IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(A) 1

Civil Appeal No 10 of 2021

Between

Sim Kwai Meng

… *Appellant*

And

(1) Pang Moh Yin Patricia
(2) Pang Moh Yin Patricia, the personal representative of Beatrice Chia Soo Hia (deceased)

… *Respondents*

In the matter of Suit No 980 of 2019

Between

(1) Pang Moh Yin Patricia
(2) Pang Moh Yin Patricia, the personal representative of Beatrice Chia Soo Hia (deceased)

… *Plaintiffs*

And

Sim Kwai Meng

… *Defendant*

GROUNDS OF DECISION

[*Res Judicata*] — [Extended doctrine of *res judicata*]

TABLE OF CONTENTS

INTRODUCTION **1**

BACKGROUND **3**

OUR DECISION **8**

THE PROCEEDINGS BETWEEN THE PARTIES 8

WHETHER H IS PRECLUDED FROM RAISING RES JUDICATA AGAINST W 18

WHETHER W WAS PRECLUDED FROM RELYING ON THE WOA 19

H'S COUNTERCLAIM FOR DAMAGES 21

ORDERS 21

CONCLUSION **22**

Sim Kwai Meng
v
Pang Moh Yin Patricia and another

[2022] SGHC(A) 1

Appellate Division of the High Court — Civil Appeal No 10 of 2021
Woo Bih Li JAD, Quentin Loh JAD and Chua Lee Ming J
22 November 2021

21 January 2022

Woo Bih Li JAD (delivering the grounds of decision of the court):

Introduction

1 This appeal concerns a dispute on the terms of an oral agreement made on 22 June 2015 between a husband ("H") and wife ("W") before they were divorced. H is the appellant and W is the first respondent. The second respondent is W's mother ("M"), who is involved only because she is a co-owner of a property, as elaborated below.

2 The parties owned two properties:[1]

(a) a property in Signature Park ("SP") which the parties owned as joint tenants; and

[1] Appellant's Case at paras 3 and 7.1; Respondent's Case at paras 4 and 5.

(b) a property in Mulberry Avenue ("MA") which was owned as follows:

(i)	50%	:	W
(ii)	33.3% (one-third)	:	H
(iii)	16.7% (one-sixth)	:	M

3 According to H, all that was orally agreed on 22 June 2015 was that SP would be sold.[2]

4 In contrast, W's account was that the agreed terms of the oral agreement were as follows:[3]

(a) She would consent to H's request to sell SP.

(b) H would transfer his interest in MA to W.

(c) W would transfer her half share of the sale proceeds of SP to H, after deducting $180,000 to compensate her for loss of rent which she would forego as a result of the sale of SP.

5 As can be seen, there was no dispute about the existence of an oral agreement as such. The dispute was on the existence of an oral agreement *based on the terms alleged by W*. We will refer to such terms as W's oral agreement or "the WOA" for convenience.

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2 Record of Appeal ("ROA") Vol 2 p 28 at paras 8 and 11.

3 ROA Vol 2 p 20 at para 19.

6 The main issue before us was whether W was precluded from relying on the WOA by the doctrine of *res judicata*. There was also the question of whether H himself was precluded by the doctrine of *res judicata* from raising *res judicata* against W.

7 W and M were the plaintiffs below. The trial was heard by Dedar Singh Gill J ("Gill J"), who allowed W's claim on the WOA and dismissed a counterclaim by H for damages as we elaborate later below. H appealed. On 22 November 2021, we allowed H's appeal on W's claim and dismissed his appeal in respect of the dismissal of his counterclaim. We also ordered a sale of MA on the terms stated in our oral judgment delivered that day. Each party was to bear his/her own costs of the trial and the appeal, including disbursements, and the costs of two previous interlocutory applications in AD/SUM 30/2021 and AD/SUM 20/2021. We now set out our grounds of decision.

Background

8 We recount the history underlying this appeal briefly here. These events are important and will be dealt with in greater detail subsequently.

Date	**Event**
13 June 1981	H and W are married.[4]
22 June 2015	H and W enter into the oral agreement.[5]
September 2015	SP is sold.[6]

4 ROA Vol 3 Part B p 6 at para 9.

5 ROA Vol 3 Part B p 11 at para 30.

6 ROA Vol 3 Part B p 15 at para 44.

Date	**Event**
4 November 2015	H files FC/D 4974/2015 ("the Divorce Suit") on the basis of four years' separation.[7]
12 April 2016	W files HC/S 364/2016 ("the Previous Suit"), claiming proprietary estoppel arising out of the WOA.[8]
9 May 2016	Interim judgment in the Divorce Suit is granted.[9]
30 May 2016	AR Shaun Pereira orders a stay of the Previous Suit on H's application.[10]
5 September 2017 10 October 2017 16 October 2017	DJ Toh Wee San ("DJ Toh") hears the Divorce Suit in the Family Court.[11]
3 November 2017	DJ Toh decides:[12] (a) W is to have the first right to buy H's interest in MA for $840,000. If she chooses to exercise this right, she is to confirm this in writing within four weeks of the order.

7 ROA Vol 3 Part B p 161 at para 3.

8 Appellant's Core Bundle ("ACB") Vol II p 7.

9 ACB Vol II p 18.

10 Appellant's Case at para 10; Respondent's Case at para 10.

11 ACB Vol II p 23.

12 ACB Vol II p 20.

Date	**Event**
	(b) Alternatively, the parties are to jointly sell MA in the open market and complete the sale within six months from the date of final judgment. (c) H and W are to each retain the assets in their own name and/or possession. DJ Toh makes no order for maintenance[13] (this is irrelevant for present purposes, and no more will be said about it). DJ Toh grants the parties liberty to apply.[14]
14 November 2017	Certificate of Final Judgment in the Divorce Suit is issued.[15]
16 November 2017	W files an appeal in HCF/DCA 153/2017 against DJ Toh's decision ("the HCF Appeal").[16]
26 February 2018	DJ Toh issues her grounds of decision ("DJGD").[17]
16 March 2018	W discontinues the Previous Suit.[18]
10 August 2018 6 September 2018	Tan Puay Boon JC ("Tan JC") hears the HCF Appeal in the Family Division of the High Court.[19]

13 ACB Vol II p 20.

14 ACB Vol II p 21.

15 ROA Vol 2 p 16 at para 7.

16 Appellant's Case at para 13; Respondent's Case at para 15.

17 ACB Vol II p 23.

18 Appellant's Case at para 14.

19 ACB Vol II pp 234 and 245.

Date	**Event**
8 October 2018	Tan JC decides the HCF Appeal, upholding DJ Toh's order granting W the first right to buy H's interest in MA for $840,000, but setting aside the alternative order for sale of MA in the open market. The liberty to apply order from DJ Toh is retained.[20]
8 November 2018	H files HC/OS 1359/2018 ("OS 1359") in the High Court naming W and M as defendants.[21] H seeks an order for MA to be sold and for the proceeds to be divided.[22]
15 November 2018	M passes away.[23] Subsequently, W becomes the personal representative of M's estate and OS 1359 is amended to reflect this.[24]
22 February 2019	W files HC/SUM 937/2019 ("SUM 937") to convert OS 1359 into a writ action.[25] W argues that the existence of the WOA constitutes a substantive dispute of fact.[26] H argues *res judicata* against W, based on the decisions of DJ Toh and Tan JC in the Divorce Suit.[27]

20 ACB Vol II pp 34–35.

21 Appellant's Case at para 16.

22 ACB Vol II p 36.

23 ROA Vol 5 p 174.

24 ACB Vol II p 36.

25 ROA Vol 3 Part G p 5.

26 ROA Vol 3 Part A pp 23–25 at paras 5–15.

27 ROA Vol 3 Part A p 54 at para 8.

Date	**Event**
19 March 2019	AR Kenneth Choo ("AR Choo") of the High Court finds that there is no abuse of process by W and W is entitled to pursue her claim based on the WOA. He decides that OS 1359 is to proceed as though begun by writ.[28] W and M's estate are to be the plaintiffs and H is to be the defendant in OS 1359 as converted into a writ action.[29]
1 April 2019	H files HC/RA 104/2019 ("RA 104") against AR Choo's decision.[30]
2 May 2019	RA 104 is heard before Lee Seiu Kin J ("Lee J") of the High Court, who directs the parties to seek clarification from Tan JC in the Divorce Suit under the liberty to apply provision made in the Divorce Suit.[31]
8 July 2019	The parties appear before Tan JC. Tan JC refers the parties to the position taken by W during the HCF Appeal.[32] Tan JC asks the parties to consider the correct mode to proceed with the division of matrimonial property, whether in a civil suit before the High Court or in the Family Division of the High Court.[33]

28 ROA Vol 3 Part D p 277 line 4 to p 278 line 17; ROA Vol 3 Part G p 7 at order 2.

29 ROA Vol 3 Part G p 7 at orders 2 and 3.

30 ROA Vol 3 Part G p 9.

31 ACB Vol II p 40.

32 ACB Vol II p 63 at line 5.

33 ACB Vol II p 63 at lines 7–9.

Date	Event
2 August 2019	W files HC/SUM 3887/2019 ("SUM 3887") in OS 1359 to adduce further evidence.[34]
6 August 2019	Lee J dismisses RA 104 and makes no order on SUM 3887.[35]

9 Thereafter, pleadings were filed. OS 1359 became HC/S 980/2019 ("the Present Suit"). On 25 and 26 August 2020, the Present Suit was heard by Gill J of the High Court.

10 On 21 January 2021, Gill J issued his judgment ("the Judgment"). He found that H was not precluded by the decision of Lee J in RA 104 from arguing that W was precluded from raising the WOA (at [41]). However, he also found that W was not precluded by the decisions of DJ Toh and Tan JC in the Divorce Suit from relying on the existence of the WOA (at [46]–[47]). On the evidence, he found that W had established the existence of the WOA (at [52]–[78]).

11 H then appealed against that decision to the Appellate Division of the High Court. His Appellant's Case was focused on the question of *res judicata* against W and did not address the evidence about the WOA.

Our decision

The proceedings between the parties

12 Before addressing the issues raised in this appeal, it is necessary to consider in some detail the prior proceedings between the parties and their

[34] ROA Vol 3 Part G pp 11–12.

[35] ROA Vol 3 Part G p 13.

proper interpretation. These proceedings largely consisted of a series of events which gave rise to confusion and misunderstanding. At all material times, W was represented by solicitors, although she was represented by one set of solicitors before DJ Toh and Tan JC in the Divorce Suit and a different set of solicitors for OS 1359 and the Present Suit. H was represented by solicitors before DJ Toh and Tan JC in the Divorce Suit, but he represented himself before AR Choo and Lee J. Before us, he was represented by the solicitors who had represented him in the Divorce Suit. For convenience, we will use the expression "family justice court" or "FJC" to refer to the Family Court and the High Court (Family Division) or either of them as the context warrants.

13 The first important point of reference is the DJGD. At [7]–[9], DJ Toh observed as follows:[36]

> 7. W asserted that H agreed to transfer his 1/3 share in the matrimonial property to W in exchange for her agreement to sell the investment property urgently. Each of them will get an equal share of the net sale proceeds and W is entitled to deduct further sums ($180K and monies from the parties' common funds) from H's proceeds as these were monies owing to her. These were due to H's mounting debts … The investment property was successfully sold but H refused to transfer his 1/3 share in the matrimonial property to W. W submitted that H is estopped from denying the existence of the oral agreement from the various evidence produced by her – i.e. text messages between the parties, the circumstances that existed including a hand written agreement and supporting evidence from their children, W's mother, relatives and friend.
>
> 8. H's countered that the court should not consider W's allegations since the court do [*sic*] not recognize pre and post marital agreements. Further, the alleged oral agreement is also not an agreement made in contemplation of divorce. H also contested W's story in respect of the finer details surrounding their oral agreement. H asserted that W had tried to force him to sign a handwritten agreement which he refused and this ended in a scuffle. The son was also involved and this episode became an ugly family violence incident in which police reports,

[36] ACB Vol II pp 25–27.

> medical attention and a family violence protection order were procured.
>
> 9. I accepted H's arguments, as supported by section 112 of the WC. [footnote (in original): In particular, subsection (e) states that any agreement between the parties with respect to ownership and division of the matrimonial assets must be made in contemplation of divorce which was not the case here.] H's lawyers also clarified that they did not represent H for the related HC matter. In any case, I was also not persuaded that the evidence on paper for the proceeding before me could conclusively prove the oral agreement in the exact form that W had pleaded. The text messages were at best indicative of some broad agreement parties had but details were lacking and therefore non-conclusive. As for the hand-written agreement between parties, H explained that it was written by W but not signed by him. He also provided a contemporaneous police report to support his story. Next were affidavit evidence from parties and each had a different interpretation and perspective. The remaining supporting evidence came from third parties who heard "W's story" from W. Such parties were W's children, mother, friend and relatives who were W's supporters. I was not persuaded that these amounted to conclusive evidence. *More importantly, I had no powers under the relevant matrimonial laws to adjudicate on such property disputes.*
>
> [emphasis added]

14 The last sentence at [9] of DJ Toh's decision was the source of contention between the parties. W argued that this sentence meant that DJ Toh did not rule on the validity of the WOA as she had no power to do so.[37] H contended otherwise, *ie*, that the reference to "such property disputes" was not to the dispute about the WOA, but rather to disputes in respect of SP and MA raised by W's family members and a friend, which were in relation to an alleged oral agreement that was not made in contemplation of divorce.[38] H argued that it was clear from the DJGD that DJ Toh had concluded that the WOA was not an agreement "made in contemplation of divorce" as mentioned in s 112(2)(*e*)

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37 Respondent's Case at paras 58–60.

38 Appellant's Case at para 57.

of the Women's Charter (Cap 353, 2009 Rev Ed) ("WC"); thus, the WOA should be disregarded.[39]

15 We are of the view that the last sentence of [9] of the DJGD was unfortunate as it was not clear what it meant. Also, H's argument as set out in the preceding paragraph did not make sense. In any event, the question was whether DJ Toh meant that:

(a) the validity of the WOA was to be determined by the High Court since the FJC had no power to adjudicate on property disputes ("the first interpretation"); or

(b) the validity of the WOA was irrelevant because even if W established the WOA, the FJC would disregard it because it was not an agreement made in contemplation of divorce ("the second interpretation").

16 The confusion was compounded by the fact that DJ Toh mentioned that W had not *conclusively* proved the WOA, when the relevant standard of proof was proof on the balance of probabilities and not proof with conclusive evidence. Nevertheless, even if DJ Toh had applied the wrong standard, the question was still what her decision meant.

17 We are of the view that the second interpretation is the correct one for two reasons.

18 First, DJ Toh had emphasised that the WOA would not have been an agreement made in contemplation of divorce. This suggested that even if W

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[39] Appellant's Skeletal Arguments at para 21.2.

could establish the WOA on the facts, DJ Toh would have disregarded it since it did not come within s 112(2)(*e*) of the WC.

19 Secondly, DJ Toh went on to grant W the first right to buy H's interest in MA and, alternatively, ordered a sale of MA and the distribution of the sale proceeds in accordance with the shares of the owners as stated in the title deed. If DJ Toh was of the view that the existence of the WOA would have to be decided by another court, then she would have adjourned the hearing for that determination to be made first because it would not make sense to make a decision about MA pending that determination. If W then succeeded in establishing the existence of the WOA, that would have meant that MA would no longer be the subject of division by DJ Toh as H had agreed to transfer his interest in it to W in exchange for her consent to the sale of SP. The fact that DJ Toh did not adjourn the hearing and instead made orders in respect of MA was inconsistent with the first interpretation and consistent with the second interpretation.

20 But that was not all. W then filed the HCF Appeal. Importantly, on 10 August 2018, her counsel informed Tan JC that, "W will not be proceeding with arguments on the [WOA]. She will be seeking to recover the entire amount of the proceeds of sale of [SP] into the pool of matrimonial assets".[40] This, in our view, was critical. Whatever the correct interpretation of the last sentence of [9] of the DJGD, W was no longer pursuing her arguments on the WOA. In other words, W had abandoned the WOA. It was not necessary to establish the existence of the WOA or whether the FJC could have regard to it.

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40 ACB Vol II p 236 at lines 14–16.

21 Realising the importance of this withdrawal, W argued in this appeal that she was doing the right thing by withdrawing the WOA from the FJC "and bringing the claim via civil proceedings".[41] There were various difficulties facing this contention.

22 First, there was no such qualification by W's counsel when the counsel withdrew her arguments on the WOA before Tan JC on 10 August 2018. The minutes of the hearing as recorded by Tan JC do not reflect this qualification at all. Furthermore, the withdrawal by W's counsel was not made inadvertently. Indeed, Tan JC had stood down the hearing to give counsel time to reflect on the WOA and how the proceeds of sale were to be dealt with. Thereafter, W's counsel withdrew her arguments on the WOA.[42]

23 Secondly, after W's counsel said that W would not be proceeding with arguments on the WOA, W's counsel went on to argue about the proceeds of sale of SP. If W was maintaining her right to rely on the WOA, then her counsel could not be arguing for the sale proceeds of SP to be included in the pool of matrimonial assets, as that would be inconsistent with the terms of the WOA.

24 Thirdly, if W really intended for the WOA to be decided by another court, then her counsel would have asked Tan JC to stay the hearing of her appeal pending the outcome of her claim on the WOA. As already mentioned, it would not have made sense to continue with any hearing in the Divorce Suit about MA (much less make a decision about MA) if there was going to be a claim in another court to establish the existence of the WOA. The fact that W's counsel did not ask for the HCF Appeal to be adjourned pending the outcome

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41 Respondent's Case at para 73.

42 ACB Vol II p 236 at lines 5–16.

of W's claim based on the WOA also contradicted the Respondent's Case that W wanted to pursue the WOA in a separate court.

25 Fourthly, it will be remembered that W had discontinued the Previous Suit on 16 March 2018. While we agreed that the mere discontinuance of an existing suit is not necessarily evidence that might be used to support H's argument about *res judicata*, the point was that even after the decision of Tan JC on 8 October 2018, W did not commence a claim based on the WOA. On the contrary, it was H who commenced OS 1359 on 8 November 2018, one month after Tan JC's decision on 8 October 2018, to seek an order for MA to be sold. It was only in response to this step that W then filed SUM 937 on 22 February 2019 to convert OS 1359 into a writ.

26 We add that when parties appeared before Tan JC again at the second hearing on 6 September 2018, H's counsel mentioned that W had abandoned her arguments on the WOA on appeal. Importantly, W's counsel did not disagree with this, and simply said that there was nothing to add.[43]

27 The above sequence of events belied W's submission that when her counsel said that W was not proceeding with arguments on the WOA, W was intending to pursue it separately. This submission was simply a desperate attempt by W to introduce a qualification through her new solicitors to salvage her reliance on the WOA. It was too late.

28 Thus, when Tan JC gave his decision on 8 October 2018, the WOA was no longer in play. W was precluded by the extended doctrine of *res judicata*, as expressed in *Henderson v Henderson* (1843) 67 ER 313 and followed in *Setiadi*

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[43] ACB Vol II p 247 line 30 to p 248 line 3.

Hendrawan v OCBC Securities Pte Ltd and others [2001] 3 SLR(R) 296, from raising the WOA again subsequently. Under this doctrine, a party is precluded from relying on an argument in a subsequent proceeding which should have been made in an earlier proceeding. Here, not only did W withdraw her arguments on the WOA, she then proceeded to argue as though the WOA no longer applied. The decision of Tan JC was made on that basis.

29 However, that was also not the end of the matter.

30 After H filed OS 1359, W had filed SUM 937 to convert OS 1359 into a writ. As mentioned, AR Choo decided on 19 March 2019 to convert OS 1359 into a writ. His reasons are important. The material part of his Notes of Argument states:[44]

> After having reviewed the parties' respective written submissions and affidavits filed and after hearing [H] and [W and M's] Counsel, I am in broad agreement with [W and M's] Written Submissions and [W and M's] Counsel's oral submissions. For clarity, I will just add the following points:
>
> a. I agree with [W and M's] Counsel's interpretation of the brief and public grounds delivered by the learned DJ in the ancillary matters proceedings as well as [W and M's] Counsel's submissions on the appeal before the High Court.
>
> b. I do not see any abuse of process as alleged by H on the part of [W and M]. It is within [W and M's] legal rights to pursue the claim on the alleged oral agreement. Quite apart from [H's] conduct which [W and M's] Counsel has asked me to focus on (i.e. the fact that [H] was the one who, through his lawyers, argued that the [WOA] should not be considered by the Family Court in view of s 112 of the Women's Charter), I was also fortified in my view given [W's] conduct should also be taken into account and I agree with [W and M's] Counsel that [W] has not abandoned or waived her right to pursue the issue of the [WOA].

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44 Respondent's Supplemental Core Bundle at p 66 line 4 to p 67 line 8.

> c. In my respectful view, the threshold for conversion has been crossed in the present case. The OS process, even with limited cross-examination, is not appropriate in the present case. A substantial dispute as to fact, in particular, on the existence of the [WOA], is likely to arise. I took into account the likely number of witnesses and the readily available documentary evidence (the email and WhatsApp exchanges) as stated in the affidavits. All things considered, the writ action would clearly be the more suitable process for this case to continue. The various interlocutory processes available to the parties would allow for the production of relevant and necessary evidence and would also narrow down the issues to be ventilated at trial.

31 As can be seen, AR Choo did not merely say that there was a substantial dispute of fact about the existence of the WOA. He also said that he did not see any abuse of process by W and it was within her rights to pursue the WOA. She had not abandoned or waived her right to pursue the WOA. He gave directions for W (and M) to be the plaintiffs and H to be the defendant and on the filing and service of pleadings.

32 H then filed RA 104 on 1 April 2019 against AR Choo's decision to convert OS 1359 into a writ.[45]

33 On 2 May 2019, Lee J heard RA 104. He directed parties to seek clarification from Tan JC under the liberty to apply provision.[46]

34 On 8 July 2019, Tan JC heard the parties and made the following remarks, as noted in his minute sheet:[47]

> Ct: Informs parties of the position taken by W during the appeal hearing.

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45 ROA Vol 3 Part G p 9.

46 ACB Vol II p 40.

47 ACB Vol II p 63 lines 5–9.

> Ask parties to consider what is the correct mode to proceed with on the division of the matrimonial property, whether in the High Court or the High Court Family Division.

35 Unfortunately, when relaying Tan JC's clarifications to Lee J, parties could not agree as to what he had actually said. According to H (who was unrepresented then), Tan JC had said that W's solicitors had dropped her contention on the WOA.[48] However, W's new solicitors said that Tan JC only said that there were no submissions on the issue of the WOA.[49] In fact, as we learned from reading the relevant minute sheet of Tan JC – and as elaborated at [20], [23] and [28] above – W's counsel did abandon the WOA at the hearing before Tan JC on 10 August 2018 and then continued on that basis till the decision of Tan JC on 8 October 2018.

36 When parties appeared again before Lee J on 6 August 2019 (after the clarification by Tan JC on 8 July 2019), Lee J dismissed H's appeal against the decision of AR Choo without elaborating on his reasons.[50]

37 After that, pleadings were filed. W's claim asserted the WOA and sought an order for H to transfer his interest in MA to her.[51] H filed a defence to W's claim on the WOA.[52] He also filed a counterclaim for alleged loss because W did not buy out his interest in MA.[53] On 21 January 2021, Gill J issued the Judgment in favour of W (as elaborated at [10] above).

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48 ROA Vol 3 Part E p 162.

49 ROA Vol 3 Part F p 131.

50 ROA Vol 3 Part G p 13.

51 ROA Vol 2 pp 20–21 at para 21.

52 ROA Vol 2 pp 27–30 at paras 1–19.

53 ROA Vol 2 pp 30–31 at paras 20–22.

38 At the hearing before Gill J, W contended that H himself was precluded by *res judicata* from relying on *res judicata*, *ie*, H should not be allowed to argue that what had transpired in the FJC meant that W could not rely on the WOA. W's argument on *res judicata* against H was based on the decision of Lee J and not the decision of AR Choo.[54] Perhaps that was why the Judgment did not refer to AR Choo's decision as a possible ground which would preclude H from raising *res judicata* against W. However, before us, W relied on both the decisions of Lee J and AR Choo to raise *res judicata* against H.[55]

Whether H is precluded from raising res judicata against W

39 We had to decide first whether the decision of Lee J and/or the decision of AR Choo precluded H from raising the issue of *res judicata* against W because of issue estoppel.

40 Gill J concluded that the decision of Lee J did not preclude H from raising *res judicata* against W because it was not clear whether Lee J had decided the point (at [41] of the Judgment). We agree. Lee J could simply have decided to allow the action to continue as a writ because there were substantial disputes of fact over both the question of *res judicata* against W and the WOA.

41 However, while it is true that it is unclear whether Lee J had decided the point, the same does not apply to AR Choo. It seemed to us that he had decided the point in favour of W (see [30]–[31] above).

42 Nevertheless, in our view, AR Choo's decision did not preclude H from raising *res judicata* against W for two reasons.

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54 ROA Vol 3 Part E pp 172, 272–274 and 290.

55 Respondent's Case at paras 84–95.

43 First, since it is unclear whether Lee J had decided the point, it is also unclear whether he endorsed that aspect of AR Choo's decision which decided that W was not precluded from raising the WOA.

44 Secondly, in order for *res judicata* to apply, AR Choo's determination that W was not precluded from raising the WOA had to be fundamental to his decision to allow W's application to convert OS 1359 into a writ action. In *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453, Sundaresh Menon JC (as he then was) elaborated at [35] that for issue estoppel to be established, the previous determination on the issue in question must have been fundamental and not merely collateral to the previous decision so that the decision could not stand without that determination. He referred to K R Handley, *Spencer Bower, Turner and Handley: The Doctrine of Res Judicata* (Butterworths, 3rd Ed, 1996) and *Blair v Curran* (1939) 62 CLR 464. This proposition was not disputed before us.

45 AR Choo need not have decided that W was not precluded from raising the WOA in order to allow her application to convert OS 1359 into a writ action. Both the *res judicata* point against W as well as the existence of the WOA could be left to be decided by the trial judge. It would have been different if AR Choo had decided to dismiss W's application *because* she was precluded from raising the WOA. In that scenario, there would be no substantial dispute of fact left to be decided.

Whether W was precluded from relying on the WOA

46 We now come back to the decision of Gill J on whether W was precluded from relying on the WOA because of *res judicata*.

47 Gill J was of the view that the decision of DJ Toh did not preclude W from relying on the WOA as there was no final and conclusive decision by DJ Toh on the issue. This was because of the last sentence at [9] of the DJGD. It appears that Gill J favoured the first interpretation (see [15(a)] above).

48 The parties did not produce the minute sheet of the hearings on 10 August 2018 and 6 September 2018 before Tan JC to Gill J. However, Gill J was of the view that even assuming that W's counsel had abandoned the WOA before Tan JC, there was nothing to indicate that Tan JC had reached a final and conclusive decision on the merits of the WOA. Hence, Tan JC's decision did not meet the first requirement of *res judicata* or issue estoppel as mentioned in *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157, at [14]–[15], *ie*, that there must be a final and conclusive judgment on the merits (see [47] of the Judgment).

49 With respect, we are of the view that this is where Gill J erred. The reason why Tan JC did not decide on the merits of the WOA was because W had abandoned it. One would therefore not expect him to rule on it. The real issue was not one of *res judicata* in the sense that Tan JC had ruled on the WOA but whether, as we mentioned at [28] above, there was *res judicata* in the wider sense because W had not raised the WOA before Tan JC when she ought to have done so. Indeed, she had in fact deliberately withdrawn it and thereafter proceeded on the basis that the WOA did not apply. She is bound by that election regardless of the earlier decision of DJ Toh, which we need not discuss any further. In other words, whatever the decision of DJ Toh meant, this was academic because W had abandoned the WOA on appeal.

50 In the circumstances, it was not open to Gill J to hear evidence and decide on the WOA. Hence, we allowed H's appeal and set aside Gill J's decision in respect of W's claim.

H's counterclaim for damages

51 As for H's counterclaim for damages, we agreed with Gill J that W was not obliged to buy H's interest in MA under the decisions of DJ Toh and Tan JC (see [117] of the Judgment). She had a right but not an obligation to do so. This counterclaim was not the subject of the Appellant's Case, though H's notice of appeal specifically stated that he was appealing against Gill J's dismissal of it.[56] For the avoidance of doubt, we dismissed H's appeal on the counterclaim.

Orders

52 As for the question whether W (and M) should be ordered to join H to sell MA, Gill J said that this relief was not sought in H's defence and counterclaim, although it was originally sought in OS 1359. In any event, this was inconsequential as he saw no basis to make such an order (at [117] of the Judgment).

53 Notwithstanding Gill J's remarks and decision, W's counsel accepted before us that the High Court had the power to order a sale of MA under paragraph 2 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) if that relief had been sought by H.

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[56] ROA Vol 2 p 5.

54 Fortunately for the parties, W did not insist that H should seek an order for sale of MA in separate proceedings if we were to allow H's appeal in respect of W's claim. The parties were inclined for us to address this issue rather than wait for separate proceedings.

55 In the circumstances, after the parties addressed us on the terms of the sale of MA, we ordered a sale of MA as mentioned at [7] above.

Conclusion

56 For these reasons, we allowed H's appeal on W's claim and dismissed his appeal in respect of the dismissal of his counterclaim.

Woo Bih Li
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

Chua Lee Ming
Judge of the High Court

Navinder Singh and Farah Nazura Binte Zainudin (KSCGP Juris LLP) for the appellant;
Sean Francois La'Brooy, Cumara Kamalacumar and Sophia Rossman (Selvam LLC) for the respondents.