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

[2024] SGHC 276

Suit No 278 of 2020 (Summons No 1545 of 2024)

Between

Darsan Jitendra Jhaveri

… *Plaintiff*

And

(1) Lakshmi Anil Salgaocar (as the administratrix of the estate of Anil Vassudeva Salgaocar, deceased)
(2) Million Dragon Wealth Limited

… *Defendants*

Suit No 279 of 2020 (Summons No 1547 of 2024)

Between

(1) Darsan Jitendra Jhaveri
(2) P.D. Holdings Limited

… *Plaintiffs*

And

(1) Lakshmi Anil Salgaocar (as the administratrix of the estate of Anil Vassudeva Salgaocar, deceased)
(2) Winter Meadow Capital Inc

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure — Judgments and orders — Application for declaration or order that cause of action be deemed dismissed as of date of dismissal of appeal in separate legal proceedings]

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Darsan Jitendra Jhaveri
v
Lakshmi Anil Salgaocar (administratrix of the estate of Anil Vassudeva Salgaocar, deceased) and another and another suit

[2024] SGHC 276

General Division of the High Court — Suits Nos 278 and 279 of 2020
(Summonses Nos 1545 and 1547 of 2024)
Goh Yihan J
17 September 2024

28 October 2024

Goh Yihan J:

1 The respective defendants in HC/S 278/2020 ("Suit 278") and HC/S 279/2020 ("Suit 279") (collectively, the "Suits") filed the present applications, *viz*, HC/SUM 1545/2024 in Suit 278 and HC/SUM 1547/2024 in Suit 279, for declarations – and, in the alternative, orders to the effect – that the Suits be deemed dismissed as of 17 April 2024.

2 The defendants' case was that, because of the judgment of the General Division of the High Court ("General Division") in HC/S 821/2015 ("Suit 821"), reported as *Lakshmi Anil Salgaocar (suing as the administratrix of the estate of Anil Vassudeva Salgaocar) and another v Darsan Jitendra Jhaveri and others (Kwan Ka Yu Terence, third party)* [2023] SGHC 47 (the "Judgment (HC)"), the plaintiffs' causes of action in the Suits have merged into

the Judgment (HC) by reason of consent orders entered in relation to the Suits, *viz*, HC/ORC 3206/2021 in Suit 278 and HC/ORC 3205/2021 in Suit 279 (collectively, the "Consent Orders"). Further, since the Judgment (HC) was largely upheld on appeal by the Appellate Division of the High Court (the "Appellate Division") in AD/CA 88/2023 ("AD 88"), reported as *Darsan Jitendra Jhaveri and others v Lakshmi Anil Salgaocar (suing as the Administratrix of the Estate of Anil Vassudeva Salgaocar) and another* [2024] SGHC(A) 27 (the "Judgment (AD)"), the defendants argued that the respective plaintiffs in the Suits, which commonly include Mr Darsan Jitendra Jhaveri ("Mr Darsan"), no longer have any actions to pursue, and the Suits ought to be declared dismissed as of 17 April 2024 (*ie*, the date of the decision in AD 88).

3 After hearing the parties, I dismissed the applications on 17 September 2024. In essence, if the basis of the applications was adherence to the Consent Orders, I was not convinced that the plaintiffs were required by the Consent Orders to discontinue the Suits or that the Consent Orders had the effect of *automatically* discontinuing the Suits upon the Judgment (HC) being largely upheld on appeal. Therefore, taking the defendants' own contention that the merits of the Suits were irrelevant to these applications, I found that there was no other basis on which the applications could have been allowed. I now expand on this summary and provide the detailed reasons for my decision.

The background facts

Suit 821

4 I begin with the background facts. It is necessary to begin with Suit 821, which was commenced by the late Mr Anil Vassudeva Salgaocar ("Mr Salgaocar") against Mr Darsan on 11 August 2015. After Mr Salgaocar

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passed away unexpectedly on 1 January 2016, Suit 821 became dormant until letters of administration for his estate were granted to his widow, Mrs Lakshmi Anil Salgaocar ("Mrs Salgaocar"), on 25 September 2017. Mrs Salgaocar is the common defendant in the Suits. Mrs Salgaocar then continued the action in Suit 821 as the administratrix of Mr Salgaocar's estate (the "Estate"), with the pleadings being amended to reflect the change in the plaintiff's status on 7 May 2018. By then, Suit 821 had evolved into a claim by the Estate and Winter Meadow Capital Inc ("Winter Meadow", also the second defendant in Suit 279) against Mr Darsan, his wife, his daughter, and various companies owned or controlled by Mr Darsan.

5 The essence of Suit 821 was premised on a trust agreement concluded between Mr Salgaocar and Mr Darsan in December 2003 (the "Trust Agreement"). By the Trust Agreement, Mr Darsan would, as trustee, (a) be Mr Salgaocar's nominee shareholder and director in various special purpose vehicles (the "SPVs") to *inter alia* carry out various investments or asset purchases funded by Mr Salgaocar, and (b) act in accordance and comply with Mr Salgaocar's instructions for any acts to be taken in connection with the SPVs, with Mr Salgaocar being the sole beneficial owner of all shares in the SPVs. Following the Trust Agreement, Mr Salgaocar funded and incorporated six SPVs in the British Virgin Islands (the "BVI"). These SPVs were used to trade in iron ore, which turned out to be highly profitable. A significant portion of these profits was used to incorporate other SPVs, particularly in Singapore, as well as to purchase and/or develop assets, including real estate and various vessels and machinery.

6 In 2014, Mr Salgaocar alleged that Mr Darsan breached his trustee and fiduciary duties by misappropriating trust assets under the Trust Agreement for his and his family's benefit without Mr Salgaocar's knowledge or approval.

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Among other things, Mr Salgaocar alleged that Mr Darsan transferred various apartment units in the "Newton Imperial" condominium development from the developer, Great Newton Properties Pte Ltd (one of the SPVs in Singapore), to (a) himself and his wife, (b) third parties, and (c) 22 BVI companies owned by another BVI company, Million Dragon Wealth Limited ("Million Dragon", also the second defendant in Suit 278), the sole registered shareholder of which was Mr Darsan's daughter. Thus, on 14 May 2014, Mr Salgaocar's solicitors issued a letter of demand to Mr Darsan for the return of the trust assets that he had allegedly misappropriated. As a result, on or around 8 July 2014, Mr Darsan and his wife transferred the entire equity in Winter Meadow, comprising two shares, to Mr Salgaocar for US$2.00. Mr Darsan also procured his daughter to transfer the entire equity in Million Dragon, comprising one share held by her, to Mr Salgaocar for US$1.00. However, Mr Darsan failed to transfer other trust assets in compliance with the letter of demand.

7 Thereafter, in Suit 821, Mr Salgaocar sought, among other things, (a) a declaration that Mr Darsan held the assets subject to the Trust Agreement on trust for Mr Salgaocar (and, after his death, the Estate), (b) an order for Mr Darsan to deliver up the assets he held on trust and all traceable proceeds thereof, and (c) an injunction restraining Mr Darsan from dealing with the fruits of the alleged misappropriations. These were all predicated on Mr Darsan owing or having breached his trustee and fiduciary duties under the Trust Agreement.

8 Mr Darsan's defence in Suit 821 was that there was no Trust Agreement. Instead, Mr Darsan claimed that he and Mr Salgaocar had embarked on an alleged shipping venture (the "Shipping Venture"), which Mr Salgaocar underwrote and funded at least in part. Pursuant to the Shipping Venture, Mr Darsan alleged that he and Mr Salgaocar had agreed to keep a running account as to the net position between them, to be settled at the end of the

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Shipping Venture, and which Mr Salgaocar subsequently failed to settle. This led Mr Darsan and Mr Salgaocar to discuss how to resolve their disputes, which included the settlement of that running account. Seen in this light, the share transfers in July 2014 were made in furtherance of such a resolution. Specifically, Mr Darsan alleged that, pursuant to an oral agreement between him and Mr Salgaocar in June 2014 (the "Oral Agreement"), the consideration for the share transfers was that Mr Salgaocar would, on behalf of the subject companies, repay loans due from (a) Million Dragon to Mr Darsan's daughter, and (b) Winter Meadow to Mr Darsan and an affiliate, *viz*, PD Holdings Limited ("PD Holdings", also the second plaintiff in Suit 279) (individually, the "Loan", and collectively, the "Loans").

The BVI proceedings and the anti-suit injunction

9 Subsequently, on 16 May 2017, Mr Darsan commenced an action in the BVI against the Estate and Million Dragon to claim ownership over the single share in Million Dragon ("BVI 83").[1] On 7 June 2017, Mrs Salgaocar applied in her personal capacity to the Singapore courts for an anti-suit injunction ("ASI") to restrain BVI 83.[2] Mrs Salgaocar had argued that the issues in relation to the ownership of the single share in Million Dragon were already being litigated in Suit 821. As such, it was not appropriate for the same issues to be determined twice, in Singapore in Suit 821, and simultaneously in the BVI in BVI 83. Although the High Court had dismissed Mrs Salgaocar's application, the Court of Appeal allowed the eventual appeal and granted an ASI in respect of BVI 83, reported as *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 ("*Lakshmi (ASI)*"). However, in the period between

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1 Affidavit of Lakshmi Anil Salgaocar in HC/SUM 1545/2024 filed on 5 June 2024 ("LAS Affidavit") at para 8.

2 LAS Affidavit at para 9.

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the High Court's decision and the Court of Appeal's decision, Mr Darsan had commenced another action in the BVI to claim ownership over the two shares in Winter Meadow ("BVI 213").

10 In the present applications, the defendants relied heavily on the Court of Appeal's decision to grant the ASI. The defendants emphasised that the Court of Appeal had found that there was a binary choice between the Estate's claim to the Million Dragon share based on the Trust Agreement, and Mr Darsan's claim to the same based on the Oral Agreement (see *Lakshmi (ASI)* at [67]–[68]). In other words, only one party's claim could have been factually true; if the court found in Suit 821 that the Trust Agreement existed, then Mr Darsan could not assert that the Oral Agreement existed as well. In light of the Court of Appeal's decision in *Lakshmi (ASI)*, Mr Darsan discontinued both BVI 83 and BVI 213 on 19 September 2019.

The commencement of the Suits and the entering of the Consent Orders

11 Around six months later, Mr Darsan commenced the Suits on 27 March 2020, which were only served on Mrs Salgaocar on 22 January 2021. Mrs Salgaocar entered an appearance for each of the Suits on 26 January 2021. In the Suits, Mr Darsan made essentially identical claims to those originally made in BVI 83 and BVI 213.

12 Because the trial in Suit 821 was due to start on 20 April 2021, the parties recognised that the issues in the Suits may be determined in Suit 821. As such, on 4 February 2021, Mr Darsan's then solicitors wrote to Mrs Salgaocar's solicitors to propose that the Suits be stayed pending the final determination of Suit 821.[3] The Estate responded on 25 February 2021, agreeing in principle to

[3] LAS Affidavit at p 19.

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Mr Darsan's proposal, but only if Mr Darsan agreed to treat the findings in Suit 821 as binding on the parties to the Suits.[4] Mr Darsan agreed to this additional condition.[5]

13 Following the parties' agreement, they entered into the Consent Orders on 12 May 2021. Each of the Consent Orders is framed in the following terms:[6]

> It is ordered that:
>
> 1. All further proceedings in this action be stayed pending the disposal of HC/S 821/2015 (**"Suit 821"**);
>
> 2. The High Court's and, if there is any appeal, the Court of Appeal's findings in Suit 821 will bind all of the parties to this action; and
>
> 3. There be no orders as to costs for this by-consent application.
>
> [emphasis in original]

It thus could not be disputed that the Consent Orders recognised that the court's findings in Suit 821 and the result of any appeal therefrom would bind the parties in the Suits, *ie*, in both Suit 278 and Suit 279.

14 Eventually, the Estate and Winter Meadow succeeded in Suit 821 before the General Division on 28 February 2023 (see the Judgment (HC) at [258]). Although Mr Darsan and the other defendants appealed to the Appellate Division, their appeal was largely dismissed in AD 88 on 17 April 2024, with written grounds furnished on 16 September 2024 (see the Judgment (AD) at [2] and [180]).

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4 LAS Affidavit at p 23.

5 LAS Affidavit at p 27.

6 LAS Affidavit at p 31.

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The present applications

15 After Mr Darsan's appeal to the Appellate Division was dismissed, the defendants filed the present applications on 5 June 2024 to have the Suits be deemed dismissed "in accordance with the Consent Orders".[7]

16 Mr Darsan, however, objected to the applications and, on 7 June 2024, he amended his Statement of Claims for both Suits.[8] Mr Darsan's amendments clarified that he was no longer proceeding with his claims in relation to the ownership of the shareholdings in Million Dragon and Winter Meadow. Instead, Mr Darsan was only asking for repayment of the Loans said to be owed by the Estate, Million Dragon, and Winter Meadow.

17 The present applications were first heard by the learned Assistant Registrar Kenneth Wang ("AR Wang") on 7 August 2024. However, when the defendants clarified that they were seeking a declaration that the Suits be deemed dismissed (as opposed to striking them out), AR Wang rightly considered that the present applications should be heard by a Judge. Accordingly, the present applications were refixed, eventually before me.

18 It was against these background facts that I considered the present applications and dismissed them on 17 September 2024.

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7 Defendants' Written Submissions at para 68.

8 Affidavit of Darsan Jitendra Jhaveri filed on 27 June 2024 at para 16 and pp 183-194.

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The parties' arguments

The defendants' arguments

19 The defendants' primary argument before me was that the plaintiffs' causes of action in the Suits had merged into the Judgment (HC) of Suit 821 by virtue of the Consent Orders. In relation to Suit 278, this was because Mr Darsan's defence in Suit 821 had been that his daughter owned the one share in Million Dragon all along but transferred the legal interest (and not the beneficial interest) to Mr Salgaocar pursuant to the Oral Agreement. Mr Darsan had procured this transfer because of a shareholder's loan said to be owed by Million Dragon to his daughter but which was subsequently assigned to Mr Darsan. By this narrative, Mr Darsan procured the transfer of the legal ownership in the one Million Dragon share to Mr Salgaocar for nominal consideration and he would only procure the transfer of the beneficial ownership of that share upon Mr Salgaocar repaying the said Loan. Mr Darsan's defence in Suit 821 overlapped with his claim in Suit 278. Thus, without the Oral Agreement for Mr Salgaocar to repay the Loan, the whole substratum of Mr Darsan's claim in Suit 278 would fall away. This was what happened in Suit 821, when the General Division rendered its Judgment (HC) finding *inter alia* that there was no Oral Agreement and there were no Loans.

20 In relation to Suit 279, the defendants argued that Mr Darsan's and PD Holdings' causes of action had merged into the Judgment in Suit 821 for similar reasons. In Suit 279, the plaintiffs similarly claimed that Mr Darsan and his wife had transferred their legal titles to the two Winter Meadow shares to Mr Salgaocar based on the Oral Agreement but that the beneficial interest in the same would only vest in Mr Salgaocar on his repayment of the Loan said to have been owed by Winter Meadow to Mr Darsan and PD Holdings. As with Suit 278, without the Oral Agreement for Mr Salgaocar to repay the Loan, the

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whole substratum of Mr Darsan's claim in Suit 279 would fall away. Indeed, the General Division held in its Judgment (HC) in Suit 821 that *inter alia* there was no Oral Agreement and there were no Loans.

21 Thus, unless the plaintiffs successfully applied to set aside the Consent Orders or claimed that the Consent Orders did not reflect what the parties had agreed, they were bound by them. Because they were bound by the Consent Orders, they could not amend their Statement of Claims in the Suits by virtue of the doctrine of merger (*ie*, the merger of the plaintiffs' causes of actions in the Suits into the Judgment (HC)), as *ex hypothesi* there were no subsisting causes of action for the plaintiffs to amend. The amendments were therefore a nullity, and the present applications should be allowed.

The plaintiffs' arguments

22 In response, the plaintiffs made two general points.

23 First, Mr Darsan had not acted in breach of the Consent Orders. This is because the Consent Orders did not oblige Mr Darsan to discontinue or withdraw the Suits upon the determination of Suit 821 or any appeal therefrom. They only provided that Mr Darsan was to be bound by the General Division's findings in Suit 821. Thus, since Mr Darsan did not challenge the General Division's findings in Suit 821, his continuance of the Suits did not run afoul of the Consent Orders.

24 In fact, Mr Darsan amended the Statement of Claims in the Suits to clarify that he was no longer seeking a declaration that he was the beneficial owner of the shares in Million Dragon and Winter Meadow. Instead, Mr Darsan relied on the General Division's findings in Suit 821 to support his amended actions in the Suits. In this regard, Mr Salgaocar (and, subsequently, the Estate

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and Winter Meadow) had pleaded in Suit 821 that Mr Salgaocar had entered into an agreement with Mr Darsan in December 2003 (the "December 2003 Agreement") and that, pursuant to this agreement, it had been agreed that Mr Salgaocar would be responsible for funding the SPVs' activities, including making investments and acquiring assets. Mr Darsan further averred that the Oral Agreement was consistent with the December 2003 Agreement. Since the General Division found in Suit 821 that the December 2003 Agreement did exist, the Loans owed by Million Dragon and Winter Meadow should necessarily be repaid to Mr Darsan.

25 Second, the plaintiffs' causes of action in the Suits did not merge into the Judgment (HC) in Suit 821. In particular, Mr Darsan was not relying on his defence in Suit 821 to sustain his present actions in the Suits. Rather, he was relying on Mr Salgaocar's own account of events as pleaded in Suit 821. Further, there was no determination in Suit 821 that the Loans did not exist. It was only observed at [148] of the Judgment (HC) that "Mr Darsan has produced no such evidence of any [such] debt". This, Mr Darsan submitted, did not constitute a finding that the Loans did not exist.

26 Accordingly, the plaintiffs in the Suits had not acted in breach of the Consent Orders by continuing to maintain the Suits. The plaintiffs' causes of action in the Suits had also not been determined in Suit 821. As such, the present applications should be dismissed.

My decision: the applications were dismissed

27 After considering the parties' submissions, I dismissed the present applications for the following reasons.

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The basis of the applications was unclear

28 To begin with, it was not clear to me what the *basis* of the present applications was. Similar to AR Wang, I had thought that the present applications were applications to strike out the Suits. This would have been on the basis that the plaintiffs were bound by the findings in Suit 821 (by virtue of the Consent Orders) and that, based on those findings, the Suits should be struck out pursuant to O 18 r 19(1) of the Rules of Court (2014 Rev Ed) (the "ROC 2014").

29 However, at the beginning of the hearing before me, counsel for the defendants, Mr Liew Teck Huat ("Mr Liew"), confirmed that the defendants were not seeking for the Suits to be struck out. Instead, Mr Liew confirmed that the present applications were for declarations that the Suits be deemed dismissed as of 17 April 2024, which was when Mr Darsan's appeal in Suit 821 was dismissed by the Appellate Division in AD 88. I should add that Mr Liew's confirmation was in response to a letter that I sent to the parties about a week before the hearing, seeking, among other things, confirmation that the defendants are not asking for the Suits to be dismissed based on one of the limbs in O 18 r 19 of the ROC 2014 and/or the court's inherent power to stay proceedings that are frivolous, vexatious, or an abuse of its process. Mr Liew therefore had adequate time to consider the defendants' position when replying to me during the hearing itself.

30 Despite Mr Liew's clarification before me, it remained unclear to me what the *basis* of the present applications was. The defendants did not identify any appropriate statutory or common law basis for this court to declare that the Suits had been dismissed. At the most, it seemed that the defendants' case was that the plaintiffs' causes of action in the Suits had merged into the

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Judgment (HC) in Suit 821 because the parties were compelled by the Consent Orders to be bound by the findings in Suit 821. But even then, the defendants did not explain how the Judgment (HC), which was not rendered upon the plaintiffs' causes of action in the Suits, somehow effected a merger of the plaintiffs' causes of action and caused their extinguishment. Further, the defendants did not explain why the Consent Orders, which merely stipulated that the parties were to be bound by the findings in Suit 821 and any appeal therefrom, could somehow, in and of themselves, automatically nullify the Suits. The defendants' case was also not helped by them maintaining, on the one hand, that the present applications did not involve the merits of the Suits, but then going on to, on the other hand, effectively argue that the findings in Suit 821 had removed the factual substratum of the plaintiffs' actions in the Suits – which *was* about the factual merits of the Suits.

31 After hearing my concerns about the defendants' case, Mr Liew made an oral application at the hearing before me to amend the present applications to be applications to strike out the Suits. He submitted that the plaintiffs would not be prejudiced because it was clear that the present applications could easily be recharacterised into striking out applications. Mr Liew also argued that the court had all the materials before it to decide the applications on the basis that they were striking out applications instead of applications for declarations as originally framed.

32 I dismissed Mr Liew's oral application without any hesitation. This was because not only had the defendants steadfastly maintained in their written submissions that the present applications were not about the merits of the Suits, Mr Liew had *expressly* confirmed to AR Wang that the defendants *were not*

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treating these as striking out applications. AR Wang's minute sheet recorded Mr Liew as saying the following at the hearing on 7 August 2024:[9]

> The Defendant's position is that we maintain that the application is for a declaration, and that the action be deemed dismissed, or be dismissed. The basis of this order is the consent order, in respect of which the parties agreed to be bound by S 821. As at that date in S 821, that action in S 278 and S 279 already failed and stood dismissed. Thus, the application is for a declaration to that effect. *Therefore,* ***it is not an application to strike out****, because in a striking out it is different. The rules applicable to a dismissal, and the rules applicable to the striking out, are different.* ***We are not seeking striking out*** *because we want to base our claim on the consent order*; if there had been no consent order, we would have sought striking out instead of a declaration.
>
> We have actually taken this position from the outset. If we may refer to this procedural issue – see my second affidavit at para 18 – we reserved our entitlement to file a striking out application, should this present application fail. Related point is that where the consent order triggers, and merger operates, it is not possible to introduce any amendment to save the claim. But for striking out, the Court sometimes allows an amendment so that the action can survive.
>
> [emphasis added in italics and bold italics]

33 Having spiritedly professed his awareness before AR Wang that "in a striking out it is different" and "[t]he rules applicable to a dismissal, and the rules applicable to the [*sic*] striking out, are different", it was puzzling that Mr Liew submitted before me that the present applications could easily be recharacterised into striking out applications. He suggested that the recharacterisation would "take no one by surprise", since it was a difference of "form" and not of substance. Leaving aside that this was a complete *volte-face* from his steadfast position that "[i]t is not an application to strike out", this simply could not be squared with what Mr Liew had *himself* stated before

[9] Certified Transcript dated 7 August 2024, p 4 lines 4 to 22.

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AR Wang, where he recognised the juridical difference between a declaration and a striking out.

34 Further, and perhaps more egregiously, having expressly warranted *twice* to AR Wang that the defendants were not seeking a striking out, the prejudice to the plaintiffs if Mr Liew's oral application to amend were to be entertained was clear. This is that, having rested on Mr Liew's assurance *to the court* that they could cast the notion of a striking out application out from their minds and approach these applications *solely* as applications for declaratory relief, the plaintiffs and their counsel would have been caught completely unawares if required to fashion arguments off the cuff to resist a striking out application instead. With respect, Mr Liew's oral application to amend was a quintessential example of "litigation by ambush". I thus refused permission to amend and dealt with the present applications as applications for declarations that the Suits were deemed to be dismissed as of 17 April 2024.

The Consent Orders did not lead to the Suits "failing" upon the Judgment (HC) in Suit 821 being largely upheld on appeal in AD 88

The defendants' specific arguments

35 I turn to the primary (apparent) basis that the defendants relied on to ground the present applications, *viz*, the Consent Orders. The defendants submitted in their written submissions that a consent order "is a *res judicata*" (citing Patrick Keane, *Spencer Bower and Handley: Res Judicata* (LexisNexis, 6th Ed, 2024) ("*Res Judicata*") at para 2.16). The defendants also referred to the Privy Council decision of *Kinch v Walcott and others* [1929] AC 482 ("*Kinch v Walcott*"), where it was stated (at 493) that:

> … in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel action which is said to raise it was a consent order. For such a purpose an order by consent,

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> not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal. … Accordingly it stands at this moment as an order effective to prevent the appellant from setting up against the two respondents parties to it the charges against them thereby withdrawn. …

36 From this abstract, the defendants submitted that a party is bound by a consent judgment or order that it enters into. If such a party wanted to get around a consent order, it had to apply to set it aside in a separate action commenced for that purpose. As such, the defendants submitted that the plaintiffs could not circumvent the Consent Orders by amending the Statement of Claims in the Suits.

37 It appeared that the defendants were, in essence, arguing that the effect of the Consent Orders was to nullify the Suits upon the Judgment (HC) on Suit 821 being largely upheld on appeal in AD 88. To evaluate this argument, I needed to assess (a) the general effect of the Consent Orders, and (b) whether the Consent Orders specifically prohibited the plaintiffs from maintaining the Suits.

The effect of the Consent Orders depends on what they prescribe

38 As a preliminary point, I agree with the defendants that the effect of a consent order is, generally, to create a *res judicata*. But this begs the question: a *res judicata* in relation to *what*? It makes no sense to speak of a *res judicata* in the abstract, as if it is an object that projects certain effects in general terms. That Latin phrase, drawn from the full phrase *res judicata pro veritate accipitur*, can be loosely translated as "the decided issue is to be taken as correct" (see the Irish Court of Criminal Appeal decision of *The People (Director of Public Prosecutions) v Keith O'Callaghan* [2001] 1 IR 584 at 597 and the Irish

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Supreme Court decision of *Enda Lynch v Judge Carroll Moran and The Director of Public Prosecutions* [2006] 3 IR 389 at [21]). It therefore stands to reason that one cannot sensibly declare that there is simply "a" *res judicata* in existence; rather, one must particularise *what* "issue" precisely has been so "decided", so as to give *content* to the *res judicata* asserted to exist. Indeed, referring to the extract from *Res Judicata* that the defendants cited, the learned author goes on to explain (at para 2.16) that:

> A judgment (or order) by consent is a *res judicata*. The court is discharged from the duty of investigating or further investigating the matter and does not pronounce a judicial opinion; but at the request of the parties *it gives judicial sanction and coercive authority to an agreement* which, except by statute, could not otherwise operate as a bar. … *There can be no estoppel unless the issues raised in the second action were necessarily compromised in the first.*
>
> [emphasis added]

39 It will be observed that the learned author refers to the court giving "judicial sanction and coercive authority to an *agreement*" [emphasis added]. This implies that the effect of the consent order so made is dependent on the ambit of the parties' agreement. It is true that when parties simply agree to "judgment" by consent, it may be difficult to ascertain *what* was necessarily decided, especially when the defendant wishes to bring a subsequent action (see the majority of the High Court of Australia in *Chamberlain v Deputy Commissioner of Taxation* (1988) 78 ALR 271 at 274–277 (*per* Deane, Toohey, and Gaudron JJ)). But this only goes to show that when the parties have agreed to judgment by consent, the judgment would (generally) only create a *res judicata* in relation to the specific issues or matters that the parties agreed to the resolution of, and not all issues or disputes between them at large, unless subsequent litigation of an unaddressed issue falls foul of the so-called "extended doctrine of *res judicata*" that is grounded in abuse of process (see the High Court decision of *Goh Nellie v Goh Lian Teck and others*

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[2007] 1 SLR(R) 453 ("*Nellie Goh*") at [19]). Indeed, the learned authors of *Foskett on Compromise* (Sir David Foskett & John Sorabji eds) (Sweet & Maxwell, 10th Ed, 2024) observe, in this connection, that "[a]n important aspect of the whole subject of compromise is the need, which may arise subsequent to the making of a compromise, for a court to *identify precisely the disputes that have been settled*" [emphasis added] (at para 6–03). *A fortiori*, if the parties did not even agree to the entering of any judgment on their dispute in a consent order, it is difficult to construe that consent order as having "decided" a dispute at all (see [38] above).

40 The same can be said about *Kinch v Walcott*, which the defendants relied on as well. As will be recalled at [35] above, the defendants cited that case for the proposition that a consent order that is undischarged remains as effective as an order of the court. That is certainly true; however, the application of this general proposition must be considered with reference to the specific facts of *Kinch v Walcott*. In that case, the appellant sued the respondents for conspiracy. He based his claim upon certain charges which he had withdrawn by a consent order made to settle a libel action that the respondents had brought against him. The respondents pleaded that the appellant was estopped by the consent order from maintaining his action in conspiracy against them. The appellant then alleged that he had been misled into entering into that consent order. The Privy Council held that the appellant was bound by the consent order, which had not been discharged either by mutual agreement or by another order of the court. The consent order was therefore effective to prevent the appellant from setting up his charges against them (at 493–494). It will be apparent from this summary of the Privy Council's reasoning that the ambit of the parties' agreement determined the ambit of the consent order in that case. Specifically, the parties

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had agreed that the appellant should withdraw certain charges and he was held to be bound by that agreement – no more and no less.

41 The same can be said of the Singapore cases cited by the defendants. It is only necessary to refer to the Court of Appeal decision of *Poh Huat Heng Corp Pte Ltd and others v Hafizul Islam Kofil Uddin* [2012] 3 SLR 1003 ("*Poh Huat Heng*"). In that case, the respondent had suffered a spinal injury. The appellants, one of whom was the respondent's employer, consented to an interlocutory judgment in favour of the respondent for damages to be assessed. An assistant registrar gave an award for damages. When both parties appealed against the award, the High Court dismissed both appeals without any written grounds. On the appellants' appeal to the Court of Appeal, the respondent submitted that some of the awards were premised on an agreement between the parties at the assessment hearing. Against this background, the defendants cited the following paragraph from *Poh Huat Heng* (at [18]):

> … It is well established that a judgment or order obtained by consent is final and can form the basis for the application of the doctrine of *res judicata* (see K R Handley, *Spencer Bower and Handley: Res Judicata* (LexisNexis, 4th Ed, 2009) at para 2.16). A consent judgment or consent order is binding and cannot be set aside save for exceptional reasons (see the High Court decision of *Wiltopps (Asia) Ltd v Drew & Napier* [1999] 1 SLR(R) 252 ("*Wiltopps*") at [27] (an appeal to the Court of Appeal against the High Court's decision was dismissed without any written grounds being issued (see the editorial note to *Wiltopps*)) and *Bakery Mart Pte Ltd v Ng Wei Teck Michael* [2005] 1 SLR(R) 28 ("*Bakery Mart*") at [11]). In this regard, we would make one further observation. To constitute a consent order, there must be a real agreement between the parties, which is to be contrasted with the scenario where a party merely does not object to a course of action (see *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185 at 189F–189G, which was followed in *Wiltopps* at [18] and *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 ("*Wellmix*") at [29], and distinguished in *Bakery Mart* at [13]).

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42 However, the defendants omitted to cite the beginning of this paragraph, which sheds considerable light on the effect of a consent order.[10] The Court of Appeal had said (at [18]) that:

> There are two possible bases upon which the Appellants can be precluded from opening up an issue which they consented or agreed to before the AR. ***Much would necessarily depend on what exactly was consented to or agreed upon, and its context***. *First*, the agreement between the parties could constitute a consent order. It is well established that a judgment or order obtained by consent is final and can form the basis for the application of the doctrine of *res judicata* (see K R Handley, *Spencer Bower and Handley: Res Judicata* (LexisNexis, 4th Ed, 2009) at para 2.16). …
>
> [emphasis in original in italics; emphasis added in bold italics]

While the Court of Appeal was opining on the two possible bases upon which the appellants were precluded from revisiting an issue that they had consented to, it emphasised that "[m]uch would … depend on what exactly was consented to or agreed upon, and its context". In as much as the Court's use of the word "consented" refers to a consent order, the effect of that consent order and, in turn, the ambit of any *res judicata* created by it, would depend on *what* the parties had consented to.

43 That point has also been articulated in the Court of Appeal's recent decision in *Crapper Ian Anthony v Salmizan bin Abdullah* [2024] 1 SLR 768 ("*Ian Crapper (CA)*"), in which the Court held that the scope and ambit of an interlocutory judgment that is entered by consent will turn on the spectrum of issues which the parties had agreed would be decided by that judgment, and which would *not*. The Court reasoned (at [48]) that:

> Under this definition, an interlocutory judgment can be entered by consent on issues that do not wholly establish liability. *In such a consent interlocutory judgment, it is for the parties to*

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10 Defendants' Written Submissions at paras 80–81.

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> *agree on what had been resolved with* res judicata *effect and what had not. Implicit in such situations is that the terms of the consent interlocutory judgment would have resolved some issues in dispute but not necessarily liability between the parties.* It is difficult to see why parties cannot consent to leave certain issues (even those concerning liability such as causation) to be determined at the second stage of proceedings. For example, it is eminently possible and conceptually consistent for a consent interlocutory judgment to be entered in which the existence and breach of duty of care have been established, but followed by a final judgment whereby causation of damage was not eventually made out and with the result that no damages were due to the claimant. …
>
> [emphasis added]

The Consent Order did not prohibit the plaintiffs from maintaining the Suits

44 Thus, returning to the defendants' submission that a consent order gives rise to a *res judicata*, I agree, but that would raise the further question of a *res judicata* in relation to *what*? As I have shown, the answer to this further question depends on what exactly the parties had consented to. It cannot be that a consent order is taken to produce a certain outcome, without considering what the parties had consented to.

45 Applying this principle to the present applications, the Consent Orders did not nullify the Suits upon the determination of Suit 821 (and any appeal therefrom). It bears repeating that the Consent Orders only stated the following (see [13] above):[11]

> It is ordered that:
>
> 1. All further proceedings in this action be stayed pending the disposal of HC/S 821/2015 ("**Suit 821**");
>
> 2. The High Court's and, if there is any appeal, the Court of Appeal's findings in Suit 821 will bind all of the parties to this action; and

[11] LAS Affidavit at p 31.

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[Prayer 3 omitted]

[emphasis in original]

46 The Consent Orders meant what they said. The parties agreed that the Suits were to be stayed pending the determination of Suit 821, and that they would be bound by the General Division's findings in Suit 821 and any appeal therefrom. The Consent Orders did not say anything about the Suits being discontinued, dismissed, or withdrawn. Thus, the effect of the Consent Orders was to establish a *res judicata* in the sense that the parties could not revisit the findings made in Suit 821, whether in the Judgment (HC) or the Judgment (AD). But whether those findings had the consequence of nullifying the Suits was a different question which did, contrary to the defendants' arguments, require the court to go into the merits of the Suits. I will expand on this point later, but for now, it suffices to conclude that the defendants were incorrect in suggesting that the Consent Orders, in and of themselves and without considering the merits of the Suits, somehow compelled the plaintiffs to cease to maintain the Suits.

The plaintiffs' causes of action in the Suits did not merge into the Judgment (HC) in Suit 821

The defendants' specific arguments

47 As a secondary point, the defendants submitted that the doctrine of merger also supported their conclusion that the Suits should be deemed dismissed. They said that, once a judgment is given, the cause of action merges into it and ceases to exist. In the present case, the defendants submitted that the plaintiffs' causes of action in the Suits had merged into the Judgment (HC) in Suit 821, by virtue of the Consent Orders, which Mr Darsan had himself initiated.

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The doctrine of merger contemplates both a successful cause of action and a coincidence between the earlier judgment and the current cause of action

48 It is trite that the doctrine of merger applies in Singapore law. Thus, the Court of Appeal in *Michael Vaz Lorrain v Singapore Rifle Association* [2020] 2 SLR 808 explained the doctrine as follows (at [14]):

> We begin by considering the well-established doctrine of merger. Pursuant to this doctrine, ***once a judgment has been given on a cause of action***, the cause of action *merges* with the judgment of the court and ceases to exist as an independent entity. There is no doubt that the doctrine is part of Singapore law (see the decision of this court in *Chiam Heng Hsien (on his own behalf and as partner of Mitre Hotel Proprietors) v Chiam Heng Chow (executor of the estate of Chiam Toh Say, deceased) and others* [2015] 4 SLR 180 at [155]).
>
> [emphasis in original in italics; emphasis added in bold italics]

49 Two fundamental characteristics about the doctrine of merger emerge from this passage. First, it is important that the Court stated that the doctrine is premised on judgment being "given on" a cause of action. In the General Division decision of *Salmizan bin Abdullah v Crapper, Ian Anthony* [2024] 5 SLR 257 (overruled, although not on this aspect, by the Court of Appeal in *Ian Crapper (CA)*), I had defined a "cause of action" as the facts that a claimant must prove to obtain a decision in his favour (at [31]). This implies that there must be a *coincidence* between the judgment and the cause of action. Thus, a judgment can only have been "given on" a subsequently asserted cause of action if it is the *same* as the cause of action that the judgment had been rendered on. The requirement of coincidence means that the cause of action forming the subject-matter of the earlier judgment is the same as the cause of action asserted in a subsequent proceeding. Indeed, it cannot be that a judgment given in one case can be said to merge with a cause of action that is an entirely distinct claim altogether. In that scenario, the former cannot sensibly be said to be a judgment "given on" the latter cause of action.

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50 Thus, in the English Court of Appeal decision of *Clark and another v In Focus Asset Management and Tax Solutions Ltd (Financial Ombudsman Service intervening)* [2014] 1 WLR 2502, Arden LJ (as she then was) explained the doctrine of merger in the following terms (at [4]–[5]):

> 4 To understand merger, it is necessary to understand the meaning of "a cause of action". It is not a legal construct. The term "cause of action" is used to "describe the various categories of factual situations which entitle[d] one person to obtain from the court a remedy against another" (per Diplock LJ in *Letang v Cooper* [1965] 1 QB 232, 243). A complaint to the ombudsman need not be a cause of action but (as further discussed below) it may involve consideration of an underlying cause of action and the facts on which a complaint is based may be or include facts constituting a cause of action.
>
> 5 Merger explains what happens to a cause of action when a court or tribunal gives judgment. *If a court or tribunal gives judgment on a cause of action, it is extinguished.* The claimant, if successful, is then able to enforce the judgment, but only the judgment. The effect of merger is that a claimant cannot bring a second set of proceedings to enforce his cause of action even if the first tribunal awarded him less than he was entitled to (see, for example, *Wright v London General Omnibus Co* (1877) 2 QBD 271 and *Republic of India v India Steamship Co Ltd (No 2*) [1998] AC 878). As Mummery LJ held in *Fraser v HLMAD Ltd* [2006] ICR 1395, para 29, a single cause of action cannot be split into two causes of action.
>
> [emphasis added]

In the passages above, Arden LJ said that a merger only occurs when a court (or tribunal) gives judgment *on a* cause of action and thus extinguishes that cause of action. However, since a court could only have given judgment on matters that had been brought before it, there must necessarily be a coincidence between the prior cause of action that the prior judgment was rendered on, and the subsequent cause of action that is said to have merged into the prior judgment. A court cannot have given judgment "on" a *separate* and distinct cause of action which it never adjudicated nor determined in its judgment.

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51 The need for such coincidence between the cause of action that merged into the earlier judgment and the subsequent cause of action is furthered shored up by the historical origins of the merger doctrine in common law, stemming from the Latin maxim *transit in rem judicatam* (see the House of Lords decision in *Republic of India and another v India Steamship Co Ltd* [1993] AC 410 ("*The Indian Grace*") at 417) – *ie*, that it passes into a *res judicata* or an issue decided. This thereby requires that the cause of action said to have merged into an earlier judgment must have been the *same* action that, in fact, came to be "*judicatam*" or adjudged by the court. The doctrine dates back to as early as the words of Parke B in *King v Hoare* (1844) 13 M & W 494 ("*King*") at 504, with the following passage being reproduced approvingly by the House of Lords in *Henry J B Kendall and others v Peter Hamilton* (1879) 4 App Cas 504 ("*Kendall*") at 526:

> The judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage; and it would be useless and vexatious to subject the Defendant to another suit for the purpose of *attaining the same result*. Hence, the legal maxim, "*Transit in rem judicatam;*" the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher.
>
> [emphasis added]

52 It is clear from the foregoing words of Parke B in *King* that the doctrine of merger only operates where the cause of action is the *same* as that which the earlier judgment had been rendered on. This is made clear in *Kendall* by Lord Blackburn's articulation of the rule in *King* in the following terms (at 542), made in the context of determining whether a cause of action against one jointly liable debtor is the *same* as a cause of action against another jointly liable debtor, for the purposes of articulating when the doctrine of merger operates:

> … But *King v. Hoare* proceeded on the ground that the judgment being for the *same cause of action, that cause of action*

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> *was gone. Transivit in rem judicatam*, which was a bar, partly on positive decision, and partly on the ground of public policy, that there should be an end of litigation, and that there *should not be a vexatious succession of suits for the same cause of action*. The basis of the judgment was that *an action against one on a joint contract was an action on the same cause of action* as that in an action against another of the joint contractors, or in an action against all the joint contractors on the same contract.
>
> [emphasis added]

53 It is clear, therefore, from *King* and *Kendall*, that the doctrine of merger requires that the earlier judgment had been rendered on a cause of action that is *the same* as the cause of action that is now asserted, and which is said to have merged into the earlier judgment.

54 Relatedly, the doctrine of merger applies only where there has been a *successful* cause of action in the same proceeding in which judgment is given. Put differently, it is only where a party is successful that his cause of action merges into the judgment in his favour such that he cannot sue on the cause of action anymore. Instead, that party will need to enforce (or, if necessary, sue on) the judgment debt (or any other remedy that was given therein). Situated against the conventional definition of a "cause of action" as "the essential factual material that supports a claim" (see the Court of Appeal decision of *Multistar Holdings Ltd v Geocon Piling & Engineering Pte Ltd* [2016] 2 SLR 1 at [34]), the only "cause of action" that remains is the judgment itself. The claimant need – and indeed, can – only assert the existence of the judgment as the factual substratum of his entitlement to the remedy claimed; he need not, and indeed can no longer, assert the initial facts undergirding the cause of action that produced the judgment itself. That this is how the doctrine of merger operates can be seen from the following observations of Edelman J in the High Court of Australia decision of *Clayton v Bant* (2020) 272 CLR 1 ("*Clayton v Bant*") (at [66]):

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> First, where a cause of action, or "the very right … claimed", has *previously been established* by a local court then at common law the "*merger of the right or obligation in the judgment*" can be relied upon to preclude re-assertion of the *extinguished* right. The doctrine of merger is not merely based upon principles of finality. It exists because *when a court order "replicates" the prior right*, with added consequences such as enforcement mechanisms, *the prior right "has no longer an independent existence"*. No action can be brought upon that extinguished right. *The successful plaintiff's only right is a right on the local judgment, which is "of a higher nature"*. Since the expression "res judicata" has also been loosely used to describe all four rules discussed below, each of which is underpinned by a policy of finality, the effect of the doctrine of merger is sometimes described as "res judicata in the strict sense".
>
> [emphasis added]

55 As Edelman J stated in *Clayton v Bant*, the doctrine of merger is not merely based upon principles of finality. Rather, when it applies, a court order, which is the result of the merger between the successful cause of action and the judgment, subsumes the successful party's prior right to sue on that cause of action. Thus, the party's said prior right is extinguished. His only right then is a right on the resultant court order, which, as was held in *King* at 504, is "of a higher nature". Lord Penzance put the point well in *Kendall* when he said (at 526) that:

> The doctrine of law regarding merger is perfectly intelligible. *Where a security of one kind or nature has been superseded by a security of a higher kind or nature, it is reasonable to insist that the party seeking redress should rest upon the latter, and not fall back on the former.* In like manner, when that which was originally only a right of action has been advanced into a judgment of a Court of Record, the judgment is a bar to an action brought on the original cause of action. …
>
> [emphasis added]

56 Seen in this light, the doctrine of merger may be analogised to the distinction between primary and secondary obligations in the law of contract: the breach of a primary obligation gives the innocent party a new right to sue

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on the defaulting party's resulting secondary obligation to pay damages (see generally David Foxton, "How useful is Lord Diplock's distinction between primary and secondary obligations in contract?" (2019) 135 LQR 249). The effect is to substitute the secondary obligation for the primary, or as Lord Diplock put it in the House of Lords decision of *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, "breaches of primary obligations give rise to substituted or secondary obligations on the part of the party in default" (at 848). Thus, where an innocent party elects to discharge a contract on breach of a condition or fundamental term, then "for the unperformed primary obligations of the party in default there are substituted by operation of law … the secondary obligations" (at 850). Hence, the innocent party's remedy would lie in enforcing the secondary obligations that have substituted or replaced the primary obligations, a default upon which had given rise to the former. So, too, is the case with the doctrine of merger, whereby the initial default of the defendant giving rise to a valid cause of action is accordingly replaced, upon a successful prosecution thereof, with a judgment spelling out the secondary obligations of the defendant. That judgment operates in substitution of the primary obligation he or she had defaulted on which had given rise to a cause of action in the first place.

57 Accordingly, the doctrine of merger does not apply when a court holds that a cause of action has been *unsuccessful*. I again turn to Edelman J's erudite explanation in *Clayton v Bant*, where the learned judge said (at [67]) that:

> Secondly, if a judgment finally resolved a conflict about the existence or extent of a "cause of action" then the parties to that proceeding, or their privies, will be precluded from relitigating that cause of action. *This rule is independent of the doctrine of merger because even if the rights adjudicated upon were determined not to exist in the earlier proceeding, so that there was nothing to merge into the judgment, "the unsuccessful plaintiff can no longer assert" that a right exists.* The Full Court of the Family Court of Australia in this proceeding described

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> the rule as "res judicata estoppel". In Australia, it is usually described as "cause of action estoppel". But, as has been pointed out on a number of occasions, the expression "cause of action" is imprecise and might extend either to the legal right claimed or to the facts that the plaintiff must establish for their claim.
>
> [emphasis added]

As can be seen from this passage, where a court finds that a party has been *unsuccessful* in his cause of action, there is simply nothing to merge into the judgment. The doctrine of merger does not apply.

58 On a more general note, in the spirit of ensuring conceptual clarity and accuracy, it is also necessary to bear in mind when approaching the subject of *res judicata* that it is not monolithic but a "portmanteau term which is used to describe a number of different legal principles with different juridical origins", of which merger is but one (see the UK Supreme Court decision of *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160 at [17]). It is for this reason that, in his influential decision in *Nellie Goh*, Sundaresh Menon JC (as he then was) referred to *res judicata* as an "umbrella doctrine" which comprised "conceptually distinct though interrelated principles" (at [17]). This is yet another reason why a plea that a *res judicata* has arisen or applies in a given case is close to saying nothing at all, as apart from the *subject-matter* of the *res judicata*, the court would need to be informed of the doctrinal basis of the *res judicata* asserted. In short, a plea of *res judicata* ought to be substantiated with explanations as to (a) *what* the *res judicata* is about; and (b) *why* or *how* the *res judicata* has arisen.

59 The exact taxonomy of the subsidiary principles under the umbrella of "*res judicata*" is, however, a potentially contestable issue. I note that, in *Nellie Goh*, Menon JC had identified *three* principles: (a) cause of action estoppel; (b) issue estoppel; and (c) the extended doctrine of *res judicata* (at [17]–[19]).

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In my respectful view, save for one qualification relating to the doctrine of merger, I agree with this taxonomy.

60 The qualification that I have referred to is that the doctrine of merger should, in my opinion, be viewed as a distinct principle of *res judicata* and not merely a species of cause of action estoppel. In *Nellie Goh*, the High Court cited the following statement of principle from the well-known English Court of Appeal decision of *Thoday v Thoday* [1964] P 181 ("*Thoday*"), in which Diplock LJ (as he then was) had referred to the doctrine of merger as a sub-species of cause of action estoppel, specifically, when a judgment finds a cause of action to exist (at [17]):

> '[C]ause of action estoppel,' is that which prevents a party from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. *If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged in the judgment* … If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam.
>
> [emphasis added]

61 However, this statement is inconsistent with the trend of modern authority which has recognised merger as being distinct from cause of action estoppel. Indeed, under English law itself, Diplock LJ's subsummation of merger under cause of action estoppel was subsequently doubted by Lord Goff of Chieveley in the House of Lords decision of *The Indian Grace*. After quoting from the extract from *Thoday* which I had referred to at [60] above (see *Thoday* at 197–198), Lord Goff said as follows (at 417):

> There is one observation which I wish to make upon the passage from the judgment of Diplock LJ which I have just quoted. This is that the principle of merger to which Diplock LJ refers as applying where the cause of action was determined to exist, in

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> the sense that judgment was given upon it, cannot be described simply as a species of estoppel. …

62 Put simply, conceptually, the doctrine of merger operates in a different way from an estoppel. In the former, strictly speaking, a cause of action that has merged into a former judgment of a court of competent jurisdiction *ceases to exist*. But, the case of estoppel does not necessarily go so far as to claim that the cause of action no longer exists, albeit that a party is barred from pursuing it. Seen in this light, the difficulty with Diplock LJ's broader scope of the category of "cause of action estoppel" is that it defines the doctrine by reference solely to an *effect* – *viz*, that a party is unable to pursue the cause of action – whilst overlooking that there is more than one *cause* for that effect – *viz*, estoppel or merger. It is therefore incorrect to say that a party who is precluded from pursuing a cause of action that has merged into a judgment is subject to a "cause of action estoppel". Indeed, as the leading text on this subject, *Res Judicata*, cautions (at para 1.04):

> It is important to distinguish between the effect of a decision as a *res judicata* estoppel, and as a merger of the cause of action. Much confusion has been created by failing to do this. If the action succeeds the cause of action mergers in the judgment and is extinguished. A second action cannot be brought on that cause of action, not because there is an estoppel, but because there is no longer a cause of action. Where a judicial decision is relied upon to bar a claim or defence *res judicata* operates in the strict sense.

63 For this reason, I respectfully suggest that a *fourfold*, rather than a threefold, classification ought to be preferred in the interest of conceptual clarity. In this regard, I again concur with the observations of Edelman J in *Clayton v Bant*, where the learned judge identified "[f]our rules concerning finality", and cautioned that "[a]lthough the principle of finality underlies all of them, and although each rule can apply where there is a final judgment on the merits by a court of competent jurisdiction, the four rules should be kept

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separate" (at [65]). The four rules of finality, according to Edelman J, are as follows (at [66]–[70]):

(a) merger or *res judicata* in the strict sense;

(b) cause of action estoppel or claim estoppel;

(c) issue estoppel; and

(d) *Anshun* estoppel or the extended principle in *Henderson v Henderson* (which our courts have generally referred to as the extended doctrine of *res judicata*; see, *eg*, *Nellie Goh* at [19]; see also at [39] and [59] above).

I respectfully agree with and gratefully adopt this taxonomy.

64 Having clarified the conceptual underpinnings of the merger doctrine, and how it stands alongside the other principles of the umbrella doctrine of *res judicata*, I turn to explain why these principles clearly show that the defendants could not rely on the merger doctrine to succeed in their applications.

The defendants could not rely on the doctrine of merger

65 In the first place, given that the finding that the defendants relied upon for the purposes of their submission on merger was a *negative* finding – *ie*, a supposed finding that the Loans *did not exist* – by the General Division in Suit 821, the invocation of merger was a non-starter. As I have explained at [54]–[57] above, the doctrine of merger can only apply where the court had found in the earlier judgment that the cause of action succeeded, as it is only where the cause of action succeeds that the claimant's cause of action undergoes the transmutation from a mere cause of action into a superior right in the

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judgment. This was therefore a sufficient basis in and of itself for the dismissal of these applications.

66 Given that the defendants' argument was flawed as a matter of law, it is strictly unnecessary for me to express a view on whether the requirement of a coincidence between the cause of action forming the subject-matter of the Judgment (HC) in Suit 821 and the causes of action in the Suits is met. However, it might be apposite to make two brief observations on this point.

67 The first concerns whether the statement relied upon by the defendants does in fact amount to a determination of the merits of Mr Darsan's assertion of the existence of the Loans. It seems arguable, although I express no conclusive view that may bind a future court that has this issue before it, that the effect of [148] of the Judgment (HC) in Suit 821 is a finding that the Loans did not exist. In the ordinary course, when a party in litigation asserts the existence of fact *X* as part of their cause of action or defence, a statement by the court that "there is no evidence before the court of *X*" would, not unnaturally, be understood as a finding that *X* did not exist. That being said, I preface that observation with my cognisance of the conceptual distinction in evidence law between a fact that is "disproved" and a fact that is "not proved" (see the Court of Appeal decision of *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286 at [16]–[23]). As this question did not arise for my consideration in these applications, I do not decide the point and shall say no more about it.

68 The second is that, even assuming (without deciding) that [148] of the Judgment (HC) is a determination on the existence or non-existence of the Loans, it is not clear that the requirement of a coincidence in *causes of action* was met. It is telling that, in their written submissions, the defendants did not focus on Mr Darsan's counterclaim in Suit 821 as forming the basis of the

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supposed merger, but asserted that "[t]he key features of Darsan's *defence* in Suit 821 and claim in Suit 278 are exactly the same" [emphasis added in italics; emphasis in original in bold and bold underlined italics omitted].[12] A *defence* is not aptly described as a cause of action. It thus seems to me, although I again make no conclusive determination on it, that there might well be a commonality of *issues* between Darsan's defence in Suit 821 and his claims in the Suits, but that is a different thing from saying that there is an identity of *causes of action*. Nevertheless, given that striking out applications in respect of the Suits may be on the horizon, following the dismissal of these applications, I shall say no more on this issue.

Neither the Consent Orders nor the doctrine of merger prohibited the plaintiffs from amending their Statement of Claims

69 It followed from my conclusion at [46] and [65] above that the Judgment (HC) in Suit 821, the Consent Orders, and the doctrine of merger did not nullify the Suits once the appeal against the Judgment (HC) in Suit 821 was dismissed in AD 88 as reflected in the Judgment (AD). It followed that the plaintiffs were free to amend their Statement of Claims in the Suits without leave of court, since pleadings had not closed when they did. No defence or reply had been filed or served in relation to the Suits (see O 18 r 20 of the ROC 2014). Hence, *per* O 20 r 3(1) of the ROC 2014, the plaintiffs could amend their pleadings without the leave of the court.

The court should not exercise its inherent powers to dismiss the Suits

70 Having heard all my concerns in relation to his arguments founded on the Consent Orders and the merger doctrine, Mr Liew relied on a fallback

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12 Defendants' Written Submissions at para 100.

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argument that I should exercise the court's "inherent power" to dismiss the Suits. He suggested that the facts clearly showed that this should be done. However, as I said to him, the court cannot exercise its inherent powers without any proper basis (see generally Goh Yihan, "The Inherent Jurisdiction and Inherent Powers of the Singapore Courts: Rethinking the Limits of Their Exercise" [2011] Sing JLS 178). More broadly, parties cannot treat the court's inherent powers as some kind of fall-back argument when all else has failed, much like how implied terms are said to be the desperate last resort of counsel in distress (see R E Megarry, *Miscellany-at-Law: A Diversion for Lawyers and Others* (Wildy, Simmonds and Hill Publishing, 2006) at p 210). It is vitally important that counsel base their submissions on legal principles and not vague allusions to general concepts like "inherent powers", or worse, "fairness and justice", important as these concepts may be, in principle.

71 In this regard, it is important to emphasise that even inherent powers must be exercised based on principle. The court's inherent powers are designed to prevent injustice or an abuse of the court's process to remedy unfair situations (see the Court of Appeal decision of *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2022] 1 SLR 771 at [95]). However, the court's invocation of its inherent powers is exceptional and arises only when it is shown that there is a *need* to invoke them to prevent injustice (see the Court of Appeal decisions of *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 at [27] and *Siva Kumar s/o Avadiar v Quek Leng Chuang and others* [2021] 1 SLR 451 at [57]). It must be shown not only that the power has not been statutorily excluded on the facts but that there exist "*exceptional circumstances* where there is *need* for the court to use its inherent powers in order for justice to be done or injustice to be averted" [emphasis added] (see the

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Court of Appeal decision of *Chan Yun Cheong (trustee of the will of the testator) v Chan Chi Cheong (trustee of the will of the testator)* [2021] 2 SLR 67 at [37]).

72 Therefore, it was incumbent upon the defendants to demonstrate an adequate basis, in law and in fact, for the court to exercise its inherent powers to dismiss the Suits. A general and abstract invocation of the vague need of the court to exercise its powers in the interest of broad fairness and justice is woefully inadequate. I note, in this respect, the caution expressed by the Court of Appeal in *Harmonious Coretrades Pte Ltd v United Integrated Services Pte Ltd* [2020] 1 SLR 206 which recognised (at [40]) a "residual discretion" to set aside orders and judgments to prevent injustice, but took pains to emphasise at the same time "that this is not a licence to litigants to make frivolous applications to set aside judgments or court orders" or launch "a back-door appeal or an opportunistic attempt to relitigate the merits of the case". It follows that a party seeking the court's invocation of its inherent powers bears the onus of showing a sufficient *basis* to do so, in order to ensure that a plea for the court's inherent powers to be employed does not transform, in turn, into an oft-abused and exploited prayer by opportunistic parties with no further weapons in their arsenal.

73 In the present case, the defendants did not demonstrate that basis before me. They failed to show that their case had met the legal and factual requirements for the court to exercise its inherent powers to dismiss the Suits. I note, in this respect, the holding of the Court of Appeal in *The "Bunga Melati 5"* [2012] 4 SLR 546 ("*Bunga Melati*") at [33] that the court has *inter alia* an inherent power to strike out a claim where an action is "plainly or obviously unsustainable" [emphasis in original omitted]. To be clear, this case was never cited to me nor relied on by the defendants in invoking the court's inherent powers. Indeed, if this was what the defendants wished for this court to do, the

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burden was on them to show, in their affidavits and submissions, that that prevailing legal test was satisfied *on the facts* of their case. This they did not do (to the contrary, they asserted that the merits of the Suits were *irrelevant* to their applications).[13] Instead, they simply fell back upon a generic invocation of the court's inherent powers without reference to *any* principles of law governing the same. That is unacceptable and it will not, and cannot, suffice to obtain relief in their favour.

Taking the defendants' case that the merits of the Suits are irrelevant to their applications, there was no basis to allow the applications

74 The reasons which I discussed above would have been sufficient to dismiss the present applications. This flowed from the defendants' steadfast insistence that the present applications were *not* striking out applications which would have required a consideration of the merits of the Suits. It followed that I did not consider the defendants' submissions on how the findings in Suit 821 in relation to Mr Darsan's defence in that case had affected the merits of the plaintiffs' claims in the Suits here, which were said to be framed almost identically.

75 Thus, the defendants' case had to be evaluated solely on the effect of the Consent Orders and the Judgment (HC) in Suit 821, *without more*. On this premise, I have explained why these, as well as the doctrine of merger, did not take the defendants very far. It could not be said that these, in and of themselves, nullified the Suits so that they were deemed to be dismissed as of 17 April 2024 (see at [46] and [64]–[65] above).

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13 Defendants' Written Submissions at paras 9–10, 118 and 138.

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76 Since the defendants reserved their rights to take out striking out applications if the present applications failed (and they have), I will limit my observations on the desirability of them having framed the present applications as they had been to a few short points.

77 First, it is important that applications or submissions to courts *of law* are *legally* grounded and *conceptually* sound. There must be a *legal* basis for an application because the courts are here to administer law and not policy. The courts are courts of law, and not courts of policy. Put differently, the courts cannot render an outcome that is not legally sound simply because they are urged to agree with the practical result sought, nor should they be asked to do so. In saying this, I do not suggest that the courts should shy away from "practical" or "commercial" outcomes; the courts do and should strive to reach such outcomes. But that must be only if these outcomes are *legally* grounded and *conceptually* sound. Thus, while Mr Liew urged me to consider that the practical outcome would be the same if the defendants were to come back with striking out applications, it remained that I needed to decide the *present* applications based on what they were, as well as the submissions that had been exchanged between the parties. I could not venture on a frolic of my own to imagine what the outcome might have been based on hypothetical positions that were expressly not taken up – indeed, explicitly *disavowed* before AR Wang – by the parties. In any event, I note that Mr Liew recognised before AR Wang that there may be practical differences between the two kinds of applications, inclusive of the possibility of the court granting leave to parties to amend their pleadings to avert a striking out.

78 Second, in formulating a legally-sound basis for relief, parties should not simply reproduce broad principles without qualifying how those principles had come about. For example, to say that a consent order raises "a *res judicata*"

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begs more questions than the broad proposition answers.[14] In this regard, legal principles, forged by the fires of precedent, principle, and policy to bind them all, are seldom developed in the abstract. These principles were made in response to real-life problems and not as mere philosophical constructs. They were developed to be capable of application, with criteria for application and rules governing when and how they are applied. It behoves parties to be aware of such and present the propositions being argued for in this light. More broadly, parties must recognise that successful arguments must first be grounded in principle and then supported by precedent (which are but applications of principle). Even if there is a precedent, unless it were binding on the court concerned, it remains possible to argue for a change in that precedent. There is therefore limited utility in some cases for lawyers seeking (or instructing their juniors) to find a case that is on all fours with the case at hand; sometimes, such a precedent simply does not exist and that is to be expected as there is always a first time for everything. That is the beauty of our common law, which can react to novel situations in an incremental approach. In sum, a good lawyer argues based on precedent, but a better one does so based foremost on principle, supported by precedent and, if necessary, policy.

79 Third, it may be helpful for parties to consider what may be the *easier* legally-sound route to reach the desired outcome. In the present case, I did not quite understand why the defendants insisted on a declaration that the Suits are "deemed dismissed" when they could have reached the same outcome, perhaps more easily, by taking out striking out applications from the outset. It may be that they would like for the Suits to be deemed dismissed as of a certain date, which a striking out application could not achieve, but if there *is* a practical difference in outcome between the two, that is all the more reason for the court

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14 Defendants' Written Submissions at para 74.

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to be clear about which route is conceptually available to a party and which is not. By the striking out route, the defendants could have said that the plaintiffs were estopped from arguing against the findings made in the Judgment (HC) rendered on Suit 821 and, based on those findings, the Suits were plainly or obviously unsustainable, whether legally or factually (see *Bunga Melati* at [32]–[33] and [39]; see also O 18 r 19(1)(*b*) of the ROC 2014). Alternatively, the defendants might have contended that the continued prosecution of the Suits was an impermissible attack on the findings in the Judgment (HC) on Suit 821 and the Judgment (AD) on AD 88, and thereby an abuse of process of the court (see O 18 r 19(1)(*d*) of the ROC 2014).

80 Given the real possibility that the defendants would take up striking out applications in the future, I make no comment on the merits of such arguments. But what is relevant, for present purposes, is that it eluded me *why* such routes, which seemed to me the easier and more natural avenue to the defendants' desired outcome, were not pursued in the first instance.

Conclusion

81 For all these reasons, I dismissed the applications and ordered costs in favour of the plaintiffs.

Goh Yihan
Judge of the High Court

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