

Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)
[2021] SGCA 14

Case Number : Civil Appeal No 223 of 2019
Decision Date : 26 February 2021
Tribunal/Court : Court of Appeal
Coram : Sundaresh Menon CJ; Andrew Phang Boon Leong JCA; Judith Prakash JCA; Steven Chong JCA; Quentin Loh JAD
Counsel Name(s) : Ho Pei Shien Melanie, Lam Chung Nian, Chang Man Phing Jeremy, Lim Xian Yong Alvin and Lin Si Hui (WongPartnership LLP) for the appellant; Kang Choon Hwee Alban, Mok Ho Fai and Teo Tze She (Bird & Bird ATMD LLP) for the respondent; Professor Yeo Tiong Min SC (School of Law, Singapore Management University) as amicus curiae.
Parties : Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) — Merck KGaA (formerly known as E Merck)

Abuse of process – Henderson v Henderson doctrine

Abuse of process – Inconsistent positions

Conflict of Laws – Foreign judgments

Res judicata – Issue estoppel

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [\[2019\] SGHC 231.](#)]

26 February 2021

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 Issue estoppel, cause of action estoppel and the doctrine of abuse of process are all principles that are part of the armoury of tools availing a court confronted with the need to act so as to prevent litigants from being twice vexed in the same matter or in respect of the same or sufficiently similar issues. At the same time, these doctrines also promote the public interest in upholding the finality of litigation. Where issue estoppel is said to arise out of a prior *local* decision (“domestic issue estoppel”), it is these twin rationales of protecting defendants from unfair vexation and upholding finality in litigation that principally animate the court’s formulation of the applicable legal rules. Where, however, issue estoppel is said to arise from a prior *foreign* decision (“transnational issue estoppel”), additional considerations come into play in shaping how the interests of justice may be best served.

2 In our judgment, the principles governing domestic issue estoppel as set out in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 (“RBS”), among other precedents, cannot apply without some modification when a court is considering transnational issue estoppel. In this respect, and especially because the application of the relevant principles might impact Singapore’s international relations, we consider it pertinent to have regard also

to recent legislative developments that include the promulgation of the Choice of Court Agreements Act (Cap 39A, 2017 Rev Ed) ("CCAA"), the slated repeal of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) and the amendment of the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) ("REFJA"). We think this is an opportune time for us to review, reconsider and, where appropriate, recalibrate at least some of the principles governing transnational issue estoppel. Before we develop our analysis of the legal principles, we set out the relevant factual background, which in this case goes back a considerable time.

Background

The co-existence agreement on the use of the name "Merck"

3 The respondent, Merck KGaA (formerly known as E Merck) ("the Respondent"), and the appellant, Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) ("the Appellant"), both trace their roots to a German family business that commenced in 1668 under the name "E Merck". Over the years, disparate branches of the business began to operate separately and independently in Europe and North America.

4 In the 1970s, the predecessors of the Appellant and the Respondent entered into a co-existence agreement to govern the use of the name "Merck" in various jurisdictions around the world. This agreement was contained in two documents, respectively termed the "1970 Agreement" and the "1975 Letter".

5 The 1970 Agreement provided in relevant part as follows:

AGREEMENT made January 1, 1970

between

MERCK & CO., INC. of Rahway, New Jersey, USA

and

E. MERCK of Darmstadt, Germany.

Definitions:

1.) a) 'Merck & Co.' as used herein shall mean Merck & Co., Inc. and its subsidiaries and affiliates.

b) 'E. Merck' shall mean E. Merck an 'offene Handelsgesellschaft' according to German Law and its subsidiaries and affiliates.

...

f) 'All other countries' as used herein means all countries of the world other than the United States, Canada, Germany, Cuba and the Philippines.

United States and Canada:

2.) a) Merck & Co. will not object to the use of the name E. Merck in the United States and

Canada by E. Merck as all or part of a firm-name or corporate name provided such names are geographically identified with Germany as follows: 'E. Merck, Darmstadt, Germany' all words being given equal prominence.

- b) E. Merck recognizes the exclusive right of Merck & Co. to the use of the trademark Merck in the United States and Canada and in such countries will not use or attempt to acquire rights in any trade mark containing Merck.

Germany:

3.) a) E. Merck will not object to the use in Germany by Merck & Co. of

- (i) Merck & Co., Inc. or Merck & Co. Limited as all or part of a firm name or corporate name provided such names are geographically identified with the United States or Canada as follows: 'Merck & Co., Inc., Rahway, N.J., U.S.A.', and 'Merck & Co. Limited, Montrea1, Canada', all words being given equal prominence.

- (ii) 'Merck Sharp & Dohme' as all or part of a firm name, corporate name or name of a corporate subdivision, provided such names are geographically identified with a country other than Germany, all words being given equal prominence.

- b) Merck & Co. recognizes the exclusive right of E. Merck to the use of the trademark Merck in Germany and in such country will not use or attempt to acquire rights in any trademark containing Merck.

All other countries:

4.) In all other countries E. Merck recognizes that 'Merck Sharp & Dohme' as a trademark or name is not confusingly similar to any of the trademarks or names used or owned by E. Merck and E. Merck will not object to Merck & Co.'s use and registration of Merck Sharp & Dohme as all or part of a trademark, tradename or corporate name. When requested E. Merck shall so state in writing. The embellishments of design of such trademarks shall not imitate marks owned by E. Merck.

5.) In all other countries E. Merck will not object to the use by Merck & Co. as all or part of a firm-name or corporate name of 'Merck & Co., Inc.' used in association with words such as 'Rahway, N.J., U.S.A.' which identify it geographically with the United States or 'Merck & Co. Limited' used in association with words such as 'Montreal Canada' which identify it with Canada, all words being given equal prominence.

6.) In all other countries Merck & Co. recognizes that E. Merck is entitled to use the word 'Merck' or combinations such as 'E. Merck' as a trademark or name provided that any such marks or names adopted in the future shall not be confusingly similar to marks or names adopted or used by Merck & Co. under Paragraphs 4 and 5 above. When requested Merck & Co. shall so state in writing.

7.) In all other countries Merck & Co. has undertaken to cancel all existing registrations, withdraw all applications and discontinue all use of the trademarks 'Merck', 'Merck Cross' and 'MerckMerckMerck'.

...

6 The 1975 Letter set out several clarifications to the 1970 Agreement. The parties did not rely on any of its provisions in this appeal, and we therefore do not set out its terms here.

The English and Australian proceedings

7 The Appellant and the Respondent are embroiled in litigation in a number of jurisdictions around the world, including the United States, England, Germany, Switzerland, Mexico, India, Australia, China and Hong Kong, over the use of the name "Merck".

8 Relevant for the purposes of this appeal are three English decisions (collectively, "the English Decisions") that were handed down before proceedings were commenced in Singapore by way of HC/S 415/2018 ("Suit 415"). These comprise:

(a) a preliminary determination by the High Court of England and Wales ("HCEW") on 21 November 2014 that the governing law of the 1970 Agreement and the 1975 Letter was German law ("the English Preliminary Decision", being *Merck KGaA v Merck Sharp & Dohme Corp & Others* [2014] EWHC 3867 (Ch));

(b) the decision of the HCEW on 15 January 2016 essentially interpreting various clauses of the 1970 Agreement, including cl 7, and holding that the agreement precluded the Appellant from using the name "Merck" on its own as a firm name or company name in "the rest of the world", which the HCEW defined as "all countries other than those (US, Canada and associated territories [by which the HCEW appeared to mean Cuba and the Philippines] and Germany) where specific arrangements [had been] made". The HCEW also held that the Appellant had breached this agreement ("the HCEW Decision", being *Merck KGaA v Merck Sharp & Dohme Corp, Merck & Co Inc, Merck Sharp & Dohme Limited, Intervet UK Limited, Intervet International BV* [2016] EWHC 49 (Pat)); and

(c) the decision of the English Court of Appeal ("ECA") on 24 November 2017 affirming the HCEW Decision ("the ECA Decision", being *Merck KGaA v Merck Sharp & Dohme Corp, Merck & Co, Inc, Merck Sharp & Dohme Ltd, Intervet UK Ltd, Intervet International BV* [2017] EWCA Civ 1834).

For completeness, we note that by the ECA Decision, some issues were remitted to the HCEW, and that gave rise to a fourth decision, *Merck KGaA v Merck Sharp & Dohme Corp, Merck & Co Inc, Merck Sharp & Dohme Limited, Intervet UK Limited, Intervet International BV* [2020] EWHC 1273 (Ch), which was issued after Suit 415 was commenced. However, this latest decision was not relevant to the issues in this appeal, and we therefore say no more about it.

9 The Appellant also relied on a decision of the Australian Federal Court dated 12 July 2019 ("the FCA Decision", being *Merck KGaA v Merck Sharp Dohme Corp* [2019] FCA 1084), in which the court declined to decide separately before the trial whether the ECA Decision gave rise to issue estoppel in respect of cl 7 of the 1970 Agreement (at [19]). The substantive proceedings were subsequently settled by way of a consent order that was entered into "without admissions", and the Respondent sought to have evidence of this adduced at the hearing before us. We disallowed the Respondent's application because we did not consider that such evidence would assist us in this appeal.

The Singapore proceedings

10 On 23 April 2018, the Respondent and Merck Pte Ltd commenced Suit 415 against the Appellant and three other defendants for trade mark infringement, passing off and breach of contract. Before

the High Court judge ("the Judge"), the Respondent applied by way of HC/SUM 4434/2018 for:

(a) summary judgment against the Appellant for breach of the co-existence agreement between the parties' predecessors (as comprised in the 1970 Agreement and the 1975 Letter) governing the use of the name "Merck" in various jurisdictions; and

(b) preliminary determinations under O 14 r 12 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("O 14 r 12") as to: (i) whether the Appellant was bound by the English Preliminary Decision on the governing law of the 1970 Agreement and the 1975 Letter (the "Governing Law Preliminary Determination"); and (ii) whether the Appellant was bound by the ECA Decision on the interpretation of cl 7 of the 1970 Agreement (the "Interpretation Preliminary Determination").

11 On 30 September 2019, the Judge issued his decision dismissing the summary judgment application but allowing the O 14 r 12 application on the basis that the two issues raised by the Respondent were "pure questions of law" that would lead to substantial savings of time and expenditure if they were resolved without a full trial: see *Merck KGaA and another v Merck Sharp & Dohme Corp and others* [2019] SGHC 231 ("Judgment") at [33] and [36].

12 The Judge also held that issue estoppel applied such that the Appellant was bound by the English Decisions. All the conditions for issue estoppel to arise had been met. First, the English Decisions were earlier judgments that were final and conclusive on the merits, and had been reached by courts of competent jurisdiction. The Judge rejected the Appellant's contention that issue estoppel could not arise without a formal application for leave to "recognise" the English Decisions: Judgment at [17]. There were no applicable defences to the recognition of these decisions; neither was there any risk that recognising these decisions might give rise to inconsistent future decisions in Singapore because no local decisions on the subject matter of these decisions had been made yet: Judgment at [18]–[19]. Second, the parties to both the English and the Singapore proceedings were identical. The Judge rejected the Appellant's argument that issue estoppel could not arise because there were other parties to the English proceedings who were not parties to the Singapore proceedings. He pointed out that the Appellant was a party to both sets of proceedings (as well as a successor to the 1970 Agreement), and was thus capable of being bound by issue estoppel. This conclusion was not displaced by the fact that there were other parties in the English proceedings: Judgment at [20] and [28]. The Judge also rejected the Appellant's argument that the Respondent was not the successor company of E Merck on the basis of evidence that the Appellant had sued the Respondent in the United States on the 1970 Agreement, as well as the ECA's holding that the Respondent was E Merck's successor company: Judgment at [21]. Third, the Judge was satisfied that the issues in the English proceedings were identical to those in the Singapore proceedings. He disagreed with the Appellant that the ECA's findings of breach pertained to acts committed in the UK while the Singapore proceedings concerned acts that were specific to Singapore. Crucial to his decision was his holding that such an argument did not in fact meet the Respondent's principal submission on issue estoppel, which was that the Appellant was bound by the ECA's decision on the *interpretation* of cl 7 of the 1970 Agreement, rather than on any *breach* of that agreement: Judgment at [23].

13 The Judge subsequently provided some oral clarifications on 14 October 2019 regarding an argument that had been made by the Appellant, namely, that it would not be fair to make a finding on issue estoppel in relation to cl 7 of the 1970 Agreement alone because cll 5, 6 and 7 should be looked at in their totality. The Judge opined that his Judgment had held only that the Appellant was bound by issue estoppel based on the English Decisions. Clause 5 was a carve-out from the restrictions in cl 7, and it was only necessary to consider the interpretation of cl 5 when dealing with specific allegations of *breach* or *infringement* of the 1970 Agreement. Clause 5 therefore did not affect the *interpretation* of cl 7 itself, which was all that was the subject of the issue estoppel.

The parties' arguments on appeal

14 The Appellant appealed against only the Judge's decision on the Interpretation Preliminary Determination to the effect that it was bound by the ECA's interpretation of cl 7 of the 1970 Agreement. It contended that issue estoppel did not arise from the ECA Decision, and that the Interpretation Preliminary Determination was not suitable for determination under O 14 r 12. The Appellant relied primarily on three main arguments: (a) the Judge had wrongly concluded that the issues in the English proceedings were identical to those in the Singapore proceedings because he had oversimplified the ECA's findings, leading to a loss of context and reasoning; (b) the Judge had erred in finding that there was identity of issues in the English and the Singapore proceedings when different clauses of the 1970 Agreement had been relied on in the two sets of proceedings; and (c) the ECA's findings were incapable of giving rise to issue estoppel because they were jurisdiction-specific and confined to acts committed in the UK. In its written submissions, the Appellant also contended that the parties to the English proceedings were not identical to the parties to the Singapore proceedings (repeating its argument in the court below in respect of the Respondent's predecessor), and reiterated that the ECA Decision could not be recognised because a formal application for its recognition had not been made.

15 For its part, the Respondent agreed with the Judge's decision on the Interpretation Preliminary Determination. It contended that: (a) the Judge's interpretation of the ECA Decision was correct; (b) the issues in the English proceedings were identical to those in the Singapore proceedings notwithstanding that additional clauses of the 1970 Agreement had been pleaded in the latter; and (c) the ECA's findings were not territorially confined to acts committed in the UK. In its written submissions, the Respondent also argued that the Appellant's conduct of the appeal constituted an abuse of process because the Appellant had appealed against only the Judge's decision on the Interpretation Preliminary Determination, while accepting his decision and reasoning in respect of the Governing Law Preliminary Determination, even though the same issue estoppel reasoning underlay both decisions. Such an approach, it was contended, offended the doctrine of approbation and reprobation as set out in *Treasure Valley Group Ltd v Saputra Teddy and another (Ultramarine Holdings Ltd, intervener)* [2006] 1 SLR(R) 358.

16 Upon reviewing the parties' initial round of written submissions, we directed that an *amicus curiae*, Prof Yeo Tiong Min SC ("Prof Yeo"), be appointed to address this court on two questions (referred to hereafter as the "First Question" and the "Second Question" respectively):

(a) Does the doctrine of issue estoppel apply to a foreign judgment in circumstances where substantially the same issue is being determined by more than one foreign court, and if so, (a) what are the elements on the basis of which the doctrine may be invoked and (b) how is a Singapore court to determine which of several possible foreign determinations the doctrine applies to?

(b) Assuming the answer to the above is 'yes', does the doctrine of issue estoppel apply to a decision of a foreign court on a pure point of law? If so, are there any limits to this and what might these be?

In brief, Prof Yeo's opinion was "yes" to the First Question, with a "first in time" approach applying where there were several possible foreign determinations to which the doctrine of issue estoppel could apply (that is to say, with the foreign determination that was the first in time being recognised for the purposes of creating an estoppel); and "no" to the Second Question. We will discuss his opinion in greater detail below where relevant.

17 In its reply submissions to Prof Yeo's opinion, the Appellant generally agreed with Prof Yeo's answers to both questions, save that it submitted (in relation to the First Question) that in formulating the exceptions to issue estoppel, a discretionary approach that had regard to all the circumstances, including the conduct of the parties, should be adopted in order to work justice between the parties. Hence, in the present case, even if issue estoppel might apply as a matter of principle (which, as mentioned at [14] above, the Appellant denied), this court should exercise its discretion *not* to invoke it in view of the facts at hand. This was said to be because Suit 415 involved "various causes of action and multiple [d]efendants", with the result that any finding of issue estoppel, although binding on only the Appellant, would almost inevitably "impinge on" the rights of the other defendants in relation to the trade mark infringement and passing off claims in the suit, and thereby cause injustice.

18 The Respondent, for its part, emphasised in its reply submissions to Prof Yeo's opinion that the present case did not involve conflicting foreign judgments because what the Appellant was estopped from reopening was the interpretation of cl 7 of the 1970 Agreement, and the only foreign judgment that constituted "a final decision on [that] issue" [emphasis and underlining in original] was the ECA Decision. Nonetheless, the Respondent agreed with Prof Yeo in endorsing a "first in time" approach where there were several possible foreign determinations to which the doctrine of issue estoppel could apply. It disagreed with the Appellant on the broad scope of its proposed exception to the application of this doctrine.

The issues for determination on appeal

19 The following issues arose for our determination:

- (a) as a preliminary matter, whether the Appellant was prevented by the abuse of process doctrine from mounting the appeal in the manner that it did;
- (b) substantively, whether the Judge was correct to find that the Appellant was estopped from disputing the ECA's interpretation of cl 7 of the 1970 Agreement; and
- (c) whether the Judge correctly found that the Interpretation Preliminary Determination was suitable for determination under O 14 r 12.

We address these in turn.

Abuse of process

20 A party's adoption of inconsistent positions in the same or related proceedings may potentially amount to an abuse of process, or offend the doctrine of approbation and reprobation: *BWG v BWF* [2020] 1 SLR 1296 ("*BWG*") at [52]–[56] and [102]. We were satisfied, however, that this was not the case here, having regard to the stance adopted by the Appellant in mounting this appeal.

21 As to abuse of process, we considered that the Appellant was indeed taking inconsistent positions in its conduct of this appeal in so far as it argued that the Judge had erred in finding, in relation to the Interpretation Preliminary Determination, that there was identity of *parties* to found an estoppel in respect of the ECA's interpretation of cl 7 of the 1970 Agreement, whilst declining to take issue with his finding, in relation to the Governing Law Preliminary Determination, that the English Preliminary Decision likewise gave rise to an estoppel, even though the latter finding shared the same foundation of identity of parties. That said, in *BWG* (at [57]), we held that the court should adopt a "granular approach" and view each defence mounted by a party separately in order to determine

whether there was in fact any abuse of process. In that light, we were satisfied that the inconsistency we have just noted warranted at most that we disregard the Appellant's arguments on the lack of identity of parties in relation to the interpretation of cl 7. In any case, these arguments were unpersuasive for the reasons given by the Judge, which we affirmed. None of this affected the Appellant's other arguments, including those concerning identity of *issues*, given that the Governing Law Preliminary Determination and the Interpretation Preliminary Determination concerned quite distinct issues.

22 As to the doctrine of approbation and reprobation, in *BWG*, we held (at [118]) that this doctrine extended to the assertion of inconsistent positions against different parties in different proceedings, so long as the party against whom the doctrine was invoked had received an *actual benefit* arising from an earlier inconsistent position. In the present case, we did not think that the Appellant had received any such benefit as a result of the inconsistent positions it had taken. The Respondent also did not explain how any benefit to the Appellant had arisen beyond generally asserting that there was a benefit "in terms of costs consequences".

23 Having found that the Appellant's conduct of this appeal did not constitute an abuse of process or offend the doctrine of approbation and reprobation, we proceeded to consider the substantive contentions that were advanced on the question of issue estoppel and whether the Judge was correct to hold as he did on this question.

Issue estoppel arising from foreign judgments

Applicability and rationales of transnational issue estoppel

24 Prof Yeo submitted – and the parties eventually both agreed – that the doctrine of issue estoppel is applicable to a foreign judgment which has already decided the same or substantially the same issue as that presently before the court in a subsequent dispute between the same parties.

25 We affirm that foreign judgments are capable of giving rise to issue estoppel. The applicability of issue estoppel to foreign judgments has been established in several decisions of our courts, including *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 at [111] and *The "Bunga Melati 5"* [2012] 4 SLR 546 at [79]–[80]. It is also consistent with the legislative policy of Parliament as reflected in the enactment of the CCAA. Under s 13(1) of the CCAA, a foreign judgment, once recognised, has the legal effect of a judgment issued by a Singapore court. One aspect of the consequences flowing from this is that such a judgment may give rise to issue estoppel. Moreover, there is no reason why the rationales underlying domestic issue estoppel (as set out at [1] above) should not extend to transnational issue estoppel – although, as we elaborate in the following paragraphs, the scope and force of the applicable principles in the former context need to be modified in the latter context as other considerations, including transnational comity, have to be factored in.

26 Historically, under the common law, the twin rationales for issue estoppel identified at [1] above applied only to domestic judgments. As noted by the House of Lords in *Carl Zeiss Stiftung v Rayner & Keeler Ltd and Others* [1967] 1 AC 853 ("*Carl Zeiss*"), up until the 1830s, foreign judgments (unlike English judgments) were not considered to be judgments of a court of record. They were, in the early stages of private international law, considered only to be "prima facie evidence of the rights of the parties" and so were examinable on the merits (at 965). There was nonetheless a recognition that the effect to be given to foreign judgments had been a vexed question in the English courts. This is evident, for instance, in the House of Lords' decision in *Edward Houlditch, John Houlditch, James Houlditch, and Francis Stubbs v The Most Honourable George Augustus Marquess of Donegall* (1834) 6 ER 1232, where the Lord Chancellor said (at 1234):

... The question has been a *vexata questio* in our Courts, and numerous *dicta* have been uttered upon the point, whether a foreign judgment is only *primâ facie* a ground of action, or whether it is conclusive and not traversable. The language of the opinions on one side has been so strong, that we are not warranted in calling it merely the inclination of our lawyers; it is their decision, that ***in this country a foreign judgment is only primâ facie, not conclusive evidence of a debt*** . [emphasis in original in italics; emphasis added in bold italics]

27 The Lord Chancellor explained the rationale underlying this approach as follows (at 1234–1235):

... One argument is clear, that the difference between our Courts and their Courts is so great that it would be a strong thing to hold that our Courts should give a conclusive force to foreign judgments , when, for aught that we know, not one of the circumstances that we call necessary may have taken place in procuring the judgment. ... ***So with regard to other cases of decisions of foreign Courts; for the principles of the law are different in each*** : the law of Algiers ... where we have only a consul; or the law of Turkey, where we have an ambassador, might be so recognised. If that were the case, ***the law of a foreign country might be made to have the effect of binding land in this country*** . In those two countries a man is allowed more than one wife. Suppose the law of that country held conclusive here, and then you might be called on to make a declaration that the son of a second marriage was the heir, though the daughter of a first marriage, (both wives being still living,) was in existence; which would be against our law, that does not recognise a second marriage during the existence of the first; and yet the *lex loci contractûs* would say, that such a descent was valid. ***I give these as instances or examples of what would be the consequences of holding that foreign sentences were in themselves valid*** ; but they also illustrate the expediency and soundness of the view, that the judgments of foreign Courts are traversable. ... [emphasis in original in italics; emphasis added in bold italics]

28 The position of the English courts began to change shortly after this. In *Samson Ricardo and John Lewis Ricardo v Lorenzo Garcias* (1845) 12 Cl & Fin 368, the House of Lords accepted that when a foreign judgment dealt with issues that were identical to the issues to be determined in a subsequent dispute before the English courts, or when a defendant pleaded a foreign judgment as *res judicata*, it was received as conclusive save in limited instances, such as those involving fraud, public policy or want of jurisdiction (*Carl Zeiss* at 966). This paved the way for foreign judgments to be recognised by the English courts, and, in turn, for issue estoppel to apply to such judgments, since issue estoppel is a *consequence* of acknowledging that a foreign judgment has effect in binding the parties and potentially preventing them from advancing positions that are judged to be inconsistent with what had previously been decided against them.

29 Yet, even after foreign judgments came to be recognised, it took some time for such recognition to find its conceptual justification. Two theories – that of an implied contract to pay a judgment debt, and that the judgment debtor owed allegiance to a foreign sovereign – were initially canvassed but eventually rejected, with the principal remaining contenders being the doctrine of obligation, the notion of comity and the interest in the finality of litigation: Sirko Harder, “The effects of recognized foreign judgments in civil and commercial matters” (2013) 62 ICLQ 441 (“Harder”) at 448.

30 We address first the doctrine of obligation. This doctrine was articulated by Blackburn J in *Schibsby v Westenholz and Others* (1870) LR 6 QB 155 as follows (at 159):

... [T]he true principle on which the judgments of foreign tribunals are enforced in England is that ... the judgment of a court of competent jurisdiction over the defendant imposes a duty or

obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce ...

Under this doctrine, the inquiry centres on whether the party against whom the foreign judgment is asserted *voluntarily* placed himself in a position where it could fairly be said that he was bound to abide by the adjudication of the foreign court: Adrian Briggs, *Civil Jurisdiction and Judgments* (Informa Law, 6th Ed, 2015) at para 7.62. We note that this doctrine has been criticised for presupposing what it is supposed to explain, and for being unable to account for the recognition of foreign judgments that impose no obligations but instead make declarations of status: Harder at 449.

31 The second basis for recognising foreign judgments is the notion of comity between states. While this rationale was apparently rejected in *Godard and Another v Gray and Another* (1870) LR 6 QB 139 ("*Godard*") on the ground that the English courts did not enforce foreign judgments "out of politeness and courtesy to the tribunals of other countries" (at 152), this has been explained as a rejection of the idea that comity operates purely as a discretionary courtesy: Jacob van de Velden, *Finality in Litigation: The Law and Practice of Preclusion – Res Judicata (Merger and Estoppel), Abuse of Process and Recognition of Foreign Judgments* (Kluwer Law International, 2017) at p 240. Family law, in particular, has historically encouraged the recognition of the validity of annulments and divorces pronounced by the courts of other countries, with Nottingham LC declaring that it was "against the law of nations not to give credit to the judgment[s] and sentences of foreign countries, till they be reversed by the law" (*Cottington's Case* (1678) 2 Swan 326n, cited in K R Handley, *Spencer Bower and Handley: Res Judicata* (LexisNexis, 4th Ed, 2009) at para 2.37). Comity has since then been "routinely invoke[d]" as an important basis for the recognition of foreign judgments at common law (Harder at 450; *Agbaje v Agbaje* [2010] 1 AC 628 at [54] of the UK Supreme Court's judgment). For instance, in *Beals v Saldanha* [2003] 3 SCR 416, the Supreme Court of Canada relied on "[i]nternational comity and the prevalence of international cross-border transactions and movement" as the rationales that undergird the "modernization of private international law" (at [28]), and extended the jurisdictional bases of recognising foreign judgments beyond presence, residence and submission, to the foreign court having a "real and substantial connection" to the action or to the parties to the litigation.

32 As to the third rationale of upholding the finality of litigation, it has been observed that in the context of the recognition of foreign judgments, it is only in the broadest sense of enhancing comity between states that an end to litigation is in the interest of the recognising state (whose court system would not, by definition, have been involved in the genesis of the prior *foreign* judgment): Pippa Rogerson, "Issue estoppel and abuse of process in foreign judgments" (1998) 17 CJQ 91 at 92.

33 It follows from the foregoing discussion that considerations of transnational comity and reciprocal respect among courts of independent jurisdictions have come to undergird the recognition of foreign judgments at common law and, by extension, the doctrine of transnational issue estoppel. Balanced against these considerations, however, is the constitutional role of the recognising court in overseeing the administration of justice and safeguarding the rule of law within its jurisdiction. While the notion of comity would seem to support taking a more liberal approach to transnational issue estoppel so as to give effect to foreign determinations, the recognising court's constitutional role pulls in the opposite direction given the possibility of error in a foreign determination and the reality that the rule of law is not always understood and applied consistently across jurisdictions.

34 In our judgment, the proper balance to be struck between these competing considerations is a delicate one that calls for: (a) affirming that the **elements** of transnational issue estoppel are the same as those of domestic issue estoppel, whilst taking special care in *applying* these elements in the former context; (b) exercising particular caution in delineating the **outer limits** of transnational issue

estoppel; and (c) potentially adopting a different approach from that taken in the context of domestic issue estoppel to what is commonly referred to as “the *Arnold* exception”, that is to say, the **exception** to issue estoppel derived from the House of Lords’ decision in *Arnold and Others v National Westminster Bank plc* [1991] 2 AC 93 (“*Arnold*”). We elaborate on each of these aspects below.

The elements of transnational issue estoppel

A foreign judgment that is capable of being recognised

35 As we alluded to earlier (at [28] above), in order for a foreign judgment to give rise to issue estoppel in a jurisdiction, it must first be recognised under that jurisdiction’s conflict of laws rules. The first element of transnational issue estoppel is therefore the existence of a foreign judgment that is capable of being recognised in the jurisdiction in which issue estoppel is invoked. The common law principles on the recognition of foreign judgments are uncontroversial. In brief, the foreign judgment in question must be a final and conclusive decision on the merits by a court of competent jurisdiction that has transnational jurisdiction over the party sought to be bound, and there must be no defences to the recognition of the judgment. The recognition of foreign judgments under the common law does not require any special procedure beyond normal pleading rules. For this reason, we readily reject the Appellant’s contention that the ECA Decision should be denied recognition given that there was no formal application for its recognition (see [14] above). Simply put, there was no need for any such application.

36 Beyond the requirements that must be satisfied in order for a foreign judgment to be recognised, we consider that particular care should be taken in cases where the recognising court is faced with multiple competing foreign judgments (although it should be noted that that is not the situation here, contrary to what the Appellant had suggested initially). Leaving aside the possibility of a cross-estoppel (arising from estoppel by representation) that precludes a plea of estoppel based on a foreign judgment, we endorse the following principles that were helpfully summarised by Prof Yeo:

(a) Where there are multiple competing foreign judgments, the foreign judgment that is the first in time should be recognised for the purposes of creating an estoppel (see [16] above). This not only promotes finality and reduces the risk of dissatisfied parties seeking to undermine the last-rendered judgment by engaging in satellite litigation to obtain a further judgment in their favour, but is also in line with the legislative policy reflected in s 15(1)(e) of the CCAA and s 5(1)(b) of the REFJA.

(b) On the other hand, where, for whatever reason, there is an inconsistent prior or subsequent *local* judgment between the same parties, the foreign judgment should not be recognised. This gives priority to the *res judicata* effect of local judgments, and is consistent with the legislative policy reflected in s 15(1)(d) of the CCAA, which confers upon the General Division of the High Court the discretion to refuse recognition (or, as the case may be, enforcement) of a foreign judgment if it is inconsistent with a Singapore judgment given in a dispute between the same parties.

37 Where the defences to the recognition of foreign judgments are concerned, we consider that it is in principle desirable that there be broad convergence in the defences available under the common law and under statutes such as the CCAA and the REFJA. This is especially so in respect of the CCAA, which gives effect to the Convention on Choice of Court Agreements concluded at The Hague on 30 June 2005 (“the Hague Convention on Choice of Court Agreements”), a transnational convention reflecting the broad consensus of a significant number of civil and common law jurisdictions as to the validity or otherwise of particular grounds for challenging the recognition (or, as the case may be, the

enforcement) of foreign judgments rendered by the courts that the parties have chosen to resolve their disputes. In this area in particular, the common law should, in our view, generally be developed in a manner that is compatible and consistent with legislation which covers a broadly similar area. This rests on the notion that the recognising court may and, indeed, ordinarily should have due regard to legislative developments in coming to its conclusion on the appropriate balance to strike between comity, international relations and the need to aid in the development of a transnational system of justice, while also safeguarding the rule of law within its jurisdiction.

38 We leave open for future consideration the approach to be taken where a foreign judgment is handed down when local proceedings on the same or substantially the same subject matter have been commenced and are pending. Prof Yeo suggested that in line with more recent English and Hong Kong authorities, the foreign judgment may nonetheless be recognised in such circumstances. In his view, the desirability of bringing litigation to an end is just as relevant when foreign and local suits pertaining to the same or substantially the same subject matter are almost contemporaneous, and a rule of non-recognition in such circumstances might incentivise the strategic initiation of pre-emptive local proceedings in order to prevent the recognition of an impending foreign judgment. At this stage, it suffices for us to observe that it may be possible to address concerns of pre-emptive litigation in this context by having due regard to all the circumstances, including how the foreign judgment came to be issued within the particular time frame in question and whether there was undue haste or any action by a party that is suggestive of a deliberate attempt to pre-empt the recognition of the foreign judgment in Singapore.

39 We also leave open the question whether reciprocity should be a precondition to the recognition of foreign judgments at common law. Reciprocity in this context refers to whether the jurisdiction from which the foreign judgment in question originates similarly recognises Singapore judgments. In so far as the recognition of foreign judgments rests on comity (see [31] above), imposing a requirement of reciprocity is entirely consonant with this rationale. This would moreover be consonant with the stance taken under the CCAA, the REFJA and the Maintenance Orders (Reciprocal Enforcement) Act (Cap 169, 1985 Rev Ed). That said, Prof Yeo pointed out that there is some difference in the philosophy that underlies the approach of the common law and that of Parliament in giving effect to foreign judgments. While the former focuses on personal obligations and the conduct of the party who is to be held bound by the foreign judgment (and therefore does not typically require reciprocity), the latter's considerations are broader and, in particular, extend to international relations. It has further been observed that the requirement for strict reciprocity is increasingly falling out of favour: Bélig Elbalti, "Reciprocity and the recognition and enforcement of foreign judgments: a lot of bark but not much bite" (2017) 13 *Journal of Private International Law* 184 at 185. As we mentioned earlier, we defer the issue for consideration in an appropriate case, and would only point out that the absence of reciprocity would, in practice, rarely be an obstacle to the recognition of a foreign judgment. Although there are a few jurisdictions, such as Indonesia and Thailand, that appear to subscribe to a general bar against according recognition to foreign judgments save in very limited contexts (*ABLI Legal Convergence Series: Asian Principles for the Recognition and Enforcement of Foreign Judgments* (Adeline Chong ed) (Asian Business Law Institute, 2020) at pp 15–17), it seems that such a stance is uncommon.

Identity of issues and parties

40 We turn now to the other two elements of transnational issue estoppel, namely, identity of issues and identity of parties. We agree with Prof Yeo that as a general rule, there should be no distinction between local and foreign judgments as far as the legal principles on the need for these two elements are concerned (and as to identity of issues, see generally the four requirements set out in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [34]–[39]). However, when

considering the element of identity of issues, and in defining the issues that were dealt with in the earlier decision and those that are presented in the case before the court, **caution should be exercised when interpreting judgments from foreign legal systems** . In particular, care will be needed in determining:

- (a) what was actually decided by the foreign court and whether the specific issue that is said to be the subject matter of an issue estoppel was necessary, as opposed to merely collateral, to the foreign judgment (*Carl Zeiss* at 918);
- (b) whether the foreign court's decision on that specific issue was final and conclusive (discussed further at [41]–[43] below); and
- (c) whether the party against whom the estoppel is invoked had the occasion or opportunity to raise that specific issue, or whether it was foreclosed from doing so (*Carl Zeiss* at 967).

41 As regards the finality and conclusiveness of the foreign court's decision on the specific issue that is said to be the subject matter of an issue estoppel (see [40(b)] above), a distinction should be drawn between the question of whether the foreign judgment concerned is, *as a whole*, final and conclusive, and the question of whether the decision on the *specific issue* is final and conclusive. In *Carl Zeiss*, Lord Reid and Lord Wilberforce expressed strong views in *obiter* that the decision on the specific issue must also be final and conclusive under the law of the jurisdiction from which the foreign judgment emanates. According to Lord Reid (at 919):

... [W]e should have to be satisfied that the issues in question cannot be relitigated in the foreign country. In other words, it would have to be proved in this case that the courts of the German Federal Republic would not allow the re-opening in any new case between the same parties of the issues decided by the [Federal] Supreme Court in 1960, which are now said to found an estoppel here. There would seem to be no authority of any kind on this matter, but it seems to me to verge on absurdity that we should regard as conclusive something in a German judgment which the German courts themselves would not regard as conclusive. It is quite true that estoppel is a matter for the *lex fori* but the *lex fori* ought to be developed in a manner consistent with good sense.

42 These observations, which Prof Yeo considered "persuasive" and "in principle and policy correct", have been applied in subsequent English cases (see, for instance, *Helmville Ltd v Astilleros Espanoles SA (The "Jocelyne")* [1984] 2 Lloyd's Rep 569 at 572, *Joint Stock Company "Aeroflot-Russian Airlines" v Berezovsky & Anr* [2014] EWCA Civ 20 at [28]–[34], *Abdel Hadi Abdallah Al Qahtani & Sons Beverage Industry Company v Antliff (Andrew)* [2010] EWHC 1735 (Comm) at [52]–[55] and *Mad Atelier International BV v Manes* [2020] EWHC 1014 (Comm) ("*Mad Atelier*") at [48]–[61]). A similar position has also been taken in Hong Kong (*Zheng Zhenxin v Chan Chun Keung* [2018] HKCFI 2284 at [44]–[47]) and the United States (see the US Restatement (Fourth) of Foreign Relations Law § 487 (2018): "A foreign judgment will not be given greater preclusive effect in the United States than the judgment would be accorded in the state of origin").

43 Like Prof Yeo, we agree with and endorse the views expressed in *Carl Zeiss*: in order for a foreign judgment to give rise to issue estoppel, not only the foreign judgment as a whole, but also the decision on the specific issue that is said to be the subject matter of the estoppel must be final and conclusive under the law of the foreign judgment's originating jurisdiction. This must follow from the awareness that in certain jurisdictions, binding effect might be accorded to the result arrived at in a judgment, but not to the reasons, intermediate steps or other elements that led to that result even if they are stated in the judgment, such that even an essential part of the reasons in judgments from

those jurisdictions might not be binding and therefore should be incapable of giving rise to issue estoppel. As noted in *Civil Jurisdiction and Judgments* at para 7.82, “the court may have recited the considerations on which its judgment was formally based, but without intending them to have the status of decisions on the particular points”. This is illustrated by *Mad Atelier*, where the defendant in the English proceedings argued that the facts and matters relied on by the claimant had already been heard and dismissed by the Paris Commercial Court, and that issue estoppel arose from the Paris Commercial Court’s decision. The HCEW held that for a foreign judgment to be considered final and conclusive, the foreign legal system in question had to have either a doctrine of issue estoppel covering the issues dealt with in the foreign judgment, or a doctrine with the same underlying basis and operation. Since there was no doctrine of issue estoppel or its equivalent under French law, the relevant findings of the Paris Commercial Court were not final and conclusive. All this underscores the need to be alive to inter-jurisdictional differences, and to consider the expert evidence, if available, on what precisely the position is under the law of the foreign jurisdiction in question.

Application to the facts of this case

44 The importance of carefully considering the foreign judgment to frame the specific issue that is said to be the subject matter of an issue estoppel is underscored in this case, which, in some respects, offers a paradigmatic illustration of how a lack of care in this regard can lead to unnecessary outlay of time and expense.

45 After we repeatedly sought clarification from the Appellant’s counsel during the hearing, it became apparent that the Appellant’s main contention was that the Judge had erred in presenting the gist of the ECA’s interpretation of cl 7 of the 1970 Agreement as being that “the use of the word Merck *per se* constitutes a breach of cl 7” (Judgment at [36]), when this conclusion was nowhere stated in the ECA Decision. In other words, the Appellant’s contention was that the Judge had *misunderstood or oversimplified* the ECA Decision by neglecting to mention those parts of [139] of the decision which are emphasised below:

For all of these reasons, I would dismiss this ground of appeal [as regards the proper interpretation of the 1970 Agreement]. In my judgment the judge was right to find that the 1955 and 1970 Agreements precluded Merck US [meaning, in essence, the Appellant for the purposes of this appeal] from using the word ‘Merck’ *on its own as a firm or company name in the rest of the world [outside the United States, Canada, Cuba, the Philippines and Germany], including the UK*. Construed in context and according to German law, the scope of clause 7 was not limited to the use of the word ‘Merck’ *as a trade mark*. I am satisfied that Merck US agreed that, in respect of the rest of the world, including the UK, it would not use the word ‘Merck’ *as a trade mark* and also that it would not use the word ‘Merck’ *alone as a contraction of its corporate name or as a trade or business name when furthering or promoting its business to third parties*. [emphasis added]

46 But apart from this, and subject to the two points that we discuss at [47]–[48] below, the Appellant *accepted* that issue estoppel *would apply* to the ECA’s interpretation of cl 7 of the 1970 Agreement as set out at [139] of the ECA Decision, namely, that cl 7 proscribed it from using, in “the rest of the world” outside the United States, Canada, Cuba, the Philippines and Germany, the name “Merck”: (a) on its own as a firm name or company name; (b) as a trade mark; and (c) on its own as a contraction of its corporate name or as a trade or business name when furthering or promoting its business to third parties.

47 The first point that the Appellant raised was that the issues in the English and the Singapore proceedings were not identical because in the former, the Respondent had relied on cl 7 alone,

whereas in the latter, it had pleaded cll 5, 6 and 7 collectively. In our view, this argument stemmed from the Appellant's misapprehension of the Judge's decision. The additional clauses were ultimately relevant to only the question of *breach*, but not the question of *interpretation*. While the clauses allegedly *breached* might differ, as far as the *interpretation* of cl 7 was concerned, the issue that was presented to the Judge was identical to that which had been dealt with by the ECA. In any case, in so far as the Appellant's complaint was that certain arguments as to how cll 5 and 6 interrelated with or informed the interpretation of cl 7 had not been aired in the English proceedings, that line of argument was barred by the doctrine of abuse of process laid down in the English case of *Henderson v Henderson* (1843) 67 ER 313 ("*Henderson*"). This doctrine is both well established as well as uncontroversial (see, for instance, *Lim Geok Lin Andy v Yap Jin Meng Bryan and another appeal* [2017] 2 SLR 760 at [41]). Applied to the facts of this case, it entails that any arguments pertaining to the relevance of additional clauses that, in the Appellant's view, would detract from the interpretation of cl 7 arrived at by the HCEW (in the HCEW Decision) and affirmed by the ECA (in the ECA Decision) could and should have been raised by the Appellant in the English proceedings. To borrow the words of the ECA in *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 at 640 (*per Lord Denning MR*):

... The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given upon it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. ... But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances ... And *within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. **If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings.*** But this again is not an inflexible rule. It can be departed from in special circumstances ... [emphasis added in italics and bold italics]

48 The second point that the Appellant made was that the ECA Decision could not give rise to an issue estoppel in the Singapore proceedings because it was territorially confined to acts committed in the UK (see [14] above). In support of this argument, the Appellant relied on those portions of the ECA Decision that referred to "uses *in the UK* of the word 'Merck'" [emphasis added] (see the ECA Decision at [198]). Again, it was clear to us that this argument stemmed from the Appellant's misapprehension that those statements in the ECA Decision were made in the context of discussing the *interpretation* of cl 7, when they were in fact made in the context of discussing the question of *breach*.

49 Having rejected the Appellant's two aforesaid points, what we were left with was its concession that issue estoppel *would apply* to the ECA's interpretation of cl 7 as set out at [139] of the ECA Decision (see [46] above). For its part, the Respondent accepted that [139] was the material controlling portion of the ECA Decision that defined the extent of the Appellant's obligation under cl 7, this being the issue that the Appellant was estopped from reopening. The Respondent did not contend that issue estoppel operated in respect of any question of breach; nor did the Judge make any finding of breach. The parties were therefore in fact substantially in agreement with each other as to the applicability of issue estoppel to the interpretation of cl 7 set out at [139] of the ECA Decision. There

was then no further controversy for us to resolve since it was evident that the Judge did not err *in substance* in his understanding of the ECA Decision.

50 For these reasons, we dismissed the appeal and affirmed the Judge's decision that issue estoppel applied to the ECA's interpretation of cl 7, as well as his decision that the Interpretation Preliminary Determination was suitable for determination under O 14 r 12.

51 For completeness, we note that Prof Yeo submitted that issue estoppel does not apply to a foreign (or even local) judgment on a "pure" question of law that does not directly affect the parties' rights, liabilities or legal relationship. We agree. Because issue estoppel is about precluding parties from re-litigating what a prior competent court of law has already decided about their dispute, it has no role to play in "determinations of pure questions of law that do not affect the actual dispute". This observation does not, however, have any bearing on the present appeal as the ECA's decision on the interpretation of cl 7 was not a decision on a "pure" question of law since it involved applying the law (namely, German principles of contractual interpretation) to the facts.

The outer limits of transnational issue estoppel

52 The conclusions which we have set out above represent our reasons for dismissing this appeal. We think it apposite to go on now to state our views on some of the further considerations that are relevant to transnational issue estoppel. The requirements of a foreign judgment that is capable of being recognised in the jurisdiction in which issue estoppel is invoked, identity of issues and identity of parties are necessary but ultimately insufficient conditions for transnational issue estoppel to arise. Due to the tension between transnational comity and a local court's role as custodian of the rule of law within the domestic legal regime, the courts in various jurisdictions have accepted that attempts to rely on foreign judgments as giving rise to issue estoppel will, in the words of one commentator, be approached "with a caution beyond that inherent in the recognition of foreign judgments generally" (Simon Beckwith, "Res judicata and foreign judgments: the Indian Grace" (1994) 43 ICLQ 185 at 188).

53 In England, the position remains that stated in *Carl Zeiss* – issue estoppel arising from foreign judgments "may involve difficulties and necessitate caution" (at 967) due to the lack of familiarity with foreign procedure and the need to avoid prejudicing a defendant who might have faced difficulties in defending an action in a foreign jurisdiction. Some English decisions also recognise a doctrine of perversity, under which a foreign judgment will not give rise to an issue estoppel if it is regarded by the English courts as perverse in the sense that it is at variance with generally accepted doctrines of private international law (*Air Foyle Ltd and another v Center Capital Ltd* [2003] 2 Lloyd's Rep 753 at [36(5)]; *Simpson v Fogo* (1863) 1 H & M 195). Australia adopts a similar approach as that of the House of Lords in *Carl Zeiss*, which calls for caution in applying the doctrine of issue estoppel to foreign judgments: *Telesto Investments Ltd v UBS AG* (2013) 94 ACSR 29 at [209]; *Armcel Pty Ltd v Smurfit Stone Container Corporation* (2008) 248 ALR 573 at [63].

54 The inquiry here focuses on what control or gatekeeping mechanisms are appropriate to define the outer boundaries of transnational issue estoppel. In our view, the following limitations could potentially apply, although we express no concluded views on them as the resolution of this issue was ultimately neither determinative of nor essential to the outcome of this appeal.

55 First, transnational issue estoppel should not arise in relation to any issue that the court of the forum ought to determine for itself under its own law. We find persuasive Prof Yeo's submission that this would be the case: (a) where there is a mandatory law of the forum that applies irrespective of the foreign elements of the case and irrespective of any choice of law rule; (b) where the issue in question engages the public policy of the forum; or (c) where the issue in question is, as Prof Yeo put

it, "classified as procedural for the purpose of the conflict of laws". In relation to (c), Prof Yeo gave the example of a decision from jurisdiction Y that a particular finding in a foreign judgment from jurisdiction X creates an issue estoppel under the law of jurisdiction Y. The decision from jurisdiction Y would *not* create an issue estoppel in Singapore proceedings on the question of whether issue estoppel arises from the aforesaid finding in the judgment from jurisdiction X because under Singapore law, issue estoppel is characterised as procedural for the purposes of the conflict of laws. The decision from jurisdiction Y, being a decision on a *procedural* matter, would not be a decision on the *merits*, and therefore would not be capable of creating an issue estoppel.

56 Second, transnational issue estoppel should be applied with due consideration of whether the foreign judgment in question is territorially limited in its application. To put it another way, there can be no question of according binding effect to a foreign judgment that is incapable of having transnational impact. As Prof Yeo notes, inherent territorial limitations may arise from the nature of the subject matter dealt with in some foreign judgments, such as findings on the validity of a patent in a jurisdiction or findings concerning or implicating the public policy of a jurisdiction. This point is uncontroversial.

57 Third, additional caution may be necessary in applying the doctrine of transnational issue estoppel against a *defendant* in foreign proceedings, as opposed to against a *plaintiff*, as the latter has the prerogative to choose the forum: *Carl Zeiss* at 918. As noted in *Civil Jurisdiction and Judgments* at para 7.83, "[a] defendant may have acted prudently in allowing a claim in a faraway court to be lost or to go by default: it may have been a claim too small to be worth the expense of fighting". It may be inappropriate to hold, in such circumstances, that the defendant is estopped in relation to a larger claim brought in another jurisdiction. In view of the practical difficulties faced by a defendant in deciding whether to deploy full resources to defend a point in a relatively trivial case, Prof Yeo flagged the possibility that issue estoppel may apply asymmetrically, at least in the context of transnational issue estoppel. Our provisional view is that where a defendant can demonstrate *bona fide* reasons for its decision not to contest or fully contest an issue in proceedings in another jurisdiction, it may be eminently sensible that it not be estopped on that issue in proceedings in Singapore.

58 Fourth, where a foreign judgment conflicts with the public policy of the jurisdiction in which issue estoppel is invoked, issue estoppel may be denied to the judgment. This could conceivably extend to a limitation on transnational issue estoppel in respect of foreign judgments that are considered to be perverse or that reflect a sufficiently serious and material error, although we leave this open for determination on a future occasion. The concept of invoking substantive public policy as a defence to the recognition (or, as the case may be, the enforcement) of foreign judgments is neither controversial nor novel, being a defence found in the CCAA and the Hague Convention on Choice of Court Agreements. As stated in *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (Preliminary Document No 7 of April 1997), a report prepared for a meeting of a Special Commission of the Hague Conference on Private International Law held in June 1997:

187 The possibility cannot be avoided of the court addressed raising its substantive public policy as an objection to the recognition or enforcement of a foreign judgment which conflicts with its fundamental principles and rules. However, following all the conventions on the subject, including those on the recognition of arbitral awards, it should be clearly stated that it is the effect of the foreign judgment which has to be contrary to the substantive public policy, not the judgment itself. In other words, the problem is the inclusion of obligations and rights derived from the foreign judgment in the legal system of the State addressed. The implementation in practice of this objection should therefore probably be limited to especially flagrant cases. ... [underlining in original]

59 Particular difficulties can arise in relation to a potential subset of the public policy defence where a foreign judgment deals with a question involving the law of the jurisdiction in which its recognition is sought. Specifically, in such a context, would it be contrary to public policy to recognise a foreign judgment that purports to make an error, especially one that is manifest, patent or egregious, in applying the law of the recognising jurisdiction?

60 The relevance of the recognising jurisdiction's substantive law was flagged in *Preliminary Draft Convention on Exclusive Choice of Court Agreements: Explanatory Report* (Preliminary Document No 26 of December 2004), where it was stated (in footnote 154 to para 143) that the public policy defence "[could] also be invoked where the foreign judgment conflicts with a provision of the substantive law of the requested State". That said, there remains some controversy over invoking, under the ambit of the public policy defence, errors in the application of the recognising jurisdiction's substantive law. We need only cite the Indian Supreme Court's decisions in *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* (2003) 5 SCC 705 and *Shri Lal Mahal Ltd v Progetto Grano Spa* (2014) 2 SCC 433 (departing from the much-criticised holding in the former) to demonstrate the difficulty of ascertaining the extent to which such errors may feature under the head of public policy. This is an issue that warrants careful consideration.

61 We therefore leave open the question whether a foreign judgment that rests on an erroneous application of Singapore law warrants special consideration, regardless of whether this is characterised as involving a question of our public policy or a standalone limitation on transnational issue estoppel. In a sense, this rests on the general approach that a Singapore court should take towards issue estoppel arising from a foreign judgment that has decided a question of Singapore law. Prof Yeo considered that we should avoid taking an extreme position (either that a foreign judgment on any question of Singapore law would *necessarily be incapable* of giving rise to an issue estoppel on the basis that the Singapore courts are the ultimate authority on Singapore law, or that a foreign judgment on any question of Singapore law would *always be capable* of giving rise to an issue estoppel so long as all the elements of transnational issue estoppel are present). This seems to us to be a sensible course. The difficulty lies in ascertaining where along the continuum of approaches between these two extreme positions the correct approach should lie. As Prof Yeo noted, there is a delicate balance to be struck between, on the one hand, giving effect to what foreign courts have decided (so that we do not in effect find ourselves sitting as a *de facto* appellate court, given the significance of considerations of comity), and, on the other, ensuring the correct application of Singapore law (both from the standpoint of our role as guardian or custodian of Singapore law, and from that of the administration of justice in any given case by not allowing patent errors to go uncorrected). There may also be a need to distinguish between cases where Singapore law is applied in a manner that is obviously wrong, and cases where a point under Singapore law is uncertain with no clear Singapore decision and the foreign court adopts a considered position after taking into account expert evidence, which position is eventually proved incorrect by a subsequent Singapore decision. In our view, such situations could potentially be dealt with by distinguishing between existent errors, where the foreign court clearly erred in its application of Singapore law, and retrospective errors, where the foreign court adopted a view that cannot be said to be wrong under Singapore law *as it then stood* but happened to anticipate wrongly how Singapore law would develop. Again, however, we do not need to decide the point, and we leave it for resolution in an appropriate case, having traced the contours of the considerations that were canvassed before us.

The Arnold exception in the context of transnational issue estoppel

62 In *Arnold*, the House of Lords conceived the *Arnold* exception as an exception to issue estoppel that could be invoked "in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings", provided

that the further material in question “could not by reasonable diligence have been adduced in those [earlier] proceedings” (*Arnold* at 109 per Lord Keith of Kinkel; cited in *RBS* at [103]). The *Arnold* exception was considered by this court in some depth in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2009] 1 SLR(R) 875 and *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2011] 1 SLR 998 (“*Lee Tat (No 2)*”), both of which stemmed from the protracted litigation over whether the residents of and visitors to Grange Heights condominium were entitled to use a private road on an adjoining plot of land as a right of way. In both cases, the court took a wide perspective of the *Arnold* exception, regarding it as an exception that was “intended to serve the wider interests of justice”, with the “overriding consideration in mind” being “to work justice and not injustice” (*Lee Tat (No 2)* at [90]; cited in *RBS* at [179]). We subsequently took a different view in *RBS*, and instead adopted a narrow perspective of the *Arnold* exception in the context of *domestic* issue estoppel as follows (at [190]):

In the circumstances, and in summary, we respectfully depart from this court’s view in *Lee Tat (No 2)* ... that the *Arnold* exception is a wide and nebulous one with loosely-defined boundaries based on the wide interests of justice. Instead, we hold that the following cumulative requirements must be met before the *Arnold* exception can apply to enable a litigant to avoid being estopped from reopening an issue that was previously the subject of a decision:

- (a) the decision said to give rise to issue estoppel must directly affect the *future* determination of the rights of the litigants;
- (b) the decision must be shown to be clearly wrong;
- (c) the error in the decision must be shown to have stemmed from the fact that some point of fact or law relevant to the decision was not taken or argued before the court which made that decision *and* could not reasonably have been taken or argued on that occasion;
- (d) there can be no attempt to claw back rights that have accrued pursuant to the erroneous decision or to otherwise undo the effects of that decision; and
- (e) it must be shown that great injustice would result if the litigant in question were estopped from putting forward the particular point which is said to be the subject of issue estoppel – in this regard, if the litigant failed to take advantage of an avenue of appeal that was available to him, it will usually not be possible for him to show that the requisite injustice nevertheless exists.

[emphasis in original]

63 Prof Yeo submitted that while the starting point is that the *Arnold* exception, as formulated by this court in *RBS*, should in principle apply as well in the context of *transnational* issue estoppel, the requirement that the decision in question be clearly wrong (requirement (b) in the passage quoted above) might not readily be applicable to foreign judgments in view of the conclusiveness principle laid down in *Godard*, which entails that a foreign judgment cannot be questioned on its merits in another jurisdiction once it has been recognised under that jurisdiction’s conflict of laws rules. The application of the *Arnold* exception in the transnational issue estoppel context could, Prof Yeo opined, result in prior foreign judgments being treated differently from prior domestic judgments, with the anomalous result that prior foreign judgments would then have stronger preclusive effect than prior domestic judgments. Prof Yeo discussed four potential approaches to resolve this conundrum:

- (a) The first would be to accept that foreign judgments do indeed have stronger preclusive

effect than domestic ones. However, as Prof Yeo submitted, this seems undesirable as a matter of principle. We note here the Respondent's argument that the second to fourth approaches considered by Prof Yeo are unsatisfactory, and that our courts should simply accept the perceived stronger preclusive effect of foreign judgments because this is balanced against the fact that: (i) greater caution is exercised in respect of foreign judgments; and (ii) clearly wrong foreign judgments would not be entitled to recognition anyway. The latter consideration is, however, premised on the Singapore courts accepting a limitation on transnational issue estoppel in respect of foreign judgments that reflect a sufficiently serious and material error, a point that we have expressly left open at [58]–[61] above. That said, it does seem to us, at least provisionally, incompatible with our role as custodian of the rule of law within this jurisdiction to readily yield to a foreign judgment that appears to have been wrongly decided.

(b) The second approach would be to regard the conclusiveness principle laid down in *Godard* as applying only to the cause of action, and not to the other issues dealt with in a foreign judgment. Prof Yeo contended that this too is unsatisfactory because the distinction between cause of action estoppel and issue estoppel is not always easily drawn, and it is also difficult, and perhaps unprincipled, to justify giving different parts of a foreign judgment different conclusive effects based on a distinction imposed by the law of the forum.

(c) The third approach would be, as Prof Yeo put it, to give "a broader meaning ... to the *Arnold* exception for issue estoppel arising from foreign judgments than in the case of [issue estoppel arising from] local judgments". Prof Yeo pointed out that some first-instance Singapore decisions seem to endorse a broad discretionary exception to issue estoppel for foreign judgments, whereby the application of issue estoppel is subject to the overriding consideration of working justice and not injustice (see, for example, *Dynasty Line Ltd (in liquidation) v Sia Sukanto and another* [2013] 4 SLR 253 at [76]; and *BAZ v BBA and others and other matters* [2020] 5 SLR 266 at [31], endorsing *Good Challenger Navegante SA v Metalexportimport SA (The "Good Challenger")* [2004] 1 Lloyd's Rep 67 at [54]). However, adopting a broad discretionary exception means that the policy objective of conserving resources might not be met because litigants can be expected to conduct their cases on the footing that issue estoppel might not apply. Prof Yeo also noted that applying a broad discretionary exception might well lead to the court of the forum deciding, in the face of potentially conflicting judgments on related issues from multiple foreign jurisdictions, that the doctrine of issue estoppel should be abandoned and all the disputed issues determined afresh. This would likely give rise to difficulties in ascertaining when the threshold for abandoning issue estoppel is crossed because complexity in itself is not a good reason to abandon a general legal principle. It also seems to us that this approach might bring us back to some of the difficulties inherent in the first approach.

(d) The fourth and preferable approach in Prof Yeo's view is to test "the conclusive effect of the specific issue in question in [a] foreign judgment ... under the law of the originating state [in] which the judgment was given". In other words, Prof Yeo suggested pegging both the conclusiveness of a foreign judgment and the applicability of the *Arnold* exception to issue estoppel arising from the judgment to the law of the judgment's originating jurisdiction. In his view, such an approach would be consistent with *Godard* as the inquiry would be directed at the foreign judgment's conclusiveness under the law of its *originating jurisdiction*, and not under the law of the forum (which would also be the jurisdiction in which the foreign judgment is said to give rise to an estoppel); conclusiveness under the latter can be contingent upon conclusiveness under the former. If it can be shown that the foreign judgment is not conclusive under the law of its originating jurisdiction, then its correctness can be challenged in the jurisdiction in which it is said to give rise to an estoppel. From this perspective, the foreign judgment would not necessarily have greater preclusive effect than a domestic judgment in the latter jurisdiction.

This approach, Prof Yeo considered, would also improve a defendant's position: on the basis that a foreign judgment has no greater effect than that which it would have under the law of its originating jurisdiction, a defendant can more readily decide on its litigation strategy in a foreign court by referring to the law on issue estoppel in that foreign jurisdiction.

64 Prof Yeo pointed out that regardless of which approach is adopted, the abuse of process doctrine laid down in *Henderson* would remain applicable. There is, he noted, a greater need for fact sensitivity in cross-border litigation than in domestic litigation since the former generally raises more complex issues. Thus, he opined, it is arguably justifiable to have a narrower scope of application for issue estoppel in the former, leaving more of the task of controlling and regulating the conduct of litigation in the forum to be done by the abuse of process doctrine.

65 It is ultimately unnecessary for us to come to a concluded view on whether the *Arnold* exception, as formulated in *RBS*, is applicable in the context of transnational issue estoppel; and if so, how it is to be applied. It seems to us at this stage that each of Prof Yeo's approaches carries different types of difficulties. We have summarised them above so that they can be more closely examined on a future occasion when it is necessary for us to come to a concluded view.

Conclusion

66 For the reasons explained above, we dismissed the appeal. We also awarded costs of \$50,000 to the Respondent, with the usual order for payment out of the security deposit.

67 In closing, we wish to express our deep gratitude to Prof Yeo for his invaluable assistance in this matter.