The Official Assignee of the Estate of Ng Eng Kiat, Bankrupt and Others v Heap Huat Rubber Company Sdn Bhd and Another
[2000] SGHC 177

Case Number : Suit 600114/2000

Decision Date : 31 August 2000

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Philip Jeyaretnam and Gwendolyn Chellam (Helen Yeo & Partners) for the plaintiffs; C R Rajah SC and Moiz Sithawalla (Tan Rajah & Cheah) for the defendants

Parties : The Official Assignee of the Estate of Ng Eng Kiat, Bankrupt; The Official Assignee of the Estate of Ng Siew Hoon, Bankrupt; The Official Receiver and Liquidator of Ng Quee Lam Pte Ltd — Heap Huat Rubber Company Sdn Bhd; Ng Siew San

The Facts

The plaintiffs in this case are actually one person who is wearing three hats: firstly, as the trustee for two bankrupt individuals (first and second plaintiffs) and secondly as the liquidator for a company (the third plaintiff). The first plaintiff, Ng Eng Kiat (NEK) was adjudged a bankrupt in 1988 while the second plaintiff, Ng Siew Hoon was made a bankrupt in 1992. The third plaintiff, Ng Quee Lam Pte Ltd. (NQL) was incorporated on 14 June 1960 by one Ng Quee Lam; it was compulsorily wound up by its judgment creditor in 1991.

The first defendant, Heap Huat Rubber Company Sdn Bhd is a company incorporated in Malaysia and registered in Singapore as a branch of a foreign company. It owns rubber estates, other properties and is also a developer. The second defendant, Ng Siew San, was at all material times a shareholder of the first defendant. She held 2,500 shares. The first, second and third plaintiffs were also shareholders of the first defendant. As at the date of their respective bankruptcies, the first and second plaintiffs held 41,112 shares (the NEK shares) and 350 shares respectively in the first defendant while the third plaintiff held 42,900 shares (the NQL shares) as at the date of its liquidation. Another shareholder of the first defendant is Excelux Pte Ltd (Excelux), a company belonging to Ng Kwee Teng (NKT) who is the older brother of Ng Quee Lam. Both Ng Quee Lam and NKT were also adjudged bankrupts in 1988 (together with NEK), at which time NKT held 5,000 shares in the first defendant (the NKT shares).

In October 1993, the first plaintiff discovered that NEK was no longer the owner of the NEK shares as the shares had earlier been transferred by the first defendant to the second defendant and her two siblings. These transfers became the subject of the Suit No. 996 of 1999 wherein the first plaintiff sued the second defendant as well as her two siblings for the return of the NEK shares on the ground that the purported transfers were void. The Suit was stayed when the second defendant and her two siblings agreed to transfer the shares back to NEK free from encumbrances.

As for the NQL shares, the third plaintiff ascertained from a search conducted on the first defendant in 1992 that those shares had been transferred to the second defendant on 26 December 1990. The first and third plaintiffs also discovered that the second defendant paid RM 0.10 cents each for the NQL shares even though NQL had itself offered to purchase the NEK shares and the NKT shares from the first plaintiff at RM 2 each in December 1990. In December 1995, the third plaintiff instituted proceedings against the second defendant in Originating Summons No. 1193 of 1995 (the OS proceedings) to recover the NQL shares on the basis that the shares had been sold to her at an undervalue. The second defendant resisted the action and in an affidavit filed in 1996, she deposed that she had 'directed' the first defendant to obtain valuation reports. The two valuation reports stated that the NQL shares were valueless or unlikely to be worth RM 0.01 cents or at all; the auditors went further to say that the net asset backing per share was a negative figure of minus RM 33.49. The court dismissed the OIS and the third plaintiff did not appeal against the dismissal. With respect to the 350 shares in the first defendant that were held by Ng Siew Hoon, she affirmed in an affidavit that she had sold these shares on 28 September 1992. She subsequently declared that she had not been paid for those shares.

In November 1999, the plaintiffs obtained letters dated 22 May and 19 June 1999 from the Malaysian tax authorities revealing that the first defendant had disposed of certain pieces of land in Johore and had made total profits of RM 153,925,873. Besides these letters, the plaintiffs were also given a supplementary agreement dated 15 December 1994 between the first defendant and a company, Laksamana Realty Sdn Bhd, relating to the sale of four pieces of land. The plaintiffs were of the view that one of the pieces of land had been undervalued by at least RM 930,000 based on the transactions reflected in the supplementary agreement.

This action was then commenced by the plaintiffs in 2000. In the statement of claim, the plaintiffs alleged that the defendants breached article 25 of the first defendant which gave all shareholders in the first defendant a pre-emptive right in relation to shares which are to be sold. The third plaintiff further alleged that the second defendant had, in the OS proceedings made false statements in her affidavit filed on 16 January 1996 when she stated (a) as at 31 December 1990, shares in the first defendant were either valueless or unlikely to be worth even RM 0.01 cents per share (b) pre-emption rights under the articles only applied to sales to non members of the first defendant as she well knew that the shares in the first defendant were not worthless. The plaintiffs also complained that they were deprived of their pre-emptive rights for the 350 shares of Ng Siew Hoon which they alleged were also transferred to the second defendant for no consideration thereby contravening s 52 of the Bankruptcy Act (Cap 20).

The defendants in turn argued that the articles of the first defendant did not create any right of pre-emption for a sale of shares by a retiring member to an existing member of the company or, that the articles required the first defendant to give notice of an intended sale of shares to existing member. They further denied that the third plaintiff at any time owned the NQL shares which were transferred to the second defendant on 26 December 1990. The second

defendant on her part denied that she had knowingly made false statements in her affidavit filed for the OS. She argued that (1) the 350 shares of Ng Siew Hoon were never transferred to her (2) the plaintiffs' claim was time-barred under s 6(1) and (2) of the Limitation Act (Cap 163) (3) the plaintiffs were precluded/estopped by the doctrine of laches and acquiescence (4) the order of court made in the OS constituted an estoppel per rem judicatum or as an issue estoppel against the third plaintiff.

Held, dismissing the plaintiffs' action with costs:

(1) There was no merit in the plaintiffs' claim relating to the 350 shares belonging to Ng Siew Hoon as the evidence showed that those shares were never transferred to the second defendant but were actually sold to Ng Siew Mui (see 41).

(2) The defendants did not obtain the dismissal of the OS by fraud. Firstly, the first defendant finally disposed of all the Johore properties only in December 1995. This was five years after the second defendant had purchased the NQL shares while the assessment of capital gains tax by the Malaysian tax authorities was only made nine years later in mid-1999. Secondly, the concern of the second defendant in the OS proceedings was only with the financial status of the first defendant as at 26 December 1990, not subsequent dates and events. Although the purchase by the second defendant of the NQL shares proved to be at a bargain price, the court is not concerned here with hindsight. Thirdly, it could not be said that the second defendant had deliberately concealed the property sales and profits generated therefrom from the third plaintiff when she had nothing to do with the running of the company which she left to the directors and her sister. Fourthly, although the accounts relied upon by the second defendant were qualified, there were no other accounts or means whereby she could assess the first defendant's share value in 1990. The court did not form the impression that the second defendant knew very much about or was interested in the first defendant, let alone its financial position. Fifthly, after taking into account all the assets and liabilities of the company, the net value of each share would be a negative figure (see 49 – 54).

(3) The plaintiffs having failed on their claim based on fraud, they cannot take advantage of the extended time limit provided under s 29 of the Limitation Act. Accordingly, the time-bar under s 6(1)(a) of the Act would apply since more than six years have lapsed from the date of the transfer of the NQL shares in 26 December 1990 (see 54).

(4) A plain reading of article 25 in the first defendant's articles of association does not support the plaintiffs' contention that existing shareholders have a pre-emptive right to shares being offered for sale. In any case, the prohibition against transferring shares to a non-member if a member was willing to buy would not apply to the second defendant because she was already an existing shareholder of the first defendant when the NQL shares were offered for sale (see 55-56); *Delavenne v Broadhurst* [1931] 1 Ch 234, *Greenhalgh v Mallard* [1943] 2 All ER 234 followed.

(5) It is trite law that for a judicial decision to operate as a res judicata, it must be final, the parties to the action and the issue must be the same in both actions and the issue was necessary or fundamental to the earlier decision reached instead of being merely a collateral matter. However even if the outcome of a prior decision amounted to res judicata, evidence of fraud would vitiate the estoppel. Such fraud included every variety of mala fides and mala praxis whereby a party deceives the judicial tribunal. In order to succeed the third plaintiff would have to show that he had come into possession of fresh facts or evidence which shows conclusively that the previous decision was wrong or must be likely to be decisive or, evidence such as entirely changes the aspect of the case (see 60-61).

(6) On the facts, the alleged fresh evidence pertaining to the actual realised values of the first defendant's Malaysian properties were not events which took place in 1990 but in 1995. Since there was no fraudulent conduct on the part of the second defendant, the decision in the OS cannot be impugned and consequently, the principle of res judicata would apply to preclude the third plaintiff from making the same claim against her (see 61-62).

(7) While the first and second plaintiffs are not estopped from raising afresh the issue that the shares were transferred to the second defendant by the first defendant at an undervalue, that still did not advance their case any further as the court had not found such an undervalue (see 62).

Case(s) referred to

Carew-Reid v Public Trustee 20 ACSR 443 (distd)

Delavenne v Broadhurst [1931] 1 Ch 234 (flld)

Greenhalgh v Mallard [1943] 2 All ER 234 (flld)

Mohamed Yahaya v MS Ally Sdn Bhd CSLR V 379 (distd)

Legislation referred to

Bankruptcy Act (Cap 20) s 52

Limitation Act (Cap 163) ss 6, 29

Judgment

Cur Adv Vult

GROUNDS OF DECISION

The facts

1. The plaintiffs in this case are actually one person who is wearing three (3) hats: firstly, as the trustee for two bankrupt individuals (first and second plaintiffs) and secondly as the liquidator for a company (the third plaintiff). Ng Eng Kiat (NEK) was adjudged a bankrupt in 1988 while Ng Siew Hoon was made a bankrupt on 30 October 1992. Ng Quee Lam Pte Ltd (NQL) was incorporated on 14 June 1960 by one Ng Quee Lam; it was compulsorily wound up by its judgment creditor United Malayan Banking Corporation on 6 September 1991. According to documents produced in court, NQL's misfortunes arose from its role as guarantor for banking facilities granted to Ng Quee Lam's flagship company South Union Company Private Limited (South Union) which itself was a victim of and was wound up during, the 1986-87 recession. Ng Siew Hoon and the second defendant are daughters of Ng Quee Lam. Although it was not adduced in evidence, I believe NEK is the nephew of Ng Quee Lam as Ng Quee Lam's son is named Ng Eng Chan suggesting he and NEK came from the same generation of the extended Ng family.

2. The first defendant is a company incorporated in Malaysia on 29 September 1960; it owns rubber estates as well as other properties and is also a developer. The company is registered in Singapore as a branch of a foreign company. The second defendant was at all material times a shareholder of the first defendant; originally she held 2,500 shares. NQL and Ng Siew Hoon were also

shareholders. As at the dates of their respective bankruptcies, Ng Eng Kiat and Ng Siew Hoon held 41,112 (the NEK shares) and 350 shares respectively in the first defendant while NQL held 42,900 shares (the NQL shares) as at the date of its liquidation. I note in the letter dated 20 July 1999 to the Official Assignee from the first defendant's solicitors, that Ng Siew Hoon held the 350 shares as a nominee for NQL. Another shareholder of the first defendant is Excelux Pte Ltd (Excelux), a company belonging to the family of Ng Kwee Teng @ Ng Quee Teng (NKT) who is the older brother of Ng Quee Lam. Ng Quee Lam and NKT were also adjudged bankrupts on 21 October 1988 (together with NEK) at which time NKT held 5,000 shares in the first defendant. Both NKT and NEK were directors of the first defendant. In late 1990 and early 1991, prior to its own liquidation, NQL offered to buy the NEK shares from the first plaintiff as well as the 5,000 shares of NKT at RM2 each but withdrew the offer in March 1991.

3. On 9 and 11 November 1991, the first plaintiff gave notice to the first defendant's secretary that he intended to dispose of the NEK shares as well as the 5,000 shares belonging to NKT at a minimum price of RM2 per share; he invited interested parties to submit offers by 30 November 1991. Through their solicitors, Excelux offered RM2.60 per share which offer the first plaintiff accepted in early December 1991, subject to contract. However the first plaintiff was unable to effect the transfer of both lots of shares to Excelux as he had to arrange for NEK and NKT to affirm statutory declarations to the effect that the relevant share certificates were lost or misplaced. However before the first plaintiff could effect the transfer of the shares to Excelux, the first defendant made a demand on NEK in January 1992 for the sum of S$32,992.60 he purportedly owed the company. The first defendant gave notice that if the debt was not paid, it would sell the NEK shares in exercise of its lien under article 13 of its articles of association. NEK denied owing the debt and the first defendant's proof of debt lodged subsequently in that regard was rejected by the first plaintiff against whose decision the first defendant did not appeal.

4. In October 1993 the first plaintiff discovered that NEK was no longer the owner of the NEK shares as the shares had earlier been transferred by the first defendant to the second defendant, her brother Ng Eng Chan and her sister Ng Siew Mui. These transfers became the subject of Suit No. 996 of 1999 (the Suit) wherein the first plaintiff sued the second defendant as well as her two siblings and the first defendant for the return of the NEK shares on the ground that the purported transfers were void. On 29 October 1999 when the Suit came on for trial, the second defendant and her two siblings agreed to transfer the shares back to NEK free from encumbrances. The Suit was stayed except for the purpose of carrying out the terms agreed between the parties.

5. As for the NQL shares, the third plaintiff ascertained from a search conducted on the first defendant in the Malaysian registry of companies in November 1992, that those shares had been transferred to the second defendant. The first plaintiff complained that he did not receive notice of the sale of these shares (which apparently took place on 26 December 1990) in contravention of article 25(B),(C) and (D) of the articles of association of the first defendant. The first and third plaintiffs also discovered from documents in NQL's files that the second defendant paid RM0.10 for those shares even though NQL had itself offered to purchase the NEK shares and those belonging to NKT from the first plaintiff at RM2 each in December 1990. Prior to the transfer of the NEK and NQL shares, NEK held 25% of the shareholdings in the first defendant while NQL held 26%.

6. In December 1995, the third plaintiff instituted proceedings against the second defendant in Originating Summons No. 1193 of 1995 (the OS) to recover the NQL shares on the basis that the shares had been sold to her at an undervalue to their true market value. The second defendant resisted the action and in an affidavit filed on 16 January 1996, she deposed that she had *'directed'* the first defendant to obtain valuation reports. The two (2) valuation reports one from public accountants Casey Lin & Company (Casey Lin) and the other from the company's auditors C H Teo &

Co stated that the shares were valueless or unlikely to be worth RM0.01 or at all; indeed the auditors went further to say that the net asset backing per share was a negative figure of minus RM33.49. Based on the second defendant's affidavit, the court dismissed the OS. The third plaintiff, on his lawyers' advice, did not appeal against the dismissal.

7. On 19 November 1999, pursuant to one of the terms of settlement between the first plaintiff and the defendants in the Suit, the solicitors for the first defendant forwarded to the plaintiffs' solicitors copies of two (2) letters dated 22 May and 19 June 1999 from the Malaysian tax authorities setting out the computation of real property gains tax on land belonging to the first defendant which had been sold. The first defendant disposed of certain pieces of land situated in the district of Tebrau in Johore at RM54,932,000 while another piece of land in Johore was sold for RM100,000,000; the total profits made by the first defendant less the original purchase prices were RM153,925,873.

8. Besides the two letters, the plaintiffs were also given a supplementary agreement dated 15 December 1994 (the supplementary agreement) between the first defendant and Laksamana Realty Sdn Bhd (Laksamana) relating to land situated at lot 51 town area XXXVI in Malacca state belonging to the first defendant. The supplementary agreement referred to an earlier agreement between the parties dated 16 November 1993 (the earlier agreement). In that earlier agreement (see 1AB144) the first defendant had agreed to sell to Laksamana lot 51 for RM1.75m and it was paid a deposit of RM175,000 upon signing. By the supplementary agreement (see 1AB169) Laksamana agreed to pay the balance sum of RM1.575m to purchase lot 51 and a further sum of RM200,000 for three (3) other pieces of land situated at lots 43, 44 and 46 town area IX. A recital in the supplementary agreement also referred to an earlier agreement dated 9 June 1990 between Chay Eng Huat (Melaka) Sdn Bhd (CEH) and Ally Azran Holdings Sdn Bhd (AA) wherein CEH agreed to sell the same piece of land to AA for RM2.3m. Lot 51 had been valued by CH Williams Talhar & Wong Sdn Bhd (CH Williams) at RM1.37m as at 1 January 1988. Lots 43, 44 and 46 had been valued collectively at RM165,000. Both valuations were adopted by Casey Lin and used by the second defendant in resisting the OS. Casey Lin had assumed there were no material changes in the value of the lots between 1 January 1988 and 26 December 1990. Neither did CH Williams mention the various other transactions pertaining to lot 51. The plaintiffs were of the view that lot 51 had been undervalued by Casey Lin by at least RM930,000 (RM2.3m -1.37m) based on the transactions reflected in the supplementary agreement.

9. As for Ng Siew Hoon, she had completed a questionnaire of the second plaintiff on 23 February 1993 stating she owned 350 shares in the first defendant. On 29 March 1993 she affirmed an affidavit for the second plaintiff stating she had sold her 350 shares on 28 September 1992. On 28 July 1994, Ng Siew Hoon affirmed a statutory declaration wherein she declared she had not been paid for those shares. On seeing the statutory declaration, the second plaintiff realised that the transfer of her shares was absolutely void as a voluntary settlement under s 52 of the Bankruptcy Act Cap 20 as it took place after the date she committed her act of bankruptcy (31 July 1992); under s 46 of the Bankruptcy Act, Ng Siew Hoon had no legal capacity to make the transfer. The first and third plaintiffs also complained that they were not given notice of the sale and transfer, contrary to articles 25(B) (C) and (D) of the first defendant and, they only learnt of it on 29 March 1993.

10. After these proceedings had commenced and in the course of discovery, the first defendant disclosed to the plaintiffs that the 350 shares of Ng Siew Hoon were transferred to her sister Ng Siew Mui on 25 July 1992 for a consideration of RM350 which transfer was duly approved on 28 July 1992 by the first defendant's board of directors.

The claim

11. In the statement of claim, the plaintiffs alleged that the defendants breached article 25 of

the first defendant which gave all shareholders in the first defendant a pre-emptive right in relation to shares which are to be sold. The plaintiffs alleged that the third plaintiff did not give notice in writing of its intention to sell the NQL shares, yet the first defendant sold those shares and did not offer them to the first and third plaintiffs who were the other shareholders and, which act the second defendant knew was a breach of article 25.

12. The third plaintiff further alleged that the second defendant had, in the OS proceedings made false statements in her affidavit filed on 16 January 1996 when she stated:

> a. as at 31 December 1990, shares in the first defendant were either valueless or unlikely to be worth even RM0.01 per share.
>
> b. pre-emption rights under the articles only applied to sales to non members of the first defendant.

as she well knew that the shares in the first defendant were not worthless. The third plaintiff asserted that she knew that the accounts audited by C H Teo & Co could not be relied upon as they qualified their accounts by stating in their report that the accounts 'do not give a true and fair view of the state of affairs as at 31 December 1990'. The second defendant also knew that the valuation done by Casey Lin & Co did not take into account the value of the first defendant's shareholding in President Emporium Pte Ltd. The third plaintiff alleged that by her aforesaid false statements, the second defendant obtained the dismissal of the OS on 25 March 1996.

13. The plaintiffs repeated the complaint that they were deprived of their pre-emptive rights for the 350 shares of Ng Siew Hoon which they alleged were also transferred to the second defendant for no consideration thereby contravening s 52 of the Bankruptcy Act.

14. The plaintiffs prayed inter alia for the following orders:

> a. to set aside the judgment in the OS;
>
> b. to set aside the transfers to the second defendant of the NQL and Ng Siew Hoon shares coupled with a declaration that those shares remained vested in the third and second plaintiffs respectively;
>
> c. that the books of the first defendant be amended to reflect the third and second plaintiffs' ownership of those shares;
>
> d. in the alternative for damages to be assessed.

15. In the common defence filed by the defendants, they denied that the articles of the first defendant created any right of pre-emption for a sale of shares by a retiring member to an existing member of the company or, that the articles required the first defendant to give notice of an intended sale of shares to existing members. However, the defendants asserted, NQL did give notice of the sale of the NQL shares by its letter dated 26 December 1990. The defendants further denied that the third plaintiff at any time owned the NQL shares which were transferred to the second defendant on 26 December 1990.

16. The second defendant on her part denied that she had knowingly made false statements in her affidavit filed for the OS. She asserted that the sale to her of the NQL shares was at an arms length carried out on a 'willing seller willing buyer' basis. She denied that the 350 shares of Ng Siew Hoon were transferred to her. The second defendant averred that the plaintiffs' claim in any case was time-barred under s 6(1) and (2) of the Limitation Act Cap 163 (the Limitation Act) and was precluded/estopped by the doctrines of laches and acquiescence. In the alternative, the second defendant relied on the order of court made on 25 March 1996 in the OS as constituting an estoppel per rem judicatum or as an issue estoppel against the third plaintiff or, in the further alternative, as a binding judgment by a court of competent jurisdiction against which no attack should be made.

17. In the Reply, the plaintiffs alleged that their rights had been concealed by fraud on the part of the defendants. They relied on s 29(1)(a) and (b) of the Limitation Act and contended that the defendants could not rely on the proviso to that section as the second defendant was a party to the fraud at the time she purchased the shares as she knew or had reason to believe that a fraud was being committed because:

> a. she knew that the procedures laid out in articles 25(B) (C) and (D) for the sale of the shares had not been followed;
>
> b. she knew that NQL was insolvent or likely to be insolvent and therefore go into liquidation;
>
> c. she knew that the shares were worth substantially more than the price she paid.

18. As for the NQL shares, the plaintiffs alleged that they only became aware of the transfer to the second defendant on or about 19 November 1999 when they received the two notices from the Malaysian tax authorities; alternatively on or about 13 August 1999 when the second defendant filed her defence in the Suit. As for the 350 shares of Ng Siew Hoon, the plaintiffs said their right of action was only discovered on or about 28 July 1994 when Ng Siew Hoon filed her statutory declaration. The defendants could not rely on the proviso to s 29 of the Limitation Act because the second defendant gave no valuable consideration for those shares. the plaintiffs repeated their allegation of fraud as regards the 350 shares.

The evidence

(i) the plaintiffs' case

19. I have, in the preceding paras 1 to 10, set out in essence the written testimony of the plaintiffs' case officer Wang Wang Chew (Wang). I now turn to evidence adduced from him under cross-examination. Wang (PW2) explained that the plaintiffs were not in possession of the 1990 audited accounts of the first defendant for the OS hearing. Further, although his office had written to NQL's company secretaries in January 1993 for clarification and confirmation on the change in shareholdings, there was no reply. Wang testified that the plaintiffs thought it strange that the second defendant and other shareholders had offered to purchase shares in the first defendant at more than RM2 per share in December 1990 before NQL was wound up even though the shares were said to be valueless in 1990. That fact made the plaintiffs suspicious of the two (2) transfers of shares to the second defendant. He also thought the second defendant may have some influence on the affairs of the first defendant by her use of the word '*directed*' (para 3 supra) in her affidavit filed to resist the OS. However all this was not raised in the affidavit filed by the Official Assignee's then

legal officer for the OS proceedings for reasons unknown to him.

20. Wang testified that although the third plaintiff knew before the OS proceedings that the first defendant owned substantial properties in West Malaysia, the plaintiffs were unaware of the details and their actual values until they saw the 1999 notices from the Malaysian tax authorities. In any case, at the hearing of the OS, the valuation reports produced by the second defendant only related to certain not all, the properties owned by the second defendant. This surmise however, proved to be incorrect on further questioning by counsel. Wang explained that the third plaintiff was in no position to refute the valuations in any event as, the first defendants' properties were not situated in Singapore; otherwise his office would have enlisted the assistance of the Chief Valuer to obtain comparative valuations.

21. Wang also revealed that the OS proceedings had been funded by Excelux who were similarly funding this litigation; there were no assets realised by the third plaintiff from NQL since its liquidation. Pressed why in that case, the third plaintiff did not request Excelux to pay the costs of obtaining comparative valuations of the first defendant's properties, Wang said it did not occur to his office to do so before the hearing of the OS. Moreover, the third plaintiff believed what the second defendant said in her affidavit – that the shares had no value at the relevant time. Unlike the second defendant and other shareholders or directors, the third plaintiff was a stranger to the first defendant and had no access to its documents. He could not verify what the second defendant claimed. Presumably the court must also have believed that the shares were valueless as the OS was dismissed. Wang explained that the first plaintiff was not involved in the OS because, until NEK's status as a shareholder was restored by order of court in the Suit last October, NEK was not a member of the first defendant when the third plaintiff commenced the OS proceedings.

22. To support their contention that the first defendant's properties as at 26 December 1990 were worth more than their assessments by the company's valuers, the plaintiffs obtained valuations from (Johore) valuers Param & Associates which showed that (as at December 1990) the Johore properties were worth RM28,661,000 (as against the first defendants' valuation of RM16,145,000) while the six (6) Malacca properties were worth a total of RM2,250,000 (as against the first defendant's valuation of RM1,615,000).

23. Sivadas Velayudhan (Sivadas), the manager of Param & Associates, testified that he prepared the valuations using a comparable sales method. Sivadas (PW3) was cross-examined at length on his valuations; counsel for the defendants suggested that he had not used the most suitable comparables in arriving at his valuations for both the Johore and Malacca properties as, Sivadas either largely ignored or gave little weight to sales at lower values. Sivadas countered by pointing out that he had taken into account and made the appropriate adjustments for, drainage reserves/streams, electrical pylons and lack of access as minus factors while road access or future/imminent road access were treated as plus factors. Further, until informed by counsel for the defendants, Sivadas was unaware that lots 38 and 120 in Malacca had been sold in August 1990 for RM148,000 which sale proceeds accordingly needed to be deducted from his valuation figure of RM2.25m.

24. Sivadas had valued on the basis that the plots of land were free from encumbrances and with vacant possession even though some plots did not have clean titles. The encumbrances included a judgment debt obtained by Indian Overseas Bank (IOB) against a company called Mercator Pte Ltd (see 2AB88) of which the first defendant was the guarantor (to the limit of S$2.8m) and for which the first defendant had given a third party charge to IOB over lots 2051 and 2058 Mukim of Tebrau, Johore. There was also a caveat lodged by United Overseas Bank (UOB) against lot 2051 while private caveats were entered by an individual Yeo Yang Poh against lots 2069, 2070, 2075 and 2076. In

addition, although the 8 plots of Johore land were zoned for industrial use, they had yet to be converted as at 26 December 1990. Indeed, when Sivadas visited the plots on 7 April 1999, he found that some plots were still being used as agricultural land for the cultivation of vegetables while others were left vacant.

25. The plaintiffs also called the audit manager from Robert Yam & Co namely Lim Min Kwong (Lim) to testify. Lim (PW4) was tasked with ascertaining the value of the shares of the first defendant and its Singapore subsidiary Heap Huat Rubber Company Pte Ltd (the subsidiary company). For purposes of his valuation, Lim relied on the information given in:

a. the audited consolidated accounts of the first defendant and the subsidiary company;

b. the valuation reports of Param & Associates;

c. the share valuation report of Casey Lim.

Lim adopted the net asset value method as the basis for his valuation and arrived at a figure of RM56 per share.

26. Cross-examined on why he had not taken into account the outstanding tax liabilities in his valuation, Lim said it was because he did not value the first defendant's assets on a break-up basis but on the basis that the company was a going concern. Further, as the properties were not sold, no tax liability should be taken into consideration. He pointed out that it was difficult for a property based company like the first defendant to be valued on an earnings basis, hence he took a net asset value approach.

27. After he had completed cross-examining Sivadas and Lim, counsel for the defendants produced a computation (see 2AB202) he had prepared which was premised on the valuations of Param & Associates being accurate but which factored in property gains tax, encumbrances on the various plots of land and Singapore income tax liability; he arrived at a negative figure of -RM21.09 per share value. The computation is as follows:-

A	**Johore properties**	RM28,661,000
Less:		
(i)	real property gains tax (28,661,000-1,006,127 [cost]) @ 5%	1,382,743.65
(ii)	sum owed to IOB as guarantor for judgment debt of Mercator Pte Ltd of S$2m @ RM$1.557 to S$1.00	4,359,600.00

(iii)	Outstanding Singapore income tax of S$4,327,836.22 for Y/A 1986-91 not taken into account @ RM1.557 to S$1.00 as at 32.12.90	6,738,441.00 12,480,784.65	16,180,215.35
B	**Malacca properties**		2,250,000.00
Less:			
(i)	sale on 14.8.90 of lots 38 and 120 town area XVI	148,000	
(ii)	real property gains tax @ 5% on 1,942,801 (2,250,000 -148,000 - 159,199 [cost])	97,140 245,140.05	2,004,859.95
C	Total net valuations **A + B** =16,180,215.35 + 2,004,859.95 = RM18,185,075.30		
Less:	book value	(4,692,630.00)	
	Balance		13,492,445.30
Less:	Excess of liability over assets as per accounts as at 31.12.90		(16,962,024.00)
Deficiency of assets over liabilities			(3,469,578.70)
Therefore value per share = RM21.09 per share		(RM3,469,578.70) = – 164,500	

28. The plaintiffs also called Ng Siew Hoon (PW1) to testify; she confirmed what had been stated in her statutory declaration (affirmed on 28 July 1994). She recalled that a share transfer form was brought to her father's house and it was already filled out when she signed. She could not remember the name of the transferee as she signed the form some ten (10) years ago. She disclosed that she worked for the first defendant for the whole of 1999 for which she received a salary, for assisting the company to draft letters in English and to give input at meetings.

(ii) the first defendants' case

29. I next turn to the first defendant's case. The company's only witness was their director and employee Ng Puay Khoon (Ng). Ng (DW1) was also a director of NQL which company (together with South Union) he first worked for (in March 1970); he was the author of the letters of offer from NQL to the Official Assignee for the NEK shares in 1990. Ng became a director of the first defendant in 1990.

30. Ng disputed the plaintiffs' allegations; he contended that the pre-emptive rights under article 25(B) of the first defendant only applied when there is a proposed sale of shares in the first defendant to non-members. Where one member wished to sell to another member, that article had no application. Hence no notice needed to be given to other members in respect of the sale of NQL shares to the second defendant since both NQL and the second defendant were members of the company. Further, the second defendant gave valuable consideration for those shares. The first defendant had therefore complied with all necessary procedures and that was why the court dismissed the OS proceedings.

31. Cross-examined, Ng explained that the first defendant had a housing development project located at Choa Chu Kang, Singapore (the project). In the company's 1990 audited accounts, a sum of RM46,466,852 was recognised as revenue from that project. Arising from that revenue, the Singapore inland revenue authorities assessed tax @ 31% amounting to S$609,556.10. Ng revealed that the project was mortgaged to UOB together with lot 241 at Pulai in Johore. UOB had obtained summary judgment against the company in 1992 in the Johore Baru court for the sum of S$26,889,986.44. UOB had also applied to the Johore court to auction the 7 lots of land at Tebrau. Hence, when the 7 Tebrau lots and lot 241 at Pulai were sold, the sale and purchase agreements both dated 29 December 1995 stipulated that the purchasers were required to obtain UOB's consent to the sales as well as resolve UOB's outstanding claims.

32. UOB had, in the exercise of its rights as mortgagees pursuant to the power of attorney contained in the mortgage instrument, taken over the project account. As such Ng said, neither the first defendant nor its auditors were able to verify the revenue and the expenses charged to the project by UOB as the Bank did not provide sufficient details in their bank statements. Hence the 1990 audited accounts qualified the revenue as well as expense figures relating to the project. He testified that the first defendant did not make a profit on the project but tax on alleged profits were levied by the inland revenue authorities which tax to date had not been settled.

33. Ng was questioned on his letter to the Official Assignee (written on behalf of NQL) dated 15 December 1990 offering to buy the NEK shares as well as the 5,000 shares belonging to NKT at RM0.50 each. Yet, eleven (11) days later on 26 December 1990, he had written to the first defendant's directors on behalf of NQL offering to sell the NQL shares at RM0.10 each. Ng explained that the second letter to the first defendant's directors was his idea which was intended to raise money for NQL as the company was also in financial difficulties at the time. His offer price of RM0.10 per share was based on the accounts of the first defendant and the position the company was then facing. Ng revealed that his letter to the first defendant was never sent out because on the date itself of the letter (26 December 1990) NQL found an immediate buyer for the shares in the second defendant. He and Madam Keh Soh Guat (wife of Ng Quee Lam and mother of the second defendant) the then two directors of NQL passed the necessary resolution on the same day approving the sale to the second defendant. Apart from the immediate family members of Ng Quee Lam, Ng said no other shareholders of the first defendant (including the first and second plaintiffs) were informed of the sale.

34. Ng explained that had he succeeded in purchasing the NEK shares and those of NKT from the Official Assignee, he would have distributed and sold them proportionally to the existing shareholders of the first defendant including Excelux, hopefully at the same price. His offer of RM0.50 per share was made without considering the value of the shares as it was prompted by the desire of the members of Ng Quee Lam's family to retain the shares within the family 'for sentimental reasons'. Ng described his offer of RM0.50 a share as a 'mistake' by NQL as it meant they would be out-of-pocket in selling at RM0.10 a share and buying from the Official Assignee at RM0.50 a share. Hence NQL withdrew its offer subsequently. He denied that the sale to the second defendant at RM0.10 per

share was at an undervalue as, it was based on the auditors' opinion that the shares were valueless. Ng also denied that Ng Quee Lam or members of his family controlled the first defendant's board of directors but, he acknowledged that he represented the interests of NQL on the board.

35. Ng admitted that on 22 April 1992 he had signed a director's resolution of the first defendant resolving to sell the NEK shares (pursuant to the company's lien) to the second defendant and her three siblings at RM2.65 per share. He denied that the move was to keep the shares out of the hands of Excelux and members of NKT's family although he was aware that in late November 1991, the Official Assignee had agreed to sell the same shares to Excelux at RM2.60 per share. Ng's attention was also drawn to a letter dated 18 December 1991 from a Johor Baru law firm Abdullah Rahman & Co to the Official Assignee which stated that the firm's clients (members of Ng Quee Lam's family) offered RM3.00 per share to buy the NEK shares as well as those of NKT. In December 1990, he did not know the shareholders of the first defendant were divided into two (2) factions who were seeking to control the company; he only became aware of the rivalry between the families of Ng Quee Lam and NKT after 1995. To counsel's question whether he considered himself a member of the Ng Quee Lam faction, Ng's answer was *'it all depends'*. As the Official Assignee had offered to sell the NEK shares at RM2.60 per share, Ng said the directors of the first defendant decided to add RM0.05 to that figure as their asking price. However, he did not know whether the directors' asking price reflected the true value of the shares as NQL did not obtain a valuation in December 1990.

36. Ng agreed he had previously acted as the second defendant's proxy at annual general meetings of the first defendant. Further, it was on her instructions that he obtained a valuation report from the auditors CH Teo on the value of the first defendant's shares, which copy he handed to her. He admitted he was pleased when the sales of the first defendant's Johore properties were completed in 1997 since the proceeds turned the company around and gave a value to its shares (provided there was no tax liability). He had told the second defendant about the sale agreements although he could not recall when. Neither could Ng recall whether he had informed the Official Assignee about the same. As for the first defendant's delay in issuing new share certificates to the Official Receiver on behalf of another shareholder Ng Quee Hock Pte Ltd (in liquidation), Ng said the delay was due to certain procedures having to be first complied with including the giving of an indemnity to the first defendant; these had since been complied with and he had instructed the company secretary to issue new share certificates to the Official Receiver.

37. In the course of his cross-examination, Ng's attention was drawn to a resolution of the board of directors of the first defendant dated 26 November 1997 wherein a company called Lee Huat Investment Pte Ltd (Lee Huat) was appointed the first defendant's general agent and a deposit of $200,000 was paid as agency fees to the former. Questioned on Lee Huat, Ng said he was a shareholder of the company. Ng's attention was also drawn to another resolution of the first defendant dated 1 May 1998 approving the appointment of one Kong Choot Sian as the company's consultant at a monthly salary of S$9,000 and the appointment of one David Ng Puay Tiong as an administration supervisor at a monthly salary of S$4,000, for a period of five (5) years. Questioned, Ng said Kong Choot Sian is the son-in-law of Ng Quee Lam while David Ng is his cousin but, he did not bring him into the company; I shall make my observations on these resolutions later in my findings.

(iii) the second defendant's case

38. The second defendant, a bank officer, was the only witness for herself. She produced a receipt from NQL dated 26 December 1990 to prove she had paid RM4,290 for her purchase of the NQL shares. She believed that the price she paid (RM0.10 per share) was not less than what the shares of the first defendant were then worth. The second defendant pointed out that at the material time, the first defendant was in serious financial trouble and its shares were practically worthless as

its liabilities exceeded its assets by millions of dollars and it was involved in several suits with its creditors, including banks. She asserted that the plaintiffs' allegation of fraud was an attempt to circumvent s 29 of the Limitation Act. The second defendant denied she knew that NQL was insolvent or likely to be so at the time of her purchase. She bought the NQL shares for sentimental reasons so that the shares of the first defendant would remain within the family since her father had put in a lot of effort to build up the first defendant and, the shares were owned by his own company. Questioned by the court, the second defendant said it was her father who initiated the offer through her; he could not buy himself as he was already a bankrupt. As for the 350 shares of Ng Siew Hoon, the second defendant said they were not transferred to her but to her sister Ng Siew Mui.

39. While she was aware that her father had the project as well as several other housing projects, the second defendant said she did not know the details. She was also not aware that the project came under the first defendant until she saw the company's accounts in relation to the negative value of its shares and that her offer of RM0.10 per share was a fair value. She did not pay much attention to the project as she was aware that the first defendant had and still has, numerous debts. Questioned why in that case she was willing to and did, pay RM2.65 per share for the NEK shares she subsequently purchased from the first defendant, the second defendant explained this was some two (2) years later; she had no choice as it was the only price at which the vendor was willing to sell. She acknowledged that she would have been unhappy had Excelux bought the NEK and NQL shares and thereby obtained control of the first defendant although there were no ill feelings between herself and her cousins from NKT's family. She also agreed that by January 1996 it appeared to her that she had got a bargain for the NQL shares and they were certainly worth more than RM0.10 a share. However she denied the affidavit she filed for the OS proceedings was misleading pointing out that the affidavit was based on 1990 events, not what transpired in 1996.

40. As for the first defendant, the second defendant testified that she relied on the directors and her sister Ng Siew Kuan (who had since passed away) but not her sister's husband Kong Choot Sian, to run the family owned company.

The findings

41. I shall first dispose of the plaintiffs' claim relating to the 350 shares sold to Ng Siew Mui. Counsel for the plaintiffs conceded that his clients' claim against the second defendant must fail as those shares were never transferred to her. Accordingly I dismiss with costs that claim against the second defendant.

42. I turn next to the far more substantial claim relating to the NQL shares. In that regard several issues were raised by the parties. Firstly, is the plaintiffs' claim time-barred pursuant to s 6(1) and (2) of the Limitation Act? Secondly, has fraud been established against the defendants in relation to their dismissal of the OS proceedings? Next, does article 25(B) and (C) of the first defendant's articles of association require the company to give notice to all existing members of an intended sale of shares and, were the NQL shares transferred to the second defendant in breach of those articles? Finally, is this action barred by the doctrine of res judicata because of the dismissal of the OS proceedings without any appeal therefrom?

(*i*) *Is the claim time-barred?*

43. The plaintiffs relied on s 29 of the Limitation Act for their counsel's argument that his clients' claim was not time-barred whereas the defendants relied on s 6 for the opposite proposition. As both sections are relevant to my determination, I set them out herewith:

6(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:

(a) actions founded on a contract or on tort;

(2) An action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement of the action.

29(1) Where, in the case of any action for which a period of limitation is prescribed by this Act --

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent;

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

(2) Nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which --

(a) in the case of mistake, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

b) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

44. Determination of the first issue is dependent upon my finding on the second issue – did the defendants obtain the dismissal of the OS by fraud? If they did not, I would accept the defendants' contention that the plaintiffs' claims based on breach of contract are time-barred as more than 6

years have lapsed from the date (26 December 1990) when the NQL shares were transferred to the second defendant.

(*ii*) *did the defendants fraudulently obtain the dismissal of the OS?*

45. The plaintiffs' case based on fraud relied heavily on the statement made by the second defendant in her affidavit filed on 16 January 1996 for the OS, that the NQL shares were either valueless or unlikely to be worth even RM0.01 per share. I had in para 12 above particularised the plaintiffs' allegation that the second defendant knew that her deposition was false. The plaintiffs' pleaded case however has to be seen against the evidence adduced at the trial.

46. The plaintiffs' case officer Wang was unable to enlighten the court on what transpired at the hearing of the OS as he was not directly involved in those proceedings. However, Wang did confirm that what triggered off the plaintiffs' present action was the receipt by his office on 19 November 1999 from the first defendant's solicitors of the two (2) letters dated 22 May and 19 June 1999 from the Malaysian tax authorities setting out the real property gains tax payable by the first defendant. The first letter related to the disposal of 7 lots of Tebrau properties at RM54.93m while the later assessment related to the disposal of the Pulai property at RM100m, both disposals were on 28 December 1995. I am of the view that too much store has been put on these two (2) letters by the plaintiffs. In any case, the first defendant has appealed against the assessment, according to Ng.

47. While I accept Wang's testimony that the third plaintiff was in no position at the hearing of the OS (25 March 1996) to challenge the statements made by the second defendant that the shares of the first defendant had no value or were worthless, I do not accept that the Official Assignee could not have done anything else other than to accept what the second defendant said at face value. Cross-examination of Wang revealed that Excelux funded the OS just as they are funding these proceedings. The third plaintiff could and indeed should, have filed a rebuttal to the second defendant's affidavit after obtaining his own valuations (as the plaintiffs have now done) of the first defendant's properties to show the same were worth more than the values put on them by CH Williams and Colliers Jordan Lee & Jaafar Sdn Bhd (Colliers). Wang candidly admitted that this course of action did not occur to his office at the material time. His office did not inquire of members of NKT's family whether Excelux was willing to pay for the costs of obtaining valuations of the first defendant's Malacca and Johore properties and of its shares. Even without comparative valuations however, a valid objection which could have been (but was not) raised by the third plaintiff at the hearing of the OS was, that the property valuations relied on by the second defendant were not reflective of their values as at 26 December 1990. The valuation done (retrospectively) by CH Williams was as at 1 January 1988 for the Malacca properties, it was outdated by almost three (3) years whilst the first (dated 1 October 1989) by Colliers was more than a year outside the requisite date and the second (dated 29 August 1990) was four (4) months too early .

48. It is noteworthy that Casey Lin's report was also retrospective being dated 8 January 1996 but based on values as at 26 December 1990. Casey Lin relied on the qualified audited balance sheet of the first defendant as at 31 December 1990 for information concerning the company's assets and liabilities and the fact that the company's trading results showed losses for the years 1989 to 1991. Casey Lin clearly stated in para 4 of its report that it did not carry out an audit of the group, it relied on information provided by the company's management and the auditors' report without verification and of course on the valuations done by the aforementioned two valuers. Casey Lin's report contained the following concluding paragraph:

> In the light of this, we are unable to state whether the value per share of the group is exactly -RM33.49 as at 26 December

> 1990. However, based on evidence of claims from the banks and subsequent accounts, it is unlikely that the share value of the group to be worth RM0.01 at all as at 26 December 1990.

49. There are other factors which need to be considered in relation to the property valuations. Firstly, the first defendant finally disposed of all the Johore properties (after numerous attempts) in December 1995. This was five (5) years after the second defendant had purchased the NQL shares while the assessment of capital gains tax by the Malaysian tax authorities was only made nine (9) years later in mid-1999. I agree with counsel for the plaintiffs that it would have been preferable had the second defendant disclosed in her affidavit (filed on 16 January 1996) that the first defendant had reaped an unexpected windfall in the previous December 1995 by disposing of plots of land it had owned for over 20 years (but which had yielded little revenue in the interval not to mention being the subject of conflicting claims from prospective purchasers and lending banks). However, as the second defendant repeatedly maintained under cross-examination, her concern in the OS was with the financial status of the first defendant as at 26 December 1990, not subsequent dates and events. Moreover, she had worked in a bank throughout the years and had nothing to do with the running of the company which she left to the directors and her sister. How then can it be said she had deliberately concealed the property sales and profits generated therefrom from the third plaintiff? How could she know, as the plaintiffs alleged, that the shares were not valueless? As far as the second defendant was concerned, the first defendant was a debt-ridden company which indeed it was. Of course as it turned out, and which the second defendant admitted, her purchase proved to be at a bargain price but, we are not concerned here with hindsight.

50. The plaintiffs had also alleged that the second defendant knew that the accounts of CH Teo were qualified; hence they did not show a true and fair view of the company's financial position and presumably she should not have relied on them. Although the accounts were indeed qualified, there were no other accounts or means whereby the second defendant could assess the first defendant's share value. The fact that those 1990 qualified accounts were only ready 2 years later (on 2 April 1993) also speaks of the state of the company's management and financial health. From the second defendant's testimony, I certainly did not form the impression that she knew very much about or was interested in, the first defendant let alone its financial position. She was vague on the properties it owned and she was none too clear about the (housing) project either. Like other members of her family, she held the shares in the company either for or because of her father or on behalf of his company NQL. Unlike her two (2) sisters, she never worked in the company at all. What she knew about the company would be what Ng or other directors told her; she would have had no first hand knowledge. I therefore do not agree with the plaintiffs' assertion (made through Wang) that the use of the word '*directed*' by the second defendant in her affidavit filed for the OS (in relation to her request or instruction to the first defendant to obtain valuation reports) implied that she was in a position to direct the affairs of the first defendant notwithstanding that she was not a director.

51. I had in para 37 above, briefly referred to the appointment in 1998 of the son-in-law of Ng Quee Lam as a 'consultant' at a monthly salary of S$9,000 and David Ng being appointed as an administration supervisor at S$4,000 per month. For a debt-ridden company, such salary scales would be considered very high by any standards. One also wonders why a property-based company would need to have a 'consultant'. A cursory perusal of the general ledger accounts of the first defendant for 1997 and 1998 (see AB852-1089) shows widespread misuse of the company's funds. Despite its continuing trading losses, the company's money was used for a variety of expenditure totally unrelated to its business including entertainment, household appliances/items, furniture and incidentals, meals, parking charges and petrol. Unfortunately, this practice is not an uncommon occurrence in many family-owned and family-run companies; their directors and or shareholders have a tendency to give themselves a *carte blanche* to use the company's funds as and how they please. I

can only say it reflects poorly on them and such a questionable practice is to be discouraged. It does not surprise me that the accounts of the company, at least for 1990, were qualified.

52. The last factor be taken into account on the issue of the first defendant's share value is the defendants' computation set out at 2AB202 and reproduced in para 27 above. Their calculation was premised on and accepted the accuracy of, the valuations done by the plaintiffs' valuers Param & Associates. The defendants' disagreement with the plaintiffs centred on three (3) items which the plaintiffs did not but which the defendants factored into their calculations namely: (i) real property gains tax levied by the Malaysian tax authorities, (ii) the encumbrances on (and the liabilities attached to) the various plots of land and (iii) Singapore income tax liability.

53. I am mindful that the plaintiffs' expert Lim disagreed with the defendants' negative figure because he assessed the company's share value on the basis that the company is a going concern, not that it was being broken up. While I would be loathe to disagree with any accountant on his method of calculation of the fair value of a company's shares, it seems to me that the defendants' approach is sensible and is to be preferred. I would imagine that for a true and fair view of a company's financial health to emerge, one would need not only to take into account all its assets but also all its liabilities to arrive at its net value. Whether the company is valued as a going concern or on a break-up basis, it cannot avoid its creditors be it income tax authorities or judgment creditors – confirmed liabilities must be or have to be discharged, otherwise the company runs the risk of compulsory liquidation. Indeed Lim agreed that its liabilities (other than real property gains tax) should be taken into account when valuing the first defendant. Even if I accept his view that the outstanding Malaysian tax (totalling RM1,627,883.70) should not be taken into account and the two (2) amounts are added back to the deficiency of RM3,469,578.70, the share value would still be a negative figure, as can be seen from the following computation:-

Deficiency of assets over liabilities (+3,469,578.70… 1,627,883.70) = … 1,841,695

Value per share = … $\frac{\text{RM1,841,695}}{164,500}$ = … RM11.196

54. Consequently, I would answer the second issue in the negative. I do not find that either defendant was guilty of any fraudulent conduct which enabled the second defendant to obtain the dismissal of the OS. The plaintiffs having failed on their claim based on fraud, they cannot take advantage of the extended time limit provided under s 29 of the Limitation Act. Accordingly, the time-bar under s 6(1)(a) of the Act would apply. Even if I accept the plaintiffs' contention that they only found out about the transfer of the NQL shares to the second defendant in or about November 1992, the claim would still have been time-barred by November 1998; these proceedings were commenced on 1 February 2000.

(iii) does article 25 give a right of pre-emption to existing shareholders?

55. Although my findings on the first two (2) issues would dispose of this suit, I will go on to consider the remaining two (2) issues, starting with article 25. The relevant provisions of that article in the first defendant's articles of association state:-

> (B) Save as hereby otherwise provided, no share shall be transferred to any person who is not a member of the Company so long as any member or any person selected by the directors as one whom it is desirable in the interests of the company to admit to membership is willing to purchase the

> same at the fair value, which shall be determined as hereinafter provided.
>
> (C) In order to ascertain whether any member or person selected as aforesaid is willing to purchase a share at the fair value, the person, whether a member of the Company or not, proposing to transfer the same (hereinafter called the 'retiring member') shall give a notice in writing (hereinafter described as 'a sale notice') to the Company that he desires to sell the same. Every sale notice shall specify the denoting numbers of the shares which the retiring member desires to sell and shall constitute the Company the agent of the retiring member for the sale of such shares to any member of the Company at the fair value. No such notice shall be withdrawn except with the sanction of the directors.

56. A plain reading of the above article does not support the plaintiffs' contention that existing shareholders have a pre-emptive right to shares being offered for sale. The key words in article 25(A) are those underlined. The prohibition against transferring shares to a non-member if a member was willing to buy would not apply to the second defendant because she was already an existing shareholder of the first defendant when the NQL shares were offered for sale. Support for my views can be found in the cases relied on by the defendants namely *Delavenne v Broadhurst* [1931] 1 Ch 234 and *Greenhalgh v Mallard* [1943] 2 All ER 234.

57. Counsel for the plaintiffs relied on the Australian case *Carew-Reid v Public Trustee* 20 ACSR 443 for his clients' right of pre-emption. In that case the issue concerned the interpretation of a similar article (namely article 103) in a company's articles of association which states:

> A share may be transferred by a member or other person entitled to transfer to any member selected by the transferor but save as aforesaid and subject to articles 108 and 110 no share shall be transferred to a person who is not a member so long as any member (or any person selected by the directors as one whom it is desirable in the interests of the company to admit to membership) is willing to purchase the same at fair value.

The court there held that there was no evidence that the shares which the plaintiff wished to transfer were offered to the other members first or at all. Consequently the registration of shares effected in breach of the pre-emption rights in the articles was void and the defendant shareholder had the right to apply for rectification of the share register. That situation is far different from our case.

58. Another case relied on by the plaintiffs was *Mohamed Yahaya v MS Ally Sdn Bhd* CSLR V 379. There, although the pre-emptive rights of the articles of association of the defendant company were considered by the Malaysian court, the actual dispute did not turn on the pre-emption article but whether a retiring member of the defendant company had the final say on the offer price for his shares. He had offered to sell his shares at $2.60 per share whereas the company had accepted offers at $1.63 per share (as determined by the company's auditors to be the fair value) from existing shareholders on his behalf and effected the transfer of his shares to transferees at that price despite his objections. Hence, the case is not relevant.

(iv) is the claim by the third plaintiff res judicata?

59. In the OS proceedings, the third plaintiff had sought a declaration against the second defendant that the transfer to her of the NQL shares was void under s 329(1) of the Companies Act (Cap 50) and s 52 of the then Bankruptcy Act (Cap 20). The OS raised two (2) issues namely:-

> a. whether the NQL shares had been transferred to the second defendant at an undervalue;
>
> b. whether the procedure adopted on the transfer of the shares involved a breach of the first defendant's articles which breach itself invalidated the transfer.

The court dismissed the third plaintiff's application although the reasons therefor were not stated.

60. Consequently, the question arises whether the third plaintiff is precluded from making the same claim in these proceedings, based on the principles of (i) action estoppel or (ii) issue estoppel (res judicata in its widest sense). In support of (i) and (ii), counsel for the defendants relied on *The modern law of evidence* (1996 4th ed at pp 546-550) by *Adrian Keane* for his contention that as between the third plaintiff and the second defendant, the claim could not be re-litigated. It is trite law that for a judicial decision to operate as a res judicata

> (a) it must be final,
>
> (b) the parties to the action and the issue must be the same in both actions and
>
> (c) the issue was necessary or fundamental to the earlier decision reached instead of being merely a collateral matter.

The defendants argued that the requirements were satisfied save that the mode of commencement of the proceedings differed, the earlier being by way of Originating Summons while the present was by way of a writ of summons.

61. Counsel for the plaintiffs on the other hand referred to *The doctrine of Res Judicata* (1996 3rd ed) by *Spencer Bower, Turner and Handley* for his argument that even if the outcome of the OS amounted to res judicata, fraud would vitiate the estoppel and such fraud included every variety of mala fides and mala praxis whereby a party deceives the judicial tribunal. To succeed, the third plaintiff would have to show that he had come into possession of fresh facts/evidence which brings into question the findings in the OS. According to *Keane's* textbook, the fresh evidence must show conclusively that the previous decision was wrong or must be likely to be decisive or, evidence such as entirely changes the aspect of the case. As pointed out earlier (para 49), the alleged fresh evidence pertaining to the actual realised values of the first defendant's Malaysian properties were not events which took place in 1990 but in 1995. I should also point out that the various sub-sales of the first defendant's Malacca properties (see para 8) referred to by the plaintiffs do not help their case either as I am only concerned with what the first defendant itself received under its own sale agreements, not the profits made by its purchasers or sub-purchasers under those agreements.

62. As my earlier finding was that there was no fraudulent conduct on the part of the second defendant, the decision in the OS cannot be impugned. Consequently, the principle of res judicata would apply to preclude the third plaintiff from making the same claim against her. Although the first

and second plaintiffs are not estopped from raising afresh the issue that the NQL shares were transferred to the second defendant by the first defendant at an undervalue, that still does not advance their case any further as I do not find there was such undervalue either, based on the computation set out in para 53 above.

Conclusion

63. Accordingly, I dismiss the plaintiffs' claim against both defendants with costs.

Sgd:

LAI SIU CHIU
JUDGE