Wawasan Dengkil Properties Sdn Bhd & Ors v Khoo Peng Lai & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-1498–09 OF 2015
ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA
25 AUGUST 2016

Civil procedure — Res judicata — Setting aside — Application to set aside earlier court order in different proceedings and consequential order that shareholder be restrained from executing same — Whether proper parties cited — Whether court furnished with sufficient details to proceed with proceedings — Whether there were company searches conducted — Petition under s 181 of Companies Act 1965

The appellants' action before the High Court was essentially to set aside an earlier order of court granted in different proceedings and for a consequential order that the first respondent be restrained from executing that same order. The learned High Court judge dismissed the action. The case concerns the ninth respondent ('Telemont'), an investment holding company and ultimately its sale of one of its wholly-owned subsidiaries, Modal Jati Sdn Bhd ('Modal Jati'). Modal Jati in turn was wholly-owned by another company, Jejaka Makmur Sdn Bhd ('Jejaka Makmur'). Telemont sold its entire shares in Modal Jati to two of its directors cum shareholders. These directors subsequently sold Modal Jati to the first appellant ('Wawasan Dengkil') vide an agreement ('SPA'). Through the purchase of Modal Jati, Wawasan Dengkil acquired Jejaka Makmur. The first respondent, Khoo Peng Lai ('KPL') was a shareholder in Telemont. He successfully initiated a s 181 of the Companies Act 1965 petition against the two directors and the rest of the Board of Directors of Telemont ('the s 181 petition') on the grounds of oppression of minority shareholders. KPL's principal complaint was that his entire shareholding of 20% of Telemont, had been dissipated without his consent, knowledge and approval. KPL claimed that his shares had been transferred vide a forged Form 32A and that he had not been paid any consideration for the transfer. The petition was allowed and the trial court, inter alia, ordered that KPL be given access to the company accounts and documents of Telemont ('the original order'). Seven months later, the terms of the original order were amended ('the amended order'). On 14 October 2013, the decision of the trial judge in the s 181 petition was affirmed by the Court of Appeal. It was the terms and effect of this amended order that formed the basis of the appellants' application because these amended terms now extend to the appellants, more specifically, to Jejaka Makmur. The appellants applied to set aside the amended order and to restrain KPL from enforcing the same. The application was

dismissed and hence the present appeal.

Held, allowing the appeal:

(1) One of the reasons for the dismissal of the appellants' application was the operation of the doctrine of res judicata and issue estoppel. The learned judge found that the said order was binding on the appellants even though they were not parties to the s 181 petition because of this doctrine. The understanding and the application of this doctrine was erroneous. The learned judge was particularly persuaded by the fact that they were present at the trial of the s 181 petition the common parties in the person of the two directors in the several companies under Telemont. Their presence ought not to have signified anything more than that which was relevant to the issue, which was the allegation of acts of oppression by majority shareholders against a minority shareholder of Telemont (see paras 26–27).

(2) The relevance of the existence of common directors in Telemont and Modal Jati was never properly considered in the High Court. In considering whether the doctrine applies, a careful comparison of the two sets of proceedings must be undertaken. The object of such an exercise being to answer whether the present court was invited to deal with exactly the issue already dealt with by the previous court. When the grounds of decision in the s 181 petition were examined, the issue of ownership of Modal Jati and thereby Jejaka Makmur by the appellants was never in contention. Instead, the issue arising in the s 181 petition was quite focused and narrow: whether the several acts complained of by KPL amounted to acts of oppression under s 181 of the Companies Act (see paras 27, 34 & 35).

(3) The trial judge in the s 181 petition, inter alia, found that the Form 32A was indeed forged and that the matters raised amounted to acts of oppression within the intent of s 181. However, none of the matters raised by KPL, discussed and examined by the trial court in the s 181 petition came even close to the matters of change of ownership or disposal of Telemont's entire shares in Modal Jati to the two directors or worse, of the disposal of the same shares by the two directors to Wawasan Dengkil. The issue of the disposal of shares and specifically of Telemont's shares in Modal Jati was never under consideration. That being the case, there was no operation of the doctrine of res judicata and the extended principle of issue estoppel (see para 37).

(4) The appellants claimed that there was, inter alia, fraud. The learned judge did not find this allegation proved beyond reasonable doubt. The learned judge was erroneous in relation to the correct test where fraud is alleged. Such an allegation was to be proved on the same standard as any other

civil claim, that is, on a balance of probabilities and not beyond reasonable doubt (see paras 40–41).

(5) Telemont's ownership of Jejaka Makmur was through Modal Jati. The moment Telemont ceased to own Modal Jati, it could no longer count Jejaka Makmur as its subsidiary, direct or indirect. From the findings of the trial judge in the s 181 petition, it appears that the court there was in fact describing a different company. The s 181 petition was not against Telemont Construction Sdn Bhd but against Telemont Sdn Bhd. There was no SSM search on Telemont Construction Sdn Bhd, only Telemont Sdn Bhd. This serious discrepancy was enough to warrant intervention by the court. There must be available before the court the correct and necessary parties at the time of the making of any order for the simple reason that the order needs compliance (see paras 44 & 53).

[Bahasa Malaysia summary

Tindakan perayu di hadapan Mahkamah Tinggi adalah pada asasnya adalah untuk mengetepikan perintah terdahulu yang diberikan dalam prosiding yang lain dan untuk perintah berbangkit bahawa responden pertama ditahan daripada melaksanakan perintah yang sama. Hakim Mahkamah Tinggi yang bijaksana menolak tindakan. Kes ini berkenaan dengan responden kesembilan ('Telemont'), sebuah syarikat pelaburan dan akhirnya penjualan salah satu anak syarikat milik penuhnya, Modal Jati Sdn Bhd ('Modal Jati'). Modal Jati pula adalah dimiliki penuh oleh satu lagi syarikat, Jejaka Makmur Sdn Bhd ('Jejaka Makmur'). Telemont menjual seluruh sahamnya di dalam Modal Jati kepada dua pengarahnya merangkap pemegang saham. Pengarah-pengarah ini seterusnya menjual Modal Jati kepada perayu pertama ('Wawasan Dengkil') melalui satu perjanjian ('PJB'). Melalui belian Modal Jati, Wawasan Dengkil memperoleh Jejaka Makmur. Responden pertama, Khoo Peng Lai ('KPL') adalah pemegang saham di Telemont. Dia telah berjaya memulakan satu petisyen s 181 Akta Syarikat 1965 terhadap dua pengarah dan seluruh Lembaga Pengarah Telemont ('petisyen s 181') atas alasan penindasan terhadap pemegang saham minoriti. Aduan utama KPL adalah bahawa seluruh saham Telemont sebanyak 20%, telah dilenyapkan tanpa kebenaran, pengetahuan dan kelulusannya. KPL mendakwa bahawa sahamnya telah dipindahkan melalui satu Borang 32A yang dipalsukan dan bahawa dia tidak dibayar apa-apa balasan untuk pindah milik. Petisyen itu dibenarkan dan mahkamah perbicaraan, antara lain, memerintahkan KPL diberi akses kepada akaun syarikat dan dokumen Telemont ('perintah asal'). Tujuh bulan kemudian, terma perintah asal telah dipinda ('perintah dipinda'). Pada 10 Oktober 2013, keputusan hakim perbicaraan dalam petisyen s 181 disahkan oleh Mahkamah Rayuan. Perayu memohon untuk mengetepikan perintah dipinda dan menghalang KPL daripada melaksanakan yang sama.

Diputuskan, membenarkan rayuan:

(1) Salah satu sebab penolakan permohonan perayu adalah operasi res judicata dan isu estopel. Hakim yang bijaksana mendapati bahawa perintah tersebut adalah terikat atas perayu walaupun mereka bukan pihak kepada petisyen s 181 disebabkan oleh doktrin ini. Pemahaman dan penggunaan doktrin ini adalah silap. Hakim bijaksana secara khusus telah diyakinkan oleh fakta bahawa mereka hadir diperbicaraan petisyen s 181 pihak-pihak bersama terdiri daripada dua pengarah dalam beberapa syarikat di bawah Telemont. Kehadiran mereka sepatutnya tidak menandakan apa-apa melebihi apa yang berkaitan dengan isu, yang merupakan dakwaan tindakan penindasan oleh pemegang saham majoriti Telemont terhadap pemegang saham minoriti (lihat perenggan 26–27).

(2) Kaitan kewujudan pengarah bersama di Telemont dan Modal Jati tidak pernah dipertimbang dengan wajar di Mahkamah Tinggi. Dalam mempertimbangkan sama ada doktrin terpakai, satu perbandingan yang berhati-hati terhadap dua prosiding itu hendaklah diambil. Objektif amalan seperti ini adalah untuk menjawab sama ada mahkamah ini telah diminta untuk berurusan dengan tepat isu ini yang sudah ditangani oleh mahkamah sebelumnya. Apabila alasan keputusan dalam petisyen s 181 diperiksa, isu pemilikan Modal Jati dan dengan itu Jejaka Makmur oleh perayu tidak pernah dihujahkan. Sebaliknya, isu berbangkit dalam petisyen s 181 adalah agak fokus dan sempit: sama ada beberapa tindakan aduan oleh KPL dikira tindakan penindasan di bawah s 181 Akta Syarikat (lihat perenggan 27, 34 & 35).

(3) Hakim perbicaraan dalam petisyen s 181, antara lain, mendapati bahawa Borang 32A sememangnya dipalsukan dan bahawa perkara yang dibangkitkan dikira tindakan penindasan dalam maksud s 181. Walaubagaimana pun, tiada satu perkara pun dibangkitkan oleh KPL, dibincang dan diperiksa oleh mahkamah perbicaraan dalam petisyen s 181 hampir kepada perkara pindah milik pemilikan atau lebih teruk, pelupusan saham yang sama oleh kedua pengarah Wawasan Dengkil. Isu pelupusan saham dan khususnya saham Telemont dalam Modal Jati tidak pernah dipertimbangkan. Dengan itu, tiada operasi doktrin res judicata dan lanjutan prinsip isu estoppel (lihat perenggan 37).

(4) Dakwaan perayu bahawa terdapat, antara lain, fraud. Hakim yang bijaksana tidak mendapati dakwaan ini dibuktikan melampaui keraguan munasabah. Hakim bijaksana terkhilaf berkaitan ujian yang betul di mana fraud didakwa. Dakwaan sebegitu hendaklah dibuktikan atas standard yang sama seperti tuntutan sivil yang lain, iaitu, atas imbangan kebarangkalian dan bukan melampaui keraguan munasabah (lihat perenggan 40–41).

(5) Pemilikan Jejaka Makmur terhadap Telemont adalah melalui Modal Jati. Di saat Telemont berhenti memiliki Modal Jati, ia tidak boleh mengira

Jejakan Makmur sebagai anak syarikat, secara langsung atau tidak langsung. Daripada dapatan hakim perbicaraan dalam petisyen s 181, ia kelihatan yang mahkamah sebenarnya menggambarkan syarikat berbeza. Petisyen s 181 bukan menentang Telemont Construction Sdn Bhd tetapi terhadap Telemont Sdn Bhd. Tiada carian SSM terhadap Telemont Construction Sdn Bhd, hanya Telemont Sdn Bhd. Percanggahan yang serius sudah cukup untuk mewajarkan campur tangan mahkamah. Hendaklah hadir di hadapan mahkamah pihak yang betul dan perlu sewaktu membuat apa-apa perintah untuk sebab yang ringkas bahawa perintah itu perlu dipatuhi (lihat perenggan 44 & 53).]

Notes

For a case on setting aside, see 2(4) *Mallal's Digest* (5th Ed, 2015) para 7999.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)

Dr Aishah Tul Radziah bt L Hussin v Dr Suresh a/l Kumarasamy & Ors [2014] 11 MLJ 702, HC (refd)

Everise Hactares Sdn Bhd v Citibank Bhd [2010] MLJU 1379; [2011] 2 CLJ 25, CA (refd)

HLE Engineering Sdn Bhd v HTE Letrik Bumi JV Sdn Bhd [2015] 2 MLJ 661, CA (refd)

KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd [1994] 2 MLJ 201, SC (refd)

Kong Thai Sawmill (Miri) Sdn Bhd; Khong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung, Re [1978] 2 MLJ 227; [1978] 1 LNS 170, PC (refd)

Simpang Empat Plantation Sdn Bhd v Ali bin Tan Sri Abdul Kadir & Ors [2006] 1 MLJ 193, CA (refd)

Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)

Legislation referred to

Companies Act 1965 ss 165, 181, 181(2), Forms 32A, 49
Evidence Act 1950 s 44
Personal Data Protection Act 2010 s 165
Rules of Court 2012 O 92 r 4

Appeal from: Originating Summons No 24NCC-98–03 of 2015 (High Court, Kuala Lumpur)

Lua Kok Hiyong (Lua & Mansor) for the appellant.

HY Lee (Joseph Ting and Bruce Toh Chen Hsiang with him) (Joseph Ting & Co) for the first respondent.
Tan Jee Tjun (Thomas Philip) for the second to ninth respondents.
Leong Sher-How (Leong & Partners) for the tenth respondent.

Mary Lim JCA (delivering judgment of the court):

[1] The appellants' action before the High Court was essentially to set aside an earlier order of court granted in different proceedings and for a consequential order that the first respondent be restrained from executing that same order. The application was resisted. Upon hearing the parties, the learned High Court judge dismissed the action with each party to bear its own costs.

[2] On 10 May 2016, after considering the written and oral arguments of both counsel and the grounds of judgment of the learned High Court judge, we unanimously allowed the appeal and granted prayer (2) in the originating summons. These are our reasons in full.

[3] The case concerns the ninth respondent, Telemont Sdn Bhd ('Telemont'), an investment holding company and ultimately its sale of one of its wholly-owned subsidiaries, Modal Jati Sdn Bhd ('Modal Jati'). Modal Jati in turn wholly owned another company, Jejaka Makmur Sdn Bhd ('Jejaka Makmur'). One of Jejaka Makmur's principal assets is 783 acres of oil palm plantation land in Kelantan.

[4] Telemont sold its entire shares in Modal Jati to two of its directors cum shareholders on 11 November 2010. These directors subsequently sold Modal Jati to the first appellant, Wawasan Dengkil Properties Sdn Bhd ('Wawasan Dengkil') for RM5,483,405 vide agreement dated 17 August 2012 ('the SPA'). Through the purchase of Modal Jati, Wawasan Dengkil acquired Jejaka Makmur.

[5] The first respondent, Khoo Peng Lai ('KPL') was a shareholder in Telemont. He successfully initiated a s 181 of the Companies Act 1965 petition against the two directors, namely Kho Ah Tee ('KAT') and Tan Ah Hin ('TAH'), and the rest of the board of directors of Telemont vide KL High Court Civil Suit No 26NCC-26 of 2011 in April 2011 ('the 181 petition'). KPL alleged that the majority shareholders of Telemont had undertaken a series of acts amounting to oppression of his rights as a minority shareholder.

[6] KPL's principal complaint was that his entire shareholding of 20% (10% of which was supposedly held on trust for KAT) of Telemont, had been dissipated without his consent, knowledge and approval in November 2009. KPL claimed that his shares had been transferred to KAT vide a forged Form

32A and that he had not been paid any consideration for the transfer. The reliefs that KPL sought were:

(a) a rectification of the register to reflect his actual shareholding in Telemont;

(b) an appointment of an independent auditor to investigate and audit accounts of Telemont from 2005 to the date of the order;

(c) that the respondents repay Telemont all sums found by the independent auditor to be unaccounted for, with interest;

(d) that the directors of Telemont be ordered to enable the records of Telemont to be inspected and that KPL be given leave to take such steps as necessary to protect the interests of Telemont; and

(e) alternatively, that the respondents jointly and severally compensate him for the loss of his shareholding in Telemont at a value to be determined by the court.

[7] The petition was allowed on 28 February 2013 and the trial court, inter alia, ordered that KPL be given access to the company accounts and documents of Telemont from 2005 to the date of the order ('original order').

[8] Seven months later, on 10 September 2013 and on the application of KPL, the terms of the original order were amended by the learned trial judge (amended order'). On 14 October 2013, the decision of the trial judge in the 181 petition was affirmed by the Court of Appeal.

[9] It is the terms and effect of this amended order that forms the basis of the appellants' application because these amended terms now extend to the appellants, more specifically, to Jejaka Makmur who is the eighth appellant. The eight appellants in this appeal who comprise Wawasan Dengkil and the directors of Jejaka Makmur applied as plaintiffs to set aside the amended order and to restrain KPL from enforcing the same vide Originating Summons No 24NCC-98–03 of 2015 ('setting aside OS'). The respondents cited in this setting aside OS include KPL, Modal Jati and all the respondents in the 181 petition.

[10] As summarised by the learned judge, the appellants' arguments for setting aside the amended order, inter alia, were:

(a) the appellants had no knowledge of the 181 petition until the order was served on them;

(b) the court was *functus officio* when it made the order;

(c) KPL had no right or interest in Jejaka Makmur as he is neither shareholder nor director of the company, and he has no contractual relationship with Jejaka Makmur and the appellants;

(d) there was a violation of the rules of natural justice as the appellants were not heard before the order was made;

(e) KPL had failed to make full and frank disclosure and had exposed the appellants to risk of contempt if the appellants did not comply with the order by concealing the fact that Jejaka Makmur was not a subsidiary of Telemont at the material time;

(f) KPL had abused the process of court as its intention was to solicit and unlawfully obtain Jejaka Makmur's accounts, records and documents that may contain trade secrets and data within the Personal Data Protection Act 2010; and

(g) ss 165 and 181 did not give the court jurisdiction to make the orders sought.

[11] KPL was the only party that resisted the appellants' application. The others supported the appellants. These respondents took the position that the application should be allowed because not only Jejaka Makmur but Modal Jati was not a party to the 181 petition; and neither were they involved in the application to amend the order of 28 February 2013.

[12] Amongst KPL's reasons for opposing the application were:

(a) the application was an attempt to obstruct committal proceedings which KPL had initiated due to non-compliance of the amended order to produce the accounts;

(b) the amended order was obtained after a full trial and upheld by the Court of Appeal;

(c) the first to the seventh appellants have no locus standi based on their individual capacities as directors, shareholders or company secretaries of Jejaka Makmur;

(d) Jejaka Makmur's right to be heard had been satisfied because as at year 2013, one of the two directors was still a director of Jejaka Makmur and the respondents were well aware of the amended order;

(e) the issue of whether Jejaka Makmur is a subsidiary of Modal Jati or party to the KPL case is res judicata and the appellants are estopped from challenging the amended order; and

(f) the copy of the SPA produced in court was unstamped and there was no evidence produced of consideration being paid for the sale of the shares in Jejaka Makmur by Modal Jati to Wawasan Dengkil.

DECISION OF THE HIGH COURT

[13] The application was dismissed; hence the present appeal. The learned judge gave the following reasons for rejecting the application.

[14] First, the learned judge found that the appellants' case was premised on an allegation of fraud relying on s 44 of the Evidence Act 1950. On that claim, the High Court found that the appellants had failed to discharge their burden of proving fraud on the standard of beyond reasonable doubt. According to the High Court, there was 'not even a tinge of any fraud on the part of the first defendant'.

[15] Second, the learned judge found that the court in the 181 petition had made a finding of fact that at the time of the 'said order', Jejaka Makmur was a subsidiary of both Telemont and Modal Jati. In the understanding of the learned judge, the 'said order' referred to the original order which was subsequently amended. The learned judge referred to the notes of proceedings and the grounds of decision in the 181 petition in support of this reasoning.

[16] Third, the learned judge found that the said order which referred to both the original and the amended order had been upheld by the Court of Appeal; and that there was no further appeal. That being so, the said order was binding on the appellants under the principle of res judicata and issue estoppel even though they were non-parties to the 181 petition.

[17] The learned judge further found the argument of want of jurisdiction to be without merit because Jejaka Makmur was represented by its directors during the hearing of the 181 petition. According to the learned judge, since the said order which was issued on 28 February 2013 only required the production of documents for a period up to February 2013, a period before the appellants took over Jejaka Makmur, the appellants were not prejudiced by the said order. When the appellants took over Jejaka Makmur in April 2013, the appellants took over Jejaka Makmur 'subject to whatever order that the court has made against the eighth plaintiff prior to the taking over'. The learned judge also did not find any suppression of material evidence in obtaining the said order.

OUR DECISION

[18] It is best to set out the terms of the amended order so that we can appreciate the complaints of the appellants. The following highlighted amendments that the appellants sought to set aside:

> 2. Seorang Juru Odit bebas daripada firma KPMG dilantik untuk menyiasat dan mengodit akaun-akaun Telemont Sdn Bhd ... *dan kesemua anak-anak syarikatnya* bermula dari tahun 2005 sehingga tarikh perintah yang dibuat di dalam ini;
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> 3. ... ;
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> 4. ... ;
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> 5. ... ;
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> 6. Pengarah-pengarah Telemont Sdn Bhd diperintahkan membenarkan kesemua rekod-rekod Telemont Sdn Bhd *dan kesemua anak-anak syarikatnya* diperiksa *dan disalinkan* oleh Pempetisyen *dan/atau juruodit/juruakaun/professional-professional yang dilantik olehnya* dan pempetisyen diberikan kebenaran (leave) untuk mengambil apa-apa langkah-langkah yang diperlukan demi melindungi kepentingan Telemont Sdn Bhd;
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> 7. ... ;
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> 8. ... ;

[19] The basic argument of the appellants is that the amended order cannot be granted because Jejaka Makmur and Modal Jati were not owned by Telemont at the material time. The material time being the time of both the original order and the amended order. By these dates, both Modal Jati and Jejaka Makmur were no longer owned by Telemont because the ownership in both Modal Jati and consequently Jejaka Makmur had changed with the sale of Modal Jati. Unfortunately, the appellants were not able to raise these arguments because of the principle of res judicata and issue estoppel. On the merits, the learned judge was also not with the appellants.

[20] The principal submissions of KPL, the first respondent in this appeal is that the proceedings were commenced in bad faith and were in fact an attempt to obstruct committal proceedings which the first respondent had initiated against the respondents in the 181 petition. Since the Court of Appeal had already upheld the decision of the High Court in the 181 petition, it was not open to the appellants to challenge what was in effect the decision of the Court of Appeal. The appellants would also be barred by the doctrine of res judicata and estoppel. It was also submitted that contrary to the submissions of the appellants, Jejaka Makmur was in fact represented in the 181 petition by the two directors (the second and third respondents in the present appeal) who

were not only directors of Telemont, they were also directors of Modal Jati (since 2007) and Jejaka Makmur (together with another individual called Te Soh Peng).

[21] Learned counsel for KPL maintained that the appellants had only taken over Jejaka Makmur in April 2013. Given that the original order was granted in February 2013, the appellants must take Jejaka Makmur subject to whatever orders issued prior to April 2013. In any case, the High Court which is said to have 'unlimited jurisdiction' under s 181(2) of the Companies Act 1965 to make whatever orders that the court thinks fit had only ordered the production of documents for the period up to February 2013, a period before the appellants were involved. Arguably, the appellants are not in any way affected, prejudiced or discriminated by the order. As can be seen, this submission was accepted by the learned judge in the court below.

[22] These are our views. First of all, it merits mention several undisputed matters amongst which is the integrity of the SPA. It is a non-issue as the trial court in the 181 petition had found that the SPA had been stamped on 29 August 2012. Second, it would appear that the change of ownership is also not in dispute. Modal Jati was sold to the two directors who are the second and third respondents in this appeal on 11 November 2010, and they then sold Modal Jati to Wawasan Dengkil, the first appellant through the SPA on 17 August 2012. Jejaka Makmur remained fully owned by Modal Jati until 18 March 2013 when its shares in Jejaka Makmur were subsequently transferred to Wawasan Dengkil. Third, it is also not in dispute that the material time would be the dates of the two orders, the original order on 28 February 2013 and the amended order on 10 September 2013.

[23] The issues in the setting aside OS relate to whether a proper case had been made out for the setting aside and impeachment of the order in the 181 petition, specifically the amended order of 10 September 2013. The appellants claimed, inter alia, that there was an abuse of process, lack of full and frank disclosure of facts or a suppression of material facts concerning the disposal of the shares in Modal Jati and Jejaka Makmur, misdirecting and/or commission of a fraud upon the court in the 181 petition by KPL, the first respondent.

[24] The learned High Court judge did not find merit in any of these arguments of the appellants. While the appellate court is strained to disturb the findings of the court of first instance, there must be intervention where the findings are clearly erroneous or not borne out by the evidence led; or where the findings are plainly wrong in law. We do not find ourselves in agreement with the learned judge and find that the exercise of appellate intervention necessary in the facts and circumstances of this appeal.

[25] We must add that the appellants' application was the proper mode for challenge or the setting aside of the said orders made in the 181 petition. These collateral proceedings are the appropriate mode given that the appellants could not have intervened in the 181 petition as they were not aware of those proceedings, be it at the time of the trial, or the dates of both orders. The appellants' lack of knowledge is not in dispute, just that the learned High Court judge took the view that the presence of the two directors was sufficient to impute knowledge. When we examine the issue of the status of Modal Jati and Jejaka Makmur, it will become apparent that this view too, is erroneous.

Res judicata and issue estoppel

[26] One of the reasons for the dismissal of the appellants' application was the operation of the doctrine of res judicata and issue estoppel. Relying on the Federal Court decision in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 and a subsequent High Court decision in *Dr Aishah Tul Radziah bt L Hussin v Dr Suresh a/l Kumarasamy & Ors* [2014] 11 MLJ 702, the learned judge found that the said order was binding on the appellants even though they were not parties to the 181 petition because of this doctrine.

[27] In this regard, with respect, we find the understanding and the application of the doctrine erroneous. We find that the learned judge was particularly persuaded by the fact that there were present at the trial of the 181 petition the common parties in the person of the two directors in the several companies under Telemont. In our view, their presence ought not to have signified anything more than that which is relevant to the issue, which is the allegation of acts of oppression by majority shareholders against a minority shareholder of Telemont. The relevance of the existence of common directors in Telemont and Modal Jati was never properly considered in the High Court.

[28] In *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd*, Peh Swee Chin FCJ explained on the meaning and application of the doctrine of res judicata:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate one more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari proeadem causa*. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.

...

The starting point ought to be the celebrated passage by Wigram VC in the case of *Henderson v Henderson* (1843) 3 Hare 100 at p 115 which is:

> The pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.
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> ...
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> ...

To revert to that famous passage set out above, the next step is to state our view on its scope of operation or approach towards such scope which has given rise to certain controversial aspects referred to earlier. Bearing in mind the well-known relevancy of a previous judgment in barring a second suit, eg please see s 40 of the Evidence Act 1950, it will be readily understood that when Wigram VC spoke of 'points', the points should actually include causes of action, or all causes of action which one of two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties. The relevant case law revolves itself into this understanding. Lack of this understanding causes, in our view, a fair share of the confusion in connection with the famous passage of Wigram VC which Lord Shaw in *Hoystead v Taxation Commssioner* [1962] AC 155 at p 170 spoke of as 'settled law' in the Privy Council.

Thus, there are in fact two kinds of estoppel *per rem judicatum*. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.

[29] Since KPL is relying on the operation of the second kind of estoppel per *rem judicatum* which is issue estoppel, the Federal Court's observations on the same are useful. On this, the Federal Court observed:

> On the other hand, the issue estoppel literally means simply an issue which a party is estopped form raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary form that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter Gibson J in *Lawlor v Gray* [1984] 3 All ER 345 at p 350, who said: 'Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action'.
>
> ...

There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata, ie doctrine of estoppel per rem judicatum.

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel per rem judicatum. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

It is further necessary at this state to understand the import of the words in the said famous statement, ie '... every point which properly belonged to the subject of litigation ...' which Somervell LJ explained in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 as follows:

> ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

[30] On the meaning of the term 'privies', the Court of Appeal said in *Everise Hactares Sdn Bhd v Citibank Bhd* [2010] MLJU 1379; [2011] 2 CLJ 25:

> When you talk about 'privies', Lord Reid in *Carl Zeiss Stiftung v Rayner & Keeler Ltd & Others; Rayner & Keeler Ltd & Others v Courts and Others* [1967] 1 AC 853 (HL), said at p 910 that 'there must be privy of blood, title or interest: here it would have to be privy of interest'.
>
> A judicial determination directly involving an issue of the fact or law disposes once and for all the issue, so that it cannot afterwards be raised between the same parties or their privies ...

[31] It is difficult to see how the appellants and Telemont or even the other respondents could fall within the meaning of the term 'privies' given the fact that the proceedings were initiated under s 181 of the Companies Act.

[32] With respect to the learned judge, reliance on *Dr Aishah Tul Radziah* is somewhat misplaced. In that case, the plaintiff was sued by a patient for medical negligence for failing to remove the placenta after the plaintiff had delivered the patient's baby at her clinic. The patient fell ill after delivery and

was eventually admitted to Hospital Pulau Pinang where a hysterectomy was performed. In that first suit, the plaintiff denied negligence blaming the hospital instead. She was unsuccessful. She then instituted the second suit against the hospital and the doctors involved. These defendants filed an application to strike out the claim on the basis that the claim was time-barred and that there was an abuse of process in seeking to re-litigate the issue of negligence which had already been determined in the first suit. The defendants relied on res judicata and issue estoppel. In opposing the application, Dr Aishah contended that the doctrine did not apply because the defendants were not parties or privies to the first suit. They only participated as witnesses. In allowing the application and striking out the claim, the trial judge in *Dr Aishah Tul Radziah* applied the doctrine of res judicata because 'the facts and circumstances were such that they had participated in that suit as witnesses and a ruling on the issue of liability was made in their favour. As such, a fresh suit against them based on essentially the same issue as an abuse of process and the plea of res judicata/issue estoppel succeeded. There had to be finality to the litigation. It was unjust and oppressive to allow Dr Aishah to drag HPP and its doctors through another round of litigation to re-litigate the same issues'.

[33] The facts in *Dr Aishah Tul Radziah* are distinctly different from our present appeal and, it is a decision peculiar to those facts. We must remember that the doctrine of res judicata and issue estoppel have their roots in equity and its application must be carefully and cautiously considered less injustice is occasioned. In *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346, the Court of Appeal cautioned:

> ... res judicata is not merely a technical rule of pleading. It is a doctrine of substantial justice. It is a process whereby justice is achieved procedurally by precluding a party from re-agitating in subsequent proceedings a complaint or an issue that had, or could fairly have been disposed in earlier proceedings between the same parties or their privies. It is merely equity in action in the procedural arena.

[34] We must further bear in mind that in considering whether the doctrine applies, a careful comparison of the two sets of proceedings must be undertaken. The object of such an exercise being to answer whether the present court is invited to deal with exactly the issue already dealt with by the previous court. In fact, the exercise has been described as one which must be done 'with precision' in the case of *HLE Engineering Sdn Bhd v HTE Letrik Bumi JV Sdn Bhd* [2015] 2 MLJ 661:

> [12] On this issue on res judicata, we also agree with the learned counsel for the defendant in that in deciding whether a matter is caught by res judicata, the earlier judgment must with precision, determine the point in issue. Support for this proposition can be found in the decision of the Court of Appeal in the case of *Farlim Properties Sdn Bhd v Goh Keat Poh & Ors (And Other Appeals)* [2003] 4 MLJ 654; [2003] 4 CLJ 505 where it has held as follows:

When the plea of res judicata is raised, it is necessary to identify with precision the issue that was decided in the earlier proceeding. In other words, the earlier judgment must, necessarily and with precision, determine the point in issue.

[35] When the grounds of decision in the 181 petition are examined, the issue of ownership of Modal Jati and thereby Jejaka Makmur by the appellants was never in contention. Instead, the issue arising in the 181 petition was quite focused and narrow: whether the several acts complained of by KPL amounted to acts of oppression under s 181 of the Companies Act. Those acts being that:

(a) contrary to the initial arrangement upon which KPL had been invited to participate in the management of Telemont, one of the two directors, TAH ran Telemont in a dictatorial and authoritarian manner without heed to KPL's advice, suggestions and interests. This effectively excluded KPL from the management of Telemont and KPL was compelled to resign from all his directorships in Telemont and its subsidiaries in March 2007;

(b) from the time KPL resigned from the management of Telemont and its subsidiaries, the respondents had failed to call for any AGM and had kept KPL completely in the dark of the financial status of Telemont and had failed to file audited accounts of Telemont for several years;

(c) the respondents had failed and neglected to provide KPL with any information despite his queries on the affairs of Telemont; and

(d) unknown to KPL, his entire shareholding in Telemont was dissipated without his consent, knowledge and approval in November 2009, that his entire shareholding had been transferred to TAH vide a forged Form 32A and that KPL was not paid any consideration for the transfer.

[36] The above clearly indicates that all of KPL's concerns and complaints focused in and on Telemont. That comes as no surprise as Telemont was the investment holding company and KPL operated at the level of Telemont.

[37] The trial judge in the 181 petition, inter alia, found that the Form 32A was indeed forged and that the matters raised amounted to acts of oppression within the intent of s 181 as determined in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Khong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227; [1978] 1 LNS 170, warranting thereby the grant of the reliefs sought. However, none of the matters raised by KPL, discussed and examined by the trial court in the 181 petition come even close to the matters of change of ownership or disposal of Telemont's entire shares in Modal Jati to the two directors or worse, of the disposal of the same shares by the two directors to Wawasan Dengkil. The issue of the disposal of shares and specifically of Telemont's shares in Modal Jati was never under consideration. That being the

case, we cannot find the operation of the doctrine of res judicata and the extended principle of issue estoppel. Without even applying the precision test, it is readily apparent that the issues engaged in the 181 petition were far removed from those raised in the setting aside petition in which case the doctrine has no application. Certainly, it would strain its application resulting in substantial injustice to parties who were not present in the 181 petition; and those present cannot be considered the 'privies' of the appellants. For this, we will need to consider whether a case has in fact been properly made out under s 44 of the Evidence Act 1950 and under the inherent powers of the court as reiterated in O 92 r 4 of the Rules of Court 2012; but suffice to say that the doctrine of res judicata and issue estoppel has been misapprehended and misapplied in our instant case.

[38] In any event, we are convinced that viewing the facts as a whole and this will become more apparent when we examine the status of Modal Jati and Jejaka Makmur later, as was the case in *Simpang Empat Plantation Sdn Bhd v Ali bin Tan Sri Abdul Kadir & Ors* [2006] 1 MLJ 193, it is clear that the justice of the case lay in permitting the application. The doctrine and principles of res judicata and issue estoppel should not be allowed to stand in the way of justice.

Section 44 of the Evidence Act 1950

[39] The appellants, inter alia, relied on s 44 of the Evidence Act 1950 when challenging to impeach the said order. Section 44 reads as follow:

> Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which had been proved by the adverse party, was delivered by a Court not competent to deliver it or was obtained by fraud or collusion.

[40] The appellants claimed that there was, inter alia, fraud. The learned judge did not find this allegation proved beyond reasonable doubt. In fact, Her Ladyship did not find 'even a tinge of any fraud on the part of the first defendant'.

[41] We find it necessary to state that the learned judge was erroneous in relation to the correct test where fraud is alleged. We appreciate that when the decision was rendered as well as when the written grounds were available, the latest decision of the Federal Court on this may not have been drawn to the court's attention. At that time, it was generally understood that allegations of fraud had to be proved on the standard of beyond reasonable doubt. The Federal Court has since pronounced in the case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584 that such an allegation is to be proved on the same standard as any other civil claim, that is, on a balance of probabilities and not beyond reasonable doubt. Having said

that, we do not see it necessary to examine this issue given our other more pressing reasons for allowing this appeal.

Status of Modal Jati and Jejaka Makmur

[42] A central issue in the setting aside OS is the status of Jejaka Makmur: was it still a subsidiary of Telemont at the two material dates of the original order and the amended order. If the answer is in the affirmative, was there a suppression of material facts before the learned judge in the 181 petition which affected the proper making of the amended order on 10 September 2013. On the first aspect of the issue, the appellants argued in the negative while KPL, the first respondent maintained that Jejaka Makmur was still a subsidiary.

[43] The learned judge concluded that at the time of the said order, Jejaka Makmur was a subsidiary of Telemont and Modal Jati. Her Ladyship relied on the testimony of TAH given during the 181 petition (that the structure and assets of Telemont and its group of companies since KPL's exit from Telemont in 2007 had been maintained); that TAH was a director of both Telemont and Modal Jati; and that the learned judge in the 181 petition had made a finding of fact that Jejaka Makmur is a wholly owned subsidiary of Modal Jati which came under the control and direction of Telemont, 'a holding company for several subsidiaries'. Various parts of the grounds of decision were identified, including para 2:

> Based on the evidence before me, the facts are as follows:
>
> (i) Telemont Construction Sdn Bhd (Company No 609021 D) ('Telemont Construction'); and
>
> (ii) Modal Jati Sdn Berhad (Company No 103729-X) ('Modal Jati').
>
> A copy of the search conducted in the Companies Commission of Malaysia on Telemont Construction is annexed to this Petition and marked as 'P-7'.
>
> A copy of the search conducted in the Companies Commission of Malaysia on Modal Jati is annexed to this Petition and marked as 'P-8';
>
> (iii) the wholly owned subsidiaries of Modal Jati, which came under the control and direction of Telemont:
>
> (a) MJB Forestry Sdn Bhd (Company No 663624-W) ('MJB Forestry');
>
> (b) *Jejaka Makmur Sdn Bhd (Company No 313510-W) ('Jejaka Makmur')*;
>
> ...
>
> (c) Alifya Forestry Sdn Bhd (Company No 384623-H) ('Alifya Forestry');
>
> ...
>
> (d) Sindiyan Sdn Bhd (Company No 388706-T) ('Sindiyan').

Copies of the searches conducted in the Companies Commission of Malaysia on MJB Forestry, Jejaka Makmur, Alifya Forestry and Sindiyan are annexed to this Petition and marked as 'P-9', 'P-10', 'P-11' and 'P-12' respectively. (Emphasis added.)

[44] With the corporate structure as set out earlier, it becomes evidently clear that Telemont's ownership of Jejaka Makmur is through Modal Jati. The moment Telemont ceases to own Modal Jati, it can no longer count Jejaka Makmur as its subsidiary, direct or indirect. From the above findings of the trial judge in the 181 petition, it appears that the court there was in fact describing a different company: Telemont Construction Sdn Bhd with registration number of 609021-D, and not Telemont Sdn Bhd with a registration number of 533734-U. The 181 petition is not against Telemont Construction Sdn Bhd but against Telemont Sdn Bhd (Company No 533734-U). There is no SSM search on Telemont Construction Sdn Bhd, only Telemont Sdn Bhd. This serious discrepancy is enough to warrant intervention by this court.

[45] Proceeding nevertheless on the assumption that the learned judge's description of Telemont and the various subsidiaries is correct, that is still of no real assistance to the issue of whether the collateral proceedings undertaken by the appellants to set aside the amended order in relation to the appellants was properly initiated and was one of merit. The answers and evidence identified by the learned judge must be examined in terms of the material date of the said order. It appears from the record of appeal that exhs P7 and P8 were SSM searches conducted in 2009 (pp 101–106 in R/A *Jil* III for P8; and pp 113–118 in R/A *Jil* III for P7). There is no point saying that Model Jati or even Jejaka Makmur was owned by Telemont but the present owner of either company is not before the court at the time of pronouncement of any order especially one which is intended to be affected by the present owner. The present owner of Jejaka Makmur, who are the appellants, were never notified of the 181 petition proceedings or even the application to amend. In such circumstances, the appellants' application has merit.

[46] In any event there is evidence aplenty before the High Court in the setting aside OS to show that Modal Jati was no longer a subsidiary of Telemont by the time of the said order. This evidence was produced by both the appellants and KPL. First, there were the relevant resolutions of Telemont and Modal Jati. These resolutions dated 1 November 2010 authorised the disposal of Telemont's shares in Modal Jati and the transfer of those shares to the two directors — see pp 233–238 of R/A *Jil* III. Then, there is the SSM search on Jejaka Makmur that was conducted on 28 August 2012 (see pp 151–157 of R/A *Jil* II). This valid and material search shows that by the time of the decision in the 181 petition on 28 February 2013, Modal Jati was not a subsidiary of Telemont. Evidence of the director recorded during the trial of the 181 petition

must also be treated with caution as it was given in the context of a 181 petition against Telemont and not its subsidiaries. Certainly, it was not against any other company, whether Modal Jati or Jejaka Makmur.

[47] The above position of the ownership of Modal Jati and Jejaka Makmur was confirmed by the other respondents before us. Although learned counsel for KPL had suggested that these parties were not without bias, it cannot be denied that their position is borne out by the contemporaneous documents already before the court.

[48] It must be added that the presence of common directors does not equate or translate the 181 petition against the majority directors and shareholders of Telemont to a 181 petition against Telemont and all its subsidiaries. The directors and shareholders named were present to answer to the complaints only in relation to Telemont; not Modal Jati or even Jejaka Makmur. Same or common directors does not mean the companies are the same. They remain separate and distinct and that is a basic and fundamental rule of corporate laws.

[49] There was nothing to indicate that any of the subsidiaries were also under scrutiny in the 181 petition. Those parts of the judgment as identified by the learned High Court judge in the setting aside OS serve only to describe the companies that fall within the group. Even then, there was no ascertainment of the position of those subsidiaries as at the date of the decision. There was no ascertainment because it was not relevant to the petition which was only against Telemont. Had that question been examined, the trial judge in the 181 petition would have found that Modal Jati was no longer owned by Telemont as per resolution passed on 1 November 2010 and as registered on 18 March 2013.

[50] We agree with the appellants that the rule in *Turquand*'s case allow the appellants to rely on the resolutions and the other company documents which are in the public domain as representing the truth of ownership of Modal Jati, that the two directors were entitled to transact with the appellants over the disposal of their shares in Modal Jati to the appellants. These documents such as the annual return forms, Form 49 and the memorandum and articles of Modal Jati are *ex facie* valid and there is nothing to put the appellants on inquiry. The appellants were entitled to rely on these documents as expounded by the Supreme Court in *KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd* [1994] 2 MLJ 201. Therefore, the amendments sought ought not to be applicable to Modal Jati, and consequently, Jejaka Makmur.

[51] We are further of the opinion that this conclusion is unaffected by the decision of the Court of Appeal in the 181 petition. There were no additional grounds shown to us; what we see are the grounds of decision in the 181

petition dated 10 June 2013. At this point in time, the matter of amendments had not arisen. It only arose on 10 September 2013. There is nothing to indicate whether this point was addressed by the Court of Appeal at the time of its decision on 14 October 2013. What we find is that the same parties before the High Court are cited in the cause papers of the appeal. In any case, we do not see this material or relevant as the appellants were not even aware of the 181 petition at this point. They only became aware when KPL set about enforcing the amended order. The appellants were therefore, not in the position to intervene in the 181 petition or the appeal therefrom.

[52] Had all these matters including the supporting contemporaneous documents been properly considered by the learned High Court judge, the application would have been positively entertained. Instead, the appellants were shut out from even making their case.

[53] We must add that there must be available before the court the correct and necessary parties at the time of the making of any order for the simple reason that the order needs compliance. At the time of these orders, as evident from the grounds of decision in the 181 petition, the company searches on Telemont, Modal Jati and Jejaka Makmur were those conducted in 2009. Given that KPL was interested in securing orders against subsidiary companies, it was imperative that the latest SMS searches were made available. There are no records of any search produced to the court in the 181 petition at the time of the amendment. Where it is shown that the status as found in the 2009 searches no longer holds true, and the appellants have successfully shown this to be the case, then an order made under such erroneous conditions, without the new owners present, is clearly one which is liable to be set aside. The rules of natural justice must always be observed. Where there is a breach of those rules as was the case here, we agree that the appellants have been prejudiced by the lack of fair play. We further agree with the appellants that a fit case for setting aside and impeachment of the amended order has consequently been made out under the principles as laid down in *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75.

CONCLUSION

[54] In the circumstances, this appeal must be allowed. However, in view of the peculiar facts, that it is only these subsidiaries, Modal Jati and Jejaka Makmur that are at issue by reason of the change of ownership, we shall only grant the order as sought in prayer (2) of the setting aside OS in relation to the appellants. We further order costs of RM10,000 to be paid to the appellants subject to the payment of allocatur. Lastly, we order that the deposit of this appeal be refunded to the appellants.

A *Appeal allowed.*

Reported by Afiq Mohamad

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