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ISSUE ESTOPPEL CREATED BY CONSENT JUDGMENTS: DISSONANCE BETWEEN THE PRINCIPLES UNDERLYING SETTLEMENTS AND COURT DECISIONS

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This article discusses the application of the concept of issue estoppel to consent judgments. Four High Court decisions have reached conflicting conclusions on this topic and created considerable conceptual difficulties. The article discusses the underlying reasons for the differences in these decisions, focusing on the dissonance brought about by the conventional policies underlying issue estoppel and the differing policy concerns applying to consent judgments. The article recommends that the courts take into account the unique nature of consent judgments, and use a modified test of issue estoppel for consent judgments. It also suggests that the extended doctrine of *res judicata* is much more appropriate for consent orders.

I. INTRODUCTION

The doctrine of *res judicata*, a well-established common law principle, is primarily underpinned by the need for finality of judicial orders and decisions. As the English court has stated, once "the *res*—the thing actually or directly in dispute—has been adjudicated upon... it cannot be litigated again".[1] In applying this doctrine, the courts have repeatedly stressed the underlying interest of the state in putting an end to litigation, and the individual's interest in not being repeatedly troubled for the same dispute.[2]

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1 *Ord v Ord* [1923] KB 432 at 439.

2 Lord Blackburn in *Lockyer v Ferryman* [1877] 2 App Cas 519 at 530 (HL) stated:

> The object of the rule of *res judicata* is always put upon two grounds—the one public policy, that it is in the interest of the State that there should be an end of litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause.

See also *Royal Bank of Scotland NV v TT International Ltd* [2015] 5 SLR 1104 at para 98 (CA) [*Royal Bank of Scotland*]:

> Broadly speaking, these three principles operate to preclude litigants from making arguments that were previously rejected by a court or tribunal, or that they ought to have advanced on an earlier occasion. Underlying all three principles is the policy that litigants should not be twice vexed in the same matter, and that the public interest requires finality in litigation.

While the justification for *res judicata* appears trite, "its practical manifestations are far from simple".[3] One such difficulty has emerged relating to the application of the specific concept of issue estoppel to consent judgments. Several conflicting High Court decisions have been made concerning this area. The controversy has, unfortunately, not been put to rest by a relevant decision by the Court of Appeal.

This article examines the conceptual difficulties of *res judicata* arising from four High Court decisions on this subject. It discusses the unique nature of consent judgments and the resulting challenges in attempting to fit the concept of issue estoppel with such judgments. It also proposes a different articulation of policy concerns and a modified test of issue estoppel for consent judgments. Finally, it recommends using the extended doctrine of *res judicata* as an alternative concept for consent judgments.

II. The General Legal Framework for *Res Judicata*

There are three interrelated principles classified under the concept of *res judicata*, namely: cause of action estoppel; issue estoppel; and the extended doctrine of *res judicata* or the defence of abuse of process.[4] The United Kingdom ("UK") Supreme Court has observed that these disparate legal principles have for many years lacked a coherent scheme. They are "distinct although overlapping legal principles".[5] The lack of clarity and uniformity has given rise to considerable difficulties, including the topic examined in this article. The varying juridical bases and policy concerns of these three principles are briefly discussed below.

A. *Cause of Action Estoppel*

The principle of "cause of action estoppel" has been attributed to Lord Diplock's formulation in *Thoday v Thoday*, where he elaborated on how this type of estoppel denies an unsuccessful plaintiff the chance of re-litigating a case he has lost:

> [C]ause of action estoppel. . . *prevents a party to an action 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*.[6]

In essence, the same cause of action cannot be brought again if it has been earlier determined by the courts. In elaboration, the Singapore Court of Appeal noted that

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[3] Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, 3d ed (London: Sweet & Maxwell, 2013) at para 25.64:

> However, although this idea is straightforward, its practical manifestations are far from simple, not least because English law employs three different doctrines for implementing it. These doctrines are neither sharply differentiated from each other nor clearly identified by a generally accepted terminology.

[4] *Royal Bank of Scotland NV*, *supra* note 2 at paras 98-105. These three categories are similar to what was elaborated on by Sundaresh Menon JC (as he then was) in *Goh Nellie v Goh Lian Teck* [2007] 1 SLR (R) 453 at paras 17-25 (HC) [*Goh Nellie*].

[5] *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at para 25 (SC) [*Virgin Atlantic*].

[6] [1964] 1 All ER 341 at 197 (CA) [*Thoday*] [emphasis added].

the focus here is determining "whether the later action is in substance a direct attack on and seeks to reverse, other than by way of a permitted appeal, an earlier decision made".[7]

Cause of action estoppel directly impinges on the public interest of encouraging finality in litigation, and preventing litigants from having a second bite at the cherry.[8] It has usually been construed as a strict rule creating an absolute bar against re-litigation. Exceptions are made only when fraud or collusion justify setting aside the earlier decision.[9]

B. *Issue Estoppel*

Issue estoppel is underpinned by similar public policies as cause of action estoppel, but is much wider in its application.[10] The principle prevents a litigant from raising *discrete issues of law or fact* that were earlier determined by the court to establish a cause of action. Although the claims in the two proceedings may differ (and hence no cause of action estoppel applies), issue estoppel may nonetheless arise if the same question of law or fact is being raised.

Diplock LJ once again in *Thoday*, explained how issue estoppel worked:

> '[I]ssue estoppel,' is an extension of the same rule of public policy. . . Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. *If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was*.[11]

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7 *Royal Bank of Scotland, supra* note 2 at para 99.

8 As Wigram VC in *Henderson v Henderson* [1843-60] All ER Rep 378, [1843] 3 Hare 100 at 115 [*Henderson*] explained:

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

9 Per Lord Keith of Kinkel in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 at 104 (HL) [*Arnold*], "[i]n such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment." This holding was accepted by the Singapore Court of Appeal in *Royal Bank of Scotland*, *supra* note 2 at para 103. According to *Henderson*, *ibid*, even the discovery of new factual matter which could not have been reasonably brought forward at the time of original proceedings is no ground for reopening the earlier decision.

10 *Royal Bank of Scotland*, *supra* note 2 at para 100, quoting *Watt (formerly Carter) v Ahsan* [2008] 1 AC 696 at para 31 (HL) [*Watt*].

11 *Supra* note 6 at 198 [emphasis added].

Drawing from common law's conceptualisation of issue estoppel, the Singapore Court of Appeal in *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* has distilled the requirements of issue estoppel into the following four-pronged test (the "*Lee Tat* test"):

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

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

(c) There must be identity between the parties to the two actions that are being compared; and

(d) There must be an identity of subject matter in the two proceedings.[12]

Because issue estoppel has a potentially wider scope of application than cause of action estoppel, the UK courts have tended to apply it less rigidly. Lord Keith in *Arnold* highlighted that the subject matter of the relevant two proceedings are identical in cause of action estoppel but not for issue estoppel, and that different treatment of the two concepts was warranted. He went as far as suggesting that issue estoppel need not create as absolute a bar as cause of action estoppel. The House of Lords in that case allowed an exception to issue estoppel, arising when a party has further material relevant to the determination of an issue in earlier proceedings, provided that this further material "could not by reasonable diligence have been adduced in those proceedings".[13]

Following *Arnold*, there were further attempts to modify issue estoppel from a strict rule to a more flexible one. Some decisions have interpreted *Arnold* widely to allow issue estoppel to be overcome whenever the injustice of not allowing re-litigation of the issue outweighs the hardship to the opponent who is made to lose the benefit of earlier findings.[14] The Singapore Court of Appeal in *Royal Bank of Scotland* differed in its opinion, stressing that the "*Arnold* exception. . .was a narrow one, meaning that issue estoppel remained a rather robust and rigorous principle even if it was somewhat less so than cause of action estoppel".[15] Because of the importance of ensuring finality in litigation, exceptions to issue estoppel would only be allowed in rigidly-demarcated categories.[16] Hence both cause of action and issue estoppel remain rather strict rules of *res judicata* within Singapore.

C. *Abuse of Process or Extended Doctrine of* Res Judicata

The extended doctrine of *res judicata*, also known as the defence of abuse of process, has rather different juridical underpinnings from the above two principles. Lord

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12 [2005] 3 SLR (R) 157 (CA) at paras 14, 15 [*Lee Tat*].

13 *Supra* note 9 at 109.

14 See *Olympic Airlines SA (in special liquidation) v ACG Acquisition XX LLC* [2014] EWCA Civ 821 at para 68, in which the Court of Appeal found that the exceptions to issue estoppel may not be limited to the circumstances in *Arnold*; and *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2014] QB 458 at para 147 (CA) [*Yukos*], in which the Court of Appeal suggested that there was a larger "discretionary in special circumstances" exception to issue estoppel, of which *Arnold* was an example.

15 *Supra* note 2 at para 103.

16 *Ibid* at paras 181-186.

Sumption in *Virgin Atlantic* described this doctrine as associated with the courts' exercise of procedural powers to prevent abuse of its processes.[17] There is the additional policy consideration here of discouraging abusive conduct or collateral attacks on the courts' previous decisions.[18] However, the doctrine has been classified under the concept of *res judicata* because it shares the common purpose of preventing duplicative litigation.[19]

This principle is known as the "extended" doctrine of *res judicata* because of its broader scope. Unlike issue and cause of action estoppel, the doctrine is not concerned with points that have been raised in earlier litigation.[20] Rather, it has been applied to points "which properly belonged to the subject of [earlier] litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" but did not: *Henderson*. In such circumstances, it is considered an abuse of the process of the court to allow a new proceeding to be started on the points that could and should have been raised earlier.[21] Hence, the doctrine has 'extended' the reach of *res judicata* beyond points that were decided in earlier proceedings to points that were not previously argued but should have been raised. While the doctrine does not directly apply to duplicitous claims or issues, it effectively encourages litigants to bring forth their entire case and achieve finality of litigation.

The approach in deciding whether abuse of process exists is also considerably wider than the above two principles. In this regard, the House of Lords in *Johnson v Gore Wood & Co* opined that there are no hard and fast rules as to what amounts to abuse of process. The court has to take a broad, merits-based judgment, taking into account all the facts of the case and all public and private interests.[22] The Singapore Court of Appeal concurred, stating that this principle has "a much higher degree of flexibility". Relying on *Goh Nellie*, the court elaborated that it could take into account a variety of circumstances, including whether there were *bona fide* reasons for not raising the points earlier and whether there was fresh evidence available warranting re-litigation.[23] By contrast, issue and cause of action

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17 *Supra* note 5 at para 25.

18 *Goh Nellie*, *supra* note 4 at para 52, citing *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL).

19 Lord Sumption in *Virgin Atlantic*, *supra* note 5 at para 25 explained:

> *Res judicata* and abuse of process are juridically very different. *Res judicata* is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation.

20 *Royal Bank of Scotland*, *supra* note 2 at para 105.

21 *Henderson*, *supra* note 8 at para 115, which was cited with approval by *Royal Bank of Scotland*, *supra* note 2 at para 101. Somervell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257 (CA) further developed this principle by elaborating that certain issues which are so clearly part of the subject matter of litigation could clearly have been raised during original proceedings, such that it would be an abuse of process for the court to now allow a new proceeding to be raised in respect of them.

22 [2002] 2 AC 1 at 31 (HL) [*Johnson*], endorsed in Singapore in *Royal Bank of Scotland*, *supra* note 2 at para 104. Note that several post-*Henderson* decisions appear to take an excessively broad perspective on abuse of process, such as *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 (PC) [*Yat Tung Investment Co Ltd*], where the court seemed to find abuse of process based on a very wide sense of abuse of process arising from any matter which could have been litigated in earlier proceedings.

23 *Royal Bank of Scotland*, *supra* note 2 at para 104.

estoppel are applied much more rigidly, with less latitude to consider all the relevant circumstances.

The courts have sometimes eroded the strict rules of issue and cause of action estoppel by re-casting them in the likeness of the extended doctrine of *res judicata*. For instance, some UK decisions have allowed exceptions to issue estoppel based on broad considerations of justice.[24] The distinction between the strict rules of substantive law and the extended doctrine of *res judicata* has thus been muddied. By comparison, the Singapore Court of Appeal in *Royal Bank of Scotland* expressed its preference to delineate cause of action and issue estoppel and abuse of process very clearly. The latter principle only applies to matters that were not raised in earlier proceedings, while issue and cause of action estoppel arise only in relation to matters that were argued earlier. The rules of issue and cause of action estoppel are also to be applied with much more rigour than the extended doctrine of *res judicata*.

The three principles of cause of action estoppel, issue estoppel and the extended doctrine of *res judicata*, being distinct yet inter-related, are often raised as alternative grounds to strike out the opposing party's claims. This has been the case in a series of High Court judgments that discussed the concept of *res judicata* in the context of consent judgments.

III. The Doctrine of Issue Estoppel Applied to Settlements Reflected in Consent Judgments—A Web of Unresolved Concepts

Four Singapore decisions examining how issue estoppel applies to consent judgments have arrived at very different conclusions. These differing decisions reflect stark variations in their balancing of policy concerns and their conceptualisation of the nature of consent judgments.

The circumstances in these cases are common. Litigants frequently consider the possibility of settlement while involved in court proceedings. Though pleadings may have been filed in court, the warring parties may decide to settle their dispute before the trial commences, or even in the midst of the trial. The details of their settlement may then be encapsulated in a consent judgment recorded before the court. In some cases, where partial agreement on liability is arrived at without resolving the entire dispute, an interlocutory judgment on the issue of liability is entered by consent.

Where no consent judgments are entered, the plaintiff may simply file a notice of discontinuance to end the court proceedings. Some parties choose to also sign a deed of settlement as evidence of their compromise. Another approach is for the parties to record terms of settlement before the court with the express agreement that a notice of discontinuance would be filed only after the terms have been fulfilled; and for any breach to give the non-defaulting party the liberty to extract a court order to enforce the settlement.

Two High Court decisions were made in relation to the entering of consent final judgments, while another two cases dealt with interlocutory judgments on liability. These will be summarised in turn before being collectively discussed.

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[24] *Yukos*, *supra* note 14; *Virgin Atlantic*, *supra* note 5; and *Watt*, *supra* note 10.

A. Low Heng Leon Andy v Law Kian Beng Lawrence (administrator of the estate of Tan Ah Kng, deceased)[25]

This was a dispute over the plaintiff's right to live in a flat owned by his deceased grandmother. The defendant, as administrator of the estate, filed an application under order 81 of the *Rules of Court*,[26] seeking immediate possession of the flat. After both parties arrived at a settlement, a consent order was entered before a registrar for the plaintiff to deliver vacant possession of the flat to the defendant, and for the defendant to abandon any claim by the estate against the plaintiff arising from the latter's occupation of the flat.

Subsequently, the plaintiff commenced an action, claiming, amongst other matters, equitable compensation for the loss of opportunity to reside in the flat. The defendant applied to strike out the claim based on the grounds of issue estoppel and abuse of process.

On the question of whether the consent order resulted in issue estoppel, the High Court judge cited the four-part *Lee Tat* test,and then focused on the first part—whether there was a final and conclusive judgment on the merits. There are three main reasons for the judge's refusal to find issue estoppel:

(a) First, the judge opined that the consent order was a "contractual consent order".[27] The parties' lawyers were corresponding with the view of negotiating a settlement, before arriving at a draft consent order to be entered before the registrar. This consent order entered into by agreement by the parties was distinguishable from a situation in which a party, thinking that his case was unsustainable, "threw in his hand" and conceded on an issue, before entering a consent judgment.[28]

(b) A contractual consent order was not final and conclusive "on the merits" of an issue. The registrar did not apply his mind to the case to ascertain whether the prayers should be granted. "He was merely recording the terms agreed upon by parties in the form of a consent order, and this must mean that no final decision on the merits of the O 81 Application was made".[29]

(c) This was not a matter to be decided on ground of issue estoppel. "[I]n relation to contractual consent orders, whether an issue is allowed to be re-litigated is determined by the appropriate remedy to be granted based on principles of contract law rather than issue estoppel." Parties in such circumstances should enforce their agreement based on the principles of contract law in a separate set of proceedings.[30]

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25 [2013] 3 SLR 710 (HC) [*Andy Low*].
26 Cap 322, R 5, 2014 Rev Ed Sing.
27 *Andy Low*, *supra* note 25 at para 50.
28 *Ibid* at paras 51, 53.
29 *Ibid* at para 54.
30 *Ibid* at paras 54, 55.

The judge also did not find any abuse of process. In his opinion, it was reasonable that the plaintiff did not challenge the earlier application. Furthermore, it was clear from the parties' correspondence that disputes over the flat were not over and further claims might be brought in the future.

B. Cost Engineers (SEA) Pte Ltd v Chan Siew Lun[31]

Three years later, a different High Court judge expressed his disagreement with the above reasoning concerning consent judgments. In an earlier trial before this judge, the first plaintiff company applied for a declaration that the defendant held a portion of the shareholding in a company on trust for it. The defendant eventually consented to a judgment in which he would transfer half of this shareholding to the first plaintiff, provide an account of all dividends and profits that the first plaintiff was entitled to and pay all sums found to be due upon the taking of the accounts.

In the present case, a question arose as to whether the earlier consent judgment gave rise to an issue estoppel that the term "dividends and profits" included unofficial payouts received by the defendant as a shareholder.

The judge first addressed the preliminary issue of whether a consent judgment could give rise to issue estoppel. The judge affirmed the applicability of issue estoppel based on the following reasons:

(a) The judge cast doubt on the term "contractual consent orders" formulated in *Andy Low*.

In the judge's opinion, it was difficult to understand why a consent judgment entered based on a concession on merits was deemed a decision on the merits while other consent judgments were not. In either case, the court would not have applied its mind to the merits of the case. Furthermore, the distinction between contractual and non-contractual consent orders was difficult to draw; it was unclear as to whether only an outright concession on the merits would render an order "non-contractual". In any case, a consent judgment was not a mere contract between the parties, but a judgment or court order that could be enforced without instituting fresh proceedings.[32]

(b) A judgment on the merits was not necessary for issue estoppel to apply, as long as the judgment was final.

The judge highlighted that the Court of Appeal in *Lee Tat* had never addressed its mind to the specific question of whether a consent judgment was capable of giving rise to issue estoppel. Hence its observation that issue estoppel was only engaged when a matter has been "decided on the merits" could not be taken to be conclusive of the question whether a consent judgment can give rise to issue estoppel.[33] While the courts would be hard

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31 [2016] 1 SLR 137 (HC) [*Chan Siew Lun*].

32 *Ibid* at paras 51-53, 59.

33 *Ibid* at paras 47-49.

> pressed to describe a consent judgment as a "final and conclusive judgment of the merits", this did not necessarily preclude a consent judgment from giving rise to issue estoppel. There were several local authorities which have held that as long as a consent judgment was final, it was capable of forming the basis of an issue estoppel.[34]

(c) The principles underlying the doctrine of *res judicata* justified the conclusion that issue estoppel can arise from a consent judgment.

> Whether an order was arrived at through judicial examination or through agreement, there was a real interest in both situations in disallowing issues which were raised in previous proceedings from being re-litigated after being recorded as a judgment. In addition, it was open to a party to negotiate a settlement and a withdrawal of the suit without the entering of a consent judgment, thus avoiding the application of issue estoppel.[35]

The judge proceeded to examine whether the issue being raised had been concluded in the earlier consent judgment. He acknowledged that it was difficult to identify the issues which were necessarily decided and concluded in order to arrive at the consent order. Nonetheless, the judge did not deem it necessary for the consent judgment to contain an explicit finding on an issue in order for issue estoppel to arise. "The determination of the issue may be implicit from the judgment".[36] On the facts of this case, the judge found that that the interpretation of "dividends and profits" as including unofficial payouts was not an issue that was necessarily decided by the consent judgment.

The next two decisions, involving interlocutory judgments in motor accident cases, were also not unanimous in their determination of the applicability and scope of issue estoppel to consent orders.

C. Jaidin bin Jaiman v Loganathan a/l Karpaya[37]

This case involved an accident involving a motorcycle ridden by the first defendant (the motorcyclist), a pillion rider on the motorcycle (pillion rider) and a car driven by the second defendant (the driver).

In an earlier suit, the motorcyclist commenced action against the driver for personal injury suffered. The case proceeded for a court dispute resolution session in the State Courts. Both parties eventually agreed to enter a consent interlocutory judgment involving the driver bearing 60% liability.

In this present case, the pillion rider sued both the driver and the motorcyclist for injuries that he sustained in the same accident. The question before the court was whether the earlier interlocutory judgment gave rise to issue estoppel on the question of liability.

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[34] *Ibid* at para 57.
[35] *Ibid* at paras 60-62.
[36] *Ibid* at paras 64-66.
[37] [2013] 1 SLR 318 (HC) [*Jaidin*].

1. *Final and Conclusive on the Merits?*

The judge decided that issue estoppel applied. Like the court in *Chan Siew Lun*, he highlighted that the question of *res judicata* for consent judgments was not directly put before the Court of Appeal in *Lee Tat* on the facts. The judge also arrived at the similar conclusion that a consent order would not prevent the forming of issue estoppel as long as it was final. Finality was evidently fulfilled here as nothing more remained to be decided concerning the parties' liabilities.[38]

2. *Identity of Parties and Subject Matter*

It is noteworthy that the judge found issue estoppel despite the involvement of different parties and different duties of care in the two proceedings. The first suit was between the motorcyclist and the driver, whereas the instant suit also included the pillion rider. In the judge's view, "identity of parties" in the *Lee Tat* test must refer to "the identity of the principal and effective parties to the determination of the apportionment of liability as between the driver and motorcyclist". The principal parties for the purpose of determining liability were still the motorcyclist and the driver; the pillion rider was akin to a nominal plaintiff.[39]

In ascertaining whether the two suits involved the same issue, the judge referred to two approaches in common law. The "technical" approach construed the identity of duties strictly. If two duties could not be formulated in precisely identical terms, no issue estoppel would arise. Conversely, the more "robust" approach favoured seeking the substantial question involved, which was who had caused the collision. The judge favoured the robust approach, finding that the questions of fact involved in apportioning liability between the driver and the motorcyclist for injuries to the pillion rider did not differ from the issues of fact in the earlier suit.[40] Issue estoppel was therefore upheld, based on all components of the *Lee Tat* test.

D. Soh Lay Lian Cherlyn v Kok Mui Eng[41]

A subsequent High Court judgment departed from the preceding judge's analysis. The circumstances differed slightly from *Jaidin* as the two sets of proceedings here involved the same two parties—the two drivers involved in a collision. The previous personal injury claim was commenced by the defendant driver against the plaintiff driver in the High Court. The matter was settled via a consent interlocutory judgment in which the plaintiff bore 90% of liability for the accident. The parties subsequently entered a consent final judgment for a global settlement sum without any apportionment of liability. The second suit was akin to a cross-claim. It was commenced in the State Courts by the plaintiff against the defendant, seeking compensation for personal injuries sustained in the same accident. The defendant argued that both issue estoppel and abuse of process should bar the plaintiff's claim.

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38 *Ibid* at para 5.

39 *Ibid* at para 7.

40 *Ibid* at paras 9, 10.

41 [2015] 5 SLR 53 (HC) [*Soh Lay Lian* (HC)] and *Kok Mui Eng v Cherlyn Soh Lay Lian* [2014] SGDC 419 [*Soh Lay Lian* (DC)].

1. *The District Court's Decision*

The District Judge found that *Jaidin* applied in respect of issue estoppel. It was even clearer here that the *Lee Tat* requirements were fulfilled. "Not only were the *parties* in the two suits germane to the present proceedings identical, the *subject matter* of both suits—namely the appropriate apportionment of liability between the Plaintiff and the Defendant for the accident—[was] similarly identical."[42] Issue estoppel was established, the parties were bound by their respective liabilities set out in their earlier consent judgment.

The defendant raised the additional argument that the plaintiff's failure to bring the present claim as a counterclaim in the earlier proceedings amounted to an abuse of process. On this issue, the District Judge noted that it was the general practice in the motor insurance industry for a defendant's claim to be commenced as a separate action, since a defendant's insurer would generally take interest in defending the plaintiff's claim and not in pursuing the defendant's own claim. The District Judge also opined that the plaintiff's current action was not an attempt to mount a collateral attack on the outcome of the earlier suit as she was seeking to follow the earlier suit's apportionment of liability.[43] Nevertheless, issue estoppel in this case still operated to prevent the plaintiff from proceeding with her current claim.

2. *The Appeal in the High Court*

The High Court judge reversed the decision by declining to follow *Jaidin.* The judge gave two reasons for concluding that the elements of the *Lee Tat* test had not been properly fulfilled in *Jaidin*. First, there was no identity of the parties since the pillion rider had not been involved in the earlier suit and the settlement agreement between the motorcyclist and the driver. Secondly, the judge stated that there had to be a decision on the merits in order for issue estoppel to apply. Proceeding to consider the merits of the plaintiff's claim afresh, the judge found that the defendant should not bear any contributory negligence for the accident.[44]

IV. The Conceptual Difficulties

Within the last three years, there have been rather different views expressed on the application of the *Lee Tat* test to consent judgments. Considerable confusion has ensued within legal practice as a result. These judgments have, in essence, raised three perplexing questions concerning issue estoppel and consent orders:

(a) There is the threshold question of *whether issue estoppel should apply* to consent judgments. There are two subsidiary questions to be resolved under this broad issue:

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42 *Soh Lay Lian* (DC), *ibid* at para 23 [emphasis in original].
43 *Ibid* at paras 36-41.
44 *Soh Lay Lian* (HC), *supra* note 41 at paras 10-12.

(i) One's understanding of the *nature of a consent judgment* invariably affects the conclusion of whether issue estoppel applies.

The court in *Soh Lay Lian* concluded that a consent judgment could not be properly deemed a decision "on the merits" under the *Lee Tat* test. In a similar vein, the judge in *Andy Low* devised the term of the "contractual consent order" to avoid the application of issue estoppel.

(ii) In addition, it is crucial to understand *the key policy considerations underlying issue estoppel,* in order to examine whether they apply with full force to consent judgments.

(b) If the answer to the threshold question is yes, then *the scope of issue estoppel* for consent judgments presents another thorny issue. Specifically, there are the following questions:

(i) How does the court determine *whether the relevant issue has been concluded by the consent judgment*? Should the court limit the application of issue estoppel to points that are apparent from the face of the judgment?

(ii) How is *the requirement of "identity of parties"* in the *Lee Tat* test to be applied to consent judgments?

The High Court in *Jaidin* found that issue estoppel applied despite the pillion rider being involved in the second but not the first suit. Is such a robust approach to issue estoppel warranted for consent judgments?

(c) Even if the first two issues can be resolved satisfactorily, is there are a more appropriate principle under *res judicata* for consent judgments?

These issues will now be examined in turn.

V. Whether Issue Estoppel Should Apply to Consent Judgments

A. *The Nature of Consent Judgments*

There is an uneasy interface between the practice of entering consent orders, and the concept of *res judicata* that is historically associated with judgments delivered after contested litigation. Spencer Bower, Turner and Handley aptly described the consent order as a situation in which the court is discharged from the duty of investigating the matters in controversy and does not pronounce a judicial opinion on them, but at the joint request of the parties gives "judicial sanction and coercive authority to what they have agreed". In this way, the consent judgment "converts an agreement. . . into a judicial decision on which a plea of *res judicata* may be founded".[45]

[45] Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata*, 3d ed (London: Butterworths, 1996) at para 38.

This synthesis of the parties' agreement and the court's judicial sanction creates a rather unusual creature—a judgment that is neither fully a judicial pronouncement based on merits, nor a simple agreement between the parties that does not involve the courts. There is technically no decision made on the "merits" according to what the *Lee Tat* issue estoppel test envisages. When the concept of issue estoppel is directly applied to consent judgments, similar to how it has been readily applied to judicial pronouncements, there is, naturally, considerable difficulty in reconciling the dissonant principles underlying issue estoppel and consent orders.

One illustration of this dissonance is the challenge the court often faces in deciding whether certain issues were concluded by the consent judgment. Sometimes, the issues are plain from the face of the judgment, such as when the judgment refers to apportionment of liability (as in *Jaidin*), specific admissions[46] or an agreement not to raise certain allegations in the future.[47] However, it is common for the consent judgment not to explicitly mention the underlying issues. The court in *Chan Siew Lun* suggested that the determination of the issue could be implicit from the consent judgment in such circumstances. Referring to certain UK authorities, the judge reasoned that one could determine whether certain issues must have necessarily been decided, or would have been necessary steps leading to the consent judgment.[48] Nevertheless, this is invariably a difficult exercise of imagining what the court would have considered in order to reach the judgment, when there has in reality been no court decision on the matter. Such an exercise underscores the most uneasy fit between issue estoppel and consent judgments. The principle of issue estoppel appears to be more custom-made for court decisions that considered discrete issues. By contrast, the issues are difficult to be discerned with the same clarity within consent judgments.

The courts' discomfort with this awkward fit has sometimes been manifested in their efforts to characterise the consent judgment as a private settlement agreement. This discomfort was most palpable in *Andy Low*, where the court created the concept of "contractual consent orders" arising from the parties' agreement and not involving any concessions on the merits.[49] The court effectively relegated the consent judgment to a private settlement that is purely contractual in nature.

Nonetheless, as the judge in *Chan Siew Lun* pointed out, such an analysis does not accurately reflect the true nature of a consent order, which is distinguishable from a mere contract.[50] Consent orders ought to be recognised as possessing judicial authority and distinguishable from private settlement agreements that do not involve the court's sanction. Parties often decide to convert a settlement into a consent order precisely because of the order's judicial sanction; the order can be directly enforced without a need to commence a fresh action to sue on a purely contractual settlement agreement.

Evidently, much of the difficulties in the above decisions stem from the failure to acknowledge the unique nature of consent orders, and the consequent tendency to equate them with either private settlements or court decisions. Perhaps it is better to acknowledge that consent judgments do not neatly fit into either framework, but

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46 *Palmer v Dunford Ford (a firm)* [1992] 2 All ER 122 (QB).

47 *Kinch v Walcott* [1929] AC 482 (PC) [*Kinch*]; *Chan Siew Lun*, *supra* note 31.

48 *Chan Siew Lun*, *supra* note 31 at paras 66-71.

49 See Part III.A.

50 See Part III.B.

have elements of both the parties' agreement and the court's authority (as noted by Spencer Bower[51]). If this is so, the court will be treading the wrong path by continuing to treat consent orders simply as private settlement agreements or, conversely, as court decisions with clearly defined issues.

B. *The Key Considerations Underlying Issue Estoppel*

1. *Do the Usual Policies Underlying Issue Estoppel Apply to Consent Judgments?*

Many of the courts' articulations of policy concerns for issue estoppel are premised on issues determined by *court decisions*. It cannot be assumed, however, that these policies are equally relevant to *consent judgments*, which have elements of both the parties' agreement and judicial sanction.

Consider for example the dual justification that is often given for *res judicata*. The first reason pertains to the public interest of the state and the courts. Menon CJ highlighted in this regard that it is in the court's interest to relieve the strain on its limited resources, and it is also in the public interest to devote more resources to litigants with *bona fide* claims. The court should not be made to devote scarce resources to matters that have already been considered and decided by them. The second is a private interest justification. Litigants should be able to put completed litigation behind them and carry on with their lives. People should not be vexed twice for the same reason.[52]

The court in *Chan Siew Lun* opined that "[t]he principle that issues which were necessarily resolved and decided by a final judgment in previous litigation should not be re-litigated applies with equal force when a consent judgment is entered."[53] This author respectfully disagrees that the dual reasons apply equally to consent judgments. First, when settlements have been reached on certain issues, the courts probably would not have spent substantial resources in determining these issues, a point which has been noted by Zuckerman.[54] The public interest of conserving public resources does not resonate as strongly for consent orders as in court decisions. Furthermore, the courts and the litigants are not being "vexed" once more, as the issues were not argued exhaustively and decided earlier in court. There is no attempt to have a "second bite at the cherry" as such.[55]

There is, at best, one conventional *res judicata* policy consideration that applies to consent orders to some degree—the private interest justification. If an issue has indeed been resolved between the parties by way of a consent order, there ought

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51 See text accompanying note 45.

52 *Royal Bank of Scotland*, *supra* note 2 at para 98.

53 *Chan Siew Lun*, *supra* note 31 at para 60.

54 *Zuckerman on Civil Procedure, supra* note 3 at para 25.98. Zuckerman is of the view that "in the absence of a clear agreement concerning specific issues and not just the outcome, a mere inference of an underlying fact should not give rise to issue estoppel". He underscores the reality that "[t]here are no strong public interest reasons for giving default or consent judgments extensive issue estoppel effect, because the court will not have invested time in the determination of the issue and there is no risk of conflicting decisions".

55 The court in *Wall v Radford* [1991] 2 All ER 741 at 751 (QB) [*Wall*] stated that a party should not have a second bite at the cherry when an issue has already been decided.

to be finality and closure of the dispute. The individual litigant has an interest in preventing the resolved issue from being re-opened between the same parties.

There is another secondary policy concern that applies—the courts have an interest in ensuring that their judicial authority is not callously disregarded. Although the court may not have expressed an earlier opinion on the relevant issue, it has lent its judicial authority to the parties' agreement by allowing the consent judgment. If the parties did not want to be bound by such judicial authority, they could have chosen to discontinue the action without entering any consent judgment. As a UK court has observed, the parties have, by entering the consent judgment, willingly abandoned their right before the court to argue the same issue in subsequent litigation.[56] In addition, there could potentially be contradictory judgments on the same issue, if the issues concluded by the consent judgment could be ignored.

2. *Countervailing Policy Reasons*

Accordingly, the primary policy reasons underlying *res judicata* apply only partially to consent judgments. In addition, there are other countervailing policy considerations that the above concerns have to be weighed against.

First, settlements in the courts should not be discouraged. An unduly broad scope of issue estoppel will make settlements in the form of consent orders unattractive. The litigants would rather litigate each and every issue in court, thus straining the court's scarce resources, which is, ironically, an outcome that the *res judicata* doctrine is meant to avoid. In this regard, Lord Reid in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* highlighted that the broader scope of issue estoppel compared to cause of action estoppel can create some practical difficulties for litigants in deciding how much effort to invest in arguing an issue:

> The difficulty which I see about issue estoppel is a practical one. Suppose the first case is one of trifling importance but it involves for one party proof of facts which would be expensive and troublesome; and that party can see the possibility that the same point may arise if his opponent later raises a much more important claim. What is he to do? The second case may never be brought. Must he go to great trouble and expense to forestall a possible plea of issue estoppel if the second case is brought? This does not arise in cause of action estoppel: if the cause of action is important, he will incur the expense; if it is not, he will take the chance of winning on some other point. It seems to me that there is room for a good deal more thought before we settle the limits of issue estoppel. . .[57]

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[56] *Khan v Golechha International Ltd* [1980] 1 WLR 1482 at 1491 (CA) [*Khan*]:

> I refer back to what Lush J said in *Ord v Ord* [1923] 2 KB 432, 443: "The maxim 'Nemo debet bis vexari' prevents a litigant who has had an opportunity of proving a fact in support of his claim or defence and chosen not to rely on it from afterwards putting it before another tribunal."
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> In this case the plaintiff had his opportunity, in support of his appeal on the previous occasion, of establishing that money was lent. He chose not to establish that position. His counsel got up in court and deliberately abandoned it. So it seems to me that he loses his right of establishing that same position before another tribunal.

[57] [1966] 2 All ER 536 at 554 (HL) [*Carl Zeiss*].

The above difficulties are much more pronounced when issue estoppel is applied to consent judgments. The parties may be cautious in settling any issue via a consent order, out of fear that it will bind them in the future in an unrelated cause of action. Their fear will be even greater if the scope of issue estoppel is beyond what the parties actually contemplated when agreeing to the consent judgment. For instance, the consent judgment may have not referred to any agreement on specific issues. However, if the court were to infer that a particular issue must have necessarily been concluded through the consent judgment, it may bind the parties to an arrangement beyond what they originally envisaged. Alternatively, if the parties only intended to be bound *between themselves* on certain issues, they may be surprised if the courts later were to decide that their agreement on the issues bound them in relation to *other parties who were not in the original agreement,* as was the case in *Jaidin*. It is therefore not inconceivable for an excessively broad scope of issue estoppel to have a chilling effect on future settlements in courts.

Most litigants will be able to avoid these challenges by refraining from entering a consent judgment (and reach a private settlement), or entering a consent judgment for a global settlement figure without referring explicitly to any agreed issues. However, this difficulty is most prominent in relation to interlocutory judgments on liability. Some parties who may not be able to reach an agreement on the quantum of their settlement may nonetheless agree on apportioning their liabilities. It is common practice to enter consent interlocutory judgments, so as to proceed to the next stage, assessment of damages by the courts. However, if the parties are uncertain about the scope of issue estoppel arising from interlocutory judgments, they are likely to "play it safe" by refraining from settling on liability.

Another countervailing policy is to avoid stifling a litigant's right to argue a matter in court. This interest has been commonly associated with the UK courts' call to apply *res judicata* so as to "work justice and not injustice".[58] The New Zealand court has also observed that the effects of applying issue estoppel strictly can at times be "odious" by shutting out a party's opportunity to litigate an issue.[59] Apart from the situation in *Arnold*, when new material was available which could not reasonably be adduced in earlier proceedings, there may be many other extenuating circumstances in which a litigant does not want to be bound by an issue that was resolved earlier in a consent order. It may then seem drastic to deny a litigant the opportunity to argue the matter before the courts when he has not earlier drained public resources by litigating the issue at length.

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[58] *Ibid* per Lord Upjohn at 573:

> All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.

This was approved in *Arnold*, *supra* note 9 at 107, and quoted with approval in the Singapore decision of *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2011] 1 SLR 998 at para 90 (CA).

[59] See North P's judgment in the New Zealand case of *Craddock's Transport Ltd v Stuart* [1970] NZLR 499 at 514, 515 (CA) [*Craddock's Transport Ltd*]:

> In my opinion, when regard is had to the way English law has developed, there is a good deal to be said for the view that if care is not taken in applying the doctrine, it may have the effect of excluding the truth as Lord Reid pointed out in the *Carl Zeiss* case, for sometimes it can truly be said that estoppels are odious.

3. *Where the Balance Should Lie*

In view of the very different policy considerations underlying consent judgments, and the countervailing interests that arise, it is not surprising that the courts have manifested great unease in applying the *Lee Tat* test of issue estoppel to these judgments. Since the doctrine of issue estoppel fits so imperfectly with consent judgments, should it continue to apply at all to such judgments?

It is submitted that issue estoppel should still apply to consent judgments, but within very strict limits that will be elaborated on in the next Part. While the policy concerns of preserving public resources may not resonate very strongly for consent judgments, there are nonetheless the interests of protecting finality of resolution of disputes for individual litigants, ensuring respect for judicial sanction and preventing contradictory judgments on the same issue. The challenge remains of upholding these interests through the principle of issue estoppel, without unduly discouraging settlements and stifling a valid opportunity to litigate an issue. It will be argued below that this balance may be reached through *a modified application of the Lee Tat issue estoppel test for consent judgments.* However, the inherent limitations of the strict issue estoppel rule ultimately point to *the desirability of using a different res judicata principle that is tailored to the unique characteristics of the consent judgment.*

VI. The Proper Scope of Issue Estoppel for Consent Judgments

The first limb of the issue estoppel test currently refers to a judgment "on the merits". In light of the policy reasons that warrant the application of issue estoppel to consent judgments, this requirement *should probably focus on the concept of "finality and conclusiveness" of the judgment, in place of the concept of "on the merits"*. This should put to rest the earlier controversy that has ensued in the four High Court decisions. The concept of finality applies comfortably to both court decisions and consent judgments. As held in the Singapore decision of *Goh Nellie,* finality of the judgment means that the determination of the party's liability or rights leaves nothing else to be judicially determined.[60] Interlocutory judgments on liability will be considered final, since they fully deal with the issue of the parties' respective liabilities.

Next, it is submitted that the other parts of the *Lee Tat* test have to be strictly construed and applied. Issue estoppel, similar to cause of action estoppel, has been applied by the courts as an almost absolute bar to re-litigation. As explained earlier, the Singapore Court of Appeal in *Royal Bank of Scotland* has reiterated the strictness of this principle, stating that exceptions to issue estoppel would be allowed only in rigidly-demarcated categories, instead of being premised on broad considerations of justice. Given the Singapore courts' reluctance to allow exceptions to issue estoppel, it is crucial that its ambit is properly circumscribed so as not to overreach in its application to consent judgments.

This will, in turn, mean that the *Lee Tat* test should be applied *very strictly* in relation to consent orders before issue estoppel is found. In particular, there are two

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[60] *Goh Nellie*, *supra* note 4 at para 28.

components of the test—identity of subject matter and identity of parties in both sets of proceedings—that control the potential applicability of issue estoppel. Because of the potentially prejudicial consequences of a broad application of issue estoppel, it is proposed that *issue estoppel be found only when there is clear identity of subject matter and identity of the parties in both proceedings.* Any other broader approach potentially frustrates the parties' intentions in settling (as well as the court's intention in sanctioning the settlement) and runs the risk of severely reducing the attraction of settlements via consent judgments. The two Parts below elaborate on the proposed modification of the *Lee Tat* test.

A. *Identity of Subject Matter: How Should the Court Determine Whether the Issues Have Been Concluded by the Consent Judgment?*

To satisfy the *Lee Tat* test, the court has to ensure that the issue being raised in the current suit was earlier concluded by the consent judgment. However, as highlighted earlier, the issues may not be readily apparent from the face of the consent judgment. There are no grounds of decision to refer to in order to shed light on the issues. This conundrum is more pronounced if the consent order were to take the form of a dismissal of a claim without further elaboration on the agreed issues. The unique nature of the consent judgment poses no small challenge in discerning the exact issues that were laid to rest through the consent order.

In several UK decisions, the courts found that there was clear evidence that shed light on the issues that were concluded through the consent judgment. In *Kinch*, the consent judgment expressly provided that the appellant withdrew all his allegations of fraud and duress against the respondents. Thus, issue estoppel operated to prevent his subsequent attempt to claim damages for conspiracy.[61] Admissions or concessions made in court have also been taken into consideration in finding issues that were addressed by the consent judgment. The plaintiff in *Khan* appealed against the decision that a transaction was considered a loan under the meaning of the *Moneylenders Act 1927*.[62] His counsel subsequently informed the court quite clearly that he was withdrawing the appeal because it was unlikely to be successful in light of the respondent's arguments. The Court of Appeal found that this admission, which resulted in the dismissal of the appeal by consent, laid to rest the issue of money-lending.[63]

However, in the absence of background evidence or clear pleadings to shed light on the relevant issues, it is speculative for the court to infer the issues that formed the basis of the consent judgment. The High Court in *Chan Siew Lun* took the view that the court may make a fair and reasonable interpretation of the judgment to ascertain the issues that were really involved in the action. There are UK decisions that also suggest that issue estoppel may apply to issues that are implicit in a consent order, and not only to matters that were embodied in the terms of the judgment. Such issues are deemed to be "necessary steps" to the decision which the court would have had to make if it had proceeded to hear the matter. [64]

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61 *Kinch*, *supra* note 47.
62 (UK) 17 & 18 Geo V, c 21.
63 *Khan*, *supra* note 56.
64 *Ibid* at 1490; *SCF Finance Co Ltd v Masri (No 3)* [1987] QB 1028 at 1047 (CA) [*SCF Finance*].

It is not unforeseeable how such *dicta* may be applied to consent judgments in an overreaching manner. The court may well infer the presence of issues that were beyond the parties' contemplation when agreeing to the consent judgment. Furthermore, the court will be engaging in a highly artificial exercise of predicting the issues that a court would have necessarily decided, in order to reach a decision on the merits. This is, with respect, a misguided approach of construing the effects of a consent judgment. It applies issue estoppel as if there were a court decision, when the actual circumstances in a consent judgment really impinge on the parties' intentions and considerations in agreeing to the judgment.

The circumstances in *Chan Siew Lun* offer an apt illustration of how the court should be slow to infer issues beyond what is apparent from the terms of the consent judgment. The consent judgment here stated that the defendant would provide an account of all dividends and profits that the first plaintiff was entitled to. The High Court judge took pains to analyse whether this judgment gave rise to an issue estoppel that the term "dividends and profits" included unofficial payouts received by the defendant as a shareholder, and eventually decided that the issue was not contemplated within the consent order.

A similar situation surfaced in *Andy Low.* The consent judgment provided for the plaintiff to deliver vacant possession of the disputed flat to the defendant in exchange for the latter's undertaking to abandon any claim based on the plaintiff's occupation of the flat. The plaintiff subsequently claimed for equitable damages, based on proprietary estoppel, for lost opportunity to reside in the flat. Having concluded that issue estoppel did not apply, the judge did not actually consider whether there was identity of subject matter for the purpose of issue estoppel. Nevertheless, it is submitted that the issue of proprietary estoppel was not unequivocally a "necessary step" to arrive at the consent order. The plaintiff's decision to forgo physical possession of the flat did not necessarily mean that he was also forfeiting an equitable claim which was based on quite different arguments.

In view of the grave danger of overextending the application of issue estoppel for consent judgments, it is strongly recommended that the requirement in the *Lee Tat* test for identity of subject matter be strictly applied. In other words, where there is a lack of background evidence and ambiguity concerning the presence of an implicit issue in the consent judgment, it would be more prudent to refrain from finding issue estoppel.

B. *Application of the Requirement of "Identity of Parties" in the* Lee Tat *Test to Consent Judgments*

It is further argued that the requirement of "identity of parties" in the *Lee Tat* test should be similarly applied in a strict way. The circumstances in *Jaidin* and *Soh Lay Lian* aptly illustrate the danger of applying this requirement liberally. The situation in *Jaidin* is not uncommon, where the first case was between a motorcyclist and a car driver, and the second involved a pillion rider claiming damages from the motorcyclist and the driver in respect of the same accident. The court decided that the pillion rider was akin to a nominal plaintiff, and the principal and effective parties to the determination of liability were the motorcyclist and car driver, who were held to be bound by their consent judgment in the earlier suit.

Estoppels in *res judicata* apply to the parties and their privies (in blood, title or interest).[65] However, it cannot be said that the pillion rider was a privy of either the motorcyclist or driver. All three of them were parties to the instant suit in their own right. The court probably reached its particular conclusion because the pillion rider was suing the other two parties, and liability would be effectively apportioned between two of them. There was no mention of contributory negligence to be borne by the pillion rider, and it was probably assumed that the principal dispute would not involve him.

This conclusion on identity of parties was also reached because the court found that both suits involved essentially the same facts and issues. The judge adopted the "robust" approach that was used in the English case of *Wall.* The circumstances also involved different parties in the two sets of proceedings, albeit in a different sequence; the passenger was involved in the first case and not the subsequent one involving the drivers of two vehicles. When applying issue estoppel to the first judgment, Popplewell J took the view that the facts giving rise to breach of duty owed to the driver and the duty owed to the passenger were identical. "It is the same duty owed to a different person".[66]

The sole English case that has shunned the "robust approach" is *Randolph v Tuck*. Here, the first proceeding involved a driver of a car, the owner of this car and the driver of another car. The next action was brought by a passenger against the earlier three parties. The court focused on the separate and distinct nature of the duties of care in both actions. The respective duties of the drivers and owner to the plaintiff were held to have never been placed before the court in earlier proceedings.[67] It is significant that this "technical" approach has also been preferred by the Australian,[68] New Zealand[69] and the New York courts.[70] For instance, Barwick CJ in *Ramsay*, an appeal from the Supreme Court of New South Wales, opined that though the act in question and evidence were the same, "the issues raised in each case are not, upon a proper analysis, identical".[71] These cases focused on the different duties of care arising in each proceeding.[72]

Notwithstanding the pragmatism of the robust approach, it is plain that this approach has *not* been embraced by most common law jurisdictions, and probably for valid reasons. When there are different parties bringing their claims in different suits, the duties of care will invariably differ. There are grave dangers in ignoring the different issues of law and parties involved in the two suits. The situation in *Jaidin* could have been vastly different if there had been a dispute over the pillion rider's

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65 *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 909, 910 (HL).

66 *Wall*, *supra* note 55 at 751. Other similar English decisions are *Bell v Holmes* [1956] 1 WLR 1359 and *Wood v Luscombe* [1966] 1 QB 169.

67 [1962] 1 QB 175 at 184, 185.

68 *Jackson v Goldsmith* [1950] 81 CLR 446 (HCA); *Ramsay v Pigram* [1968] 118 CLR 271 (HCA) [*Ramsay*].

69 *Craddock's Transport Ltd*, *supra* note 59.

70 *Neenan v Woodside Astoria Transportation Co*, 261 NY 159 (CT App NY 1933).

71 *Ramsay*, *supra* note 68 at 278.

72 Spencer Bower and Handley, *Res Judicata,* 4th ed by KR Handley (London: LexisNexis, 2009) at para 12.10. Spencer Bower and Handley observed that the commonsense or robust approach used by the English courts treats the issue as a question of fact. While the issues of law in both cases may have entailed different duties of care, the facts and evidence to be analysed were deemed identical. By contrast, the other jurisdictions' decisions focused on the distinct issues of law involved in the cases.

contributory negligence in the second proceeding. Additional evidence concerning the conduct of the pillion rider would have had to be brought. It cannot be assumed that pillion riders or passengers in accident proceedings will always be "nominal parties".

In *Soh Lay Lian*, the two sets of proceedings involved exactly the same parties suing each other in different capacities. The first claim was commenced by one driver against the other. The second claim was started by the other driver (in essence a cross-claim). The supporting evidence for both claims was likely to have been identical.Nonetheless, the duties of care in both suits were still different. There may well have been additional evidence that would have been brought by the other driver in respect to the duty owed to him. Again, it is submitted that in the absence of a clear decision, it cannot be assumed that the consent judgment will involve similar issues when there are different parties in the subsequent suit.

Moreover, it is arguably erroneous to conclude that the facts and issues leading to the consent judgment are identical to the subsequent suit. In *Wall,* where there were two fully litigated proceedings, the court was certainly in a position to scrutinise the previous judgment and compare it with the pleadings in the instant case, in order to determine whether the same facts were involved despite the involvement of different parties. However, such evidence is not available in a consent judgment, for litigation would not have proceeded in court. It is prejudicial to the new parties to assume that the relevant facts for their case have been fully dealt with in the earlier consent judgment. They will be unduly denied the opportunity to litigate their case in court based on different, albeit inter-related, issues of law. From a wider perspective, this approach may also deter litigants from reaching settlements in the form of consent judgments, out of fear of being bound in relation to disputes with other parties.

Accordingly, a greater degree of care is needed when examining the relevant issues and parties involved in consent judgments. The assumption that the facts in related cases are always identical despite the lack of identity of parties may not always hold true. It is submitted once again that *any doubt over identity of subject matter and parties ought to be resolved in favour of not finding issue estoppel for consent judgments.* It is prudent in this regard to note the caution issued by the New Zealand Court of Appeal in *Craddock's Transport Ltd*: "it behoves the Court to be quite sure that *the issues are precisely the same* in the two proceedings before it holds that a plea of issue estoppel has been made out".[73]

VII. A More Appropriate Principle for Consent Judgments—Abuse of Process

The above arguments on how the *Lee Tat* test has to be substantially modified and carefully applied underscore the severe constraints of the issue estoppel principle for consent judgments. These limitations are brought about by the misalignment of the traditional policy concerns for issue estoppel and the differing policy considerations underlying consent judgments. As argued above, the *Lee Tat* test has been crafted to suit the contours of a court decision, but has resulted in an awkward fit with the consent judgment. Safeguards then have to be incorporated into the test to ensure

[73] *Craddock's Transport Ltd*, *supra* note 59 at 515 [emphasis added].

that issue estoppel does not overreach in binding parties to issues that they had not reasonably contemplated within their consent judgment. The potential for issue estoppel to be over-inclusive is even greater in Singapore because its Court of Appeal, in contrast to some UK decisions, has allowed very few exceptions to the principle.

These constraints strongly suggest that issue estoppel is probably not the most suitable *res judicata* doctrine for consent orders. A different doctrine is needed, one that is more appropriate for the unique nature of consent judgments. In this connection, both issue and cause of action estoppel are premised on *a litigation framework* involving parties presenting arguments before the court and obtaining decisions. By contrast, the extended doctrine of *res judicata* is premised on the litigant's *conduct* associated with bringing the second action. Instead of analysing the points brought up in different proceedings, this doctrine focuses on determining whether it is abusive conduct or a collateral attack on the court's process to bring up the relevant issue in the second proceeding in light of all the surrounding circumstances.

It is submitted that the extended doctrine of *res judicata* presents a much more situation-specific and flexible way of dealing with the effect of consent judgments. The foremost reason is how the analysis in this doctrine shifts from a strict comparison of issues to a more holistic assessment of the person's litigation conduct. The court assesses whether the party could have dealt with the issue earlier, in light of the "public and private interests involved" as well as "the facts of the case".[74] This different focus is able to properly take into account the unique circumstances of the earlier consent judgment and the current proceedings. As Auld LJ helpfully pointed out in *Bradford and Bingley Building Society v Seddon*, abuse of process, unlike cause of action or issue estoppel, does not create an absolute bar to re-litigation. Instead, the court's task is to "draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter".[75] The different policy considerations underpinning the impact of the earlier consent judgment can be properly weighed. By contrast, the court is not allowed to take into account other interests involved when applying the principle of issue estoppel.

Such flexibility helps to prevent re-litigation on issues in the consent judgment only when there is some indication of misuse of court processes. It thereby prevents the overreaching application of *res judicata*, which can potentially occur in issue estoppel. Interestingly, the courts have at times used arguments that properly belong to the abuse of process doctrine when ostensibly applying the principle of issue estoppel. For instance, Gibson LJ in *SCF Finance,* while discussing whether issue estoppel arose from a dismissal of an application by consent, said that "the court is concerned to prevent abuse of the court's procedure by any party".[76] The court's views on the defendant's conduct were pivotal to its decision to find issue estoppel. Gibson LJ described the second defendant as deliberately refraining from taking the opportunity to go ahead with the decision, commenting that to now "allow her to avail herself of that argument... would be to permit her to abuse the process of the court".[77] He proceeded to rely on the case of *Yat Tung Investment Co Ltd*,

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74 *Johnson*, *supra* note 22 at 31.
75 [1999] 1 WLR 1482 at 1490 (CA); quoted in *Johnson*, *ibid* at 30.
76 *SCF Finance*, *supra* note 64 at 1048.
77 *Ibid* at 1040.

which was a Privy Council decision deciding whether there was abuse of process to raise in subsequent proceedings matters which could have been litigated in earlier proceedings.[78]

The court in *Khan*, a case discussed above, also concentrated on evaluating the appellant's conduct. Bridge LJ described how the plaintiff, through his counsel, quite specifically and categorically chose to withdraw an issue on appeal on the basis that he was bound to accept defeat on the issue:

> If the self-same issue were now allowed to be raised and litigated in these proceedings... would it not be a case of the company being vexed a second time in relation to an issue which it was open to the plaintiff to have had determined in the previous proceedings?[79]

This analysis was clearly couched in terms of the broad considerations of litigation conduct in light of all the circumstances.

The court's inadvertent reliance on broad-based considerations in the context of issue estoppel is a very strong indication of the suitability of the extended doctrine of *res judicata*. The key question to be asked in the context of consent judgments is *whether the issue should have reasonably been brought up and referred to in the earlier consent judgment*. The relevant circumstances can then be considered, such as whether there was ample opportunity to bring it up when negotiating a settlement, or whether it was such a closely connected issue that should have been brought up. As an illustration, the District Judge in *Soh Lay Lian* considered whether the plaintiff was abusing the court's process by bringing a personal injury claim later rather than pursuing it as a counterclaim in the earlier suit filed by the defendant in respect of the same accident. He took into account the generally acceptable practice in the motor insurance industry for a defendant's claim to be commenced by way of a separate action, due to the defendant's insurers usually being involved only in defending the plaintiff's claim but not in advancing the defendant's own claim. This is an apt example of a situation-specific approach of evaluating the party's conduct and deciding whether it amounted to an abuse of the court's process.

The abuse of process defence can also deal with situations in which the relevant issues are not explicitly referred to in the consent judgment. Under the current jurisprudence for issue estoppel, the court is likely to decide whether the relevant issue can be properly inferred to have been a necessary step leading to the consent judgment. As submitted above, this artificial exercise imputes intentions to the parties that could have been non-existent. By contrast, under the proposed strict application of the *Lee Tat* issue estoppel test, the court will not infer issues from the judgment, if there is no background evidence. Abuse of process can, however, be applicable. The principle is eminently suitable to examine issues that were not expressly raised by the parties in the consent judgment, but should have reasonably been dealt with then.

In summary, the clear distinction between the strict rule of issue estoppel and the broad-based approach in the defence of abuse of process should be preserved. It is proposed that issue estoppel be applied with much circumspection to consent

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78 *Ibid* at 1049.

79 *Khan*, *supra* note 56 at 1493.

judgments. It is also argued that the extended doctrine of *res judicata* is much more appropriate to use for consent judgments, for it weighs the relevant policy interests and binds parties to their earlier consent judgments only in clear instances of abusive conduct. Moreover, it is more consonant with the nature of a consent judgment, since it gives weight to the parties' intentions during the consent judgment, in light of all the circumstances, as well as the court's authority and interest in preventing abuse of its processes.

VIII. Conclusion

This article began by highlighting four conflicting High Court decisions concerning how issue estoppel should be applied to consent orders. The absence of an authoritative Court of Appeal holding on these matters has resulted in uncertainty in the practice of settlement via consent orders. It has been suggested that consent judgments are a unique synthesis between judicial sanction and the parties' consent. Much of the dissonance in the decisions stem from the courts' characterisation of the consent judgment as either a court decision made after full litigation, or a private settlement agreement, but not as a combination of both. It has been proposed that an understanding of the dual nature of consent judgments paves the way for a clearer articulation of the underlying concerns in applying issue estoppel to such orders.

From this perspective, it has been suggested that some of the traditional concerns for issue estoppel that apply to court decisions do not apply with full force to consent judgments. Moreover, there are other countervailing concerns, such as the need to encourage settlement, that warrant the adoption of a different approach in determining the presence of issue estoppel for consent judgments.

It has therefore been recommended that the *Lee Tat* issue estoppel test be modified in respect of consent judgments. The requirements of identity of subject matter and parties are to be applied very strictly, so as to prevent the finding of issue estoppel beyond what the parties contemplated in their consent order. Apart from circumscribing the ambit of the issue estoppel test for consent judgments, it has also been proposed that the abuse of process defence be used as an alternative *res judicata* principle. In comparison to issue estoppel, this doctrine provides a better and situation-specific fit to the nature of consent judgments.