit 1274 are materially similar to those sought for breach of contract in the Arbitration. In the Arbitration, the plaintiff sought the following reliefs:

(a) A claim for loss of profits arising from the termination of the Contract;[80]

(b) A claim for work done under the schedule of works; [81]

(c) A claim for piped services installation;[82]

(d) A claim for prime cost and provisional sums, which take into account attendance and profit costs in respect of the various nominated and domestic subcontractors for the respective trades on the Project;[83]

(e) A claim for preliminaries;[84]

(f) A claim for materials on-site and rental charges for equipment, materials, and tools left on-site;[85]

(g) A claim for materials purchased or for which deposits had already been paid, but which remained off-site;[86]

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80 SOCA at [132].

81 SOCA at [104].

82 SOCA at [110].

83 SOCA at [112].

84 SOCA at [115].

85 SOCA at [119].

86 SOCA at [124].

(h) A claim for variation works;[87]

(i) The sum claimed by the first defendant in and in relation to the performance bond;[88] and

(j) A declaration that the Contract was wrongfully terminated by the first defendant.[89]

85 The plaintiff's claims in the present proceedings are substantially similar with the above-listed claims. In particular, the plaintiff seeks:[90]

(a) Loss of profit arising out of and/or related to the termination of the Contract;

(b) Loss and damage caused by the conduct of the replacement tender and the appointment of the sixth defendant;

(c) Costs and expenses incurred by the plaintiff in its attempts to comply fully with the ADs and Notices issued to it;

(d) Costs and expenses arising out of and/or related to the termination of the Contract, the call on the Performance Bond and disputes arising from the same, including but not limited to legal costs and disbursements and/or staff and managerial costs; and

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87 SOCA at [128].

88 SOCA at [132(3)].

89 SOCA at [132(1)].

90 ASOC at [97].

(e) Interest costs arising out of and/or related to the call on the Performance Bond.

86 For the purposes of my analysis at this juncture, I will only consider the reliefs that are being pursued by the plaintiff flowing from the alleged first "sub-plot". I will consider the reliefs sought that flow from the alleged second "sub-plot" when I consider (see [113] below) whether the claims in relation to that second "sub-plot" should be struck out on an application of the principles of issue estoppel.

87 From my review of the plaintiff's case, the main relief being pursued which flows from the first "sub-plot" is damages arising from the termination of the Contract. This is because the object of the first "sub-plot" was the termination of the Contract. As is immediately evident, the claim for loss of profit arising out of or related to the termination of the Contract in Suit 1274 is entirely similar to the claim made in the Arbitration for lost profits (see [84(a) above].

88 As for the claim in the present proceedings for recovery of the costs and expenses incurred by the plaintiff in trying to comply with the ADs and the Notices issued to it, this is in substance a claim for variations or additional works. Such a claim was already sought in the Arbitration (see [84(h)] above) and specifically rejected by the tribunal because of the plaintiff's non-compliance with the contractual conditions for such claims (see [89(b)] below).

89 An examination of the awards issued by the tribunal in the Arbitration makes especially clear that the remedies sought by the plaintiff in relation to the first "sub-plot" were already specifically addressed by the tribunal:

(a) In respect of the plaintiff seeking damages for loss of profit arising out of or in relation to the termination of the Contract, this was disposed of at the Arbitration by the tribunal deciding that the first defendant was entitled to terminate the Contract, meaning that by extension, the plaintiff was not entitled to damages for loss of profit.

(b) In relation to the plaintiff's claim for costs and expenses it incurred in attempting to comply fully with the ADs and Notices issued to it, this was fully addressed at the Arbitration:

(i) In relation to the variation works carried out by the plaintiff on the instructions of the architects, the tribunal specifically found that S$121,736.71, representing the value of the variation works, was to be added to the original Contract sum.[91] In reaching this figure, the tribunal adjusted the figures claimed by the plaintiffs in several categories of variation works, including, *inter alia*, floor finishes[92] and metalwork.[93]

(ii) Further, in relation to the plaintiff's claim for costs and expenses it incurred in attempting to comply with *invalid* ADs and Notices issued to it, the tribunal concluded that this claim was untenable because of the plaintiff's non-compliance with cl 1(5) of the SIA Conditions, which required the plaintiff to give prior notice in writing for claims for extra payment or

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91 Partial Award 3, Chapter 2, at [175] and [176].

92 Partial Award 3, Chapter 2, from [69] to [72].

93 Partial Award 3, Chapter 2, at [68].

> compensation for variation works.[94] Absent notice in writing, cl 1(5) provides that the contractor "shall be conclusively deemed to have undertaken to comply with the direction without an increase in the Contract Sum or any additional payment or compensation".[95] On the basis that no such notice in writing had been provided, the tribunal rejected the plaintiff's claims for costs and expenses incurred in complying with the invalid ADs.[96]

90 I accept that the plaintiff's claim in this Suit for its costs and expenses arising out of or in relation to the termination of the Contract, the call on the performance bond, and the disputes arising from those developments, are not fully encompassed by the claims in the Arbitration. This is unsurprising given that the plaintiff, by seeking the legal costs of the entire Arbitration, is in effect attempting to subsume and reverse the awards and costs ordered in the Arbitration through this claim. I do not accept that this claim is legitimate because it is little more than a collateral attack the arbitrator's findings in the Arbitration. If one refers to the fact that the plaintiff is seeking the *full* cost of the Arbitration and the legal proceedings because of the alleged conspiracy (which is claimed to have given rise to the termination of the Contract), it becomes immediately apparent that the plaintiff is, in effect, seeking to "un-do" the effect of the awards issued in the Arbitration.[97] The plaintiff's claim for the entirety of the legal costs involved in the Arbitration would render the awards made by the arbitrator utterly nugatory and bereft of actual effect. For example,

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94 Partial Award 1, Chapter 2, at [128] and [129].

95 First Affidavit of William Liem alias William Nuraslim ("WL1") at p 72.

96 Partial Award 3, Chapter 2, at [239]

97 ASOC at [97(d)].

the S$4,162,000 the first defendant was awarded as costs for the liability phase of the Arbitration in Partial Award 2 would be rendered entirely pointless if the first defendant is liable in Suit 1274, jointly and severally with the other defendants, to bear the *full S$11 million in costs for the Arbitration*.[98] I am not satisfied that there is a viable basis for the plaintiff's claim for its costs and expenses arising out of or in relation to the termination of the Contract, the call on the performance bond, and the disputes arising from those developments, and accordingly discount it from my consideration of the applicable reliefs.

91 What the above analysis on the reliefs being pursued in Suit 1274 underscores is the identity of causes of action on the instant facts. Not only does the cause of action in relation to the first "sub-plot" rely on the same material facts as the plaintiff had relied on in the Arbitration, the plaintiff seeks remedies for the first "sub-plot" which it had already sought in the Arbitration. In short, the same factual matrix is relied upon by the plaintiff to give rise to its claim to be entitled to substantially the same kind of reliefs in these legal proceedings. In my judgment, this illustrates that there is identity of causes of action, and given that all the four requirements for cause of action estoppel are met, cause of action estoppel applies in the present suit as a basis for striking out the plaintiff's claims for lawful and unlawful means conspiracy in relation to the first "sub-plot".

Issue estoppel

92 My findings in relation to cause of action estoppel above would in and of themselves suffice to address the application to strike out the first "sub-plot"

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98 1DSS at [113(a)].

of the plaintiff's claims in conspiracy. But, be that as it may, I will proceed to explain why I find that the claims arising out of that first "sub-plot" are nonetheless also untenable on the basis of issue estoppel, even if one is to take the strict view that the claim in the Arbitration was one for breach of contract and is conceptually distinct from the claims for conspiracy pleaded in this suit.

93 Of the requirements for issue estoppel outlined at [44] above, the first three are identical to the first three requirements for cause of action estoppel. The analysis on whether those three requirements are met is therefore similar (see above from [61] to [66]), and I do not propose to repeat it here. Rather, the central issue for present purposes is whether the fourth requirement, for identity of subject-matter, is met in relation to the first "sub-plot".

94 At [34] to [35] of *Goh Nellie* ([40] *supra*), the Court provided the following guidance on the fourth requirement:

> [34] … Firstly, the issues must be identical in the sense that the prior decision must traverse the same ground as the subsequent proceeding and the facts and circumstances giving rise to the earlier decision must not have changed or should be incapable of change. Where this is not the case, issue estoppel may not arise …
>
> [35] The second idea which is contained within the requirement of an identity of subject-matter is that the previous determination in question must have been fundamental and not merely collateral to the previous decision so that the decision could not stand without that determination …

95 Turning first to whether the Arbitration traverses the same ground as the present proceeding in relation to the first "sub-plot", I am of the view that it clearly does. The factual matrices in both the Arbitration and the first "sub-

plot" in Suit 1274 are similar, focusing on the origins of the Contract,[99] the second defendant's alleged wrongdoing,[100] the purported impropriety on the part of the architects,[101] the issuance of the ADs, and ultimately, the termination of the Contract. Both proceedings traverse the same ground and rely on, fundamentally, the same acts. In this regard, [72] to [75] above are instructive in illustrating how striking the similarities are in terms of the factual matrices relied upon.

96 The key determination by the arbitrator was that the Contract had been validly terminated.[102] This determination was reached despite the plaintiff's arguments at the Arbitration that the architects had behaved improperly, were improperly influenced by the first and/or second defendants, and/or had not acted in an independent manner in wrongfully issuing ADs which were without basis.[103] These arguments were central to the plaintiff's case at the Arbitration, and essentially the same points are being made in the present Suit – that the architects were party to a conspiracy with the first and second defendants pursuant to which they acted improperly in issuing ADs and, eventually, the Termination Certificates.

97 The basis of the determination by the arbitrator that the Contract had been validly terminated was, in effect, that the ADs had been issued validly, formed a sound basis for the Notices, and that the termination was ultimately

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99 ASOC from [8] to [19].

100 SOCA at [99A(e)].

101 SOCA at [78].

102 PSS at [14].

103 See for example, SOCA from [77] to [83].

warranted. The facts and circumstances giving rise to this determination have not changed and are not capable of change given that the ADs, Notices, and Termination are all past events. My attention has not been drawn to any fresh evidence that will change that factual matrix.

98 As to whether the arbitrator's determination on these issues was fundamental to his decision, I am of the view that it clearly was. It was at the very heart of the tribunal's decision as to liability for breach of contract.[104] If the arbitrator had *not* found in favour of the first defendant on these issues as to the independence of the third defendant and the validity of the ADs, he would not have found that the first defendant had validly terminated the Contract. This is made clear by the arbitrator's finding as to the applicable legal principle that, if the third defendant had not acted independently in issuing *any* of the ADs referred to in the Termination Certificates, this would have rendered the certificate(s) invalid and ineffective notwithstanding the existence of other ADs referred to in the Termination Certificates which were not tainted. Specifically, the arbitrator found in Partial Award 1 that:[105]

> [231] The result of this analysis may be summarized as follows:
>
> (a) Where one or more of the 31 ADs is/are found to be invalid by reason of improper pressure and undue influence, the general position is that the tainted ADs are invalid. To the extent that any of these invalid ADs form the basis of a Termination Certificate, then notwithstanding that the Termination Certificate also relies on other ADs which are valid, that Certificate itself is invalid.
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> (b) Conversely if the Termination Certificate is found to rely on certain ADs which are found to be invalid but

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104 1DSS at [94].

105 Partial Award 1, Chapter 2, at [231].

> the invalidity is not the result of any improper pressure or undue influence being applied on the Architect, the invalid ADs may be severed and the Termination Certificate remains valid for the purposes of terminating [the plaintiff's] employment on the basis [of] the remaining valid ADs.

99 The effect of this finding by the arbitrator cannot be overstated. The arbitrator, in finding that the termination of the Contract was valid, found that *none* of the ADs relied on in Termination Certificates 260 and 262 were tainted by improper pressure and/or undue influence. Put another way, the arbitrator rejected *any* suggestion that the third defendant had acted improperly under the influence of the first defendant or in a non-independent manner in relation to *all* of the ADs relied on in Termination Certificates 260 and 262. In the present Suit, for the plaintiff to establish that there was a conspiracy, it would necessarily have to show that that the first defendant had asked for, and the architects had agreed to, the issuance of ADs which were not the product of their independent decision-making. That would effectively require this Court to come to a view that is the opposite of what the arbitrator had found in relation to the independence of the third defendant and the validity of each of the ADs. A finding of conspiracy in this Suit would therefore *necessarily* impugn the arbitrator's findings, which were fundamental to his decision in the Arbitration. Such a collateral attack on a previous binding decision of a properly-constituted tribunal is precisely what the doctrine of issue estoppel seeks to prevent.

100 In reaching this conclusion, I bore in mind the observation by the Court at [37] of *Goh Nellie* ([40] *supra*), that:

> … In my judgment, the assessment of which side of the line an issue falls should be approached from a commonsensical perspective, balancing between the important public interest in securing finality and in ensuring that the same issues are not repeatedly litigated on one hand, and on the other, the private

> interest in not foreclosing a litigant from arguing an issue which, in substance, was not the central issue decided by a previous court …

Having reference to the full panoply of legal proceedings which have transpired between the parties, I am satisfied that the plaintiff has had ample opportunity to ventilate its entire suite of arguments.[106] I do not agree with the plaintiff's counsel's submission that finding an issue estoppel on the present facts would foreclose the plaintiff from arguing an issue which was not the central issue decided in the Arbitration. Rather, it is quite the reverse – the plaintiff succeeding in Suit 1274 that there was a conspiracy *necessitates* a finding that the conspiracy gave rise to the termination of the Contract, which caused the plaintiff to suffer loss. The plaintiff succeeding in the present suit would undoubtedly undermine the arbitrator's findings that (a) there was no collusion, (b) the third defendant was independent in his decision-making, (c) none of the ADs were tainted and invalid by reason of improper pressure, (d) the first defendant's termination of the Contract was therefore justified, and (e) that the plaintiff is accordingly not entitled to damages from the termination of the Contract. I do not accept, given the totality of the circumstances, that the plaintiff should be permitted to re-litigate these points.

101 Given my finding that all the requirements for issue estoppel are met in relation to the first "sub-plot", I conclude that the plaintiff's claims in conspiracy relating to the first "sub-plot" are precluded on the basis of *both* issue estoppel and cause of action estoppel (see [60] to [100] above). I therefore agree

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106 See [23] to [29] above.

with the first defendant that there is a proper basis to strike out those claims under O 18 r 19(1)(*b*) and/or (*d*) of the ROC.[107]

The second "sub-plot"

102 I now turn to the question of whether the plaintiff's claims in conspiracy arising from the second "sub-plot" should be struck out on the basis of issue estoppel. In this regard, the first defendant argues that the *issues* underlying the remedies claimed for the second "sub-plot" were already dealt with in the Arbitration.

103 I note for completeness that cause of action estoppel is not applicable in relation to the second "sub-plot" because the thrust of the arbitrator's findings in the Arbitration went towards, as the plaintiff rightly points out, whether the termination of the Contract was lawful.[108] The crux of the cause of action in the Arbitration was thus one which was logically *prior* to the cause of action in the second "sub-plot". Specifically, the cause of action in the second "sub-plot", namely the alleged conspiracy relating to the replacement tender and replacement costs, could only arise *after* the Contract was terminated. I am thus not satisfied that there is adequate identity of causes of action between the second "sub-plot" and the claim in the Arbitration. In any event, the first defendant does not appear to have seriously pursued its argument on cause of action estoppel specifically in the context of the second "sub-plot", with the bulk of its submissions on cause of action estoppel going towards the first "sub-plot" instead.

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107 1DSS at [200].

108 Minute Sheet of 9 March 2020 at p 3.

Issue estoppel

104 Turning to issue estoppel in relation to the second "sub-plot", the analysis on whether the first three requirements for issue estoppel are met largely mirrors what I have already outlined from [61] to [66] above. All that I would add is in relation to the third requirement that there must be identity of parties. It is fairly clear to me that when one examines the substance rather than the form of the second "sub-plot", it pits the plaintiff on one hand and the first defendant on the other, with the second, sixth, seventh, eighth and/or ninth defendants being alleged to have colluded with the first defendant in relation the appointment of the sixth defendant as the replacement contractor and fixing the replacement tender price. The centrality of the first defendant to both the Arbitration and to the second "sub-plot" of the alleged conspiracy is clear – the first defendant is after all the party with the most to gain from the alleged second "sub-plot" given that it is the party which receives the moneys claimed under the performance bond. I am thus satisfied that there is identity of parties in relation to the second "sub-plot". The crux of my analysis in relation to issue estoppel in the context of the second "sub-plot" is therefore on the remaining requirement, that is, on whether there is identity of subject-matter.

105 The Arbitration, and in particular the tribunal's findings in Partial Award 3, traverses the same ground that the plaintiff is seeking to rely on for the second "sub-plot". Partial Award 3 concerns the quantum phase of the Arbitration, where the tribunal had the task of determining what sums were due to either the plaintiff or the first defendant, flowing from his findings on liability in Partial Award 1. The plaintiff made two main allegations on this matter at the Arbitration: first, that the first defendant had already decided to appoint the sixth defendant as the replacement contractor even before any tender, and second,

that the costs that the plaintiff had purported to pay the new contractor, the sixth defendant, were inflated and excessive. The plaintiff also alleged the involvement of, *inter alia*, the second, sixth, and ninth defendants in the appointment of the sixth defendant as the replacement main contractor. Specifically, the plaintiff pointed to a "series of exchanges between the [second defendant] and the [first defendant's] Quantity Surveyor [the ninth defendant] on 6 September 2014 [referring] to an 'express negotiation' between the [first defendant] and the [sixth defendant]" for the purpose of "stack[ing] the deck in favour of the [sixth defendant]".[109] Further, the replacement tender price was alleged to have been inflated, which had the effect of allowing the first defendant to claim a larger sum in damages, in the form of increased costs of completing the Project, from the plaintiff.[110]

106 In Partial Award 3, the tribunal already dealt, in considerable detail, with both these allegations. In particular, the tribunal found that there was no impropriety with the first defendant's appointment of the sixth defendant as the replacement main contractor. Further, the tribunal specifically considered whether the sums claimed by the first defendant arising from the appointment of the sixth defendant as the replacement main contractor were unreasonable and/or inflated when the issue of the net amount due (taking into account the amount paid under the performance bond) between the plaintiff and first defendant was determined. I will illustrate how the tribunal's approach in Partial Award 3 is directly relevant to the instant proceedings by outlining the

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109 See Partial Award 3, Chapter 3, at [43] and [63].

110 See Partial Award 3, Chapter 3, at [63].

plaintiff's arguments before the tribunal, the tribunal's findings, and how those findings give rise to issue estoppels.

107 In the Arbitration, the plaintiff made, *inter alia*, the following arguments as to the costs incurred in order to complete the Project after the plaintiff's termination as main contractor (the "replacement costs"):

(a) The first defendant's replacement costs were "excessive" and "failed to properly take into account", among other things, "the value and nature of works completed by the [plaintiff]", "the value and nature of outstanding works to be completed by the replacement contractor", "the value of plant, machinery, equipment, tools and material left on site by the [plaintiff] at the point of termination", "the value of any alleged rectification works required to be carried out by the replacement contractor" and "the value and nature of work that the replacement contractor tendered for in its bid proposals".[111] Put in other words, the plaintiff contended that the amount the first defendant purported to have to pay the replacement contractor, the sixth defendant, undervalued the work done by the plaintiff while over-estimating the work the sixth defendant had to do in order to complete the project.

(b) The replacement costs should be confined to the balance works under the Contract and there can be no change in the scope of work, meaning that the first defendant is not entitled to claim for design and consulting fees as part of the replacement costs.[112]

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111 Reply and Defence to Counterclaim in the Arbitration ("RDCCA") at [107] and [107(a)] and [107(b)] in particular.

112 RDCCA at [108(a)].

(c) The replacement costs should not include the cost of additional site staff to supervise the remaining works and for overtime charges as there does not appear to be basis for these additional site staff.[113]

108 Hence, the plaintiff did in fact argue at the quantum phase of the Arbitration that the replacement costs were inflated. Specific examples of such inflation were provided, and were directly responded to in the first defendant's pleadings at the Arbitration.[114] Given the plaintiff's arguments at the Arbitration and how they were specifically responded to by the first defendant, the tribunal proceeded to address the specific issues concerning whether the replacement costs were reasonable. In particular, the tribunal made, *inter alia*, the following findings:

(a) The tribunal found that it was not unreasonable for the first defendant to have preferred a "more reliable contractor", *ie*, the sixth defendant, to complete the remaining works, even if this were to result in an increase in costs, "provided that this increase is not disproportionate".[115] The tribunal concluded that "[f]rom an examination of the factual matrix, the Tribunal is unable to find unreasonableness in the [first defendant's] conduct on account of its declared preference for [the sixth defendant]".[116]

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113 RDCCA at [108(b)].

114 See Rejoinder and Reply to Defence to Counterclaim (Amendment No. 1) in the Arbitration from [104] to [114].

115 Partial Award 3, Chapter 3, at [49].

116 Partial Award 3, Chapter 3, at [50].

(b) The tribunal did not find any issue with the absence of any adjustment to the tender price for work done by the plaintiff after 31 August 2014 even though the Contract was terminated on 24 October 2014.[117] In other words, the tribunal was of the view that the work done by the plaintiff between 31 August 2014 and 24 October 2014 did not significantly affect the remaining cost of completion which the first defendant had to pay to the sixth defendant. Further, the tribunal did not find it objectionable that there was no adjustment to the sixth defendant's tender price even though the sixth defendant received an extension of time for completion from six to eight-and-a-half months.[118]

(c) The tribunal rejected the plaintiff's argument that the cost of the sixth defendant's preliminaries (including scaffolding etc) should be reduced by S$3,069,000.[119]

(d) The tribunal rejected 15 of the first defendant's 21 claims for back-charges against the plaintiff.[120] This reduced the claimed back-charges by the first defendant in relation to the replacement tender from S$3,000,000 to S$670,481.43, a reduction of S$2,329,518.57.[121]

(e) The tribunal, while rejecting the view put forward by the first defendant's expert that the work done by the eighth defendant in relation to the replacement tender exercise was worth S$22,400, also declined to

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117 Partial Award 3, Chapter 3, at [87] to [93].

118 Partial Award 3, Chapter 3, at [94] to [96].

119 Partial Award 3, Chapter 3, at [182].

120 Partial Award 3, Chapter 3, at [254].

121 Partial Award 3, Chapter 3, at [256].

accept the plaintiff's figure of S$12,000.[122] On an analysis of the evidence, the tribunal reached a figure of S$18,000 for that element of the work done instead.[123]

109 As is evident from the above, the tribunal specifically addressed questions of the reasonableness of the replacement costs. Insofar as the tribunal was of the view that certain claims as to the replacement costs were inflated, those claims were accordingly reduced. Where the tribunal disagreed that elements of the replacement costs were inflated or unwarranted, they were maintained. This led ultimately to the tribunal's determination that the reasonable costs of completing the entire Project was S$88,915,291.44.[124] Taking the difference between the reasonable costs of completion as determined by the tribunal, as well as the adjusted contract sum of the original Contract (S$87,442,402.56), the tribunal found that the damage suffered by the first defendant as a result of the breach of contract was S$1,472,888.88.[125] Because the first defendant had already been paid S$8,806,383.30 under the performance bond, the net amount due from the first defendant to be plaintiff was, after accounting for GST and the liquidated damages due, S$6,492,392.20.

110 Each of the tribunal's findings in relation to each of the elements of the replacement costs outlined from [108(a)] to [108(e)] above is capable of giving rise to an issue estoppel. Each of those findings is fundamental to the tribunal's eventual decision as to the reasonable sum payable to the replacement contractor

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122 Partial Award 3, Chapter 3, at [283].

123 Partial Award 3, Chapter 3, at [284].

124 Partial Award 3, Chapter 3, at [369].

125 Partial Award 3, Chapter 4, at [1].

to complete the project, and hence the sum payable by the first defendant to the plaintiff after accounting for the first defendant's call on the performance bond. Had the tribunal reached a different position on *any* of the elements of the replacement costs outlined above, its conclusions as to the relevant sums payable, which was the very issue it was supposed to determine in the quantum phase of the Arbitration, would have been different. Put another way, it logically flows that the tribunal's determinations as to the appropriate quantum for the *components* of the overall cost of completion would be fundamental to the eventual overall cost of completion (and amount of shortfall payable by the first defendant after accounting for the performance bond).

111 The tribunal has therefore already traversed the issue of whether or not the replacement costs are inflated, and has reached several specific findings on that point. Among other things, the tribunal did in fact find that a number of elements of the replacement costs were overpriced (see for example, [108(d)] above), and reduced the sum that the plaintiff was liable for accordingly.

112 In Suit 1274, the plaintiff's case is that the costs of the replacement tender are inflated, and that the inflated sum was reached pursuant to a conspiracy between the first, second, sixth, seventh, eighth and/or ninth defendants. The Court is asked to award damages on the basis of that conspiracy and the inflated claim on the performance bond that arose as a result. The plaintiff's claims for this second "sub-plot" therefore require an assessment of (i) whether the replacement costs are in fact inflated, *and* (ii) whether that inflation was pursuant to a conspiracy. However, what the plaintiff's argument ignores is that the tribunal has adjudicated *the precise issue* of whether the replacement costs are inflated in determining the reasonable replacement costs and ultimate quantum payable in Partial Award 3. I am not satisfied that the

Court should have to re-assess each element of the replacement costs to determine whether that element has been inflated, when the tribunal has already done so. The tribunal has in fact *already* provided a legal remedy to the plaintiff by reducing the amount claimed by the first defendant as replacement costs in the Arbitration, and any remedy sought in relation to the second "sub-plot" in Suit 1274 would thus entail potential double-recovery.

113 My findings in this regard are buttressed by the fact that the issues underlying the reliefs sought by the plaintiff in relation to the second "sub-plot" have, for all intents and purposes, been subsumed by the plaintiff's claims in relation to the first "sub-plot". These issues have already been dealt with by the tribunal. To recapitulate, the plaintiff seeks the following reliefs in relation to the second "sub-plot":

(a) Loss and damage caused by the conduct of the replacement tender and the appointment of the sixth defendant; and

(b) Interest costs arising out of and/or related to the call on the Performance Bond.

114 As for the plaintiff's claims for loss and damage caused by the conduct of the replacement tender and the appointment of the sixth defendant, the plaintiff's position is that the main loss arising is that, but for the conduct of the replacement tender, the first defendant "would have no basis to call on the Performance Bond in the manner and to the extent that it did".[126] This claim for damages therefore fundamentally collapses into a claim for losses suffered as a

126 ASOC at [92].

result of the claim under the performance bond, and such a claim was already addressed by the tribunal through its determination in Partial Award 3 that the first defendant ought to pay S$6,405,536.34 to the plaintiff because it had over-claimed on the performance bond (see [18] above). The tribunal has therefore *already* determined the various issues which, in aggregate, determined the reasonable amount which could be claimed under the performance bond, and which gave rise to its eventual conclusion as to the applicable remedies. The plaintiff appears to simply be trying to re-litigate this point.

115 The plaintiff's claim for interest costs arising out of and/or related to the call on the performance bond may be fairly quickly dealt with because it was once again specifically adjudicated on by the tribunal. The tribunal found that the plaintiff was not entitled to such interest costs in view of cl 3.5.9 of the Contract, which provides that "the Employer … shall not for any reason whatsoever be liable for any interest on the over-payment …" even if the Employer, in this case the first defendant, was overpaid.[127] The tribunal's determination on this point effectively addresses an issue the plaintiff needs to traverse in its claim for interest costs, namely whether such interest costs are permissible under the terms of the Contract.

116 In sum, my analysis on the relief sought by the plaintiff in relation to the second "sub-plot" underscores why, on a holistic assessment of the facts (see [100] above), issue estoppel applies in relation to the second "sub-plot". Not only is the plaintiff relying on issues determined by the tribunal which were fundamental to the tribunal's decision, the remedies it is seeking in relation to

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127 Clause 3.5.9 of Exhibit CK-2 in CK1.

the second "sub-plot" require the Court to re-traverse issues which have already been decided at the Arbitration.

117 I therefore find that issue estoppel operates on the instant facts to bar the plaintiff's claims in conspiracy in relation to this second "sub-plot" as raised in Suit 1274. I am also of the view that, as with above at [91], nothing turns on the fact that the plaintiff is bringing claims in both lawful and unlawful means conspiracy in relation to the second "sub-plot". I therefore agree with the first defendant that there is sound basis on this ground to strike out the plaintiff's claims in relation to the second "sub-plot" under O 18 r 19(1)(*b*) and/or (*d*) of the ROC.

Extended doctrine of res judicata

118 Having found that both issue estoppel and cause of action estoppel apply to bar the plaintiff's claims in conspiracy against the defendants, it is not necessary for me to consider the parties' arguments as to whether the plaintiff's claims in conspiracy on both the first and second "sub-plots" should also be struck out on the basis of the extended doctrine of *res judicata*. In this regard, I am guided by the Court of Appeal's position in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 at [102] that the extended doctrine of *res judicata* extends beyond cause of action and issue estoppel "… to cases where [a particular] point was *not* raised in the earlier proceedings even though it could and should have been…" (emphasis added). Given my finding that the relevant points giving rise to both cause of action and issue estoppel *were* in fact raised at the Arbitration, the extended doctrine of *res judicata* does not arise on the instant facts.

The plaintiff's claim in the tort of intimidation

119 I turn now to the plaintiff's claim in the tort of intimidation against the first defendant. Broadly, the plaintiff alleges that the second defendant carried out various acts of intimidation against it, and that it acted in compliance with those threats and thereby suffered loss. These threats alleged by the plaintiff include the following:

(a) In around the first quarter of 2014, the second defendant made unlawful demands for monetary gratification from the plaintiff.[128] Specifically, the second defendant told the plaintiff's Mr Kwok Heng Leong, the plaintiff's senior project manager at the time, that he wanted an "ang pow" from the plaintiff.[129] The plaintiff complied with the request. The plaintiff's Mr Arasu handed over S$15,000 in cash in an "ang pow" to the second defendant on or around 30 January 2014 at Ichiban Sushi at the IMM Building.[130]

(b) Around the 2014 Chinese New Year period, the second defendant demanded monetary gratification from one Mr Veeramuthu (also known as "Mr Guna"), the Managing Director of the plaintiff's sub-contractor for brick works.[131] This was refused.

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128 ASOC at [17].

129 ASOC at [19D].

130 ASOC at [21] and [22].

131 ASOC at [23] and [23A]. SOCA at [99].

(c) In or around May 2014, the second defendant demanded that the plaintiff give him S$220,000, being 5% of half the retention moneys.[132] The plaintiff did not accede to this demand and the second defendant showed his displeasure by, *inter alia*, demanding that the plaintiff's key personnel such as Mr Jeffrey Odi, Mr Raj Kumar, and Mr Arumugam be removed from the project site.[133]

(d) In the week of 21 August 2014, the second defendant indicated to Mr Arasu that the plaintiff paid his management staff well, in the region of S$15,000 to S$20,000, but that the second defendant was not being paid for the help he was giving the plaintiff.[134] This is alleged to have been an implied threat that, unless the plaintiff paid the second defendant the sum of around S$15,000 to S$20,000, the second defendant would not co-operate with the plaintiff. Mr Arasu accordingly met with the second defendant at Orchard Parade Hotel and handed the second defendant S$20,000 in an "ang pow".[135]

(e) On 15 September 2014, the second defendant threatened to cause the first defendant to call on the performance bond and to bankrupt Mr Arasu such that he and his wife would have to "pack up and go back to India".[136]

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132 ASOC from [31] to [33]. SOCA at [98(b)].

133 ASOC at [35]. SOCA at [97(a) and (b)].

134 ASOC from [42] to [44]. SOCA at [98(d)].

135 ASOC at [46].

136 ASOC at [54A] and [54B]. SOCA at [98(f)].

The plaintiff's claim against the first defendant in the tort of intimidation is based on the first defendant being vicariously liable for the second defendant's abovementioned acts of intimidation.[137]

120 Before I consider the first defendant's application, it bears reiteration that the plaintiff has discontinued its action against the second defendant (see [22] above). This was done sometime after the second defendant's striking out application against the plaintiff (Summons No 5859 of 2019) was withdrawn in the course of the hearing. The remaining issue before me is therefore whether the plaintiff's claim in the tort of intimidation against the *first* defendant should be struck out.

121 The starting point in assessing the plaintiff's claim in intimidation is an examination of the elements of the tort. The first element is that the threat must be coercive in nature for the plaintiff to do something to his/her detriment, and the second is that the plaintiff must have in fact complied with the threat, to his/her detriment: *Ten Leu Jiun Jeanne-Marie v National University of Singapore* [2018] SGHC 158 at [110] and [111].

122 As has been rightly pointed out by the first defendant, even if one were to take the plaintiff's pleaded case at its highest, there are only *two* instances where Mr Arasu, the Managing Director of the plaintiff, actually complied with the threats allegedly made by the second defendant: the acts relating to the first and second "ang pows". These two episodes relating to the first and second "ang pows" are the *only* instances raised by the plaintiff where it, any of its contractors or sub-contractors, and/or Mr Arasu complied with any of the

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137 PSS at [16].

alleged threats by the second defendant. All the other pleaded instances of threats did not involve any compliance on the part of the recipients of the threats. Unsurprisingly thus, during oral argument before me, counsel for the plaintiff acknowledged that demands made by the second defendant which were *not* complied with would not give rise to claims in intimidation, and indicated that the plaintiff would therefore only be relying on the incident in relation to the first "ang pow" as the basis for its claim in intimidation.[138]

123 For completeness, I should add that, while this was not expressly stated, I presume that the plaintiff is not relying on the incident involving the second "ang pow" because it is common ground that the S$20,000 paid in the second "ang pow" was returned to Mr Arasu shortly after it was paid over, and the plaintiff therefore cannot be said to have suffered any loss as a result of it.[139] Either way, counsel for the plaintiff was clear that the incident relating to the first "ang pow" is the sole basis for its claim in intimidation against the first defendant.

124 In relation to the plaintiff's claim in intimidation in relation to the first "ang pow", the first defendant argues that it should be struck out on five grounds:

(a) First, the first defendant argues that Mr Arasu paid the second defendant the S$15,000 in the first "ang pow" at the second defendant's

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138 Minute Sheet of 9 March 2020 at Page 5.

139 1DSS at [255].

suggestion, and not pursuant to any coercive threat by the second defendant.[140]

(b) Second, the first "ang pow" given to the second defendant was *not* given on behalf of the plaintiff. Rather, the S$15,000 in the "ang pow" came from Mr Arasu's own pocket.[141] The plaintiff therefore has not suffered any loss in relation to the first "ang pow" and should not be permitted to mount a claim in intimidation for it.

(c) Third, the first defendant is not vicariously liable for the acts of the second defendant and should not be made vicariously liable.[142]

(d) Fourth, issue estoppel operates to bar the plaintiff's claim in intimidation because the tribunal had already decided that the third defendant had not acted under improper pressure and interference from the second defendant;[143] and

(e) Fifth, the extended doctrine of *res judicata* applies to preclude the plaintiff bringing its claim in intimidation on the basis of the first "ang pow" because the plaintiff should have brought its claim in intimidation at the Arbitration.[144]

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140 1DSS at [250].

141 1DSS at [257].

142 1DSS from [262] to [270].

143 1DSS from [274] to [278].

144 1DSS from [279] to [286].

125 The first three of the first defendant's arguments in this regard may be fairly swiftly dealt with. All three arguments entail highly fact-specific findings, such as whether there was a coercive threat in the first place, whether the S$15,000 in the first "ang pow" was from Mr Arasu's own funds or was loss suffered by the plaintiff, and whether the relationship between the second and first defendants was such that the first defendant should be vicariously liable for the second defendant asking for an "ang pow" from Mr Arasu. Given the questions of fact involved, I am of the view that assessing these issues at trial is the appropriate course of action. That would allow the entirety of the facts to be considered before the Court so that it can make the relevant findings as to what precisely occurred in relation to this incident and, in particular, what was actually said between the two persons involved and what the source of the funds for the "ang pow" was. These factual issues are disputed. Thus, I am not satisfied that this is a "plain and obvious" case of the type envisaged in *Gabriel Peter* ([31] *supra*) for striking out.

126 I am also not convinced that issue estoppel applies in relation to this incident regarding the first "ang pow" because I do not accept that the arbitrator's findings on the interaction between the second defendant and the plaintiff's Mr Arasu were *fundamental* to his eventual conclusions. Put simply, the arbitrator was ascertaining whether or not the architects had acted under improper pressure in issuing the ADs and Notices. His assessment of the *second defendant's interactions with Mr Arasu* were not fundamental to his conclusion that the architects had behaved properly and were not influenced by the second defendant. In other words, the arbitrator could have reached his central conclusion in Partial Award 1 that the architects had acted independently and not under any improper influence *even if* he had reached a completely different position on the interactions between the second defendant and Mr Arasu.

127 The point I make is underscored by the arbitrator's own explanation of his position *vis-à-vis* the second defendant's behaviour towards Mr Arasu and the plaintiff's employees and/or agents. In Partial Award 1, the arbitrator stated quite categorically that:[145]

> [62] The *focus of this inquiry should be properly focused on whether [the second defendant] had applied improper pressure to bear on the Architect* who discharges the role of certifier in issuing both the ADs and the certificates of this Contract. *Even if the [plaintiff] is correct that [the second defendant] is corrupt as alleged, it is necessary to explore whether [the second defendant] would have a motivation to exert such influence or pressure on the Architect.* The issue of gratification is *at best an ancillary issue* because for the purpose of this arbitration, the two issues which the Tribunal has to address is [*sic*] whether [the second defendant] is capable of influencing the Architect in the course of discharging his certification duties and secondly *whether the Architect was in fact influenced by [the second defendant] in carrying out these duties* …
>
> [Emphasis added]

As can be seen from this extract, the arbitrator was clear that the focus of his assessment was on the architects and whether or not they had behaved under the improper influence of the second defendant. The second defendant's exchange with the plaintiff's Mr Arasu was merely "ancillary". I accordingly do not accept that the arbitrator's findings on this narrow issue of the second defendant's exchanges with Mr Arasu were *fundamental* to his eventual conclusions, and reject the first defendant's reliance on issue estoppel to strike out this claim for intimidation in relation to the incident concerning the first "ang pow".

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145 Partial Award 1, Chapter 3, at [62].

128 As for the final basis on which the first defendant seeks the striking out of the plaintiff's claim in intimidation, I am not satisfied that the first defendant has clearly and convincingly shown that the extended doctrine of *res judicata* unquestionably applies to the claim. Put another way, the first defendant has not crossed the high hurdle for striking out, that is, it has not persuaded me that the plaintiff's claim for intimidation in relation to the first "ang pow" is undoubtedly barred by the extended doctrine of *res judicata* and is thus a hopeless claim. In my view, without the benefit of fuller argument, it is not entirely clear that the plaintiff *should* have raised a specific claim in intimidation for the first "ang pow" at the Arbitration given that the second defendant, who is alleged to be the primary tortfeasor, was not party to the arbitration. The liability of the secondary tortfeasor, the first defendant in this case, is premised on and secondary to the liability of the primary tortfeasor, the second defendant on the instant facts. As the Court of Appeal observed at [41] of *Ng Huat Seng and another v Munib Mohammad Madni and another* [2017] 2 SLR 1074, vicarious liability is a form of "secondary liability" which holds a defendant "*liable for the negligence of another* even if the defendant has not been negligent at all" (emphasis added).

129 In fact, the first defendant's arguments on the extended doctrine of *res judicata* in relation to the plaintiff's claims in intimidation raise an interesting question of law concerning the nature of secondary liability in the context of vicarious liability, and whether or not that secondary liability should be pursued in arbitration even if the primary tortfeasor is not a party to the arbitration. This question was not satisfactorily addressed before me. As the authors of *Singapore Civil Procedure 2020* observe at [18/19/6], "[i]f an action contains a point of law which requires serious argument, it is not appropriate to strike it out". In a similar vein, this Court observed in *Pacific Internet Ltd v Catcha.com*

Pte Ltd [2000] 1 SLR(R) 980 at [14], in the context of a dispute over, *inter alia*, copyright infringement and the use of website linking technology, that "[t]here is therefore novelty in both law and the technology of deep linking of websites, both of which require the most rigorous examination and scrutiny which only a full trial can ensure". On the present facts, I am not persuaded that the plaintiff's claim in intimidation relating to the first "ang pow" should be struck out without there having been full argument on the potential legal complexity that arises in relation to secondary liability as outlined above.

130 I note for completeness that it will be open to the first defendant, if it so chooses, to pursue this point that the extended doctrine of *res judicata* applies at the trial of the plaintiff's claim for intimidation. The point I make is simply that it is premature *at this stage* in proceedings to strike out the plaintiff's claim in full given the high threshold required for striking out.

131 On balance, I find that there is no basis for the first defendant to seek to strike out the plaintiff's claim in intimidation as relates to the first "ang pow". The plaintiff should have the opportunity to proceed to trial on this claim.

132 As for the other factual bases pleaded by the plaintiff which it relied on to support its claim in intimidation (including those outlined from [119(b)] to [119(e)] above), I am satisfied following the analysis from [121] to [122] above that they should be struck out under O 18 r 19(1)(*a*) and/or (*b*) of the ROC as disclosing no reasonable cause of action and/or being legally unsustainable (see *The Bunga Melati* at [39]). As counsel for the plaintiff rightly acknowledged, the only viable factual basis for the claim in intimidation is that relating to the first "ang pow".

Conclusion

133 The doctrine of *res judicata* plays an important role in Singapore's legal framework. As the High Court stated in *Zhang Run Zi* ([42] *supra*) at [50], referring to the Court of Appeal's decision in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2009] 1 SLR(R) 875:

> … [T]he public interest in finality of judicial decisions, as well as the right of individuals to be protected from vexatious multiplication of suits, are the twin principles of policy imperatives that underlie the doctrine of *res judicata*. Should parties be allowed to continuously re-litigate claims against the *same defendants* on the *same sets of facts* by raising new legal bases for their entitlement to a remedy or new legal arguments, the purposes of the doctrine of *res judicata* could easily be circumvented.
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> [Emphasis original].

134 On the instant facts, the plaintiffs have had ample opportunity to have their legal grievances heard. Dispute resolution proceedings have proceeded for an extended period of time, and parties have been subjected to rigorous cross-examination for the distilling of facts. I do not accept that the first defendant should be subjected to litigation on the exact same factual matrix when the substance of those claims has already been determined at the Arbitration, nor am I able to accept that the plaintiff should be permitted to argue claims in conspiracy which, if accepted, would *necessarily* impugn the findings of the arbitrator as to the validity of the Contract's termination and the proper allocation of the losses arising from the termination. There is strong public and private interest to the contrary.

135 Accordingly, the plaintiff's claims in conspiracy against the first defendant in Suit 1274 are struck out in their totality. The plaintiff's claims for

intimidation, save as relate to the procurement of the first "ang pow" of S$15,000, are also struck out.

136 I will deal with the issue of costs separately.

Ang Cheng Hock
Judge

Lee Sien Liang Joseph, Qabir Singh Sandhu and Yap Pei Yin (LVM Law Chambers LLC) for the plaintiff;
Chuah Chee Kian Christopher, Kua Lay Theng and Rachael Chong Rae-Hua (WongPartnership LLP) for the 1st defendant.