A

CHONG FOOK SIN

v.

AMANAH RAYA BHD & ORS

B

FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF PCA
RAUS SHARIF FCJ
HELILIAH MOHD YUSOF FCJ
[CIVIL APPEAL NO: 02( )-37-2009(W)]

C

19 JULY 2010

CIVIL PROCEDURE: *Parties - Intervention - Application to intervene in proceedings - Whether interveners have legal basis to intervene - Whether test for intervention into appellate proceedings the same as for*

D

intervention into High Court proceedings - Issue estoppel - Whether arose - Whether interveners bound by res judicata

This appeal was against the decision of the Court of Appeal (COA) allowing the application by the second to sixth respondents ('the interveners') to intervene ('the intervener application') into the

E

Court of Appeal Civil Appeal Number W-02-432-2004. The facts were that the first respondent, Amanah Raya Berhad ('ARB'), was appointed as the administrator of the Estate of Raja Datuk Nong Chin ('the deceased'). In August 1998, ARB commenced

F

proceedings against thirteen defendants including the appellants. The claim was in respect of an alleged conspiracy to defraud the Estate of the deceased pertaining to certain shares alleged to have been owned by the deceased. The interveners had as beneficiaries to the estate of the deceased instituted proceedings of a similar nature

G

against all the appellants in the appeals except the appellant herein ('the prior claim'). An application was then made to strike out the claim by various defendants thereto. The High Court struck out the said claim. By the admission of the interveners, they had caused ARB to file the ARB claim which was, as mentioned above, filed in

H

August 1998. On 6 April 2004, ARB's solicitors sought an adjournment on the grounds that they had filed an application to discharge themselves as solicitors. On 7 April 2004, the judge denied the application for adjournment and struck out the ARB claim. ARB on 28 April 2004 appealed to the Court of Appeal

I

against that decision to strike out its claim. On 12 November 2008, the interveners filed the intervener application, on the basis, *inter*

alia, to ensure that all matters may be effectively and completely determined and adjudicated upon. The Court of Appeal had allowed the intervener application. Hence, this appeal. The issues that arose were whether COA had erred in law and/or fact in (i) concluding that the interveners had legal basis to intervene into the proceedings of the COA as they were lawful beneficiaries and as such they had beneficial interest clearly and directly related to the subject matter of the appeal; (ii) allowing the interveners to intervene into the proceedings at the COA when the intervener's earlier suit (prior claim) on the same subject matter had been struck out; (iii) failing to appreciate that the test for intervention into appellate proceedings was the same as that for intervention into High Court proceedings

Held (allowing the appeal with costs)
Per Alauddin Mohd Sheriff PCA delivering the judgment of the court:

(1) The interveners did not have the requisite 'legal interest' as the subject matter of the appeal before the COA was the consequence of non-compliance with the unless order on the part of ARB. This was a matter in which the interveners were not involved at all. Further, even if the interveners were beneficiaries, they did not have legal interest in the estate of the deceased pending the administration of the same (*Chor Phaik Har v. Farlim Properties Sdn Bhd*). The grounds advanced by the interveners in support of their application *ie*, to ensure due determination of all matters in controversy and to lend assistance did not in any way go to establishing a 'legal interest'. The interveners were circumscribed by the grounds on which they moved the COA. (para 39)

(2) Any dissatisfaction concerning the way in which ARB was conducting itself as administrator of the estate of the deceased was and is a matter that was to be taken up in an entirely different forum. Further, the interveners did not seek to intervene at the first available opportunity. In this regard, the interveners had knowledge of the ARB claim. They had in fact caused the filing of the ARB claim by a complaint about the defendants in the High Court. The interveners also supplied information and documents to ARB. The interveners did not seek to apply to intervene in the High Court at any point in

time. The intervener application was filed some ten years after the commencement of the ARB claim and approximately four years after the ARB claim had been struck off. No explanation was given as to the delay or the interveners' reasons for not having made an application in the High Court. (para 39)

(3) The interveners were not legally entitled to move an application to intervene because they had themselves commenced the 'prior action' against the defendants and this had been struck out on the application of the various defendants in 1998. The basis of the striking out was the appointment of ARB as the administrator of the estate of the deceased. There was as such a determination of the capacity and interest of the interveners to bring a suit. An issue estoppel arose and the interveners were bound by the doctrine of *res judicata*. (para 39)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan ini adalah terhadap keputusan Mahkamah Rayuan (MR) membenarkan permohonan oleh responden kedua hingga keenam ('pencelah-pencelah') untuk mencelah ('Permohonan pencelah') Mahkamah Rayuan Nombor Sivil Rayuan W-02-432-2004. Fakta-faktanya adalah responden pertama, Amanah Raya Berhad ('ARB'), dilantik sebagai pentadbir pusaka Raja Datuk Nong Chin ('simati'). Pada Ogos 1998, ARB telah memulakan prosiding terhadap tiga belas defendan termasuk perayu-perayu. Tuntutan adalah mengenai dakwaan konspirasi fraud estate simati berhubungan dengan saham-saham tertentu yang didakwa dimiliki oleh simati. Pencelah-pencelah sebagai benefisiari-benefisiari kepada estet simati memulakan prosiding yang serupa sifat terhadap semua perayu-perayu di dalam rayuan kecuali perayu di sini ('tuntutan sebelum ini'). Permohonan dibuat untuk membatalkan tuntutan oleh defendan-defendan itu. Mahkamah Tinggi membatalkan tuntutan tersebut. Dengan pengakuan pencelah-pencelah, mereka telah menyebabkan ARB memfailkan tuntutan ARB yang, seperti disebut di atas, difailkan pada bulan Ogos 1998. Pada 6 April 2004, peguam-peguam ARB memohon perlanjutan atas alasan-alasan bahawa mereka telah memfailkan permohonan untuk melepaskan diri mereka sebagai peguambela. Pada 7 April 2004, hakim telah menolak permohonan untuk perlanjutan dan membatalkan tuntutan ARB. ARB pada 28 April 2004 merayu ke Mahkamah Rayuan terhadap keputusan tersebut untuk membatalkan tuntutan mereka. Pada 12 November

2008, pencelah-pencelah memfailkan permohonan mencelah, atas dasar, antara lain, untuk memastikan segala halperkara boleh ditentukan dan diputuskan secara efektif dan secara keseluruhan. Mahkamah Rayuan telah membenarkan permohonan mencelah tersebut. Oleh itu, rayuan ini. Isu-isu yang berbangkit adalah sama ada Mahkamah Rayuan telah silap dari segi undang-undang dan/atau fakta dalam (i) membuat kesimpulan bahawa pencelah-pencelah mempunyai asas undang-undang untuk mencelah prosiding MR kerana mereka adalah benefisiari-benefisiari yang sah dan kerana itu mereka mempunyai kepentingan benefisial yang dengan jelasnya dan secara terus berhubungan kepada halperkara rayuan; (ii) membenarkan pencelah-pencelah mencelah prosiding MR apabila tindakan guaman pencelah-pencelah ('tuntutan sebelum ini') berhubungan halperkara yang sama telah dibatalkan (iii) kegagalan untuk memahami ujian campur tangan dalam prosiding rayuan adalah sama dengan campur tangan dalam prosiding Mahkamah Tinggi.

Memutuskan (membenarkan rayuan dengan kos)
Oleh Alauddin Mohd Sheriff PMR menyampaikan penghakiman mahkamah:

(1) Pencelah-pencelah tidak mempunyai 'kepentingan di sisi undang-undang' kerana halperkara rayuan di hadapan MR adalah kesan dari ketidakpatuhan dengan perintah melainkan dari bahagian ARB. Ini adalah perkara di mana pencelah-pencelah tidak terlibat langsung. Seterusnya, walaupun pencelah-pencelah adalah benefisiari-benefisiari, mereka tidak mempunyai kepentingan di sisi undang-undang di dalam estet simati sehingga pentadbirannya (*Chor Phaik Har v. Farlim Properties Sdn Bhd*). Alasan-alasan yang diberi oleh pencelah-pencelah untuk menyokong permohonan mereka iaitu untuk memastikan segala penentuan perkara-perkara kontroversi dan untuk memberi bimbingan tidak mewujudkan 'kepentingan di sisi undang-undang'. Pencelah-pencelah dibataskan oleh alasan-alasan yang mereka membawa di MR.

(2) Apa-apa perasaan tidak puas hati mengenai cara pengendalian ARB sebagai pentadbir estet simati adalah perkara yang sepatutnya dibawa ke forum yang lain. Seterusnya, pencelah-pencelah tidak minta untuk mencelah pada peluang yang paling

awal. Di dalam hal ini, pencelah-pencelah mempunyai pengetahuan mengenai tuntutan ARB. Mereka telah membuat ARB memfailkan tuntutan mereka dengan membuat aduan mengenai defendan-defendan di Mahkamah Tinggi. Pencelah-pencelah juga memberi maklumat dan dokumen-dokumen kepada ARB. Pencelah-pencelah tidak memohon untuk mencelah di Mahkamah Tinggi pada bila-bila masa. Permohonan mencelah difailkan sepuluh tahun selepas permulaan tuntutan ARB dan empat tahun selepas tuntutan ARB telah dibatalkan. Tiada penjelasan diberikan mengenai kelewatan atau sebab-sebab pencelah-pencelah tidak membuat permohonan di Mahkamah Tinggi.

(3) Pencelah-pencelah tidak mempunyai hak di sisi undang-undang untuk membawa permohonan mencelah kerana mereka telah memulakan 'tuntutan sebelum ini' terhadap defendan-defendan yang telah dibatalkan atas permohonan beberapa defendan pada tahun 1998. Dasar pembatalan adalah perlantikan ARB sebagai pentadbir estet simati. Terdapat penentuan kapasiti dan kepentingan pencelah-pencelah untuk membawa tindakan guaman. Isu estoppel berbangkit dan pencelah-pencelah diikat dengan doktrin *res judicata*.

Case(s) referred to:

Chor Phaik Har v. Farlim Properties Sdn Bhd [1997] 4 CLJ 393 FC ***(refd)***

Fairview Schools Bhd v. Indrani Rajaratnam & Ors [1998] 1 CLJ 285 CA ***(refd)***

Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals [2008] 2 CLJ 121 FC ***(refd)***

Law Hock Key & Anor v. Yap Meng Kan & Ors [2008] 3 CLJ 470 CA ***(refd)***

Pegang Mining Company Ltd v. Choong Sam & Ors [1968] 1 LNS 96 PC ***(refd)***

Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd [1992] 2 CLJ 1153; [1992] 1 CLJ (Rep) 344 SC ***(refd)***

Tradium Sdn Bhd v. Zain Azahari Zainal Abidin & Anor [1996] 2 CLJ 270 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 69(1)

Rules of the Court of Appeal 1994, r. 4

Rules of the High Court 1980, O. 15 rr. 3, 6(2)(b)

For the appellant - Malik Imtiaz Sarwar (Khor See Yimn with him); M/s Thomas Philip
For the 1st respondent - Shamsul Bahrin Manaf; M/s Shook Lin & Bok
For the 2nd - 6th respondents - Dato' Harpal Singh (Renu Zechariah & G Ragumaren with him); M/s G Regumaren & Co

[Appeal from Court of Appeal; Civil Appeal No: W-02-432-2004]

Reported by Suhainah Wahiduddin

JUDGMENT

Alauddin Mohd Sheriff PCA:

Introduction

[1] Appeals No: 02( )-36-2009(W), 02( )-37-2009(W) and 02( )-38-2009(W) were all set for hearing before us on 18 May 2010.

[2] Upon the request of the parties concerned, we proceeded to hear appeal No: 02( )-37-2009(W) only. It was also agreed by all parties concerned that the result of this appeal would bind the other two appeals.

[3] The appeal is against the decision of the Court of Appeal (COA) dated 8 May 2009 (the "decision") by which the COA allowed the application by the 2nd to 6th respondents (the "interveners") to intervene (the "intervener application") into the COA Civil Appeal Number W-02-432-2004. The application to intervene was made in the Appeal.

[4] Leave to appeal was granted by the Federal Court to the appellant on 12 October 2009 on the following question:

> Whether the test for intervention by beneficiaries to the Estate into proceedings brought by administrators of the Estate at the High Court is the same as that for appellate proceedings.

[5] Leave to appeal was also granted to Shorga Sdn Bhd (appellant in Appeal No. 02( )-38-2009(W)) and Raja Rajmah binti Raja Chik & 7 Others (appellants in Appeal No. 02( )-36-2009(W)) on the same date and orders were made that a common record of Appeal be filed for the purposes of the three appeals. Appeals have also been lodged by the appellants in the other two appeals.

[6] The position taken by each of the three appellants is the same ie, that the decision was erroneous and ought to be set aside for there having been no basis in law and/or fact for the COA to have made the decision. In that regard, the COA ought to have dismissed the intervener application with costs.

Background Facts

[7] The material facts pertaining to the intervener application are as follows:

(a) The 1st respondent, Amanah Raya Berhad ("ARB") was appointed as the Administrator of the Estate of Raja Datuk Nong Chin bin Raja Ishak (the "deceased") by way of an order of court dated 17 December 1996 granted in Kuala Lumpur High Court Petition No. S1-31-391-1996. As a matter of fact this was a consent order. (Please see para. 3 p. 71, Record of Appeal Vol. 1/5, ARB's statement of claim dated 5 August 1998).

(b) ARB was at all material times and still is the Administrator of the Estate of the Deceased.

(c) In August 1998, ARB commenced proceedings against 13 defendants including all the appellants here in Kuala Lumpur High Court S2-22-546-1998 (the "ARB claim"). The claim was in respect of an alleged conspiracy to defraud the Estate of the deceased pertaining to certain shares alleged to have been owned by the deceased.

(d) Significantly, the Interveners (2nd-6th respondents) had as beneficiaries to the Estate of the Deceased in Kuala Lumpur High Court Suit No. D5-22-975-1994 instituted proceedings of a similar nature against all the appellants in the Appeals except the appellant herein (the "prior claim").

(e) An application was then made to strike out the claim by various defendants thereto. The High Court had on 9 March, 1998 struck out the said claim. (See Record of Appeal Vol. 4/5, p. 437 - 441).

(f) The appointment of ARB was then agreed to by the disputing parties.

(g) By the admission of the interveners, they had caused ARB to file the ARB claim. (See Record of Appeal Vol. 5/5 p. 444).

[8] As mentioned above, the ARB claim was filed in August 1998. A

[9] The claim proceeded to case management on more than ten occasions.

[10] Following from this, trial dates were fixed from 2 to 6 June 2003. These dates were however vacated by reason of court vacation. B

[11] The next trial date was fixed from 25 to 26 February 2004. An application was filed by ARB for discovery/release of certain documents. Quite clearly at that point of time ARB was not in a position to commence trial. It was again adjourned to 6 April 2004. In adjourning the trial to 6 April 2004, the learned trial judge issued several directions and had further directed the trial to proceed on 6 April 2004 failing which he would strike out the matter. C D

[12] On 6 April 2004, ARB's solicitors sought an adjournment on the grounds that they had filed an application to discharge themselves as solicitors. Submissions were made by the respective parties. The learned judge reserved his decision to 7 April 2004.

[13] On 7 April 2004, the learned judge allowed the application by ARB's solicitors for discharge but denied the application for adjournment. ARB conceded that it was not ready to proceed with the trial as no witnesses were present. E

[14] On that basis the learned trial judge struck out the ARB claim. F

[15] ARB on 28 April 2004 appealed to the COA against that decision to strike out its claim.

[16] On 12 November 2008 the interveners filed the intervener application. This was ten years after the commencement of the ARB claim and four years after having knowledge that the ARB Claim had been struck out. (See Record of Appeal Vol. 4/5 at pp. 353 - 355). G H

[17] The basis of the intervener application was particularized as follows:

(a) to ensure that all matters may be effectively and completely determined and adjudicated upon; and I

A (b) to lend all assistance, knowledge and any background information that may be of assistance.

[18] In view of the circumstances set out above, the appellant here opposed the intervener application, in essence, on the following
B primary grounds:

(a) the interveners did not have any basis in fact and/or law to intervene in that the intervener did not have any legal interest in the subject of the Appeal. In this regard:

C (i) the ARB claim was an Estate claim instituted by the administrator. Beneficiaries do not have an interest in the estate of a deceased person until administration is complete and distribution made. The estate's interest are the responsibility of the administrator of the estate; and

D (ii) in any event, the Appeal was concerned only with the correctness of the decision to strike out the ARB claim and not the merits of the ARB claim. This was a matter in which the interveners had not been involved in;

E (iii) the question of the intervener's right to commence action had been put to rest when the prior claim was struck out. There had been no appeal against that decision by the interveners. There was as such an issue estoppel which tied down the interveners; and
F

(iv) there had further been inordinate delay on the part of the interveners. Further, they had not sought to intervene in the ARB claim at all.

G **The Decision Of The Court Of Appeal**

[19] The Court of Appeal however allowed the intervener application. In concluding that there were merits in the said application, the Court of Appeal took the view that:

H (a) Order 15 r. 6(2)(b) Rules of the High Court, 1980 ("RHC") applied by reason of a lacuna in the Rules of the Court of Appeal 1994 ("RCA") and the operation of r. 4, RCA;

(b) the interveners had a beneficial interest which fulfilled the "test
I of establishing their interest for the purposes of obtaining leave"; and

(c) the said beneficial interest "clearly and directly related to the subject matter of the" Appeal.

The Appeal

[20] Before us the decision of the COA was attacked on the following grounds:

(a) The COA erred in law and/or fact in concluding that the 2nd to 6th respondents (the "interveners") had legal basis to intervene into the proceedings at the COA (the "Appeal") as they were lawful beneficiaries and as such they had beneficial interest clearly and directly related to the subject matter of the Appeal.

(b) The COA erred in law and/or fact when it allowed the interveners to intervene into the proceedings at the COA when the intervener's earlier Civil Suit in D5-22-975-94 (prior claim) on the same subject matter had been struck out, thus necessarily allowing the interveners to circumvent the principle of *res judicata* and/or issue estoppel.

(c) The COA erred in law and/or fact in failing to appreciate that the test for intervention into appellate proceedings is the same as that for intervention into High Court proceedings.

(d) The COA erred in law and/or in fact by failing to:

(i) apply the expressed language of O. 15 r. 3 of the RHC 1980 read with r. 4 of the RCA 1994;

(ii) distinguish a legal interest from a mere beneficial interest, the former capable of satisfying the term in *Pegang Mining Company Ltd v. Choong Sam & Ors* [1968] 1 LNS 96; and

(iii) in any event, failing to distinguish the subject matter of the civil suit from the subject matter of the Appeal.

[21] We will begin by restating the question posed for determination by this court ie:

> Whether the test for intervention by beneficiaries to the Estate into proceedings brought by Administrators of the Estate at the High Court is the same as that for Appellate proceedings.

[22] In the context of this appeal our view is that the question necessarily requires a consideration of two separate matters:

A (a) whether the High Court test is applicable; and

(b) if so, whether the Court of Appeal correctly determine the intervener application.

B **Applicability Of The High Court Test**

[23] The law in respect of evaluating intervener applications at first instance had been laid down by the Privy Council in *Pegang Mining Company Ltd v. Choong Sam & Ors* [1968] 1 LNS 96.

C **[24]** The decision in *Pegang Mining (supra)* was adopted by the then Supreme Court in *Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd* [1992] 2 CLJ 1153; [1992] 1 CLJ (Rep) 344.

[25] In *Tohtonku Sdn Bhd (supra)* the then Supreme Court had this to say:
D

> It is settled law, on the authorities, that a party may be added if his 'legal interests' will be affected by the judgment in the action but not if his commercial interests alone would be affected: per Lord Diplock in *Pegang Mining Co. Ltd. v Choong Sam & Ors* at page 55 - 56.
E

[26] This is reflected by O. 15 r. 6(2)(b) RHC which provides:

(a) Only a person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all
F matters in dispute in the cause or matter may be effectually and completely determined and adjudicated; or

(b) whether there is a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause
G or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

[27] The RCA are silent as to intervener applications. There is no provision which is in *pari materia* to O. 15 r. 6(2)(b), RHC, above.
H

[28] However, s. 69(1), Courts of Judicature Act 1964 ("CJA") provides that the COA shall have "all the powers and duties, as to amendment or otherwise, of the High Court ..."

I **[29]** Rule 4, RCA provides:

> Where no other provision is made by any written law or by these Rules, the procedure and practice in the Rules of the High Court 1980 [P.U. (A)50/1980] shall *mutatis mutandis* apply.

[30] Based on the foregoing provisions, we would say that it stands to reason that:

(a) the COA does have jurisdiction/power to determine an intervener application;

(b) the material provision is O. 15 r. 6(2)(b) RHC read with r. 4 RCA; and

(c) the test entrenched in that provision must, in our view, necessarily be moulded (*mutatis mutandis*) to suit the circumstances of the Court of Appeal.

[31] On that footing, it is our judgment that the test of 'legal interest' would still be applicable. However the legal interest in issue must be an interest in the subject matter of the appeal before the COA.

[32] It would be observed that in some cases, the subject matter of the appeal is the same as the subject matter in the High Court. In such cases, the legal interest would be identical for both.

[33] However, there could arise situations where the subject matter of the appeal of the COA is separate and distinct from, although connected to, the subject matter of the proceedings at the High Court. The present appeal presents one such situation. The interveners assert an interest by reason of being beneficiaries in the Estate of the deceased. This is more relevant to the proceedings in the High Court as they stood prior to being struck off. The appeal only concerns ARB's non-compliance with the unless order made against it. This did not and could not involve the interveners qua beneficiaries.

[34] In such situations, it is incumbent upon the proposed intervener to establish a legal interest in the subject matter of the appeal before the COA by reference to the matter under consideration in that court. An indirect interest cannot amount to a 'legal interest'.

[35] In addition, the intervener application must be made at first instance where the proposed interveners had knowledge of the proceedings in the High Court and the opportunity to take the necessary steps. (See *Tradium Sdn Bhd v. Zain Azahari Zainal Abidin & Anor* [1996] 2 CLJ 270 and *Fairview Schools Bhd v. Indrani Rajaratnam & Ors* [1998] 1 CLJ 285.

[36] In this regard 'opportunity' must be understood as meaning legal avenue and entitlement to make such an application. Quite apart from the requisite 'legal interest', an applicant must establish that he is not precluded by any other circumstances from making such an application.

[37] Such precluding circumstances would include a prior determination of the courts that gave rise to an issue estoppel such as to attract the doctrine of *res judicata*. A party so impeded would not be in a position to seek leave to intervene.

[38] Based on the foregoing, we are unanimous that the question before the court must be answered in the affirmative subject to the qualifications noted above.

Whether The Court Of Appeal Erred

[39] Having heard submissions before us by both parties and having referred to the authorities cited for and against, we must say, with utmost respect, that the COA erred for the following reasons:

(a) The interveners did not have the requisite "legal interest" as the subject matter of the appeal before the COA was the consequence of non-compliance with the unless order on the part of ARB. This was a matter in which the interveners were not involved at all.

(b) Further, even if the interveners were beneficiaries, they did not have legal interest in the Estate of the deceased pending the administration of the same. In *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 4 CLJ 393 the Federal Court held that, in law, a beneficiary under an intestacy has no interest or property in the personal estate of a deceased person until the administration of the latter's estate is complete and distribution made according to the law of distribution of the intestate estate. (See also *Law Hock Key & Anor v. Yap Meng Kan & Ors* [2008] 3 CLJ 470 and *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2008] 2 CLJ 121).

(c) The grounds advanced by the interveners in support of their application ie, to ensure due determination of all matters in controversy and to lend assistance do not in any way go to establishing a 'legal interest'. The interveners were circumscribed by the grounds on which they moved the COA.

(d) Any dissatisfaction concerning the way in which ARB was conducting itself as Administrator of the Estate of the deceased was and is a matter that is to be taken up in an entirely different forum.

(e) Further, the interveners did not seek to intervene at the first available opportunity. In this regard the interveners had knowledge of the ARB claim. They had in fact caused the filing of the ARB claim by a complaint about the defendants in the High Court. The interveners also supplied information and documents to ARB.

(f) The interveners did not seek to apply to intervene in the High Court at any point in time.

(g) The intervener application was filed some ten years after the commencement of the ARB claim and approximately four years after the ARB claim had been struck off.

(h) No explanation was given as to the delay or the interveners' reasons for not having made an application in the High Court.

(i) Further, the interveners were not legally entitled to move an application to intervene because they had themselves commenced the 'prior action' against the defendants and this had been struck out on the application of the various defendants in 1998. The basis of the striking out was the appointment of ARB as the Administrator of the Estate of the deceased. There was as such a determination of the capacity and interest of the interveners to bring a suit. An issue estoppel arose and the interveners were bound by the doctrine of *res judicata*.

Conclusion

[40] In view of what we have said above, we would allow this appeal with costs here and below. We would also allow Appeals No: 02( )-36-2009(W) and 02( )-38-2009(W) with costs here and below. We also order that the deposits be refunded to the appellants.