IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1994] SGCA 14

CA 78/1993

Between

Pan-Electric Industries Ltd (in liquidation)

… *Appellant*

And

Oversea-Chinese Banking Corp Ltd
Another

… *Respondent*

GROUNDS OF DECISION

Credit and Security — Pledges and pawns; Credit and Security — Pledges and pawns

Version No 1: 29 Oct 2026 (23:45 hrs)

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Pan-Electric Industries Ltd (in liquidation) v Oversea-Chinese Banking Corp Ltd and Another

[1994] SGCA 14

CA 78/1993
Karthigesu JA; Lai Kew Chai J; L P Thean JA
28 January 1994

1 Cur Adv Vult

2 This appeal has arisen out of competing claims over 1.55 million shares in ACMA Electric Industries Ltd (ACMA), a public company whose shares were and are still listed on the Stock Exchange of Singapore. The appellants (Pan-El) were a public company also listed on the Stock Exchange of Singapore. On 30 November 1985, they went into receivership and the liquidation which followed led to the unprecedented closure of the Stock Exchange of Singapore. Pan-El through their liquidators claim to be the beneficial and absolute owners of these shares. These shares were registered in the names of their respective corporate nominees as trustees. As they were the registered proprietors of the shares in the Register of Members of ACMA the legal title therein therefore vested in them. All that Pan-El had, if they had any, was the beneficial ownership in equity of the shares in question. Although one of the features under the Companies Act (Cap 50, 1990 Ed) is that beneficial interests and trusts as between registered members and beneficiaries are kept out of a company`s register of members, one relevant requirement under the Act to note is that all

substantial shareholders, as defined, must disclose their substantial shareholdings, legal and beneficial, and such disclosures and notices of changes in or cessation of substantial shareholders were kept in a company`s register of substantial shareholdings: see ss 82-84 and 88 of the Companies Act.

3 However, Pan-El permitted to be delivered to Associated Asian Securities (Pte) Ltd (AAS) the relevant share certificates together with duly executed blank transfers of the shares in question and other shares. They totalled 6.3 million ACMA shares. The trial judge, Chao Hick Tin J, after understandably lamenting that there was a paucity of or `scanty` evidence led before him, perforce made no determination as to the purpose for which the share certificates and duly executed transfers were deposited with AAS. After having carefully evaluated the entire evidence, he was ineluctably driven to conclude that there was `no credible evidence before [him] to show why 6.3 million ACMA shares [including the shares in question] were held by AAS.` He further ruled that the burden of proof was on the respondents to prove on a balance of probabilities that Pan-El had, either through Tham or TKL [Tan Kok Leong], authorized AAS to sell or pledge [meaning mortgage] the shares`: the words within brackets are added. Tham and TKL were the directors of Pan-El.

4 AAS were at all material times carrying on the business of a stockbroker on the Stock Exchange of Singapore. Such a deposit of share certificates and duly executed transfers could provide opportunities and temptations to AAS to abuse their position. In this case, the risks for abuse and misuse of the indicia of title accompanied by duly executed transfers were seriously compounded and facilitated such abuse, as was demonstrated by the events that unfolded, because Tham was a common director of both Pan-El and AAS. One could see he was placed in a present or potential position of conflict of interest.

Version No 1: 29 Oct 2026 (23:45 hrs)

5 It was therefore not surprising that AAS deposited the share certificates and duly executed transfers as to 200,000 ACMA shares with the first respondents and 1.35 million ACMA shares as security for the banking facilities which the two respondents were extending to AAS. It was common ground that the respondents were bona fide lenders with no notice of Pan-El`s beneficial interests in the shares in question. In those circumstances, the respondents claimed that they were accordingly equitable mortgagees of the shares in question and refused to return them to Pan-El.

6 During the trial, there were really two issues. First, did Pan-El at all material times, that is at the time the shares certificates and transfers were equitably mortgaged to the respondents by AAS and also at the time of the trial below, beneficially own the shares in question? The burden of proof was on Pan-El and the standard of proof was on a balance of probabilities. The respondents put them to strict proof. The second question, which only required consideration if the answer to the first question was in the affirmative, was whether Pan-El by depositing the shares and transfer forms with AAS were precluded or estopped as against the respondents from denying that they had authorized AAS to sell or mortgage the shares and therefore were precluded from asserting their beneficial ownership of the shares in the light of the facts as found by Chao Hick Tin J and case law.

7 At the conclusion of the trial, Chao Hick Tin J determined that Pan-El had failed to prove that more probably than not they were the beneficial and absolute owners of the shares in question. Although that finding of fact without further ado could have disposed of the proceedings, Chao Hick Tin J proceeded on the assumed basis that Pan-El were the beneficial owners and very helpfully set out his determination on the second question as to whether the equitable

Version No 1: 29 Oct 2026 (23:45 hrs)

doctrine of estoppel operated against and therefore would consequentially have displaced the equitable ownership of Pan-El and allowed the equitable mortgagee interest of the respondents to have priority in effect over Pan-El`s interest as owners. He considered the authorities and came to the conclusion that the principle of estoppel did not operate and would not have assisted the case of the respondents.

8 In this appeal, Pan-El strenuously contended that the trial judge had erred in law and in fact in finding that Pan-El had not proved they were the beneficial owners of the shares. Such a finding, they argued, must inevitably mean that another party or parties was or were at all material times the beneficial owner(s) of the shares and this aspect of the case was not considered in the judgment of the trial judge. Since the ACMA shares were worth millions of dollars, it would be an extraordinary feature that no other party had come forward since January 1985 to claim ownership or other interest in the bulk of the shares in question. It was recognized by Pan-El that an appellate court would be slow to disturb any finding of fact by a trial court. But it was said that, in this case, the findings of fact were based on inferences drawn from established and really non-controversial primary facts. Pan-El in this proceedings of course supported the trial judge`s conclusion that they were not estopped from claiming ownership of the shares. On the other hand, both respondents filed their respondents` notices which contained, mutatis mutandis, identical grounds. They contended that the trial judge ought to have found that the shares and the transfers were delivered and `pledged` by Pan-El to AAS as securities for share transactions and AAS in turn charged, mortgaged or otherwise pledged the shares to the respondents. In support of the decision of Chao Hick Tin J, the respondents further contended that Pan-El were estopped from denying that they had expressly and/or impliedly and/or ostensibly authorized AAS to charge,

Version No 1: 29 Oct 2026 (23:45 hrs)

mortgage, pledge and/or otherwise deal with the shares. Finally, they canvassed that as a matter of equity and/public policy the court should not compel the respondents, who were admittedly innocent parties and who had given good value and taken the shares in good faith as securities without notice of the appellants` alleged interest, to suffer loss caused solely by the fraud of TKL, a director and sole member of the appellants` investment committee, who was given unlimited authority to deal with investments in quoted securities.

9 **The undisputed facts**

10 At all material times Tham and TKL were directors of Pan-El. TKL became a director in 1983. At the board meeting on 29 April 1983, the directors decided that Pan-El should diversify their activities and `look for share trading opportunities.` In the same year, the board established an investment committee which was responsible for share trading and investments. The meeting of the board meeting of 15 February 1985 confirmed that the board directed TKL and Tham to continue to serve on the investment committee. At that meeting, the board established an executive committee consisting of M/s Crafter, Tham, TKL and Segarajasingam to approve transactions, including investments, which might affect the group`s profitability by over $2m. According to the board minutes, Tham resigned from the board on 10 July 1985. Following the departure of Tham, the board authorized TKL as a one-member investment committee to act.

11 Tham, at all material times, was also the managing director of AAS.

12 On 18 January 1981, Pan-El became beneficial owners of 8,000,000 ACMA shares (or 33% of ACMA shareholdings) in exchange for the transfer

Version No 1: 29 Oct 2026 (23:45 hrs)

to ACMA of their entire shareholdings in one of their subsidiaries, Pan Electric Appliances (Pte) Ltd. On 16 June 1982, Pan-El disposed of 100,000 ACMA shares. On 13 July 1982 they disposed of another lot of 100,000 shares. Just under two years later, on 6 February and 22 May of 1984, they disposed of 650,000 and 756,260 ACMA shares respectively. As at late May 1984, Pan-El still owned 6,393,740 ACMA shares.

13 The company secretary of ACMA confirmed that in 1984 Pan-El owned 6,393,740 ACMA shares. Pan-El was shown as a substantial shareholder within the meaning of that expression under the Companies Act. He quite properly said that the accuracy of that register depended on the response from a substantial shareholder. In fact, on 19 March 1985, he sent a letter to the company secretary of Pan-El seeking confirmation that Pan-El were still the beneficial owners of those shares. ACMA never got a reply to that letter. In the absence of a reply, and also it is fair to note, in the absence of any advice from any other substantial shareholder, the annual reports of ACMA for the financial years ended 30 April 1985, 1986 and 1987 continued to show Pan-El as still the beneficial owners of the 6,393,740 shares. According to an officer of Raffles Nominees Ltd, the company held four million ACMA shares for Pan-El and collected the dividends. The sum of $180,000 was paid to Pan-El on 11 September 1984. Raffles Nominees Ltd and its parent, Standard Chartered Bank, must have been satisfied that Pan-El were the beneficial owners of the four million ACMA shares in 1984 However, on 16 December 1983, the share certificates and the relative transfers duly executed were returned to Pan-El.

14 The corporate banking manager of the Hongkong & Shanghai Banking Corp (HSBC) confirmed that its subsidiary, HSB Nominees, held two million ACMA shares for Pan-El until they delivered the share certificates and blank

Version No 1: 29 Oct 2026 (23:45 hrs)

transfers duly executed to Pan-El in 1984. As for the dividends received by Pan-El, a staff officer from HSBC confirmed that in 1984 Pan-El did make a claim for the dividends in respect of 1,324,000 ACMA shares and the sum of $59,580 was paid to Pan-El on 3 December 1984. The unclaimed dividend of $22,905 was left in the suspense account.

15 The auditor who assisted the liquidators of Pan-El, PW1 Roger Philip Edmonds, confirmed that Pan-El did not claim dividends for any 6.3 million ACMA shares for 1985 and 1986. The dividends would have amounted to $0.5m.

16 Sometime in 1984, Pan-El deposited with AAS 6.3 million ACMA shares, of which the ACMA shares in dispute constituted a part. As will be elaborated later, the trial judge concluded that there was `no credible evidence to show why the 6.3 million ACMA shares were held by AAS.` This finding of fact, in our view, could not be challenged as there was ample evidential bases for the trial judge to have come to that conclusion.

17 AAS deposited the 6.3 million ACMA shares certificates and duly executed transfer forms with eight financial institutions by way of equitable mortgages to secure credit facilities. So far as the two respondents are concerned, AAS deposited with them a total of 1.55 million ACMA shares and the duly executed blank transfers as security for banking facilities. On 23 October 1985, AAS deposited with the first respondent 200,000 ACMA shares with transfers duly executed by Raffles Nominees. On 28 January 1985 and 12 March 1985, AAS deposited respectively with the second respondents 1,250,000 ACMA shares with transfers executed by Raffles Nominees and 100,000 ACMA shares with transfers executed by HSB Nominees.

Version No 1: 29 Oct 2026 (23:45 hrs)

18 Pan-El claimed beneficial ownership to all the shares and that AAS had no beneficial interest of any kind to transfer, mortgage or otherwise deal with the shares for their own benefit. They therefore claimed that they were the beneficial owners and sought a declaration to that effect. If they proved on a balance of probabilities that they were the beneficial owners, then it followed, and it is settled law and not disputed between the parties, that AAS had no equitable interest in the shares to assign absolutely or by way of a mortgage or otherwise. The liquidators of Pan-El in these proceedings sued the eight financial institutions and also AAS, which was also in liquidation. Before the trial began, all but the two respondents settled with Pan-El. In consequence, the trial below concerned 200,000 ACMA shares which were equitably mortgaged to the first respondents and 1.35 million ACMA shares which were equitably mortgaged to the second respondents. Both parties raised several issues in their pleadings but, on the evidence, what ultimately remained in contention were these questions: (1) did Pan-El at all material times beneficially own the ACMA shares in question? and (2) if Pan-El were the beneficial owners of the shares in question at the time they were equitably mortgaged to the respondents, did the interests of the two respondents as equitable mortgagees take priority over the beneficial ownership of the appellants because, the appellants, having left in AAS`s custody both the share certificates and duly executed transfers in blank, are estopped from denying that AAS had either express or implied authority to mortgage the shares to the respondents?

19 The general nature of the evidence led at the trial should be briefly noted. Both parties did not call any directors or staff of Pan-El or AAS to give evidence. Tham and TKL were convicted in connection with offences involving the two companies. The liquidators of Pan-El called the auditor of their firm of accountants involved in liquidation, a staff member each of the two nominee

Version No 1: 29 Oct 2026 (23:45 hrs)

companies, the company secretary of ACMA and a staff officer of Hongkong & Shanghai Bank to check on the payment of dividends to Pan-El in 1984.

20 As noted earlier, in 1981 Pan-El acquired 8,000,000 ACMA shares for valuable consideration. They had sold some of them as stated earlier. Pan-El proved that up to the time they handed the shares certificates and executed blank transfers to AAS, they were the beneficial owners.

21 The trial judge considered the evidence on the purpose of the deposit and firmly made certain findings of fact. He rejected any claim that Pan-El`s deposit with AAS of the 6.3 million ACMA shares was to secure the share transactions of one of Pan-El`s subsidiaries, Orange Grove Properties Pte Ltd (OGP), or other Pan-El subsidiaries. He accordingly rejected the claim that the 6.3 million ACMA shares were placed with AAS `as a pledge to enable AAS to obtain loans from their bankers to cover` any alleged losses of OGP. The trial judge further found that it was AAS that owed OGP substantial sums. The trial judge concluded thus:

> *We are now left with the position where there is no credible evidence before me why the 6.3 million ACMA shares were held by AAS. It is true that we have the minutes of the board to show that Tham and TKL had the authority to make investment decisions for Pan El. But there is no admissible evidence to show how they exercised those powers. I think the burden is on the defendants [ie the respondents] to prove on a balance of probabilities that Pan El had, either through Tham or TKL, authorized AAS to sell or pledge the shares.*

22 **Beneficial ownership of the shares**

23 Pan-El in this appeal contended that the trial judge had erred in finding that they had failed to prove that they beneficially owned the shares in question at the time of their equitable mortgages to the respondents and at the trial. It was

Version No 1: 29 Oct 2026 (23:45 hrs)

observed, and we agree with this submission, that the trial judge`s decision turned on inferences from undisputed primary facts and that accordingly this court is in as good a position to take a view on the proper inferences to be drawn. The trial judge`s reasoning went along the following lines. Pan-El failed to claim any dividends for the shares in 1985 and 1986. The dividends amounted to the significant sum of $0.5m. Even in 1984, of the two million ACMA shares held in the name of HSB Nominees, Pan-El claimed dividends for only 1,324,000 shares. No explanation was offered as to why they failed to do so and no officers of Pan-El were called. Secondly, Pan-El failed to respond to ACMA`s request in writing in 1985 for confirmation that they still beneficially owned 6,393,740 ACMA shares or about 25% of their entire shareholdings. The liquidators were not able to offer any explanation after their investigations. The trial judge also found that the ownership situation was `constantly changing`. He only referred to the fact that Pan-El only claimed dividends for 1,324,000 out of two million shares held in the name of HSB Nominees, which indicated that even as at December 1984, 676,000 of the two million shares were no longer owned by Pan-El.

24 In contrast, the overall perspective as established by the evidence was this. In 1981, Pan-El acquired eight million ACMA shares (or 33% of the entire shareholdings). From 1981 to 22 May 1984, they sold 1,606,260 shares: they sold 100,000 shares on 16 June 1982; 100,000 shares on 13 July 1982; 650,000 shares on 6 February 1984 and 756,262 shares on 22 May 1984. In 1984, Pan-El deposited the self-same 6.3 million ACMA with AAS and there was no credible evidence as to the purpose of the deposit. On 28 January 1985 and 12 March 1985, AAS mortgaged respectively 1.25 million and 100,000 ACMA shares to the second respondents. On 23 October 1985, AAS mortgaged 200,000 ACMA shares to the first respondents. These and other ACMA shares deposited

Version No 1: 29 Oct 2026 (23:45 hrs)

with 6 other financial institutions totalled 6.3 million ACMA shares. On 30 November 1985, Pan-El went into receivership and effectively all functions of the board of directors ceased, save for the residual power to challenge the validity of the debentures. This was quite quickly followed by provisional liquidation and final liquidation in October 1986.

25 One significant fact stood out. From the end of 1984 until the end of the trial and judgment on 31 May 1993, no other party had come forward to assert a claim to the 6.3 million ACMA shares, the substantial subject matter or chose in action over which Pan-El sought relief from all the eight defendants.

26 Despite the submissions advanced on behalf of the respondents, we were persuaded that not too much should be made of the fact that Pan-El failed to claim the dividends for 1985 and 1986. Well, the bulk, ie 1.25 million of the shares in question in this appeal was equitably mortgaged to the second respondents in January 1985. Pan-El was at that period facing financial difficulties and the law was catching up with TKL, among others. The omission to claim admittedly substantial dividends should not be allowed to assume disproportionate importance. We now refer to Pan-El`s failure to respond to ACMA`s written request for confirmation. This failure too had to be kept in perspective. The legal position under ss 82, 83 and 84 of the Companies Act was that a substantial shareholder was required to notify a company of his interest, any change or cessation of his interest as such substantial shareholder. As a matter of prudent practice, companies, especially public listed companies, sent out notices. The response was varied; according to the evidence, it was estimated that only one in four would respond. It was not entirely insignificant that ACMA continued to treat Pan-El as substantial shareholders of the 6.3 million shares, in spite of the fact that Pan-El had not responded. Again, we are

Version No 1: 29 Oct 2026 (23:45 hrs)

of the view that any inference against Pan-El must not be taken too far. In the end, we are of the view that Pan-El had shown that probably they beneficially owned and still own the shares in question at all material times. The trial judge failed to give any weight to the highly significant fact that no other party had come forward to assert an adverse claim to the shares and had given too much weight to Pan-El`s failures to collect the dividends and to respond to a request for confirmation.

27 **Estoppel**

28 We now turn to consider the applicability of the principle of estoppel. Before we do so, we would have to deal with the respondents` challenge of the relevant findings of fact by the trial judge. The trial judge found that there was no credible evidence before him to show why or for what purpose the 6.3 million shares certificates and executed transfers were deposited by Pan-El with AAS. The trial judge therefore did not, as he could not in the absence of any credible evidence, make any determination as to the relationship between Pan-El and AAS so far as the former`s deposit of the share certificates and executed transfers was concerned. It was unarguable that the burden of proof was on the respondents to prove either AAS`s authority, express or implied, to sell or otherwise deal with the shares and executed transfers or some holding out by Pan-El of AAS as their agents or otherwise in circumstances which would justify equity`s intervention to displace the beneficial ownership of Pan-El in preference for the respondents` interests as equitable mortgagees.

29 The respondents in the context of their respondents` notices submitted that the trial judge had erred in finding that there was no credible evidence. Counsel for the respondents invited us to draw adverse inferences against the

Version No 1: 29 Oct 2026 (23:45 hrs)

appellants for failing to call TKL and all other relevant employees of Pan-El and AAS to explain the circumstances surrounding and the purpose of the deposit. But the burden of proof rested with the respondents; they had to establish Pan-El`s intention to confer the authority on AAS in respect of which Pan-El would be precluded from denying. It was further submitted that the trial judge ought to have inferred that the deposit must have been for some commercial purpose. It is very clear and apparent from the judgment that the trial judge dealt with these submissions at length. The state of the evidence was such that he could not conclude on a balance of probabilities what the purpose was. As to the inference of some commercial purpose, the difficulty was that it was not possible on the evidence to determine the exact nature and scope of the commercial purpose, if any at all. Having reviewed the evidence, we ourselves would agree with the trial judge`s conclusion as to the equivocal or ambivalent nature of the evidence. It therefore follows that the deposit could have been for one of a number of purposes. What was clear, however, was that the respondents failed to prove that, more likely than not, AAS was authorized as agents to sell, mortgage or otherwise deal with the shares.

30 On the assumption that the appellants had proved their beneficial ownership of the shares, the trial judge decided that the respondents, in the light of the authorities, could not rely on the principle of estoppel. The trial judge stated:

> *In my judgment the mere leaving of a share certificate with a blank transfer with a broker does not give rise to an estoppel. As DW1 said, the shares in the possession of a stockbroker could be there on account of a number of reasons. No estoppel can arise. There must be something more in the owner`s conduct for estoppel to arise. This can arise where it is shown that the owner has entrusted his shares to the broker for disposal to a third party, whether by way of sale or by way of pledge. In this way, he makes the broker his agent and clothes him with actual or*

Version No 1: 29 Oct 2026 (23:45 hrs)

> *apparent authority to dispose of the shares. If the broker should act outside his actual authority but within the scope of his apparent authority, a transferee who acquires the shares without notice of the agent`s lack of authority takes priority over the owner:* ***Fry v Smellie*** *[1912] 3 KB 282. If the transferee had notice of the limitation of authority, or even put on enquiry, no estoppel could arise.*

31 ... I hold that the mere leaving with AAS of the ACMA share certificates with blank transfers does not constitute any representation that AAS had the authority to deal with the shares.

32 In our view, with regard to the question of estoppel, the right question is whether, in all the circumstances of this case, there was a personal estoppel which prevents Pan-El from setting up their ownership of the shares against both respondents. More directly, the narrower question is whether the fact that Pan-El had allowed their share certificates, with the blank transfers, to be in the hands of their stockbrokers AAS constituted a representation to anyone who dealt with AAS that AAS had the authority to deal in the shares. The starting point is the general rule of law that a person taking a chose in action from a person who has not a valid title has no better right to it as against the true owner than the person from whom he has taken it; this is the law even though the person is a bona fide purchaser or mortgagee for value without notice of the true ownership. To this, the relevant exception is when a personal estoppel prevents the true owner from setting up his ownership against a bona fide transferee or mortgagee for value without notice: ***Waterhouse v Bank of Ireland*** , pp 392-393. The other preliminary matter to put to rest is the unquestionable law that share certificates, even coupled with duly executed transfers in blank, are not as such negotiable instruments, in the sense that their mere delivery would not, in spite of a prior defect of title, pass the title in the chose in action to the bona fide

Version No 1: 29 Oct 2026 (23:45 hrs)

purchaser or mortgagee for value without notice. This proposition is so well established as to require no authority.

33 In our judgment, Pan-El are estopped in all the circumstances of this case from denying as against or in relation to both respondents that they (Pan-El) had vested AAS with implied or ostensible authority to deal with the shares. The business of AAS as stockbrokers was to buy and sell shares, to deal in shares. They bought and sold shares on their own account as well as for their customers. Shares in their hands accompanied by duly executed transfers were part of their stock in trade. They were not custodians of shares as they were not nominee companies. Pan-El on the evidence as found by the learned trial judge had placed with AAS the share certificates (in the names of the respective nominees of the respondents) and blank transfers duly signed by the nominees, the registered proprietors. Pan-El had left those shares and the transfers with AAS for the extended period of 11/2 years. We are of the view that by so doing, Pan-El had put AAS in a position where the latter could deal with those shares. Anyone who dealt with AAS would assume that AAS was clothed with the authority to deal in those shares. The conduct of Pan-El therefore gave rise to a clear representation, which must be implied, that AAS had the implied or ostensible authority to deal in the shares. This was the effect whether the respondents were mortgagees or buyers. It would be against the conscience of Pan-El to be allowed to assert otherwise. The beneficial interest of the respondents as mortgagees in those shares is accordingly unimpeachable.

34 The learned trial judge held that the mere leaving of a share certificate with the relative blank executed transfer did not amount to any specific representation by the beneficial owner dealing with the depositee. He was largely influenced by the decision of the High Court of Australia in ***Tobin v***

Broadbent , where Latham CJ held that such a deposit of share certificates with endorsed transfers with a stockbroker did not involve a representation to any person that the stockbroker was entitled to `pledge` or sell them. The learned Chief Justice also observed that ***Fuller v Glyn, Mills, Currie & Co*** was not `satisfactorily supported by authority.` The learned Chief Justice was against placing such share certificates and endorsed transfers on the same footing as negotiable instruments. The reason was that any such representation would be at variance with the basic rule of law governing the transfer of title to personal property that upon a transfer or mortgage no one can give a better title than he himself has: ***Mercantile Bank of India Ltd v Central Bank of India Ltd*** , at p 297. In our view, a finding that there is in any case an estoppel by conduct which gives rise to a clear representation which it would be inequitable for the true owner of personal property to deny is always a finding of fact. So it was a finding of fact in ***Tobin*** `s case.2 Our finding is also one of fact, in our case, which goes the other way. Whilst we would wherever possible adhere to the basic principles of the law of personal property, we will equally apply the doctrine of estoppel as an exception to the ***nemo dat***

35 rule if the facts so warrant.

36 The learned judge dealt with two lines of authorities, one relied on by each of the two sides before him. The centre piece of the learned judge`s analysis of the two lines of authorities is summed up in the following terms:

> *I think it is most important to bear in mind that although it is a matter of practice that share certificates registered in the names of third parties, with blank transfers, are commonly passed from hand to hand, that does not render such a document a negotiable instrument:* ***Tobin v Broadbent****. The question whether an instrument is negotiable or otherwise makes all the difference; that distinction is crucial.*

37 In reviewing all the authorities to which we were referred, estoppel was applied because the beneficial owner of the shares had deposited them and the executed transfers with the stockbrokers and there were facts such as conferring the authority to borrow: see ***France v Clark*** and ***MacPhail & Co v P & O Banking Corp*** . Indeed, this agency relationship was present in ***Waterhouse v Bank of Ireland*** , which was cited by counsel for the respondents to support their contention that the mere fact of deposit of the shares and executed transfers constituted a representation by Pan-El to anyone who took them from AAS that AAS had the authority to deal with the shares. Given the facts in the present appeal, the relationship of agency is deemed to have arisen so far as the respondents were concerned. The respondents also relied on ***Hone v Boyle, Low, Murray & Co*** and ***Fuller v Flyn, Mills, Curry & Co*** . In the ***Hone*** case,7 there was evidence which proved the custom that bankers and stockbrokers in Dublin treated share certificates in third party`s name on which was endorsed an assignment in blank and a power of attorney executed by the third party as transferable from hand to hand, like bearer bonds. In those circumstances, it was unremarkable that the Court of Appeal in Ireland held that the chose in action did pass to the defendant who had lent money against those shares and documents. Although there is nothing resembling that feature of negotiability in the present case, its absence is not conclusive against an estoppel arising. As for the ***Fuller*** case,3 we have noted the analysis of the High Court of Australia in ***Tobin v Broadbent*** that the ***Fuller*** case3 was unsupported by any authority. But we take the view that ***Fuller*** `s case3 stands on its own facts.

38 There is a useful summary of the application of estoppel in relation to the commercial context with which we are concerned in ***The Law Relating to Estoppel by Representation*** by Spencer and Turner (3rd Ed, 1977). Para 181 states:

Version No 1: 29 Oct 2026 (23:45 hrs)

> *Holding out as agent ...*
>
> (181) The application of the doctrine of estoppel to this species of representation results in the following well-established rule. Where A, by words or act, or by silence or inaction (if there is a duty on him to speak or act), represents to B, or to the public or a class of which B is a member, that X is his (A`s) agent, or has his authority, either generally, or for the purposes of a particular transaction or type of business, and B is induced by such representation to alter his position for the worse, A is estopped from afterwards disputing, as against B, that X was invested with such agency or authority at the time at which he was so accredited. Illustrations of the operation of this rule are abundant and can readily be found in eg ... company cases in which the owner of shares or similar securities hands them or other documents of title to a broker together with a transfer executed in blank [for which the following cases were footnoted: ***Bentinck v London Joint Stock Bank*** [1893] 2 Ch 120; ***Fuller v Glyn, Mills, Currie & Co*** [1914] 2 KB 168, 175-177; ***London Joint Stock Bank v Simmons*** [1892] AC 201 (HL).]

39 In our view, the question is whether there is an estoppel by conduct which gives rise to a clear representation. That, as we have said, is a question of fact. The distinction referred to by the learned judge does not arise in this case because if any instrument were negotiable that negotiability would have founded another and independent exception to the ***nemo dat*** rule and no recourse is necessary at all to the doctrine of estoppel, which, if operative, would have constituted another exception to that rule. The cases dealt with by the learned judge were individual fact situations as founded by the courts in question. Such cases therefore should be read in their individual factual contexts.

40 In the result, although Pan-El are the beneficial owners of the shares in question, estoppel operates to confer priority to the respondents as equitable mortgagees. Accordingly, the appeal must be and is dismissed with only one set of costs to both respondents. The appeal deposit is to be paid in equal shares to account of the respondents` costs.

Version No 1: 29 Oct 2026 (23:45 hrs)

41 ***Appeal dismissed.***

Karthigesu JA
Lai Kew Chai J
L P Thean JA

Sundaresh Menon, Patrick Ang and Sim Bock Eng (Wong Meng Meng & Pnrs) for the appellants
Tang Khin Wai and Mark Lim (Lee & Lee) for the first respondents
Yang Ing Loong (Lee & Lee) for the second respondents

Version No 1: 29 Oct 2026 (23:45 hrs)