GEORGE PATHMANATHAN A/I MICHAEL GANDHI NATHAN v PORTCULLIS INTERNATIONAL LTD & ORS (PORTCULLIS TRUST (LABUAN) LTD, PROPOSED INTERVENER)

CaseAnalysis
| **[2023] MLJU 837**

George Pathmanathan a/l Michael Gandhi Nathan v Portcullis International Ltd & Ors (Portcullis Trust (Labuan) Ltd, proposed intervener) [2023] MLJU 837

Malayan Law Journal Unreported

HIGH COURT OF MALAYA (KUALA LUMPUR)

LIZA CHAN SOW KENG J

ORIGINATING SUMMONS NO D-26-50 OF 2006

16 April 2023

Suaran Sidhu (with Chow Xing Hui) (Law Partnership) for the petitioner and third respondent.
Nad Segaram (Shearn Delamore & Co) for the first and second respondents.
Naseema Jalaludheen (with Rachel See)(Cheah Teh & Su) for the proposed intervener.

Liza Chan Sow Keng J:

GROUNDS OF JUDGMENT

Introduction

[1] Enclosure 273 is an application by the proposed intervener, Portcullis Trust (Labuan) Ltd ("PTL") formerly known as Portcullis Trustnet (Labuan) Ltd ("PTNLL"), for the following relief:

1.1 all further proceedings herein including any action and/or proceedings to execute and/or enforce the High Court Orders dated 23.5.2018 be stayed pending the hearing and disposal of the application filed herein;

1.2 for leave to intervene and be added as an intervener in the action herein; and

1.3 to set aside the High Court Orders dated 23.5.2018 in. respect of the Notice of Application dated 27.1.2017 and 1.8.2017 (collectively referred to as "High Court Orders dated 23.5.2018").

[2] After having read the cause papers, considered the written as well as oral submissions by the parties, I had on 2.2.2023 allowed PTL's application for prayers 2 and 3 and given brief grounds for my decision.

[3] The 1st and 2nd Respondents have appealed against my decision. This judgment contains the full reasons for my decision.

Background Facts

[4] The background facts are largely undisputed.

[5] The Petitioner held 25% of the shares of Portcullis Holdings (Malaysia) Sdn Bhd, the 3rd Respondent (interchangeably referred to as "PHM"). The 2nd Respondent vide the 1st Respondent held the remainder 75% shares of the 3rd Respondent.

[6] The Petitioner vide this Petition filed in 2006 initiated a minority oppression action under section 181 of the Companies Act 1965 against the Respondents in respect of the shares he held in the 3rd Respondent Company.

[7] After a full trial, the High Court found in favour of the Petitioner on 29.7.2011 and ordered that the 1st Respondent transfer its 75% shareholding in the 3rd Respondent to the Petitioner at net book value within 90 days from the date of the judgment. This decision was affirmed on 14.8.2013 by the Court of Appeal. The application by the 1st and 2nd Respondents for leave to appeal to the Federal Court was dismissed on 29.1.2014.

[8] An application vide Enc. 148 was made by the 1st and 2nd Respondents to determine their entitlement to dividends from the retained profits of the 3rd Respondent which was dismissed by the High Court, but allowed by the Court of Appeal on 27.1.2015. The Court of Appeal ordered that the dividend from the profits of the 3rd Respondent from 29.7.2011 (being the cut-off date for share valuation) up to the date of the transfer of the 1st Respondent's shares be paid to the shareholder(s) of the 3rd Respondent ("CA 2015 Order").

[9] 3 days after the CA 2015 Order, on 30.1.2015, the 1st Respondent's 75% shareholding in the 3rd Respondent was transferred to the Petitioner.

[10] Dissatisfied with the CA 2015 Order, the Petitioner filed a Notice of Motion to the Federal Court seeking leave to appeal.

[11] On 18-3-2015, the 1st and 2nd Respondents filed an application (enc. 177) for ancillary orders and directions so as to give effect to the CA 2015 Order. On 8.9.2015, the parties entered into a Consent Order, providing for the mechanics of the payment of dividends as ordered by the Court of Appeal for the period of 29.7.2011 to 30.1.2015.

[12] The relevant terms of the Consent Order for ease of reference are produced:

> "1. Messrs Leong Siew Hoong & Co., auditors for the 3rd Respondent, certify and finalise within a period of 30 days from the date of this order, the retained profits available for dividend distribution from 29.7.2011 to 30.1.2015, after having first provided the indicative amount to be certified to the Petitioner and the Respondents for their comments (if any);
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> 2. Messrs KBCF Tan, Labuan, the auditors for 3rd Respondent, certify and finalise within a period of 14 days from the date

of this order, the retained profits available for dividend distribution for the 3rd Respondent from 29.7.2011 up to 30.1.2015 after having first provided the indicative amount to be certified to the Petitioner and the Respondents for their comments (if any);

3. Portcullis Trustnet (Labuan) Ltd will place an amount no less than the sum of US$695,000.00 which is free from encumbrances in a time deposit account and a copy of the time deposit slip is to be forwarded to the Respondents;

4. The Petitioner who is the sole signatory to the account of Portcullis Trustnet (Labuan) Ltd hereby gives the following undertaking: -

a. That the amount of US$695,000.00 will remain in the time deposit account and upon maturity, will ensure that the time deposit is rolled over to the next maturity date and the sum of US$695, 000.00 will not be uplifted until disposal of the Petitioner's application for leave to appeal to the Federal Court and if applicable, until the disposal of the substantive appeal;

b. That in the event the Petitioner is successful in the application for leave to appeal to the Federal Court and subsequently in the substantive appeal, the time deposit will be uplifted and if the 1st and 2nd Respondents are successful, the undertaking continues until the dividend distribution for the period 29.7.2011 - 30.1.2015 is determined by Messrs Leong Siew Hoong & Co and Messrs KBCF Tan and upon such certification, the time deposit will be uplifted and 75% of the certified amount would accordingly be paid within fourteen (14) days from the date of the certification."

[13] Pursuant to the Consent Order, Portcullis Trustnet (Labuan) Ltd ("PTNLL") had on or about 5.10. 2015 deposited the sum of USD$817,140.54 into a time deposit account.

[14] The Petitioner's leave application for leave to appeal to the Federal Court was dismissed by the Federal Court on 20.9.2016. The Federal Court on 22.11.2016 dismissed the Petitioner's motion to review the 20.9.2016 decision.

[15] On 7.4.2016, Messrs KBCF Tan ("KBCF"), certified that the retained profits available for distribution was USD875.043.00 in respect of PTNLL.

[16] Messrs Leong Siew Hoong & Co ("LSH") by letter dated 9.12.2016 informed that the retained profit of the 3rd Respondent between 29.07.2011 to 30.01.2015 was USD693,390.29 "on the assumption that the profits of PTNLL is declared as a dividend and pay to the 3rd Respondent". LSH however refused to certify the profit available for dividend distribution and took the position that it is "a matter for the Board of Directors of the relevant Companies to decide".

[17] Given LSH's refusal to certify the amount of profits available for distribution, the 1st and 2nd Respondent filed:

i. Enc. 198 on 27.1.2017 for an order to inter alia uplift and pay out the sum of USD656,282.25 (i.e. 75% of the total certified sum of USD875,043.00), which was being held in the time deposit pursuant to the Consent Order;

ii. Enc. 228 for interest to be accumulated and accounted for and for 75% of the total certified sum of interest, to be paid to the 1st and 2nd Respondents;

iii. An application for and successfully obtaining an *inter partes* Mareva Injunction on 24.2.2017 against the Petitioner, PTNLL and the 3rd Respondent from, among others:

(a) restraining them from uplifting, transferring, disposing, removing and/or dissipating the monies totalling USD 821,034.09 held in time deposit accounts maintained by PTNLL, until the 1st and 2nd Respondents' application for payment of retained profits in Enc. 198 is heard and disposed; and

(b) restraining them from making any payments of the Monies to themselves and/or their servants, agents, and any other party except with the express authority of the High Court until Enc. 198 is heard and disposed.

[18] The Petitioner filed an application in Enc. 233 to set aside the Mareva Injunction.

[19] The High Court on 23.5.2018 decided Enc. 198, 228 and 233 all in favour of the 1st and 2nd Respondents. Enc. 198 was granted on the following terms:

> "1. That the 75% of the total retained profits certified by Messrs KBCF Tan for Portcullis Trustnet (Labuan) Ltd for the period 29.7.2011 to 30.1.2015 in the sum of USD656,282.25 (i.e. 75% of the total certified sum of US$875,043.00) be uplifted from the time deposit and be forthwith paid out to the 1st and/or 2nd Respondents pursuant to Clause 4(b) of the Consent Order dated 8.9.2015 (the "Consent Order");
>
> 2. That Messrs Leong Siew Hoang & Co forthwith comply with Clauses 1 and 4(b) of the Consent Order and certify the retained profits available for dividend distribution from 29.7.2011 to 30.1.2015 for the 3rd Respondent and its subsidiaries save for Portcullis Trustnet (Labuan) Ltd;
>
> 3. That upon final certification by Leong Siew Hoang & Co, 75% of the certified retained profits for the period 29.7.2011 to 30.1.2015 for the 3rd Respondent and its subsidiaries save Portcullis Trustnet (Labuan) Ltd, shall be paid to the 1st and/or 2nd Respondent ...."

[20] The Petitioner appealed against the High Court Orders made in respect of Enc. 198, 228 and 233 to the Court of Appeal. All 3 appeals were dismissed by the Court of Appeal on 25.6.2019.

[21] The Petitioner then sought leave to appeal to the Federal Court in respect of Enc. 198 and 228 only (and not Enc. 233) but to no avail. The motion for leave was dismissed by the Federal Court on 6.1.2020.

[22] Premised upon the High Court Orders dated 23.5.2018, PTL had on 6.4.2022 filed an application for leave to intervene in this action and further to set aside the orders made by the High Court pertaining to enc. 198 and 228.

[23] There was no objection by the Petitioner and 3rd Respondent with regards to PTL's application but the application was opposed by the 1st and 2nd Respondent.

PTL's Case for Application to Intervene

[24] PTL argued that:

> 24.1 The legal interest as well as the pecuniary interest of PTL would be directly affected if the sum of USD656,282.25 from the time deposit is uplifted and paid together with the accumulated interest to the 1st Respondent and/or the 2nd Respondent pursuant to the High Court Orders dated 23.5.2018
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> 24.2 The High Court Orders dated 23.5.2018 are void as the orders were made in breach of statute i.e., section 140 of the Labuan Companies Act 1990 ("LCA 1990") and/or were made without jurisdiction as the 1st and 2nd Respondents are not

shareholders of PTL; PTL would commit an offence punishable under s.142 LCA 1990 i.e., punishment or penalty of RM10,000.00 if it pays dividends to the 1st or 2nd Respondent; and

24.3 The High Court Orders dated 23.5.2018 are inconsistent and/or contrary to the CA 2015 Order and the Consent Order.

1st and 2nd Respondents' Objection to PTL's Application to Intervene

[25] The 1st and 2nd Respondent contended that there is no basis in law for PTL to intervene and set aside the High Court Orders:

25.1 PTL should have intervened before the High Court Orders were perfected, once perfected, the orders may only be set aside in a fresh action; the Court is now *functus officio citing:*

(i) *Squad Security Joint Services (M) Sdn. Bhd. V Jayvinder Singh A/L Surjit Singh* [2019] MLJU 306

(ii) *Hong Leong Bank Bhd v Staghorn Sdn Bhd* [2008] 2 MLJ 622 FC;

(iii) *Nite Beauty Industries Sdn Bhd & Anor v Bayer (M) Sdn Bhd* [2000] 3 MLJ 314

25.2 PTL has no right to intervene; it has not shown how its legal interest will be affected, see *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 *PC, Chong Fook Sin v Amanah Raya Bhd (as the administrator for the estate of Raja Nong Chik bin Raja Ishak, deceased) & Ors* [2011] 1 MLJ 721 FC, *Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd* [1998] 4 MLJ 275 CA, *Chuah Seong Keat & Ors v. Din Tan Yong Chia & Ors* [2021] 1 LNS 1178

25.3 PTL's application to intervene is an abuse of process; PTL is a wholly owned subsidiary of the 3rd Respondent which in turn is 100% owned by the Petitioner who as alter ego and controlling mind of PTL, the 3rd Respondent and its subsidiaries instigated PTL to impugn the High Court Orders dated 28.5.2018;

25.4 PTL is a privy to the Petitioner and the 3rd Respondent and is precluded from challenging the High Court Orders dated 28.5.2018 by virtue of the doctrine of res judicata/issue estoppel see *Chong Fook Sin v Amanah Raya Bhd (as the administrator for the estate of Raja Nong Chik bin Raja Ishak, deceased) & Ors* [2011] 1 MLJ 721 FC, *Sheils v Blakely* [1986] 2 NZLR 262 at 263, *Seri Iskandar Development Corporation Sdn Bhd v Pembinaan Daya Tekad Sdn Bhd* [2016] MLJU 1236, *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122, *North West Water Ltd V Binnie & Partners (A Firm)* [1990] ALL ER 547

25.5 Given its natural and ordinary meaning, Section 140 of LCA 1990 did not state that dividend could not be paid to any other individuals except for shareholders; and

25.6 The Petitioner's then lawyer, Mr Thangaraj had on 8.11. 2016 confirmed that the Consent Order binds PTL when he said that KBFC had duly complied and certified the amount for the proposed intervener pursuant the Consent Order as follows:

> "We believe that KBCF has prepared, finalised and certified KBCF's Certified Amount through their letter dated 7 April 2016 whereby a draft KBCF's Certified Amount was forwarded for parties' comments on 27th October 2015 however this is with regards to (PT Labuan) only and not the 3rd Respondent and its other subsidiaries".

Court's Findings and Decision

[26] The two issues in this application is whether PTL is entitled to intervene; and if so, whether the High Court Orders dated 28.5.2018 should be set side.

Whether PTL is entitled to intervene

[27] As the application to intervene is made under O 15 r 6 (2) (b) Rules of Court 2012, I propose to set it out for convenience:

> ***"6. Misjoinder and non-joinder of parties***
>
> (1) …..
>
> "(2) Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application
>
> (a) …
>
> (b) order any of the following persons to be added as a party, namely:
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> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the caused or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter."

[28] By the use of the word "or", Rule6 6(2)(b)(i) and Rule 6(2)(b)(ii) provide separate grounds for intervention. Both these sub-rules should be "widely or liberally interpreted "– per Gopal Sri Ram JCA (as he then was) in *Dato ' Dr Haji Mohamed Haniffa bin Haji Abdullah & Ors v Koperasi Doktor Malaysia Bhd & Ors and another appeal* [2008] 3 MLJ 530 at pg 537. This view is consonant with Lord Diplock's speech in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 at pg 55 where His Lordship stated: -

> "…one of the **principal objects of the rule** is to enable the court **to prevent injustice** being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object **calls for a flexibility of approach** which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases."

[29] In *Pegang Mining*, the contractor was added as a party to the appeal by the Federal Court before the appeal was disposed off. The Privy Council in holding the view that the contractor's interest was sufficiently direct to give the court jurisdiction to add him as a party, had formulated the test to determine whether a party's interests in the matter are 'legal' or merely 'commercial' in the following words (at p 56):

> "A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by an order which may be made in this action?'

[30] However, 22 years later, in *Arab Malaysian Merchant Bank Bhd v Dr. Jamaludin Dato' Mohd. Jarjis* [1991] 2 MLJ 27; [1991] 1 CLJ (Rep) 19, the Supreme Court recognised that as a result of the decision of the English Court of Appeal in *Gurtner v Circuit* [1968] 1 All ER 328, intervention may be allowed in respect of a person who is directly affected not only in his legal rights but in his pocket as well:

> "It was held by the Privy Council in the Pegang Mining Co Ltd case [1969] 2 MLJ 52 that one of the principal objects of O 16 r 11 of the former Rules of the Supreme Court 1957, is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. It must be noted that the Privy Council in that case added that to achieve that object calls for a flexibility of approach which made it undesirable in that case, in which the facts are unique, to attempt to lay down any proposition which could be applicable to all cases. Our present O 15 r 6 of the Rules of the High Court 1980, which replaced the former O 16 r 11 of the Rules of the Supreme Court 1957, is in pari materia with O 15 r 6 of the UK Rules of the Supreme Court. **The scope of the present rule, so far as concerns the joinder of persons not parties, has been significantly extended by the addition of para 2(b)(ii) …**" (Emphasis added)

[31] It is trite that the grant of leave to intervene is discretionary.

[32] PTL claimed that it has satisfied the test to intervene and be added as an intervener as its legal as well pecuniary interest are directly affected by the High Court Orders dated 23.5.2018 because:

(i) as neither of the 1st and 2nd Respondents are shareholders of PTL, if the sum of USD656,282.25 from the time deposit is uplifted and paid together with the accumulated interest to 1st and 2nd Respondent would be contrary to and/or in breach of section 140 of LCA 1990. Section 140 of LCA 1990 which reads:

> "*No dividend shall be payable to any shareholder of any Labuan company except out of profits*."

(ii) PTL's statutory right pursuant to LCA 1990 to pay dividend only to its shareholder has been affected by the High Court Orders dated 23.5.2018;

(iii) there is no requirement in the LCA 1990 that PTL is obliged to declare dividends merely because it has profits;

(iv) the High Court Orders dated 23.5.2018 have deprived the directors of PTL of their right to declare and approve dividends at a general meeting;

(v) PTL would commit an offence punishable under section 142 of LCA 1990 i.e., punishment or penalty of RM10,000.00 if it were to pay dividends to PIL and/or CKK. Section 142 LCA 1990 reads:

> "(1) Subject to section 142A, a person who-
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> (a) does that which by or under this Act he is forbidden to do;
>
> (b) does not do that which by or under this Act he is required or directed to do; or
>
> (c) contravenes or fails to comply with any provision of this Act, commits an offence under this Act.
>
> (2) A person who is guilty of an offence against this Act shall be liable on conviction to a penalty or punishment expressly mentioned as the penalty or punishment for the offence, or if a penalty or punishment is not so mentioned, to a penalty not exceeding ten thousand ringgit."

(vi) section 2 of LCA 1990, stipulates "person" under section 142 of LCA 1990 would include PTL.

[33] The 1st and 2nd Respondent's postulated that PTL has not discharged its burden under Order 15 Rule 6(3) of Rules of Court 2012 to show it has any legal interest that would be affected; as a subsidiary of PHM, PTL's interests are strictly speaking unrelated to the

Oppression Proceeding which will not affect PTL's rights; PTL does not have the legal interest herein, and a mere commercial interest is not sufficient grounds for PTL to be granted leave to intervene.

[34] It was further submitted on behalf of the 1st and 2nd Respondent's that Section 140 of LCA 1990 did not state that dividend could not be paid to any other individuals except for shareholders. It merely specified that should there be any dividends payable to any shareholders, the same could only be paid out of profits.

[35] Having read the cause papers and considered the parties' arguments, I am satisfied that PTL has discharged the legal onus to prove on affidavit evidence that this Court should exercise its discretion to allow PTL to intervene.

[36] This exercise of my discretion is premised on my complete agreement with Learned Counsel for the Proposed Intervener, Ms Naseema Jalaludheen's analysis of the authorities, and am persuaded that on the facts, the law, and the clarity of reasons given by her, that the High Court Orders dated 23.5.2018 directing PTL to pay dividend from its profits to non-shareholders, i.e., the 1st and/or 2nd Respondents, and, PTL by making payment as ordered would be in breach of s. 140 LCA 1990 read together with s. 2 and s. 142 LCA 1990. PTL as the paymaster, by being compelled by the impugned orders to declare and pay dividends to non-shareholders, would be directly affected not only in its legal rights but in its pocket as well. I do not, on my part, think it necessary to burden this judgment with a repetition of the submissions except to add that:

(i) any declaration of dividend by PTL can only be made to PHM, its sole shareholder and this was in fact stated in LSH's letter of 9.12.2016;

(ii) I do not find the application made too late in the day as the courts have been generous in allowing an applicant who has a direct interest in the subject matter the right to intervene even after final judgment has been entered (see: *Pegang Mining* where an intervention was allowed on appeal; *Arab Malaysian Merchant Bank Bhd v Dr. Jamaludin Dato' Mohd. Jarjis (supra)* where leave to intervene was allowed after a default Judgment was entered. It cannot be gainsaid that a default judgment once perfected is a final judgment; *Malayan Banking Bhd v Gan Bee San & Ors and another appeal; SKS Form (M) Sdn Bhd (Intervener)* [2019] 1 CLJ 575 FC where the proposed interveners were allowed to intervene and set aside a winding up order even though it was more than 3 years after the said order was made; *EON Bank Bhd v Pung Chong Thai* [2001] 5 MLJ 409, *Ang Tun Cheong v Lim Yeok Beng (Public Bank, Intervenor)* [2002] 6 MLJ 198 *Frontier-Trading Sdn Bhd v Lebbey Sdn Bhd (Chan Kwok Chin, Intervener)* [2007] 7 MLJ 44)

(iii) S. 140 LCA 2009 is cast in plain language and does not in my view have the meaning as ascribed by the 1st and 2nd Respondent's learned counsel, Mr Nad Segaram;

(iv) it is trite law that only shareholders are entitled to participate in the profits of a company, through distribution of dividends declared and approved at general meetings of the company – see e.g. *Mohd Badli bin Abd Razak & Ors v Ali bin Ismail* [2016] 5 MLJ 29 CA

(v) a flexibility of approach in construing O 15 r 6(2)(b)(i) or (ii) of the ROC 2012 is well demonstrated by *Arab Malaysian Merchant Bank Bhd v Jamaluddin bin Dato Mohd Jarjis,* so too the wide powers of the court in exercising discretion to ensure justice is

done like in the instant case, for in *Pegang Mining*, the oft quoted passage of Lord Diplock's speech at p 55 must be at the forefront of the mind:

> "The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In Their Lordships' view one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases."

[37] I am of the respectful opinion that the court is not functus officio as asserted by the 1st and 2nd Respondent nor is it necessary to file a new action for the purpose of setting aside the High Court Orders dated 23.5.2018. In *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 *FC,* Gopal Sri Ram JCA (as he then was) pronounced the *functus officio* theory does not apply as the court has inherent power to set aside its orders in breach of statute. I would also refer to 2 cases brought to my attention by Ms Naseema to put paid the 1st and 2nd Respondent's argument:

(i) *In Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, *Peh Swee Chin FCJ explained at pg 417, 418:*

> "It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first. **When one wishes to file such proceedings to so set it aside, must do so within the same proceedings or action in which the same order was obtained** and **not in a separate fresh proceeding or new action** on any ground other than those mentioned in the quoted passage from *Hock Hua Bank v Sahari bin Murid*, as mentioned later in this judgment in connection with a consent judgment." (Emphasis added)

(ii) *In Serac Asia Sdn. Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1 where the Federal Court held:

> *"*[35] …… We think that the *Badiaddin*'s phrase 'to intervene and correct a serious defect in the order' should be read in the context of where an order was obtained in a manner which contravened a statute, resulting in that order being illegal or made outside the jurisdiction of the court. It is in this respect that the court's inherent jurisdiction may be exercised, to strike out an earlier order, *ex debito justitiae* and **without the need for file a fresh suit**." (Emphasis added)

[38] For the reasons stated, I find that PTL has demonstrated it has a prima facie case for intervention and I would answer the question in the affirmative - that PTL is entitled to intervene.

Whether the Court has power to set aside the High Court Orders dated 23.5.2018

[39] Given my earlier finding that the High Court Orders dated 23.5.2018 directing PTL to pay dividend from its profits to non- shareholders, i.e., the 1st and/or 2nd Respondents, and, PTL by making payment as ordered would be in breach of s. 140 LCA 1990 read together with s. 2 and s. 142 LCA 1990, the High Court Orders dated 23.5.2018 ought to be set aside.

[40] The Federal Court in *Badiaddin (supra)* made clear that this court is seised of jurisdiction to set aside an earlier order of another court of concurrent jurisdiction *ex debito justitiae*, without a

need to appeal or file a fresh suit and this can be done in the same proceedings where the order contravenes a substantive statutory prohibition rendering it defective on grounds of illegality of lack of jurisdiction. I produce the dicta of all three illustrious judges of the Federal Court:

per Azmi FCJ:

> The Court of Appeal, in allowing the respondent's appeal, had failed to appreciate the central argument on the availability of the inherent jurisdiction of the High Court to exercise its discretion to set aside the illegal attempt by the respondent to subvert and effectively reverse the original, final and perfectly legitimate order of the High Court, as a special exception to the doctrine governing the finality of court orders, notwithstanding the absence of any appeal. The learned judges had failed to direct their minds to the fundamental issue of whether the appellants' application came within the category of cases that attracted *ex debito justitiae*. The second order for sale of the land, which had the effect of an attachment in execution of a judgment, was null and void being in violation of the prohibition imposed by s 13 of the Enactment. Thus, that order being in violation of a statutory prohibition, it followed that the High Court should have the inherent jurisdiction to set aside the second illegal order on the basis of the *ex debito justitiae principle*.

per Peh Swee Chin FCJ:

> When a judgment in the High Court has been perfected, a party to the judgment generally, and subject to the same passage or any written law, and par from any appeal, cannot re-open the matter finalised in the judgment by seeking to alter it or amend it for the court would be functus officio by virtue of the ratio of *Hock Hua Bank v Sahari Murid*. Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior court of unlimited civil jurisdiction in the course of contentious litigation. It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, but without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first.

per Gopal Sri Ram JCA:

> As a general rule orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed. It is well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. So long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is entirely open to the court upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal. It is clear that in the light of the principles established, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power does not exist; and the procedural branch of **the broad and flexible doctrine of estoppels known as res judicata finds no place in such a circumstance**. **Neither has the *functus officio* theory**, which upon close examination is merely part and parcel of the doctrine of res judicata, any role to play in the case. (Emphasis added)

Res judicata/issue estoppel do not apply

[41] Gopal Sri Ram JCA's dicta with emphasis added in the preceding paragraph, puts paid the 1st and 2nd Respondent's contention that PTL as a privy to the Petitioner and the 3rd Respondent is precluded from challenging the High Court Orders dated 28.5.2018 by virtue of the doctrine of res judicata/issue estoppel. Simply put, res judicata does not bite pertaining to the setting aside of orders made in breach of written law. In this case, the High Court Orders dated 23.5.2018 were made in breach of section 140 of LCA 1990.

[42] In *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 404 SC, the Supreme Court (per Hashim Yeop A Sani CJ) said (p 407):

> "On the question of issue estoppel, we agree with the learned judge that on the facts of this case the appellants cannot invoke the doctrine of issue estoppel. **There can be no estoppel as against statutory provisions.** (Emphasis added)

[43] Not only that. Issue estoppel in my respectful view cannot apply as the issues raised here were not brought up in the earlier proceedings in respect of Encl. 198 and Encl. 228 nor ventilated in all the proceedings between the Petitioner, the 1st and 2nd Respondents.

Did Petitioner's then lawyer, Mr Thangaraj confirm on 8.11. 2016 that the Consent Order binds PTL?

[44] The 1st and 2nd Respondent posited that the Petitioner's then lawyer, Mr Thangaraj had on 8.11. 2016 confirmed that the Consent Order binds PTL when he said that KBFC had duly complied and certified the amount for the proposed intervener pursuant the Consent Order by relying on an excerpt of the letter as follows:

> "We believe that KBCF has prepared, finalised and certified KBCF's Certified Amount through their letter dated 7 April 2016 whereby a draft KBCF's Certified Amount was forwarded for parties' comments on 27th October 2015 however this is with regards to (PT Labuan) only and not the 3rd Respondent and its other subsidiaries".

[45] Based on my reading and understanding of the contents of the whole letter instead of just paragraph (d) produced by the 1st and 2nd Respondent, the confirmation as contended by the 1st and 2nd Respondent begs credulity. The solicitor clearly stated:

> 45.1 only PHM's shareholders are entitled to dividend and therefore it would be contrary to the CA Order dated 27.1.2015 and there is no legal basis for PTL to declare and pay dividend to the 1st and/or 2nd Respondent;
>
> 45.2 KBCF has not finalised and certified the retained profits of PHM; and
>
> 45.3 PHM will only declare and dividends to its shareholders upon determination and certification by both KBCF and LSH.

[46] PTL's learned counsel at any rate made clear that PTL does not seek to set aside the orders of the Court of Appeal nor the Federal Court nor the Consent Order. The only orders sought to be set aside are the High Court Orders dated 23.5.2018.

[47] In any case, I am of the respectful view that the Consent Order cannot bind PTL as it was not a party to all the previous proceedings, and there is a general rule that the court has no jurisdiction over any person other than those brought before it and no order can be made for or against or bind a non-party - *Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 320 where Seah FJ delivering the judgment of the former Federal Court said:

> "In our judgment, the court below has no jurisdiction inherent or otherwise, over any person other than those properly brought before it, as parties or as persons treated as if they were parties under statutory provisions (Brydges v Brydges & Wood; Re Shephard and Coleman). The terms 'judgment' and 'order' in the widest sense may be said to include any decision given by a court on a question or questions at issue between the parties to a proceeding properly before the court (see para 501 of Halsbury's Laws of England (4th ed) Vol 26 at p 237)."

[48] The two exceptions to this general rule are injunctions, and where the non-party is the alter ego of the person before the court - see the judgment of Gopal Sri Ram JCA (as he then was) delivering the Court of Appeal's judgment in *Re Thien Kon Thai [2008] 6 MLJ 278*:

> "[5] We accept that it is a general rule that no order may be made against a non-party. However, there are two exceptions to this rule. The first are injunctions. An injunction is not only binding upon the person to whom it is directed. It also binds his agents or servants although they are not parties to the suit. It binds every person who has notice of it. The second exception is where the party complaining of being excluded is really the alter ego of the person already impleaded and before the court. *Jones v Lipman* (1962) 1 Ch D 442 provides an excellent example. There a defendant who had agreed to sell his land to the plaintiff transferred it to a company of which he and a clerk of his solicitors were sole shareholders and directors. Russell J (later Lord Russell of Killowen) had no hesitation in decreeing specific performance against the limited company. He described the company as a sham or a cloak."

[49] Even if PTL had knowledge of the consent judgement/order that is not to be equated with it being a party and the consent judgment/order is not binding and enforceable against PTL who is not a party to it - *Majupadu Development Sdn Bhd v Majlis Perbandaran Kluang & Anor* [2019] MLJU 1930.

[50] This contention falls.

Is the Petitioner the alter ego and controlling mind of PTL, the 3rd Respondent and its subsidiaries?

[51] With utmost respect to the 1st and 2nd Respondents' counsel submission that PTL is a wholly owned subsidiary of the 3rd Respondent which in turn is 100% owned by the Petitioner who, as alter ego and controlling mind of PTL, the 3rd Respondent and its subsidiaries, instigated PTL to impugn the High Court Orders dated 28.5.2018, I find there is plainly no evidence adduced in this Court to show that PTL is managed or controlled solely by the Petitioner. Neither is there any evidence of actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity to justify the court to disregard the corporate veil. As such, the allegation remains a bare statement.

[52] Added to that, PTL is a legal entity separate from its directors, shareholders and its holding company PHM with its own separate legal rights and liabilities - see *Rego Multi-Trades Sdn Bhd v Aras Capita/Sun Bhd & Anor* [2017] MLJU 753.

Whether the High Court Order dated 23.5. 2018 in respect of Encl. 198 is inconsistent with the CA 2015 Order and the Consent Order.

[53] PTL advanced yet another reason for the setting aside of the High Court Orders.

[54] In considering the history of the matter, it is patently obvious that:

(i) the purpose of the CA 2015 order is for the dividend from the profits of PHM from 29.7.2011 till the date of transfer of the 1st Respondent's i.e., 30.1.2015 to be paid to the shareholders of PHM:

> "Dividen di atas keuntungan Perayu Ketiga (PHM) daripada 29 Julai 2011 sehingga tarikh pindahmilik saham Perayu Pertama (PIL) dibayar kepada pemegang-pemegang saham Perayu Ketiga (PHM)."

(ii) the purpose of Consent Order was also for the **payment** of **PHM's dividend** to the shareholders of PHM. It provides amongst others for both KBCF **and** LSH as the auditors

of PHM **to certify and finalise the retained profits of PHM** from 29.7.2011 till the date of the transfer of the 1st Respondent's shares that were available for dividend distribution.

[55] Both the CA 2015 Order and the Consent Order are in clear and unambiguous language and distinctly do not provide for dividend from the profits of PTL to be paid to the 1st and/or the 2nd Respondent.

[56] Nevertheless, the High Court vide its order of 23.5.2018 ordered for **the retained profits of PTL to be** paid to the 1st and/or the 2nd Respondent:

> "That the 75% of the total retained profits certified by Messrs. KBCF Tan for Portcullis Trustnet (Labuan) Ltd. for the period 29.7.2011 to 30.1.2015 in the sum of USD656,282.25 (i.e. 75% of the total certified sum of US$875,043.00) be uplifted from the time deposit and be forthwith paid out to the 1st and/or 2nd Respondent pursuant to Clause 4(b) of the Consent Order dated 8.9.2015…"

[57] Neither Clause 2, nor Clause 4(b) of the Consent Order provide for 75% of the total retained profits certified by KBCF for PTL for the period from 29.7.2011 to 30.5.2015 in the sum of USD656,282.25 be uplifted from the time deposit and be paid forthwith to the 1st and/or the 2nd Respondent.

[58] As evident from exhibit N4, KBCF certified the retained profits of **PTL instead of** the retained profits of **PHM** from 29.7.2011 till 30.1. 2015 that are available for dividend distribution whilst LSF only specified the retained profits of PHM but did not finalise nor certify the profits available for distribution.

[59] Not only are the High Court Orders dated 23.5.2018 in breach of section 140 LCA 1990, they are erroneous on the face of the record inconsistent with both the CA 2015 Order and the Consent Order. The High Court Orders dated 23.5.2018 are bad in law, nullities and ought to be set aside at *limine*.

[60] In light of all the above circumstances, I find that it is fit and proper to set aside the High Court Orders dated 23.5.2018.

[61] As such, I exercised my discretion to allow prayers 2 and 3 of Enclosure 273 with costs subject to allocator.
