IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 208

Suit No 1085 of 2016
(Summons No 4275 of 2018)

Between

BLL

… *Plaintiff*

And

(1) BLM
(2) BLN

… *Defendants*

JUDGMENT

[*Res judicata*] — [Issue estoppel]
[*Res judicata*] — [Doctrine of abuse of court]

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v
BLM and another

[2019] SGHC 208

High Court — Suit No 1085 of 2016 (Summons No 4275 of 2018)
Valerie Thean J
29 April, 9 July 2019

10 September 2019 Judgment reserved.

Valerie Thean J:

Introduction

1 In a previous action, the Court of Appeal declared BLL, an octogenarian,[1] unable to make decisions regarding her property and affairs. Deputies were consequently appointed for her under the Mental Capacity Act (Cap 177A, 2010 Rev Ed) ("MCA"). These deputies have now commenced Suit No 1085 of 2016 ("S 1085/2016") against the defendants arising out of matters brought to light by the earlier suit. The youngest of BLL's three children, BLM, is the first defendant. BLM's husband, BLN, is the second defendant.

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1 Statement of claim para 14.

2 Summons No 4275 of 2018 ("SUM 4275/2018") was filed by consent to determine if the defendants are prevented, because of various findings made in the previous suit, from trying certain issues in S 1085/2016 by reason of issue estoppel and the extended doctrine of *res judicata*. The three preliminary questions contained in SUM 4275/2018 are the subject matter of this judgment.

Background

Originating Summons (Family) No 71 of 2011

3 Originating Summons (Family) No 71 of 2011 ("OSF 71/2011") provides the relevant context for the present suit.

4 In OSF 71/2011, commenced on 18 February 2011,[2] two of BLL's sisters ("the Sisters") applied under s 20 of the MCA for a declaration that BLL was unable to make decisions regarding her property and affairs, and for a consequential order that deputies be appointed to make all decisions regarding such matters on her behalf. OSF 71/2011 was heard at first instance by a senior district judge ("the First Instance Judge") of the Subordinate Courts (as the State Courts was then known) and her written decision was published as *AUR and another v AUT and others* [2012] SGDC 489 ("the First Instance GD"). As observed by the First Instance Judge, the crux of the dispute in OSF 71/2011 was the circumstances and events before and after BLL created a particular trust dated 26 October 2010 ("the Trust") (First Instance GD at [35]). The details of the Trust will be explained more fully below.

5 OSF 71/2011 was heavily contested by the defendants and BLL herself (as the third defendant in OSF 71/2011), resulting in protracted litigation. At

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[2] Statement of claim para 5.

first instance, BLL was found to lack decision-making capacity but this was reversed on appeal by the High Court in Registrar's Appeal Nos 223 and 224 of 2012. OSF 71/2011 eventually culminated in the Court of Appeal's decision in CA 27/2014, reported as *Re BKR* [2015] 4 SLR 81 ("*Re BKR (Court of Appeal)*"). The Court of Appeal disagreed with the High Court and found that BLL lacked capacity "because of a combination of mental impairment and the circumstances in which she lives" (*Re BKR (Court of Appeal)* at [207]). Specifically, as to her actual circumstances, the Court of Appeal found that BLL was subject to the undue influence of the defendants and was cut off from people who would otherwise be able to give her advice (*Re BKR (Court of Appeal)* at [207]). Consequently, deputies were appointed to act on BLL's behalf.

6 At the outset, it ought to be highlighted that the Court of Appeal had examined BLL's capacity "in relation to specific decisions" (*Re BKR (Court of Appeal)* at [208]). These "specific decisions" were BLL's decisions to set up the Trust and to transfer her assets held in UBS to DBS. The Court of Appeal held that BLL lacked capacity at the time these decisions were made. The Court of Appeal's decision will be examined in greater detail below.

Suit No 1085 of 2016

7 Four years have passed since the conclusion of OSF 71/2011. In S 1085/2016, BLL, through her deputies, is advancing several claims against the defendants. First, BLL avers that the defendants breached their fiduciary duties owed to BLL, as they were her agents in relation to the Trust. Alternatively, the defendants were fiduciaries because BLL reposed trust and

confidence in them in relation to her property and affairs.[3] It is alleged that the defendants were in breach of their fiduciary duties as they:[4]

(a) unduly influenced BLL when she established the Trust;

(b) unduly influenced BLL to instruct UBS to transfer all her assets in UBS to DBS for the purposes of the Trust; and

(c) cut off BLL's access to persons who could assist her in making independent decisions representative of her wishes.

8 Accordingly, BLL is claiming for damages and/or equitable compensation for the defendants' breach of fiduciary duties. In connection with the Trust, BLL has, *inter alia*, incurred expenses in dismantling the Trust in the British Virgin Islands ("BVI") and in pursuing legal action in the BVI with regard to the Trust.[5]

9 For completeness, I should mention that it is also alleged in the statement of claim that the defendants unduly influenced BLL when she executed a will in 2011 ("the 2011 Will"). I was informed by BLL's counsel during the hearing on 9 July 2019 that the 2011 Will no longer forms part of their claim in S 1085/2016.[6]

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3 Statement of claim para 37.

4 Statement of claim para 39.

5 Statement of claim para 41.

6 Minute sheet 9 July 2019 p 16.

10 Second, apart from a claim for breach of fiduciary duties, BLL also brings a claim in undue influence.[7] BLL's counsel clarified in the course of submissions that the claim in undue influence was one in tort or equity. For present purposes, it is not necessary to determine if undue influence, which is typically raised as a vitiating factor against contracts, can also give rise to a cause of action in its own right.

11 The third cause of action advanced by BLL is a claim for an abuse of the fiduciary relationship of influence and/or confidence between BLL and the defendants. As with the foregoing two causes of action, this claim is underpinned by the allegations of undue influence against the defendants.

The Trust

12 Before I turn to the Preliminary Issues, it is useful to briefly describe the Trust, given its centrality to S 1085/2016. The Trust is dated 26 October 2010 and the relevant documents were signed in November 2010. It was created with DBS and the trustee was a BVI trust company. The trustee had absolute discretion in applying the money in the Trust for the beneficiaries: a company which can be referred to as "B Ltd" and a class of beneficiaries being "Charities to be determined". The first defendant, BLM, was the protector of the Trust. On 27 July 2012, a deed of understanding was entered between BLL, BLM and the trustee which provided that the moneys in B Ltd were to be used for the exclusive purpose of maintaining BLL during her lifetime (*Re BKR (Court of Appeal)* at [19]).

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7 Statement of claim para 43.

13 The Trust identified a class of persons, referred to as Excluded Persons, who were entirely excluded from enjoying any benefits under the Trust. The excluded persons were BLL's two other children, NG and CK. In addition, BLM, by virtue of her position as protector of the Trust, was also an excluded person, although the Sisters contended in OSF 71/2011 that BLM would fall outside the definition of an excluded person if she relinquished her position as protector. The Trust was later amended to stipulate that BLM would also be an excluded person under the Trust, regardless of her status as protector. However, the provision of a gift of $10m to BLM, if she remained the protector on the date of BLL's demise, was retained (*Re BKR (Court of Appeal)* at [20]).

14 Between 8 November 2010 and 15 December 2010, following the creation of the Trust, BLL issued a series of conflicting instructions to her UBS bankers to transfer her assets to DBS, which UBS did not act on (*Re BKR (Court of Appeal)* at [25]; First Instance GD at [106]).

15 After the creation of the Trust, BLL left Singapore for Hong Kong together with BLM on 28 November 2010. Based on the evidence in OSF 71/2011, it was found that the defendants began to cut off access to BLL once she was brought back to Hong Kong. BLL resided with the defendants and was isolated from her family members, including the Sisters and BLL's two other children (*Re BKR (Court of Appeal)* at [202]; First Instance GD at [106]).

16 The Court of Appeal held that BLL lacked capacity at the time she made the decisions to set up the Trust and issued conflicting instructions to UBS (*Re BKR (Court of Appeal)* at [208]). Subsequently, the deputies pursued legal action in the BVI court to set aside the Trust, which was then set aside with the consent of the defendants.

Summons No 4275 of 2018

17 The three preliminary questions brought by consent pursuant to O 33 r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") in the present summons concern the doctrine of *res judicata*: specifically, they relate to issue estoppel and the extended doctrine of *res judicata*. The three preliminary questions are as follows:[8]

(a) Whether the Court of Appeal, in *Re BKR (Court of Appeal)*, found that the defendants unduly influenced BLL into deciding to set up, setting up and/or signing the settlement constituting a trust dated 26 October 2010 ("the First Preliminary Issue"). I shall in the course of this judgment also refer to this issue as the "Undue Influence Issue";

(b) If the answer to the First Preliminary Issue is *yes*, whether such finding(s) are final and binding on the defendants in S 1085/2016 ("the Second Preliminary Issue"); and

(c) If the answer to the First Preliminary Issue and/or the Second Preliminary Issue is *no*, whether the extended doctrine of *res judicata* precludes the defendants from arguing that they did not unduly influence BLL into deciding to set up, setting up and/or signing the settlement constituting the Trust ("the Third Preliminary Issue").

18 At the first hearing on 29 April 2019 for the present action, the defendants took the view that the Second Preliminary Issue did not encompass the extended doctrine of *res judicata*. SUM 4275/2018 was thus amended by

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[8] Summons under O 33 r 2 (by consent) filed on 14 September 2018; Notes of argument 29 April 2019 p 12 ln 31–32 and p 13 ln 1.

consent to include the Third Preliminary Issue. Counsel for the defendants prepared his written submissions for the hearing on 9 July 2019 on the basis that the Third Preliminary Issue would be relevant only if the First *and* Second Preliminary Issues were *both* answered in the *negative*. Nevertheless, he was prepared to proceed, at the oral submissions, on the basis that the Third Preliminary Issue would still be operative if the First Preliminary Issue was answered in the *positive* and the Second Preliminary Issue was answered in the *negative*.[9] This is the approach of the present judgment. The use of "and" within the "and/or" frame as applied to the First and Second Preliminary Issue as drafted within the Third Preliminary Issue must be conjunctive: as explained in the course of this judgment, the Third Preliminary Issue becomes relevant where the First is answered in the positive and the Second is answered in the negative.

19 In addition, OSF 71/2011 was directed to be heard *in camera* when the matter was at first instance and the appellate judgments were redacted. If S 1085/2016 were to be heard in open court, it would defeat the object of the earlier direction. During the hearing on 5 July 2019, I asked counsel to seek instructions on whether S 1085/2016 ought to be heard *in camera*. BLL took the view that S 1085/2016 ought to be heard *in camera* in order to maintain and preserve the confidentiality of OSF 71/2011. The defendants left it to the court to decide. I therefore exercise my discretion under s 8(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) to direct that S 1085/2016 be heard *in camera*. Under O 42 r 2 of the ROC, this judgment is published on terms that the parties' names and details are redacted.

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9 Minute sheet 9 July 2019 p 8.

First Preliminary Issue

20 With that brief background, I now turn to the First Preliminary Issue which is whether the Court of Appeal, in *Re BKR (Court of Appeal)*, found that the defendants unduly influenced BLL into deciding to set up, setting up and/or signing the settlement constituting the Trust. While BLL contends that such a finding was made, the defendants take the contrary position and submit that any findings of undue influence were not specific to the setting up of the Trust.[10]

Re BKR (Court of Appeal)

21 To begin, a broad overview of the relevant issues which were addressed by the Court of Appeal is reproduced for ease of reference (*Re BKR (Court of Appeal)* at [5]):

> (i) …
>
> (ii) We then deal with the central issue of law which we were presented with, which is the proper approach that should be taken by the court in dealing with applications of this sort and more specifically, to what extent the court may have regard to the actual circumstances in which the subject of the application is placed and where overlapping allegations of undue influence have been raised …
>
> (iii) We then consider the question of whether [BLL] lacks capacity. In this section we examine the medical evidence that was led, as well as the evidence that was given by [BLL] herself and by the other factual witnesses. *We also examine the evidence in relation to two specific sets of events or transactions* …
>
> (iv) We then set out our findings on the issue of capacity … and our conclusions and further directions …
>
> [emphasis added]

10 1st and 2nd defendants' skeletal arguments ("Defendants' submissions") para 35.

22 The "single core issue" which the Court of Appeal was confronted with was whether BLL had or lacked mental capacity in relation to decisions concerning her property and affairs (*Re BKR (Court of Appeal)* at [76]).

23 The Court of Appeal first had to determine what the court's approach ought to be when the person whose capacity to make decisions ("P") was under consideration: should the court only consider P's mental impairment or should the court also consider P's actual circumstances, including her susceptibility to undue influence? On this point, the First Instance Judge held that the court ought to consider P's actual circumstances and found that BLL was "vulnerable and susceptible to undue influence" and that BLM was "influencing and causing [BLL] to act in a manner that is contrary to [BLL's] best interests" (First Instance GD at [129]–[130]). On appeal, the High Court Judge disagreed with the First Instance Judge and held that the First Instance Judge's findings on undue influence were irrelevant for the purposes of determining BLL's mental capacity (*Re BKR* [2013] 4 SLR 1257 at [8]).

24 Taking a contrary view, the Court of Appeal decided that it was proper for the court to consider P's actual circumstances. In this connection, the First Instance Judge's findings of undue influence ought not to have been set aside. The relevance of undue influence to the issue of mental capacity was as follows (*Re BKR (Court of Appeal)* at [125]–[126]):

> 125 … The proven or potential presence of undue influence is relevant to the issue of mental capacity in at least three ways. The first is that it then becomes material whether P is able to retain, understand or use the information that relates to whether there might be undue influence being applied, for instance whether P can understand that a third person may have interests opposed to his; and if not, whether that inability is caused by mental impairment. The second is that it must be considered whether P's susceptibility to undue influence is caused by mental impairment; if so, and if the result of such undue influence is that P's will is so overborne that he is unable

> to use and weigh information relevant to the decision in question, P would be unable to make decisions "because of" mental impairment.
>
> 126 The third way in which undue influence is relevant is that it might mean that P cannot realistically hope to obtain assistance in making decisions. In such a situation, P may be found to lack capacity because of a mental impairment operating together with that lack of assistance. …

25 The Court of Appeal found that BLL had a mental impairment and that this was something between a condition referred to as Mild Cognitive Impairment and dementia. This resulted in significant memory decline, deterioration in executive functions and the emergence of paranoid and false beliefs (*Re BKR (Court of Appeal)* at [173]).

26 The Court of Appeal then subjected to scrutiny "two specific sets of events or transactions" which provided "important insights" on whether or not BLL could make decisions relating to her property and affairs. These were BLL's decisions to set up the Trust and to transfer all her assets held in UBS to DBS (*Re BKR (Court of Appeal)* at [131] and [173]). It is the former decision that is of greater relevance to this preliminary hearing.

The decision to set up the Trust

27 The Court of Appeal first noted that objectively, it was difficult to identify any good reason for establishing the Trust. If the Trust was to look after BLL's material needs, then there was already an existing JPMorgan trust in place. If the Trust was intended for charitable purposes, then a simpler way could have been to make the relevant bequests in a will (*Re BKR (Court of Appeal)* at [174]). Furthermore, BLL was unable to use and weigh the information relevant to her decision to set up the Trust (*Re BKR (Court of Appeal)* at [178]). It appeared that BLL believed that had she not established the Trust, her son would have come after her assets and left her bereft. However,

this was not a reasonable belief and gave rise to the possibility that BLL's decision to set up the Trust was "largely if not wholly impelled by a paranoid belief that was caused at least in part by her mental impairment" (*Re BKR (Court of Appeal)* at [180]).

28 At this point of the judgment, it appears that the Court of Appeal could have already arrived at the conclusion that BLL lacked capacity and was unable to make decisions relating to her property and affairs. The Court of Appeal stated at [188]:

> The sum of our reasoning so far is that there is *strong basis* for saying that [BLL] lacked the ability to make the decision to set up the Trust as well as the decision to transfer all her UBS assets to DBS. *But before we draw any firm conclusions on her capacity, we should look at the actual circumstances in which those decisions were made*. [emphasis added]

29 Nevertheless, in line with the approach that they had endorsed (*ie*, that it was proper to consider BLL's actual circumstances, including allegations of undue influence), the Court of Appeal proceeded to consider the actual circumstances in which the decisions (including the decision to set up the Trust) were made. It is this aspect of the judgment that deals with the allegations of undue influence.

The circumstances in which the decision to set up the Trust was made

30 Under the heading of the "Possibility of undue influence", the Court of Appeal highlighted that one of the Sister's "main allegations" was that the defendants had "engineered the creation of the Trust" (*Re BKR (Court of Appeal)* at [189]). The Court of Appeal was of the view that there was "a strong case for inferring that [BLL] was acting under the undue influence of the [defendants] when she established the Trust and transferred her assets to DBS" (at [197]). Parties in this preliminary hearing adopt different interpretations of

the Court of Appeal's findings on undue influence, and the relevant extract is analysed more fully below.

31 On the cutting of access, the Court of Appeal found that the evidence strongly suggested that if BLL was completely at liberty to make her own independent decision, she would not have wanted to cut off access and would instead wish to meet and interact with the Sisters and her other children (*Re BKR (Court of Appeal)* at [200]). Instead, the defendants endeavoured to cut BLL off from these individuals as well as trusted professionals and that *fortified the Court of Appeal's conclusion that the defendants were exercising undue influence over BLL* (*Re BKR (Court of Appeal)* at [202]). In the Court of Appeal's judgment, "it [was] more likely than not that the [defendants] have exercised undue influence over [BLL] and will continue to do so for as long as other people are prevented from seeing her" (*Re BKR (Court of Appeal)* at [203]).

32 The Court of Appeal concluded that BLL lacked capacity because of "a combination of mental impairment and the circumstances in which she lives" (*Re BKR (Court of Appeal)* at [207]). The statutory test for lack of capacity under the MCA was therefore satisfied.

Analysis

33 It is not disputed that the Court of Appeal made certain findings on undue influence in *Re BKR (Court of Appeal)*. Essentially, the dispute relates to the *specificity* of these findings: did the Court of Appeal find that the defendants unduly influenced BLL into deciding to set up the Trust? For the reasons below, I answer the First Preliminary Issue in the positive.

The Court of Appeal's findings were specific to the Trust

34 The defendants contend that the Court of Appeal's findings on undue influence were expressed generally in relation to the issue of BLL's capacity and not in respect of specific transactions such as the Trust.[11] The term undue influence was only used as a "descriptor" of BLL's actual circumstances and not in the "technical" sense relied upon by BLL where it relates to a specific transaction.[12]

35 In my view, the defendants' contention has no merit. While it is undoubtedly true that the "single core issue" was whether BLL lacked mental capacity (*Re BKR (Court of Appeal)* at [76]), the Court of Appeal highlighted that this had to be assessed in the light of BLL's actual circumstances. Specifically, the Court of Appeal examined two *particular decisions* of BLL that provided "important insights" in determining whether BLL lacked mental capacity (*Re BKR (Court of Appeal)* at [131]). The setting up of the Trust was one of these two decisions, and it was precisely in this context that the findings of undue influence were made. They were not made in a vacuum and were plainly directed at the decisions made by BLL. This is borne out simply by looking at the following paragraphs which preface the Court of Appeal's discussion on undue influence, and the parts highlighted in bold make clear that the findings of undue influence were expressed in connection to specific decisions made by BLL (*Re BKR (Court of Appeal)* at [188]–[189]):

> *The circumstances in which the* ***decisions*** *were made*
>
> 188 The sum of our reasoning so far is that there is strong basis for saying that [BLL] lacked the ability to make the decision to set up the Trust as well as the decision to transfer

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11 Defendants' submissions para 35a.

12 Defendants' aide memoire para 6.

> all her UBS assets to DBS. *But before we draw any firm conclusions on her capacity, we should look at the actual circumstances in which those* ***decisions*** *were made.*
>
> (1) ***Possibility of undue influence***
>
> 189 It is vigorously asserted by the [Sisters] and those associated with them, especially CK and NG, that [BLL] is subject to the undue influence of the [defendants]. *One of their main allegations is that the [defendants] engineered the creation of the Trust …*
>
> [emphasis added in italics and bold italics]

36 However, the defendants point out that under the heading of "Our findings", which is found at the conclusion of the judgment, the Court of Appeal only went so far as to state that BLL "is subject to the undue influence of the [defendants]" (*Re BKR (Court of Appeal)* at [207]). The defendants submit that there is no express finding in this section of undue influence *in respect of the Trust*.[13] The short answer is that these findings are found in other parts of the judgment, which must be read holistically. The section titled "Our findings" was only a summary of the various findings made by the Court of Appeal in other parts of the judgment, which I shall now turn to.

The Court of Appeal's findings on undue influence were not equivocal

37 A specific link between the findings of undue influence and BLL's decision to set up the Trust can be found at [197] of *Re BKR (Court of Appeal)*, which reads as follows:

> 197 … we think that *there is a strong case for inferring that [BLL] was acting under the undue influence of the [defendants] when she established the Trust* and transferred her assets to DBS … As we have found, the establishment of the Trust and the transfer of assets to DBS do not appear to bring any discernable benefit to [BLL]; they occurred without any evidential prompt or reason; the Trust was set up in secrecy

13 Defendants' submissions para 35b.

> and the banking instructions were given with unusual urgency and were … subject to inexplicable (and indeed unexplained) reversals. Given the manner in which the transactions were carried out, *it is difficult to believe that they were the considered expressions of [BLL's] volition. The fact is that, on both occasions when [BLL] signed the documents relating to the Trust, [BLM] was with her in Singapore.* In contrast, when [BLM] was away, [BLL] (a) revoked …. her previous instructions to transfer her UBS assets to DBS, and (b) declined … to sign instructions to transfer her JP Morgan assets to DBS. In short, *the choices made by [BLL] varied drastically depending on whether she happened to be with [BLM], and this strongly suggests that [BLL] was subject to the undue influence of [BLM]. This conclusion is buttressed further by the evidence on the [defendants] limiting the access that others could have to [BLL] …*

38 The defendants submit that the language used by the Court of Appeal was equivocal. It was not sufficiently clear and precise as to whether the Court of Appeal was making a finding of undue influence specific to the Trust.[14] This is because the Court of Appeal had only stated that there was a "strong case for inferring that [BLL] was acting under the undue influence of the [defendants] when she established the Trust". Furthermore, the Court of Appeal had only "strongly suggest[ed]" that BLL was subject to the undue influence of BLM (*Re BKR (Court of Appeal)* at [197]).

39 I accept that the Court of Appeal's findings appear to be equivocal if one reads [197] of *Re BKR (Court of Appeal)* in isolation from the rest of the judgment. But such a reading would be artificial. In my view, the Court of Appeal was likely to be reasoning in an inductive manner. Subsequent paragraphs in the judgment reveal that the Court of Appeal were firm and conclusive in their finding that BLL was acting under the undue influence of the defendants when she established the Trust. The passages which go towards showing this are as follows:

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14 Defendants' submissions para 35c.

(a) First, after the Court of Appeal was satisfied that the defendants endeavoured to cut BLL off from her Sisters, children and trusted professionals, it was stated that "this fortifies our conclusion that the [defendants] are exercising undue influence over [BLL]" (*Re BKR (Court of Appeal)* at [202]). This was not a reference to the defendants exercising undue influence in a generic sense, or at the time of litigation. As mentioned previously, the findings on undue influence appear in the section when the Court of Appeal was considering the two decisions made by BLL.

(b) Second, the Court of Appeal also added at [203] that "it [was] more likely than not that the [defendants] have exercised undue influence over [BLL] and will continue to do so for as long as other people are prevented from seeing her" (*Re BKR (Court of Appeal)* at [203]). As explained, the reference to undue influence must have been with reference to the two decisions that BLL made. It should be added that the language used by the Court of Appeal (*ie*, "more likely than not") is not tentative; indeed, it is a fundamental principle that "[a]nything that is more probable than not [the court] treats as certain" (*Mallett v McMonagle, a minor by Huge Joseph McMonagle, his father and guardian ad litem, and Another* [1969] 2 WLR 767 at 772).

40 When [197] and [202]–[203] of *Re BKR (Court of Appeal)* are read together and not in isolation, two points become evident. First, the Court of Appeal's findings on undue influence were expressed in relation to the decisions BLL made, including the decision to set up the Trust and second, these findings were not equivocal.

41 The defendants also point to the fact that the Court of Appeal was not concerned with the date on which the documents for the Trust were signed.[15] This would have been "critical" if their findings were to be directed at the Trust.[16] Instead, the Court of Appeal was content to state that the date on which the Trust documents were signed could either be on 6 or 26 November 2010 (*Re BKR (Court of Appeal)* at [17]). This point, however, does not take the defendants far. The Court of Appeal was examining the *actual circumstances* surrounding BLL's decision to set up the Trust. For this reason, the precise date on which the Trust documents were signed was irrelevant. Based on the available evidence, the Court of Appeal was satisfied that the defendants had exercised undue influence on BLL when she made the decision to set up the Trust. Therefore, as recognised by the Court of Appeal, "nothing turn[ed] on [the date on which the Trust documents were signed]" (*Re BKR (Court of Appeal)* at [17]).

There was sufficient evidence before the Court of Appeal for it to come to its findings

42 The defendants contend that another reason why the findings of the Court of Appeal were not directed at the Trust is because evidence in respect of the Trust was not fully before the court, or was not properly examined.

43 The defendants refer to the fact that the Sisters had applied at the interlocutory stage of OSF 71/2011 for discovery of an extensive list of documents relating to the Trust.[17] This application was resisted by BLL and

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15 Defendants' submissions para 35d.

16 Defendants' submissions para 28.

17 Defendants' submissions para 36a.

eventually dismissed. The Trust documents were hence not before the First Instance Judge or any of the appellate judges for that matter. It was only on the last day of the hearing of OSF 71/2011 that the First Instance Judge directed BLL to disclose some of the documents. Even then, the Trust documents were not disclosed for the purpose of determining whether the defendants exerted undue influence on BLL. This line of argument is, however, neither here nor there. It is more pertinent that there was sufficient evidence before the court relating to the *circumstances surrounding the setting up of the Trust*. The precise details of the Trust were less material and the Trust documents would not have shed any light on the circumstances surrounding the setting up of the Trust. It was the actual circumstances surrounding the setting up of the Trust that gave rise to the inference that the defendants had unduly influenced BLL's decision to set up the Trust.

44 The defendants further submit that they were not aware that they had to run a defence to respond to allegations that they had unduly influenced BLL into setting up the Trust.[18] In addition, key witnesses, in the form of the professionals who had advised BLL in setting up the Trust, were not called.[19] In my view, this submission and those related to it are more relevant for the other Preliminary Issues concerning whether the Court of Appeal's findings on undue influence are final and binding.

Conclusion on the First Preliminary Issue

45 I therefore answer the First Preliminary Issue in the positive (*ie*, the Court of Appeal did a make a finding that the defendants unduly influenced

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18 Defendants' submissions para 36b.

19 Defendants' submissions para 36aiii.

BLL into deciding to set up the Trust). For the remainder of the judgment, I shall refer to this finding that as the "CA Finding".

Second Preliminary Issue

46 The Second Preliminary Issue, whether the CA Finding is final and binding on the defendants in S 1085/2016, involves the concept of issue estoppel. This precludes an issue of fact, law or mixed fact and law which was necessarily decided and concluded in favour of one party in earlier proceedings from being reopened in subsequent proceedings between the same parties, even if the causes of action in question are not the same. BLL contends that the CA Finding is final and binding on the defendants in S 1085/2016 while the defendants argue otherwise.

Issue estoppel

47 The doctrine of *res judicata* consists of three conceptually distinct but interrelated principles (*Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal and other matters* [2017] 2 SLR 12 ("*Turf Club*") at [82]). These are:

(a) cause of action estoppel;

(b) issue estoppel;

(c) the extended doctrine of *res judicata*, otherwise known as the defence of abuse of process.

48 The policy which underlies all three principles is that litigants should not be twice vexed in the same matter. Further, the public interest requires finality in litigation (*The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 ("*TT International*") at [98]).

49 In order to establish an issue estoppel, it was held by the Court of Appeal in *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157 ("*Lee Tat*") at [14]–[15] that the following requirements have to be met:

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

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

(c) The two actions that are compared must involve the same parties; and

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

50 The dispute between parties centres on the fourth requirement, to which I now turn.

Identity of subject matter

51 The requirement of identity of subject matter comprises three elements, stated in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [34]–[38] (and endorsed by the Court of Appeal in *Turf Club* at [108]) as follows:

(a) First, the issues must be identical in the sense that the prior decision must traverse the same ground as the subsequent proceedings and the facts and circumstances which gave rise to the earlier decision must not have changed or should be incapable of change;

(b) Second, the previous determination must have been fundamental and not merely collateral to the prior decision so that the decision could

not stand without that determination. This analysis should be approached from the perspective of common sense; and

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

52 The approach to be taken *vis-à-vis* the requirement for identity of subject matter is to determine what had been *litigated* followed by what had been *decided* (*Lee Tat* at [15]).

Whether the Undue Influence Issue was properly raised and argued

53 The defendants deny that the Undue Influence Issue was properly raised and argued in OSF 71/2011, notwithstanding the CA Finding.[20] If the Undue Influence Issue was not raised and argued, no estoppel will generally arise unless it was not argued as a result of a concession by the defendants or due to the application of the extended doctrine of *res judicata* (*Petroships Investments Pte Ltd v Wealthplus Pte Ltd (in members' voluntary liquidation) (Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd and another, interveners) and another matter* [2018] 3 SLR 687 at [89]).

54 As explained in *Goh Nellie* at [39]:

> Plainly if an issue has in fact been raised and decided in one set of proceedings, then on the face of it, it would not be permissible to relitigate the same issue as between the same parties in a subsequent action. But, *where the issue in question has not in fact been argued or submitted upon*, it is less obvious that the policy goals underlying the doctrine of *res judicata* – the interest in the finality and conclusiveness of judicial decisions as well as the right of individuals to be protected from

[20] Defendants' submissions para 42.

> vexatious multiplication of suits and prosecutions … are necessarily attracted. …

55 Menon JC (as he then was) further explained in *Goh Nellie* at [39] that in deciding whether or not an issue had been raised and argued, the court must be satisfied that there was "actual investigation of [the] point" (see also *Zhang Run Zi v Koh Kim Seng and another* [2015] SGHC 175 at [55]). In this regard, it is permissible for the court to refer to the pleadings and the evidence in order to satisfy itself that the defendants had a fair opportunity to respond to the Undue Influence Issue (*Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 ("*Carl Zeiss*") at 965). Accordingly, it is necessary for me to peruse the summons, affidavits and transcripts to ascertain whether or not the Undue Influence Issue was raised and argued.

(1) The Undue Influence Issue was raised in the course of cross-examination

56 I begin by noting that the originating summons filed by the Sisters did not expressly allege that there was any undue influence exercised by the defendants on BLL.[21] Neither was there any reference to the Trust. It would, therefore, not have been clear to the defendants that the Undue Influence Issue was a live issue from the inception of OSF 71/2011.

57 BLL asserts that the following evidence and submissions in OSF 71/2011 show that the Undue Influence Issue was squarely before the courts.

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21 Originating Summons (Family Matters) for OSF 71/2011 dated 18 February 2011.

58 First, in BL's (one of the Sisters) first affidavit filed on 18 February 2011, BL alleged that BLL's "independent mind and will have been overborne by manipulation and undue influence" by the defendants.[22] She then asserted that:[23]

> … [the defendants] have taken [BLL] to Hong Kong to unduly influence and improperly pressure her in her vulnerable medical condition – *to transfer all her assets funds now in UBS and in JP Morgan to an unidentified account at DBS* – no doubt an account to which [the defendants] would have unrestricted access as a practical matter. [emphasis added]

59 However, BL's first affidavit did not directly raise the allegation that the defendants had *unduly influenced BLL's decision to set up the trust*. There were two references to undue influence in BL's first affidavit: the first at para 1.4.3 was a *general* allegation and the second at para 4.7.8 related to BLL's decision to transfer her assets in UBS/JPMorgan to DBS.

60 Next, BLL points to BL's eighth affidavit in OSF 71/2011 which was filed in the course of an interlocutory application to appoint interim deputies for BLL.[24] Under the heading of "[BLL] would not have wanted to set up another trust", it is alleged by BL that:[25]

> 3.4.5 … [BLL] had made all necessary arrangements to provide financially and more than generously for her own future, and the future of her own flesh and blood she cares for. It is unnecessary and wholly out of character for [BLL] to set up a new trust to be managed solely by [BLM] – especially when she has always been wary of [the defendants]. Moreover, she often told family members, bankers, and others, that [BLN] is very greedy and is a bad influence on [BLM]. As seen from

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22 BL's first affidavit dated 18 February 2011 para 1.4.3.

23 BL's first affidavit dated 18 February 2011 para 4.7.8.

24 Plaintiff's supplementary written submission para 24.

25 BL's eighth affidavit dated 20 July 2011 para 3.4.

> JPMorgan's recent discovery and independent evidence, [BLL] told them she does not trust [the defendants]. It cannot be a mere coincidence that [BLL] came up with this plan – completely out of character – after prolonged contact with [the defendants].

61 In my view, paragraph 3.4 of BL's eighth affidavit did not raise the Undue Influence Issue. In fact, when read in context, BL's eighth affidavit states that the Undue Influence Issue was not a central issue in OSF 71/2011. This can be seen from para 2.3, which prefaces the remainder of the affidavit:

> 2.3 The Defendants' repeated attempts in their affidavits to cloud this central issue with *unnecessary and inaccurate details of family politics* do not detract from these facts. In this Affidavit, I address only some of these inaccuracies where I feel it necessary to set the record straight *so that the Court will not be distracted*, nor unfairly prejudiced against me or [BLL's other children]. … [emphasis added]

62 This central issue which is referred to is "whether there is reason to believe [BLL] is now incapable of managing her property and financial affairs on her own because of an impairment of, or a disturbance in the functioning of, her mind and brain". In support of the Sisters' case, BL raises three points at para 2.2, which are BLL's clinical diagnosis of impairment of short-term memory, BLL's deteriorating mental condition and BLL's departure from her usual behaviour since she was taken to Hong Kong on 28 November 2010. Notably, there is no reference to the setting up of the Trust, which would have taken place *before* 28 November 2010. The Sisters' case, as set out in para 2.2, is therefore consistent with para 2.3 which states the other matters in the affidavit are "unnecessary" details which are dealt with so as to "set the record straight" and prevent the court from being "distracted" or "unfairly prejudiced".

63 BLL also highlights that the Undue Influence Issue was raised in correspondence prior to the commencement of OSF 71/2011. On 25 January

2011, the Sisters' solicitors, Shook Lin & Bok LLP, wrote to BLL's then-solicitors, Wong Partnership LLP, and stated as follows:[26]

> 8. We note your perception that your client has apparently made her "own decision" as to the management of her assets including the setting up of a trust for such purpose … The independence and veracity of such apparent decision-making must be re-examined in light of recent events to ensure that such alleged decisions are *not the product of any undue influence and unconscionable conduct whatsoever.*
>
> …
>
> 12. … it is inherently unlikely to say the least, that [BLL] is in reality, making decisions in the exercise of her own free and independent will, without any undue influence and/or unconscionable conduct, and/or advice tainted by any conflict of interest.

64 Nevertheless, I consider that the parties' correspondence prior to the trial of OSF 71/2011 are of limited value in showing that the Undue Influence Issue was actually investigated *during* the trial. It would have been a different matter if the Undue Influence Issue was directly raised in the summons and affidavits.

65 In my view, it was only in the course of cross-examination that it can be possibly said that the Undue Influence Issue was raised, as revealed in the following extract from the cross-examination of BLM by counsel for the Sisters:[27]

> Q: … this idea for [the Trust] was actually your idea, wasn't it?

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26 BL's first affidavit dated 18 February 2011 p 143.

27 Plaintiff's written submissions for preliminary hearing on 29 April 2019 ("Plaintiff's submissions") para 63(b).

A: No … it was my mother's idea. … she arrived at the idea after speaking to [Mr Z] … my father's oldest friend.

Q: She had this idea while she was still in Hong Kong, is that your evidence, or did she form this idea as soon as the plane touched down in Singapore?

A: She had this idea in Hong Kong after speaking with [Mr L].

…

Q: And you engaged [Mr L] to advise your mother, isn't that right?

A: No, I never did such thing. I was quite busy with daddy's estate. Mummy was the one who wanted to join and meet him. …

…

Q: You introduced [Mr L] to your mother in relation to [the Trust]?

A: No, that's incorrect.

Q: And you engaged [Mr L] to advise your mother in relation to [the Trust]?

A: No, that's absolutely incorrect.

66 Another relevant extract which shows that the Undue Influence Issue was raised is from the cross-examination of BLL by counsel for the Sisters:[28]

Q: … can you just explain your thinking when you decided to set up [the Trust]?

A: To look after me, myself. And after I pass on, I will give all to charity, to help the old and the needy.

Q: And whose idea was [the Trust]? …

A: My idea, no undue influence.

Q: All right. Now, do you know what "undue influence" is …?

A: Influence by other people.

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[28] Plaintiff's submissions para 69.

67 It was also later directly suggested to BLL that BLM was the one who had suggested for her to set up the Trust, to which BLL maintained that it was entirely her idea.[29]

68 It is clear from the defendants' closing submissions for OSF 71/2011 that they too recognised that the Undue Influence Issue was raised. Specifically, it was acknowledged that some of the allegations against them were that:[30]

> (a) BLL's current behaviour was due, in part, to the undue influence of the defendants in seizing control over a substantial part, if not the whole of, BLL's assets for their own financial benefit; and
>
> (b) The Trust was "established under the influence and manipulation" of the defendants so that they can have access to BLL's funds.

(2) The Undue Influence Issue was argued by the defendants in OSF 71/2011

69 The submissions of the defendants in OSF 71/2011 show that the Undue Influence Issue was not only raised, but also argued. In their closing submissions for OSF 71/2011, the defendants submitted that:[31]

> 204. The other transaction that the [Sisters] question is [BLL's] [Trust]. The [Sisters] say that the [Trust] *was established under the influence and manipulation* of [the defendants] so that they can have access – as a practical matter – to [BLL's] funds. … the [Sisters'] case in respect of the [Trust] is pure claptrap …
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> …

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29 Plaintiff's submissions para 69.

30 Plaintiff's submissions paras 64 and 66.

31 Plaintiff's submissions para 66.

> 207. The [Trust] was [BLL's] way of ensuring that nobody could touch her assets. She was especially wary of [CK]. [BLL] also testified that [Ms D] had explained to her the documents needed to set up the [Trust] and that during that meeting, [BLM] was not present. As for [BLN], he had only a vague idea that [BLL] was seeing some lawyers to make financial arrangements, but no idea at all that she was setting up a [Trust].
>
> [emphasis added]

70 In the defendants' written submissions for the hearing before the High Court Judge, they maintained that the idea to set up the Trust came from BLL herself and that BLM did not provide any input in setting up the Trust:[32]

> 139. First, it is clear that the idea to set up the [Trust] came from [BLL] herself. When questioned on her reasons for doing so and *whether it was [BLM] who planted the idea*, her evidence was unequivocal.
>
> …
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> 140. Second, the objective evidence shows that [BLM] did not provide any input in setting up or structuring the [Trust] and the formulation of its terms. She merely agreed to be appointed as Protector. …

71 Accordingly, notwithstanding that the Undue Influence Issue was only raised in cross-examination, it is clear that substantive submissions were made by the defendants to address it. I therefore do not accept that the Undue Influence Issue was not raised and argued in OSF 71/2011.

(3) The context in which the Undue Influence Issue was raised and argued in OSF 71/2011

72 In OSF 71/2011, the "single core issue" was to determine whether BLL had the capacity to make decisions on her property and affairs (*Re BKR (Court of Appeal)* at [76]). The Undue Influence Issue was therefore argued by the

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[32] Plaintiff's submissions para 69.

defendants *in that context*. In S 1085/2016, the Undue Influence Issue is raised as a basis for a breach of fiduciary duties by the defendants and to determine whether the defendants are liable in damages and/or equitable compensation.

73 Nevertheless, when one considers whether or not the Undue Influence Issue was raised and argued in OSF 71/2011, the mere fact that it arose in a *different context* does not mean that the doctrine of issue estoppel cannot apply.

74 As an example of how the doctrine of issue estoppel operates, one can refer to the Court of Appeal's decision in *Lee Hiok Tng (in her personal capacity) v Lee Hiok Tng and another (executors and trustees of the estate of Lee Wee Nam, deceased) and others* [2001] 1 SLR(R) 771 ("*Lee*"). In *Lee*, two brothers, Kheng and Nam were in a partnership ("the Kongsi"). At law, upon the death of Kheng, the partnership in the Kongsi was dissolved and Nam, or the executors/trustees of Nam's estate, ought to have wound up the affairs of the Kongsi and distributed its assets to those who were entitled to them.

75 Accordingly, beneficiaries of the Kheng estate sued the executors/trustees of Nam's estate. The beneficiaries of the Kheng estate contended that Nam and the executors/trustees of Nam's estate had acted in breach of trust in respect of the partnership assets. In addition, it was alleged that the executors/trustees of Nam's estate were liable to restore to the Kongsi certain specified shares (including "27 UOB Shares").

76 The High Court held, in a judgment delivered in 1992 ("the 1992 Judgment) that the shares belonged to the Kongsi and that Nam's estate was to account for the same. Furthermore, Nam and his executors/trustees had committed breaches of trust and an account was ordered to be taken of the

Kongsi's assets in respect of the period after Kheng's death (*ie*, when the partnership was dissolved) (*Lee* at [3]–[11]).

77 Seven years later in 1999, the executors/trustees of Nam's estate commenced a new action. According to one of the executors/trustees of Nam's estate, Tng, Nam had gifted Tng the 27 UOB Shares in 1962. Therefore, the appropriate portion of the 27 UOB Shares should be treated as belonging to Tng and not the Kongsi. The Court of Appeal referred to this as "the gift question". Tng also alleged that he was entitled to an indemnity and/or contribution in respect of the *costs and expenses incurred by him* pertaining to the 27 UOB Shares from Nam's estate (*ie*, moneys expended by Tng to take up additional UOB shares pursuant to rights issues). The Court of Appeal referred to this as "the reimbursement question" (*Lee* at [12]).

78 On the gift question, the Court of Appeal held that Tng was not estopped from raising it in the new action, whether through the doctrine of issue estoppel or the extended doctrine of *res judicata*. The 1992 Judgment did not consider and answer the gift question. However, on the reimbursement question, the Court of Appeal noted that the 1992 Judgment included an order for an account of all bonus and rights issues for the 27 UOB Shares *and all moneys expended to take up the shares*. The reimbursement question had therefore already been decided in the 1992 Judgment, and Tng was entitled to reimbursement pursuant to the 1992 Judgment. Although Tng chose not to *comply* with the order in the 1992 Judgment, he was nevertheless bound by it and barred from relitigating the reimbursement question in the new action (*Lee* at [40]–[44]).

79 Hence, the case of *Lee* illustrates that the mere fact that an issue was decided in a different context does not preclude the doctrine of issue estoppel

from operating, such that the party against whom the estoppel is alleged is barred from relitigating the issue.

Whether the CA Finding was fundamental to the Court of Appeal's decision

80 In order for there to be an identity of subject matter, it must also be shown that the Undue Influence Issue was fundamental and not merely collateral to the Court of Appeal's decision. This analysis should be approached from a commonsensical perspective (*Goh Nellie* at [37]).

81 The defendants submit that even if the CA Finding was made, it was not fundamental to the Court of Appeal's decision. While undue influence was relevant to the issue of whether BLL had capacity, relevance does not amount to necessity.[33]

82 In this regard, Menon JC in *Goh Nellie* drew a distinction between issues which are "no more than steps in a process of reasoning" and those which are "so cardinal" that the decision "cannot stand without them" (*Goh Nellie* at [37] citing *Blair v Curran* (1939) 62 CLR 464 ("*Blair*"). As stated by Dixon J in *Blair* at 531, "nothing but what is *legally indispensable* to the conclusion is thus finally closed or precluded" [emphasis added].

83 In determining whether the CA Finding was fundamental to its decision, I am also guided by the following principles.

84 First, the CA Finding must have been a necessary step to its decision; it must have been a matter which was necessary to decide, and which was actually

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[33] Defendants' submissions, para 41c.

decided, as the groundwork of its decision (*Carl Zeiss* at 965, cited by the Court of Appeal in *Lee Tat* at [15]).

85 Second, issue estoppel arises only in respect of issues or ultimate facts. It does not apply to evidentiary facts which are found in the process of determining the affirmative or negative of an issue (*Brewer v Brewer* (1953) 88 CLR 1 at 15; *Inhenagwa v Onyeneho* [2017] EWHC 1971 (Ch) at [58]; *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd* [2018] EWHC 2713 (Comm) at [46(i)]).

86 Third, one can consider whether the CA Finding was a condition that had to be fulfilled in order for the Court of Appeal to make a determination that BLL lacked capacity. It is useful to refer to Diplock LJ's (as he then was) judgment in *Thoday v Thoday* [1964] 2 WLR 371 at 384–385, a decision which has been cited with approval by the Singapore courts (see *Lee Tat* at [49]):

> … There are many causes of action which *can only be established by proving that two or more different conditions are fulfilled*. Such causes of action involve *as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action*; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation *upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction* … neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition …. deny that it was fulfilled if the court in the first litigation determined that it was. [emphasis added]

87 In this regard, it is useful to return to the orders sought in OSF 71/2011. In the originating summons filed by the Sisters, the two orders sought were a declaration that BLL lacked the capacity to make decisions relating to her property and affairs as well as for deputies to be appointed. The Court of Appeal was certainly of the view that the Sisters' allegations of undue influence were

relevant and material to the "single core issue": that of whether BLL lacked capacity to make decisions relating to her property and affairs (*Re BKR (Court of Appeal)* at [76]). It does not, however, follow that the CA Finding was *necessary* in order for it to make the orders sought. In my judgment, the orders granted by the Court of Appeal could still stand even if the CA Finding was not made (*Goh Nellie* at [37]). Put another way, the CA Finding was not legally indispensable to the orders made by the Court of Appeal (*Blair* at 531). The Court of Appeal found that BLL was suffering from a mental impairment (*Re BKR (Court of Appeal)* at [173]) and that BLL was isolated from important members of her family and previously trusted professionals (*Re BKR (Court of Appeal)* at [202]). These two points alone would have sufficed for the Court of Appeal to grant the orders sought. That is not to say that the findings on undue influence (of which the CA Finding was a part) were irrelevant. However, assuming that there was no finding that the defendants had unduly influenced BLL into setting up the Trust, would BLL's mental impairment and the defendants' cutting of access have sufficed for the Court of Appeal to grant the orders sought by the Sisters? The answer, in my view, must be in the positive.

88 This conclusion is reinforced by the structure of the Court of Appeal's decision. The Court of Appeal found that BLL suffered from a mental impairment that was situated between Mild Cognitive Impairment and dementia. This resulted in significant memory decline, deterioration in executive functions and the emergence of paranoid and false beliefs (*Re BKR (Court of Appeal)* at [173]). The Court of Appeal then proceeded to examine BLL's decision to set up the Trust and her decision to transfer her UBS assets to DBS. On the decision to set up the Trust, the following points were stated by the Court of Appeal:

(a) It was not easy to see any good reason for establishing the Trust, from an objective viewpoint (*Re BKR (Court of Appeal)* at [174]).

(b) BLL's ability to provide reasons for her decision to set up the Trust was deficient; she was unable to use and weigh the information relevant to her decision to set up the Trust (*Re BKR (Court of Appeal)* at [178]).

(c) BLL's belief that CK would come after her money if she did not set up the Trust was problematic as there was no apparent cause for this belief and there was no factual basis for it. There was a possibility that her decision to set up the Trust was largely if not wholly impelled by a paranoid belief caused in part by her mental impairment (*Re BKR (Court of Appeal)* at [180]).

89 The Court of Appeal then proceeded to analyse BLL's decision to transfer her UBS assets to DBS. Thereafter, the following paragraph at [188], which appears *before the findings on undue influence*, is instructive:

> The sum of our reasoning so far is that there is *strong basis* for saying that [BLL] lacked the ability to make the decision to set up the Trust as well as the decision to transfer all her UBS assets to DBS. *But before we draw any firm conclusions on her capacity*, we should look at the actual circumstances in which those decisions were made. [emphasis added]

90 The appropriate interpretation of [188] could be said to turn upon a fine distinction. It could suggest that even before the findings on undue influence were made (including the CA Finding), there was sufficient basis for the Court of Appeal to declare that BLL lacked the ability to make the decisions relating to her property and affairs. The allegations of undue influence were relevant in so far as they buttressed, supplemented and reinforced the Court of Appeal's reasoning, but they were not *fundamental* to the Court of Appeal's final

decision. It could be argued, on the other hand, that the findings on undue influence were not collateral. It formed, on a plain reading of the judgment, a necessary step in the Court of Appeal's analysis. From the structure of the judgment, it could at first blush be arguably a decisive factor in the Court of Appeal's conclusion: the point raised at [188] is reiterated at [207], "in other words, she lacks capacity because of a combination of mental impairment and the circumstances in which she lives". Nevertheless, [188] raises two instances of possible undue influence, the formation of the Trust, which is the subject of the CA Finding, and the transfer of assets from UBS to DBS, which is not and was requested *after* the formation of the Trust. The conclusion also refers to BLL's isolation. It is not clear when the isolation started, but the cutting off of access, integral to [188] and [207], was most clear after her move to Hong Kong in late November 2010. Therefore, even if a larger finding on undue influence and isolation could be said to be, in fact, a necessary step to the Court of Appeal's decision, the specific CA Finding, which relates to the formation of the Trust, was only a component of that wider ground. In and of itself, the CA Finding was collateral to the conclusion as a whole.

91 Could it be said that the above turns upon too fine a distinction? In such cases, it was suggested by Menon JC that the court could rely on the principles underlying the doctrine of *res judicata* (*Goh Nellie* at [37]):

> [T]he assessment of which side of the line an issue falls should be approached from a commonsensical perspective, balancing between the important public interest in securing finality and in ensuring that the same issues are not repeatedly litigated on one hand, and on the other, *the private interest in not foreclosing a litigant from arguing an issue which, in substance, was not the central issue decided by a previous court.* [emphasis added]

92 Adopting a commonsensical perspective, the Undue Influence Issue, which is specific to the setting up of the Trust, was *not* a central issue in

OSF 71/2011. If it was a central issue, one would have expected it to be raised by the Sisters in the summons or affidavits, and not for the first time through cross-examination. Even then, cross-examination on the Undue Influence Issue was not extensive, especially when compared to the medical evidence, and was mainly limited to the extracts reproduced at [65]–[66]. That the Undue Influence Issue was not a central issue can be attributed to the overarching inquiry in OSF 71/2011, which was to determine if BLL had capacity under the MCA. This was referred to by the Court of Appeal as the "single core issue" in OSF 71/2011 (*Re BKR (Court of Appeal)* at [76]). It was not to seek damages or equitable compensation from the defendants by reason of any alleged undue influence specific to the setting up of the Trust.

93 This analysis leads to a related point, that the issue in this proceeding is not, in any event, precisely the same issue as the CA Finding, and I turn to it.

Does the CA Finding traverse the same ground as the present proceedings?

94 In *BOM v BOK and another appeal* [2019] 1 SLR 349 ("*BOM*"), the Court of Appeal delineated the requirements of actual undue influence at [101(a)] as such: (i) that the defendant had the capacity to influence; (ii) the influence was exercised; (iii) its exercise was undue; and (iv) its exercise brought about the transaction. It follows from my positive finding on the First Preliminary Issue that the Court of Appeal in *Re BKR (Court of Appeal)* answered (i) to (iii) in the positive. What about (iv)?

95 Counsel for BLL argued that the Court of Appeal must have considered causation answered in the positive as well, because they made the CA Finding. Counsel for the defendants argued that it must be in the negative, because the Court of Appeal did not specifically consider the requirements. In my view, (iv)

is in issue, because causation is not an immutable concept, but one that must be *considered in the context of its cause of action*.

96 To explain, in the present proceedings, BLL is claiming for damages and/or equitable compensation for the defendants' breach of fiduciary duties. Counsel for BLL clarified in the course of the hearing that the claim rested on three causes of action which are predicated on the CA Finding: as a breach of the defendants' fiduciary duties, in equity, and in tort. For liability to arise under these causes of action, the question of causation must be examined. While the test for causation for the breach of fiduciary duties may not be a fully settled legal question in Singapore (see *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496 at [11], where the Court of Appeal left open the question whether but-for causation was necessary for breach of fiduciary duty), BLL has the legal burden to prove but-for causation in any event. This is because, in so far as BLL's second cause of action (*ie*, the "claim for undue influence") lies also in *tort* (assuming, for present purposes, that such a tort exists), then BLL will have to prove that *but for* the defendants' undue influence, the alleged loss which she now seeks to claim would not have arisen. In contrast, in proceedings involving the MCA, the court looks to a range of factors resulting in a lack of mental capacity, one of which would be the undue influence of persons close to the patient. In other words, the Court of Appeal's finding was that the exercise of undue influence on the part of the defendants was causative *in the sense that* it contributed to BLL's lack of capacity in setting up the Trust. The causation required for the purposes of OSF 71/2011 was *not* that of but-for causation in the setting up of the Trust, *which is the issue at hand in this case*, and which I refer to in the rest of this judgment as the "Causation Issue".

Whether the Causation Issue was answered in OSF 71/2011

97 It is clear that none of the parties in OSF 71/2011 canvassed arguments with regard to the Causation Issue as I have defined it at [96]. There was no necessity to do so. The question is whether it can be said that the Court of Appeal (or the High Court or Subordinate Courts, as the case may be) through its reasoning and conclusions, made an implicit finding that BLL would not have decided to set up the Trust but for the defendants' undue influence. According to the defendants, the basket of findings in OSF 71/2011 does not deal squarely with the issue of causation. Unsurprisingly, BLL adopts the contrary position.

98 The defendants' likely defence, as highlighted in the course of oral submissions, is that at the material time, BLL's mental impairment resulted in a paranoid belief that her son CK would come after her money. Furthermore, BLL was also professionally advised by Mr Z, Mr L and Ms D. Therefore, it is contended that BLL would still have proceeded to set up the Trust even without the defendants' undue influence: she was labouring under a paranoid belief and did receive professional advice to set up the Trust.[34]

(1) PROFESSIONAL ADVISERS

99 As regards the advice BLL received from Mr Z, Mr L and Ms D, all of whom did not testify in OSF 71/2011, this is not inconsistent with the Court of Appeal's finding that the defendants *exercised undue influence* on BLL's decision to set up the Trust. Indeed, at [205] of *Re BKR (Court of Appeal)*, the Court of Appeal stated that:

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[34] Notes of argument 29 April 2019 p 4 lns 4–11.

> We accept that [BLL] has been receiving assistance from those professionals and that this assistance is likely to remain available to her. However, the fact that such assistance was apparently made available to [BLL] at the relevant time did not prevent her acting to establish the Trust and to transfer her UBS assets to DBS. We have found that [BLL] lacked the ability to make those decisions, notwithstanding the assistance she apparently received. …

100 Implicit in the Court of Appeal's judgment was that the independent advice received by BLL did not have an emancipating effect on the undue influence exercised by the defendants on BLL (see Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2nd Ed, 2012), para 12–008; *Law Society of Singapore v Wan Hui Hong James* [2013] 3 SLR 221 at [17]; *Pek Nam Kee and another v Peh Lam Kong and another* [1994] 2 SLR(R) 750 at [123]). In other words, the Court of Appeal was not satisfied that the advice was "relevant and effective to free [BLL] from the impairment of the influence on [her] free will and to give [her] the necessary independence of judgment and freedom to make choices with a full appreciation of what [she] was doing" (see *Niersmans v Pesticcio* [2004] EWCA Civ 372 at [23]). This is not to suggest that BLL's advisers were negligent: indeed, in *Oversea-Chinese Banking Corp Ltd v Tan Teck Khong and another (committee of the estate of Pang Jong Wan, mentally disordered) and others* [2005] 2 SLR(R) 694 at [24], the High Court stated that an adviser who exercises due care might still not be able to detect undue influence.

101 However, the defendants are not simply asserting in S 1085/2016 that BLL received professional advice in deciding to set up the Trust. The defendants are arguing that it was Mr Z "who first gave BLL the idea [to set up] the [Trust]", rather than the defendants themselves.[35] In other words, Mr Z did not merely

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35 Notes of argument 29 April 2019 p 4 ln 6.

advice BLL in relation to the Trust, but *planted the idea of the Trust* in BLL. This point was neither investigated nor decided in OSF 71/2011 and it has, in my view, a material impact on the Causation Issue. Put simply, if the *genesis of the idea of the Trust* could be attributed to Mr Z, and BLL already decided in principle to set up the Trust, it is arguable that she would have proceeded to do so even if there was no undue influence exercised by the defendants. Therefore, even if the defendants unduly influenced BLL's decision to set up the Trust, it would not be correct to say BLL would not have made her decision but for their undue influence.

102 The findings in OSF 71/2011 on the role of the professional advisers therefore only go towards showing that the independent advice did not have an emancipating effect on the undue influence exercised by the defendants. They are, however, not sufficient to deal with the Causation Issue.

(2) BLL'S PARANOID BELIEF

103 The defendants are also seeking to argue in S 1085/2016 that the defendants' undue influence was not causative as BLL was labouring under a paranoid belief at the material time. Indeed, the Court of Appeal recognised this at [180] of *Re BKR (Court of Appeal)*, stating that there was a "possibility that [BLL's] decision to set up the Trust was largely if not wholly impelled by a paranoid belief that was caused at least in part by her mental impairment".

104 That being said, and as I have found in respect of the First Preliminary Issue, this statement of the Court of Appeal must be read in context. It is clear that the Court of Appeal was reasoning inductively and by the end of the judgment, there was a finding that the defendants had unduly influenced BLL into deciding to set up the Trust. But the point that is relevant here is that the defendants wish to pursue the still open question as to whether BLL would have

set up the Trust because of her paranoid belief, *independent* of any undue influence exercised on her by the defendants. Such a defence was not run in OSF 71/2011, for the simple reason that the defendants (and BLL herself) were operating under the premise that BLL did indeed have capacity when she decided to set up the Trust. If they ran a defence based on BLL's paranoid belief in OSF 71/2011, that would have completely undermined the foundation to their case in OSF 71/2011: that BLL had capacity and decision-making ability at the material time when the Trust was set up.

105 Of course, the converse point may also be made, that the paranoid delusion furnished the defendants with an opportunity which they exploited. This link between physical infirmity and undue influence was acknowledged by the Court of Appeal in *BOM* (see [171]). The First Instance Judge neatly encapsulated how these findings could support each other at [130] of the First Instance GD:

> I find that [BLM], a psychiatrist, who has lived for years with [BLL], knows and understands [BLL], and is influencing and causing [BLL] to act in a manner that is contrary to [BLL's] best interests. [BLM], with whom [BLL] stays, has effectively cut off [BLL]'s access to her family members since late 2010 and early 2011 and [BLL] has been led or allowed to believe that her family members no longer care for her, that her other daughter NG has left the country with her family and her son CK is behind this action as they are only interested in benefitting from her wealth … [The defendants] would stand to gain financially by maintaining the appearance that [BLL] has mental capacity whilst influencing [BLL] to inject all her assets into the [Trust] …

This connection is also very much alive in the Court of Appeal's judgment, where it was held that the defendants were "positive hindrances to her decision-making independence in that she [was] cut off from people who would otherwise be able to give her advice" (*Re BKR (Court of Appeal)* at [207]).

106 I do not consider, however, that the point was adequately pleaded or argued, nor would the above dicta be sufficient for the purposes of issue estoppel. A relevant point is that the First Instance Judge was of the view that the isolation started in late 2010. The Trust documents were not produced in OSF 71/2011, and the Court of Appeal was of the view that while the Trust was dated 26 October 2010, it was likely signed on 6 or 26 November 2010. It was even later, on 28 November 2010, that BLL left for Hong Kong to live with the defendants. The comments of the Court of Appeal would also have to be seen with this time sequence in mind. The issue is a relevant one for trial if parties wish to litigate it.

CONCLUSION ON THE CAUSATION ISSUE

107 Accordingly, the Causation Issue was not answered in OSF 71/2011, whether expressly or implicitly. Relevant questions, such as whether Mr Z prompted BLL to set up the Trust, and BLL's reaction to this advice, were not decided by any of the three courts, and it would have been unnecessary to do so. Furthermore, the question of whether BLL would have decided to set up the Trust in any event because of her paranoid belief was also not argued by the defendants in OSF 71/2011 because that would have contradicted their case in OSF 71/2011.

Conclusion on the Second Preliminary Issue

108 The Second Preliminary Issue centres on whether there was an identity of subject matter between OSF 71/2011 and S 1085/2016. I found that the Undue Influence Issue was raised and argued in OSF 71/2011, albeit that it was only raised in the course of cross-examination. Furthermore, the fact that it was raised and argued in a different context (*ie*, to determine if BLL had mental capacity) did not preclude the doctrine of issue estoppel from operating.

Nevertheless, I hold that the CA Finding is not binding because it was not fundamental to the Court of Appeal's decision and the orders made. It also did not traverse precisely the same grounds as S 1085/2016 but a smaller one. BLL will have to prove the Causation Issue for the defendants to be liable in damages or equitable compensation. While the practical effect of litigating the Causation Issue would result in relitigation of the Undue Influence Issue (in so far as both issues arise out of the same underlying facts), such relitigation is necessary because the issues of undue influence specific to S 1085/2016 are not identical to OSF 71/2011, as I have explained at [96].

Third Preliminary Issue

109 The doctrine of issue estoppel not applying, the question then remains whether there is any abuse of process nonetheless. Hence, there is the need to consider the Third Preliminary Issue, which is whether the defendants are precluded by the extended doctrine of *res judicata* from arguing that they did not unduly influence BLL into deciding to set up, setting up and/or signing the settlement constituting the Trust.

***The extended doctrine of* res judicata**

110 The extended doctrine of *res judicata* can be attributed to the foundational authority of *Henderson v Henderson* (1843) 3 Hare 100, where it was said at 114–115 that:

> … [W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases,

> not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which [the] parties, exercising reasonable diligence, might have brought forward at the time.

111 In *TT International* at [102], the Court of Appeal explained that the extended doctrine has also been referred to as the doctrine of abuse of process and the purpose behind the doctrine is to limit *abusive and duplicative litigation*. The concern which underlies the extended doctrine is reflected in the following passage from the Court of Appeal's decision in *Lim Geok Lin Andy v Yap Jin Meng Bryan and another appeal* [2017] 2 SLR 760 ("*Andy Lim*") at [44]:

> 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*. In our judgment, the rule in *Henderson* is applicable where some connection can be shown between the party seeking to relitigate the issue and the earlier proceeding where that essential issue was litigated, *which would make it unjust to allow that party to reopen the issue*. [original emphasis removed; emphasis added]

112 In determining whether there is an abuse of process, the court ought to look at all the circumstances of the case, and the following are some non-exhaustive factors (*Goh Nellie* at [53]):

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

(b) whether there is fresh evidence that might warrant relitigation;

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

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

113 Accordingly, and unlike cause of action estoppel and issue estoppel, the inquiry for the extended doctrine of *res judicata* is a broad-based one that takes into account all the facts and circumstances of the case. The absence or existence of the non-exhaustive factors stated above is not decisive. The court should remain guided by the balance to be found in the tensions between ensuring that a litigant who has a genuine claim or defence is allowed to put his case before the court and recognising that there is a point at which repeated litigation becomes unduly oppressive to the other party (*Goh Nellie* at [53]). There is an underlying public interest in ensuring finality in litigation and the private interest of a party not to be twice vexed in the same matter (*Johnson v Gore Wood & Co* [2001] 2 WLR 72 ("*Johnson*") at 90). These interests reflect the competing considerations between the administration of justice being brought into disrepute and the unfairness to a party on the other (*Hunter v Chief Constable of the West Midlands Police & Others* [1981] 3 WLR 906 ("*Hunter*") at 909).

114 In so far as the burden of proof is concerned, the onus of proving an abuse of process lies on the party who alleges it, which would be BLL in the present case (*Kwa Ban Cheong v Kuah Boon Sek and others* [2003] 3 SLR(R) 644 at [29]; *Johnson* at 118; *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132 ("*Bragg*") at 138). The test of whether there is an abuse of process has been referred as one that is "exacting" (*Caylon v Michailaidis & Ors (Gilbraltar)* [2009] UKPC 34 at [37]).

115 Furthermore, in determining whether the extended doctrine of *res judicata* ought to apply, the court ought to disregard the prospects of success of the claim or defence that is sought to be relitigated or raised in the new proceedings. If it is thought that the defence is one that is "hopeless", then it is liable to be struck out, but that is a separate enquiry from whether there is an

abuse of process (*Stuart v Goldberg Linde (a firm) and others* [2008] 1 WLR 823 at [57]; K R Handley, *Spencer Bower and Handley: Res Judicata* (LexisNexis, 4th Ed, 2009) ("*Spencer Bower*") at para 26.11).

Analysis

116 I have decided, in the context of the First Preliminary Issue, that the Court of Appeal did find that the defendants unduly influenced BLL into deciding to set up the Trust. I have also found that the Undue Influence Issue was sufficiently raised and argued for the CA Finding to be made. Turning then to the range of concerns expressed in the broad inquiry, the question that follows is whether abuse of process would arise here, where the *practical effect* of the defendants seeking to litigate the Causation Issue would result in litigation again of the evidence which resulted in the CA Finding. The plaintiff would be, in this sense, twice vexed by the Undue Influence Issue, by the very persons whom the Court of Appeal previously considered responsible for undue influence.

117 In assessing the Third Preliminary Issue, two questions are particularly important to the case at hand:

(a) Are there genuine reasons to allow the defendants to adduce evidence that they could have adduced at the prior proceedings?

(b) If so, how should a risk of findings inconsistent with the CA Finding be viewed?

118 I deal with these two questions in turn.

Evidence that warrants relitigation

119 One factor to be taken into account by the court in determining whether there is an abuse of process is if there is fresh evidence that might warrant relitigation (*Goh Nellie* at [53]). The defendants contend that the Undue Influence Issue should be relitigated as key witnesses were not called in OSF 71/2011, namely, Mr Z, Mr L and Ms D. BLL points out that this evidence was available at the last hearing. According to BLL, the defendants made a conscious decision not to call Mr Z, Mr L and Ms D as witnesses in OSF 71/2011.[36] Therefore, they should not be allowed to use the fact that they were not called as a reason for relitigating the Undue Influence Issue.

120 In my view, the defendants' failure to call these key witnesses must be seen in the context of the nature of the proceedings in OSF 71/2011, which were to determine if BLL had mental capacity. It was plainly not a civil trial to determine if they should be held liable for a breach of fiduciary duties by reason of undue influence exercised on BLL, in which case one would have expected the defendants to call all material witnesses to support their case. Furthermore, BLL herself did not see the need in OSF 71/2011 to call Mr Z, Mr L and Ms D, which would have resulted in more time and expenses incurred. In the circumstances, there were reasonable grounds for not calling these professionals.

121 Once it is established that there were reasonable grounds for not calling the Mr Z, Mr L and Ms D in OSF 71/2011, it becomes apparent that the *quality of evidence* in S 1085/2016 will be significantly improved in the present suit with the addition of these material witnesses. Pleadings and discovery may be

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[36] Plaintiff's supplementary written submissions para 67.

properly focused on the relevant issues. The other witnesses who were called in OSF 71/2011 will likewise be available to testify in S 1085/2016. BLL, who in any event was found to lack capacity at the material time she gave evidence in OSF 71/2011, is now acting by her deputies and will not be vexed with cross-examination. This is thus a factor that weighs in favour of allowing the Undue Influence Issue to be relitigated.

Other circumstances justifying relitigation

122 There are also other circumstances that justify allowing relitigation on the Undue Influence Issue.

123 First, the Undue Influence Issue was only raised in the course of cross-examination in OSF 71/2011. It was not raised directly in the summons or affidavits. While I find that the Undue Influence Issue was in fact argued by the defendants, I can see some force in their contention that they were not aware that they had to run a defence to respond to the Sisters' allegations of undue influence.[37] The examination of the Undue Influence Issue in S 1085/2016 will therefore be facilitated by clearer pleadings and proper discovery.

124 Second, now that it has been established that BLL did not have capacity at the material time, and was in fact operating under a paranoid belief that the Trust was necessary to prevent CK from coming after her money (*Re BKR (Court of Appeal)* at [180]), this allows the defendants to mount a new argument that was presented in the course of this preliminary hearing: that BLL's decision to set up the Trust was due to this paranoid belief and that there was no undue

37 Defendants' submissions para 36b.

influence. This argument was not open to the defendants in OSF 71/2011 as it would have undermined their case that BLL had capacity at the material time.

125 Third, the Causation Issue will in any event have to be litigated in S 1085/2016. There were reasonable grounds for the Causation Issue not to be raised in OSF 71/2011 as it was never a live issue. The allegations of undue influence only went towards whether undue influence was *exercised* on BLL: it was not necessary for the courts to consider causation as they would in a case where undue influence is invoked as a vitiating factor against a contract. Accordingly, since the Causation Issue will have to be addressed at trial (and this was the initial position taken by counsel for BLL during the hearing on 29 April 2019),[38] the very witnesses who the defendants are seeking to rely on for the Undue Influence Issue will have to be called in any event. The two issues are closely intertwined and this is another factor which leans in favour of permitting the Undue Influence Issue to be relitigated.

126 Returning to the policy goals underlying the doctrine of *res judicata*, this is not a case where the "interest in the finality and conclusiveness of judicial decisions as well as the right of individuals to be protected from vexatious multiplication of suits" is attracted (*Goh Nellie* at [39]), to the extent that the defendants should be barred from relitigating the Undue Influence Issue.

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[38] Notes of argument 29 April 2019 p 3 ln 30.

The distinction between plaintiffs and defendants

127 It is in this context that I come to the argument that the defendants relied upon: the fact that they are defendants.[39] As observed in *Spencer Bower* at para 26.15, "a defendant is in a better position to resist a finding of abuse".

128 Two English decisions are relevant in this regard. The first is *Conlon and another v Simms* [2008] 1 WLR 484 ("*Conlon*"). In *Conlon*, the defendant, Simms, was a solicitor who was in partnership with the claimants. In 2004, the Solicitors Disciplinary Tribunal ("the Tribunal") pronounced that Simms was guilty of misconduct and he was struck off the roll. The Tribunal found that Simms was actively involved in making, promoting or facilitating transactions which were bogus and had made deceitful representations to third parties in promoting these transactions. Simms's appeal to the Divisional Court was dismissed.

129 Thereafter, an action was commenced by the claimants, alleging *inter alia* that Simms had fraudulently refrained from disclosing matters which might affect his status as a solicitor. The particulars pleaded in the statement of claim were, essentially, the charges against Simms which the Tribunal had found to be made out. Simms denied the allegations against him and contended that the Tribunal's findings were inadmissible.

130 The English Court of Appeal held that it was *not* an abuse of process for Simms to deny the allegations against him in the new action and that there was a principled distinction which could be made between plaintiffs and defendants

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39 1st and 2nd defendants' further skeletal arguments (preliminary hearing on undue influence issues) para 18b.

in the context of the extended doctrine. At [146] of *Conlon*, Jonathan Parker LJ stated that:

> … there is force in Mr Simms's submission that in denying the allegations of dishonesty made against him in the present action he is doing no more than continuing to protest his innocence of the charges brought against him by the Law Society, albeit he is doing so in the face of the adverse findings of the [Tribunal] and the Divisional Court: to use his own words, *he has initiated nothing. … in general the court should be slower in preventing a party from continuing to deny serious charges of which another court has previously found him guilty than in preventing such a party from initiating proceedings for the purpose of relitigating the question whether he is guilty of those charges*. [emphasis added]

131 To a similar effect, Ward LJ also stated at [178]:

> … When deciding whether it is an abuse of the process for [Simms] to continue to demand that the case brought by others in a different context be proved, it seems to me that the essential question is whether it is more unfair on the claimants to require them to prove very serious charges of fraud … than it is unfair on the defendant to prevent him altogether from defending himself in these new and unconnected proceedings. *I am uncomfortable with the result … that a man facing serious charges of fraud is not able to defend himself again, and I conclude that he suffers a greater unfairness than do the claimants.* [emphasis added]

132 A few principles can be distilled from *Conlon*. First, where the party who is seeking to relitigate a point is the defendant in *both* the previous and current actions, the court should be slow to find that there is an abuse, as compared to a situation involving a claimant in both proceedings, or where the defendant in the earlier action *initiates* the new proceedings. Second, it appears that the court will also consider the point that is sought to be relitigated: the more serious the charge against the defendant, the more it will be in the interests of fairness and justice for him to be allowed to assert his defence in the new proceedings.

133 The next relevant English case is that of *OMV Petrom SA v Glencore International AG* [2014] EWHC 242 ("*Glencore*"). In *Glencore*, a company, Petex, commenced arbitral proceedings against the defendant, Glencore, in 2003 for breach of contract and/or fraud. The arbitral tribunal found that Glencore was in breach of contract. The tribunal, however, found that Petex suffered no actionable loss. Following these events, another company, Petrom, sued Glencore, relying on the same conclusions reached by the arbitral tribunal to find a breach of contract. Petrom alleged that it would be an abuse of process for the same issues determined by the tribunal to be relitigated. Rejecting Petrom's contentions, Justice Blair held at [30] that:

> The position in my view is analogous to that in *Conlon v Simms*, ibid, where it was held that the court should be slower in preventing a party from continuing to deny serious charges of which another court has previously found him guilty than in preventing such a party from initiating proceedings for the purpose of relitigating the question whether he was guilty of those charges. … The same point applies in the present case in my view, and I would regard it as sufficient to decide the application against Petrom.

134 This factor is not, of course, decisive. In *Then Khek Koon and another v Arjun Permanand Samtani and another and other suits* [2014] 1 SLR 245 ("*Then Khek Koon*"), for example, the defendants were precluded from denying that they were in breach of their fiduciary duties owed to the plaintiff, due to the extended doctrine of *res judicata* (*Then Khek Koon* at [101]).

135 In *Then Khek Koon*, the plaintiffs were subsidiary proprietors of flats in a condominium known as Horizon Towers. The defendants were members of the sale committee in charge of a collective sale, which the plaintiffs objected to. In the *prior proceedings* (*ie*, *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 ("*Ng Eng Ghee*"), the Court of Appeal had upheld the

plaintiffs' objections and set aside the collective sale. Although there were costs orders made in favour of the plaintiffs, the Court of Appeal did not accept all of the plaintiffs' submissions on costs. This resulted in a margin between what the plaintiffs recovered under the costs orders and the amount paid to their solicitors. In the *later proceedings* (*ie*, *Then Khek Koon*), the plaintiffs therefore sought equitable compensation equivalent to their unrecovered costs on the ground of the defendants' breach of fiduciary duties (*Then Khek Koon* at [1]–[5]).

136 The Court of Appeal, in the *prior proceedings*, had found that the sale committee breached its duties to the subsidiary proprietors by, *inter alia*, failing to disclose that the defendants had an undisclosed potential conflict of interest. The defendants sought to argue, on various grounds, that these findings were not binding on the *later proceedings*, which arose in the context of determining whether the defendants were liable to compensate the plaintiffs in equity. Vinodh Coomaraswamy J rejected the defendants' contentions, and stated as follows at [102] of *Then Khek Koon*:

> The Court of Appeal set aside the collective sale order because it was satisfied that the [sale committee's] breaches of fiduciary duties meant that the collective sale was not a transaction in good faith … Although it arises in a different context, the question before me on breach of fiduciary duties is the same question which the Court of Appeal considered and answered in [*Ng Eng Ghee*]. The defendants' invitation to me to decide afresh whether they were in breach of their fiduciary duties is in fact an invitation to me to ignore findings of fact by the Court of Appeal which were essential to its decision in [*Ng Eng Ghee*]. That invitation is an abuse of process. I am unable to accept it. I am therefore bound by the decision in [*Ng Eng Ghee*] to hold that the defendants were in breach of their fiduciary duties to the plaintiffs.

137 In coming to the conclusion that there was an abuse of process, Coomaraswamy J's reasons were as follows. First, he found that the Court of

Appeal's findings in *Ng Eng Ghee* of the various breaches in fiduciary duties were "essential step[s]" for them to arrive at their decision to set aside the collective side order (at [101]). Second, the defendants had "every opportunity to put their side of the story forward" in the prior proceedings, but chose not to do so. In *Ng Eng Ghee*, the alleged breaches of fiduciary duties were front and centre from the inception of the action. It was these breaches of fiduciary duties on the part of the sale committee which formed the very basis of the objecting subsidiary proprietors' attempt to set aside the collective sale.

138 The comparison between *Then Khek Koon* and the case at hand show that the broad-based inquiry as to whether or not there is an abuse of process is an intensely fact-specific exercise. While there were good reasons the defendants in the present suit did not fully litigate the present issues in the prior proceedings, the same could not be said of *Then Khek Koon.* Like the courts in *Conlon* and *Glencore*, I consider that there will be a greater degree of unfairness on the part of the defendants if they are not provided the opportunity to defend themselves against serious accusations which have been levelled against them. In S 1085/2016, BLL is seeking to hold the defendants liable for their alleged breaches of fiduciary duties: such liability was plainly not the subject of OSF 71/2011.

Collateral attack and inconsistent findings

139 In the light of the foregoing, it is clear that the defendants' wish to relitigate does not amount to *nothing more* than a collateral attack upon OSF 71/2011. As a final matter I consider the related issue of a risk of inconsistent findings. This is a factor that weighs against allowing the issue to be relitigated (*Antariksa Logistics Pte Ltd and others v Nurdian Cuaca and others* [2018] 3 SLR 117 at [104]–[105]). It follows from my reasons at [94]–

[96], because causation is considered in the context of its cause of action, that any undue influence findings to be made in S 1085/2016 would likely be different in nature and composition to the CA Finding.

Conclusion on the Third Preliminary Issue

140 In conclusion, any concern about relitigating the Undue Influence Issue must be balanced against the following points:

(a) It cannot be said that the current proceedings are nothing more than a collateral attack on the CA Finding;

(b) There are, in the present case, genuine reasons for relitigating the Undue Influence Issue:

(i) Key witnesses, namely Mr Z, Mr L and Ms D, were not called in OSF 71/2011, and will have to be called in any event in S 1085/2016 to address the Causation Issue;

(ii) The Undue Influence Issue was only raised in cross-examination and not in the summons or affidavits;

(iii) The defendants are seeking to argue that BLL's decision to set up the Trust was due to her paranoid belief rather than any alleged exercise of undue influence: this argument would not have been available to them in OSF 71/2011.

(c) In this context, the failure to raise the issue of BLL's paranoid delusion, call all necessary witnesses or bring to the fore all the necessary defences cannot be attributed to the defendants. The various issues were not central to their case in the prior proceedings, although they became significant as the case progressed. In this context, the court

should be slow to find an abuse on the part of a defendant who continues to deny the plaintiff's accusations in new and different proceedings, where now liability is sought to be imposed as a result.

(d) The risk of inconsistent findings, while present, may be balanced against the fact that the nature and composition of any undue influence findings in S 1085/2016 do not traverse the same ground as the CA Finding.

141 Accordingly, I find that the extended doctrine of *res judicata* does not apply to preclude the defendants from relitigating the Undue Influence Issue.

Conclusion

142 To conclude, I have answered the Preliminary Issues as follows:

(a) For the First Preliminary Issue, I hold that the Court of Appeal in *Re BKR (Court of Appeal)* did find that the defendants unduly influenced BLL into deciding to set up the Trust;

(b) For the Second Preliminary Issue, issue estoppel does not apply as there is no identity of subject matter; and

(c) For the Third Preliminary Issue, the extended doctrine of *res judicata* does not apply because there is no abuse of process in the present case.

143 I shall hear counsel on costs.

Valerie Thean
Judge

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