IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1994] SGCA 104

CA 6/1993, 8/1993

Between

Swee Hong Investment Pte Ltd

… *Appellant*

And

Swee Hong Exim Pte Ltd
Another

… *Respondent*

And

Kiaw Aik Hang Land Pte Ltd
Another

… *Third Party*

GROUNDS OF DECISION

Civil Procedure — Parties; Words and Phrases

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Swee Hong Investment Pte Ltd v Swee Hong Exim Pte Ltd and Another (Kiaw Aik Hang Land Pte Ltd and Another, Third Parties)

[1994] SGCA 104

CA 6/1993, 8/1993
Chao Hick Tin J; Karthigesu JA; Warren Khoo L H J
19 August 1994

1 Cur Adv Vult

2 These two appeals have arisen out of a sale and sub-sale of two lots of industrial land in June 1984 from Kiaw Aik Hang Land Pte Ltd (Kiaw Aik Hang) to Swee Hong Exim Pte Ltd (Swee Hong Exim) and then, in September of the same year, from Swee Hong Exim to Swee Hong Investment Pte Ltd (Swee Hong Investment).

3 The facts are fully set out in the learned judge`s judgment dated 16 December 1992 and we would only refer to those which are relevant to the appeals before us.

4 In the action, Swee Hong Investment claimed against Swee Hong Exim, its associated or affiliated company, for breach of contract, and against the Attorney General for damages for breach of statutory duty under the Planning Act (Cap 232) and/or negligence in the performance of such duty on the part of the Development & Building Control Division (DBCD) of the Public Works

Department, Ministry of National Development. Swee Hong Exim claimed in third party proceedings against Kiaw Aik Hang for breach of contract and against the Attorney General for breach of statutory duty and/or negligence in similar terms to the claim of Swee Hong Investment against the Attorney General. The Attorney General was named as a nominal defendant in both sets of proceedings in accordance with s 19 of the Government Proceedings Act (Cap 121). That section provides that, in actions against government departments which have not been authorized to act on their own behalf, the Attorney General should be named as the defendant.

5 The claim against the Attorney General arose from an admitted error in replies which the DBCD provided to Swee Hong Exim`s solicitors on 5 July 1984 on the standard form of legal requisitions in respect of the lands contracted to be sold. The DBCD had stated that there was an amended planning permission of a part 7/part 8-storey flatted factory building and that the master plan plot ratio was 2.49. The sale of the lands was therefore with the benefit of the planning permission.

6 However, on 13 March 1985, months after the sale and purchase of the lands had been completed, the DBCD explained that the plot ratio which they had stated in the requisitions was not correct because no development charge had been paid and no formal alteration to the master plan had been made. The real plot ratio, according to the DBCD, should have been 0.44.

7 Under s 32 of the Planning Act, a development charge is payable for any planning permission to develop land in excess of the plot ratio prescribed in the master plan for the area. The result was that, if Swee Hong Investment were to proceed with the development in accordance with the planning permission

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already granted, they would have to pay a development charge. The DBCD later informed them that the development charge payable was $6.8m. In the event, presumably to avoid paying such a hefty sum, a fresh planning application was submitted for a development with a plot ratio of only 0.42, within the limit of the master plan.

8 The acts and omissions in respect of which it was contended that the government should be held liable were, firstly, the failure to determine the development charge and securing its payment at the time of granting the planning permission, and, secondly, the furnishing of the erroneous information in the legal requisitions.

9 The originating summons was ordered to be carried on as a writ action, with exchange of pleadings. At the conclusion of the trial, the learned judge found that Kiaw Aik Hang had not been in breach of contract. The appeal by Exim against this decision was withdrawn before us. Swee Hong Investment and Swee Hong Exim being associated companies, they were, as the learned judge had said, really on the same side. Before us, the only contest was between them and the Attorney General over the claims against the DBCD.

10 The learned judge, who received very little assistance on the point, held that the Attorney General was afforded a complete defence by s 7 of the Government Proceedings Act (Cap 121). He dismissed the claim against him without considering the merits of the allegations of negligence and breach of statutory duty. The two appeals are entirely upon this issue. The learned judge explained his decision as follows:

> *In granting the written permission under s 9(1) on 17 September 1982, the competent authority was undoubtedly exercising the public duty of the government ... In respect of the replies to the*

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> *legal requisitions, they were made pursuant to r 7(5) of the Planning (Development) Rules 1981. The officer concerned who provided the replies to the requisitions was again exercising the public duty of the government ...*

11 The present case is ... a clear case for the application of s 7(1) of the Government Proceedings Act. In my judgment, this section provides a complete defence to the claims of the plaintiff and the first defendant against the second defendant.

12 The relevant sections of the Government Proceedings Act (Cap 121) read as follows:

> *4 Subject to the provisions of this Act and of any written law, any claim against the Government which -*
>
> (a) > is founded on the use or occupation or the right to the use or occupation of State land;
>
> (b) > arises out of the revenue laws;
>
> (c) > arises out of any contract made by the authority of the Government which would, if such claim had arisen between private persons, afford ground for civil proceedings; or
>
> (d) > is a claim (other than a claim in tort) for damages or compensation not included in paragraphs (a), (b) and (c) which might lawfully be enforced by civil proceedings as between private persons,
>
> *shall be enforceable by proceedings against the Government for that purpose in accordance with the provisions of this Act.*
>
> (5) Subject to the provisions of this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

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> (6) (1)No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally ...
>
> (7) (1)Notwithstanding any other provisions of this Act to the contrary, no proceedings, other than proceedings for breach of contract, shall lie against the Government on account of anything done or omitted to be done or refused to be done by the Government or any public officer in the exercise of the public duties of the Government.
>
> 7 (2)For the purposes of subsection (1), `exercise of public duties` includes -
>
> (a) > the construction, maintenance, diversion and abandonment of railways, roads or bridges;
>
> (b) > the construction, maintenance, and abandonment of schools, hospitals or other public buildings;
>
> (c) > the construction, maintenance, and abandonment of drainage, flood prevention and reclamation works; and
>
> (d) > the maintenance, diversion and abandonment of the channels of rivers and waterways.
>
> 7 > (3)Nothing in this section shall prevent the bringing of any suit for damages or compensation arising out of negligence or trespass in the execution of any works of construction or maintenance undertaken by the Government in the exercise of the said public duties.

13 **Contentions of counsel**

14 Counsel for the appellants submitted as follows. Referring to s 7, he submitted that a distinction should be drawn between the exercise of a duty and the exercise of a power. He submitted that, in the performance of a duty, there is no discretion, whereas in the exercise of a power, there is a discretion, the discretion lying in the choice of the manner of exercising the power. And where there is a discretion, there should be accountability. Referring to the provisions of the Planning Act, he said that the matters complained of against the DBCD

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were acts or omissions in the exercise of a discretion. The government was accountable and the case fell outside the ambit of s 7.

15 In his written submission submitted before the hearing, counsel for the appellants had put the matter slightly differently. He referred to the distinction sought to be drawn in ***A-G v Pang Ah Yew*** (to which we shall refer later in this judgment) between acts in performance of duties imposed by the legislature and acts done under the direction of the executive. `Public duties` must be interpreted as equivalent to duties imposed by the legislature, rather than as duties performed in obedience to the executive. In the instant case, the matters complained of arose from the performance of duties entrusted to the officers by the executive. Hence, the government should be held liable.

16 The senior state counsel, relying on s 7, submitted that when planning officers give a written permission and furnish replies to legal requisitions, they do so in the exercise of public duties within the meaning of s 7. He said that not every act done by the planning authority would be in the exercise of a public duty. Thus, if a planning officer gives information which he is not obliged to give, s 7 would not apply. State counsel further submitted that the use of the introductory words in s 7 (`Notwithstanding any other provisions of this Act to the contrary`) suggests that it is s 7 that takes precedence over s 5, since s 5 is prefaced by the words `Subject to the provisions of this Act.`

17 Learned state counsel refrained from attempting to define the scope of s 7. He conceded that there is a limit to the width of s 7, but this is because it is not in all situations that the government can be said to be performing public duties. He submitted, however, that the present case falls within the section. He suggested tentatively that the correct approach lies in distinguishing cases where

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a general public benefit would ensue from an act from those where it would not. Such an approach would not result in s 7 negating s 5, because it is not in all situations that the government could be said to perform public duties.

18 **Legislative history**

19 Before we deal with the effect of and the relationship between ss 5 and 7, it is useful to say a few words about their history.

20 The first legislative measure dealing with proceedings against the government in the Straits Settlements was the Crown Suits Ordinance of 1876. Of relevance is s 18, which provided as follows:

> *Any claim against the Crown founded on the use or occupation, or right to use or occupation, of Crown Lands in the Colony and any claim arising out of the Revenue Laws, or out of any Contract entered into, or which should have, or might have, been entered into, on behalf of the Crown, by, or by the authority of, the Government of the Colony, which would, if such claim had arisen between subject and subject, be the ground of an Action at Law or Suit in Equity, and any claim against the Crown for damages or compensation arising in the Colony, shall be a claim cognizable under this Ordinance.*

21 The Crown Suits Ordinance of 1876 was replaced by the Crown Suits Ordinance of 1886. However, s 18 of the 1876 Ordinance was retained in the 1886 Ordinance as s 20 and in similar terms. In turn, s 20 of the 1886 Ordinance was re-enacted in materially similar terms as s 20 of the Crown Suits Ordinance of 1935 (Cap 43). This last Ordinance remained in force until it was superseded by the (Malayan) Government Proceedings Ordinance in circumstances to be referred to below.

22 **Case law under Crown Suits Ordinance**

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23 At this point, we should refer to two important cases under the Crown Suits Ordinance, both decided by the Privy Council on appeal from the Straits Settlements.

24 In ***A-G of the Straits Settlements v Wemyss*** , a case decided by the Privy Council in 1888 under the 1876 Ordinance, the petitioner Wemyss, who was the lessee of land adjoining the sea in Penang, claimed against the government alleging that the reclamation works which the government had executed next to the seaward part of his land had adversely affected the right of access to the sea front which he had previously enjoyed. It was contended on behalf of the government that the claim was in the nature of a claim in tort and that no such claim lay against the Crown. At that time, the Crown in England was immune from such claims. The Privy Council held that the Crown in the Straits Settlement was liable under the Ordinance to claims in tort, such claims being claims for `damages or compensation` within the meaning of s 20 of the Ordinance.

25 In ***A-G for the Straits Settlements v Pang Ah Yew (PC)*** , the pleaded facts were as follows. Pang, the owner of a piece of land in Malacca, omitted to pay quit rent in respect of the year 1921. The Collector of Land Revenue, in supposed exercise of the power conferred upon him by s 7 of the Ordinance No 35 (Land Revenue Collection), sold the land. The Collector had not given notice of demand as required by s 4 of the Ordinance and had not issued attachment on the moveable property on the land as required by s 5 of the Ordinance before he sold the land. Pang prayed for a declaration that the sale was illegal and claimed damages for loss sustained by her as a result.

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26 The Attorney General applied by motion for the petition of right to be dismissed as disclosing no cause of action. He sought to draw a distinction between acts of a public officer acting in obedience to the direction of the government and acts done in pursuance of duties imposed by a statute. In the former case, the government could be liable for any wrong done in the execution of the duties; in the latter case, the government would be wholly immune. The Privy Council, affirming the decision of the court of first instance in Malacca and the Straits Settlements Court of Appeal at Singapore, held that, in collecting the revenues of the Crown, the collector was acting as the agent or servant of the Crown, and the fact that he was carrying out his duties under statutory directions and limitations could not make any difference; he was the intermediary employed by the Crown, even though the methods by which he was to proceed were prescribed by law. The government was therefore held liable for his wrongful acts.

27 **Developments across the causeway**

28 In the Malay States, there were also legislative developments along the lines of the Crown Suits legislation in the Straits Settlements. Our attention has not been drawn to the first enactment providing for suits against the government or the rulers. However, by 1918, in the Federated Malay States, there were already provisions in the Civil Procedure Code (Enactment No 15 of 1918) broadly similar to the provisions of s 20 of the Crown Suits Ordinance. The provisions were presented in the style of s 4 of our present Act.

29 In 1928, by the (FMS) Government Suits Enactment (No 20 of 1928), the above provisions were in substance re-enacted. New sets of provisions were added, in ss 11 and 12 of the Enactment. Sections 5 and 6 of the present Act

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finds their predecessors in s 11 of the Enactment. Section 7 (except for sub-s (4), to which further reference will be made below) finds its predecessor in s 12 of the Enactment.

30 There were similar Enactments in the non-federated Malay states, introduced at various times. There was, however, no complete uniformity. The Kelantan Enactment (No 10 of 1938), for instance, does not appear to have had the equivalent of s 4 of our Act, although it did have the equivalent of our ss 5, 6 and 7. There were, no doubt, other dissimilarities in respect of other matters dealt with by the various Enactments in the various states, federated and non-federated.

31 Thus, in 1956, the legislature of the Federation of Malaya enacted the Government Proceedings Ordinance to unify the law throughout the Federation. It did this mainly by re-enacting the provisions of the more comprehensive enactments of the former Malay states. One material addition which should be mentioned was a sub-s (4) to s 7 of the Ordinance in these terms:

> *Nothing in this Ordinance shall subject the Government, in its capacity as a highway authority, to any greater liability than that to which a local authority is subject in that capacity.*

32 This provision, we assume, was to import the substantive law relating to the duty of a local authority in England in relation to acts and omissions in respect of highways.

33 The 1956 Ordinance repealed the Crown Suits Ordinance (Cap 43), which had been in force in those parts of the Federation which had been parts of the Straits Settlements. It also repealed the various enactments which had been in force in the various former Malay States.

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34 Singapore being not part of the Federation, the Crown Suits Ordinance of 1935 (Cap 43) remained in force in Singapore. When Singapore became part of Malaysia, the (Malayan) Government Proceeding Ordinance was in 1965 extended to Singapore, with the result that the Crown Suits Ordinance of 1935 ceased to have effect in Singapore on 25 February 1965. For the sake of completeness, we would mention that in 1966, after the separation of Singapore from Malaysia, amendments to the 1956 Ordinance (as extended to Singapore) were introduced. These amendments, however, are not material for present purposes.

35 The provisions of ss 4-7 of our Government Proceedings Act are thus largely a reproduction of ss 4-7 of the (Malayan) Government Proceedings Ordinance of 1956.

36 We should, however, say a little more about sub-s (4) of s 7, which we have set out above. That subsection was in s 7 when the (Malayan) Government Proceedings Ordinance of 1956 was extended to Singapore. It in fact appeared in the 1970 edition of Singapore statutes. However, it was omitted from the 1985 edition, presumably on the view that the references to highway authority and local authority would not be appropriate in the context of Singapore. If our understanding of the purport of the subsection, as set out earlier, is right, it would appear that this omission is of a more substantive nature than might have been thought.

37 **Our views**

38 The main provisions of the Act dealing with the liability at civil law of the government are in ss 4 and 5. The two sections have been thrown together

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by an accident of legislative history, and the boundaries of and the relationship between the two sections are not easy to see. However, this need not detain us, as the case before us is about the relationship between s 5 and s 7, not between s 4 and s 5.

39 The marginal note to s 5 suggests that it is intended to deal with tort claims, and, indeed, the wording of it is apt to encompass such claims. The main principle of s 5 is that, in respect of wrongful acts and omissions of any public officer, the government`s liability is equated with that of a private principal for the acts or omissions of his agents. The last part of the section provides that `without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the government.` The important words are `without prejudice to the generality thereof`. The deeming provision, it seems to us, is to remove the possibility of any argument of the type raised in the case of ***A-G v Pang Ah Yew*** . It is a doubt-removing provision. It is not the core provision that states the circumstances under which the government can be held liable for the wrongful acts or omissions of its servants. That is dealt with by the first part of s 5, the part that precedes this deeming provision. The inclusion of the reference to `duty imposed by the law` in this section is solely for the purpose of the deeming provision. It bears no relationship with the reference to `exercise of public duties` in s 7. There is no need for any reconciliation between these expressions in the two sections, as was attempted by appellants` counsel.

40 Section 7, as we see it, provides an exception to the general rule of liability in s 5. Section 7(1) exempts the government from any claim on account of acts and omissions `in the exercise of public duties` of the government.

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Subsection (2) contains a detailed list of what the expression `exercise of public duties` includes. The list includes the construction, maintenance, etc, of certain public works and amenities. At first sight, it seems curious why, out of the whole range of governmental activities, these particular activities should be singled out for special mention. We do not have anything like a definitive answer. However, a not unreasonable hypothesis might be this. It will be recalled that, as early as 1888 in the ***Wemyss*** case, it was decided that a tort claim lay against the government on the wording of s 18 of the Crown Suits Ordinance. That case arose from reclamation works undertaken by the government which impeded the access to the sea by the lessee of the adjoining land. In that case, the Privy Council made references to the fact that, in many colonies, the Crown was in the habit of undertaking works which, in England, were usually performed by private persons. It also made references to the need for providing remedies for injuries committed in the course of these works.

41 Then, again, in the ***Pang Ah Yew*** case, Barrett-Lennard J made similar references. Referring to ***Wemyss*** and other cases, he said:

> *... in some of our colonies, the legislatures have subjected the sovereign to liability in respect to torts of his servants. The government of these colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which, in England, were in the past left to private enterprise and to employ inferior officers and servants. For this reason, it was thought that the exemption from suit of the sovereign would amount to a denial of justice.*

42 These references were intended to fortify a conclusion in favour of extending the liability of the Crown for tort claims, but the implications of the rule that the government had a general liability for such claims could not have been lost to the colonial administrators, especially at a time when the Crown in England enjoyed immunity from such claims. It is not unlikely that the

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predecessor of s 7 was a response to this state of the law. It was probably not a coincidence that reclamation works, which gave rise to the claim in the ***Wemyss*** case, was listed as one of the works in respect of which the exemption was provided.

43 Section 7, however, did not, and does not, give complete exemption from tort claims arising from the performance of the `public duties` referred to in it. Apart from contractual claims, claims arising from negligence and trespass were preserved. It was a compromise solution, no doubt in true British tradition. The subsequent introduction of sub-s (4) of s 7 in 1956 in the last days of British rule in Malaya was a further step to limit claims arising from acts and omissions in respect of highways.

44 **Interpretation problems: `includes`**

45 The problem of interpretation of s 7 revolves to an extent on the meaning of the word `includes`. In ***Dilworth v Commissioner of Stamps*** at p 105, Lord Watson said:

> *The word `include` is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word `include` is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to shew that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to `mean and include ` and, in that case, it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.*

46 The following features of s 7 should be noted. Firstly, the exemption is in respect of acts in relation to public works and amenities as physical and natural things. This feature is reinforced by the reference in sub-s (3) to `any works of construction or maintenance undertaken by the government`. It is (or was) also reinforced by the provision of sub-s (4) referring to liability in respect of highways. Secondly, the listing in sub-s (2) is exhaustive in the sense that the listing is not followed by any general sweeping-up language referring, for example, to all other works and services undertaken for the benefit of the public. Thirdly, as we stated earlier in another context, the construction, maintenance, and diversion of public works and amenities were, even in the days when the provisions were first enacted, only part of the functions of government. Yet the draftsman chose only to set out acts in relation to these public works and amenities in such a specific manner.

47 It seems to us that all these are indicia to a restrictive construction of sub-s (2). That is to say, it is more likely to be correct to interpret the word `includes` in the second sense postulated by Lord Watson in the above case than to interpret it in the first sense. The meaning of the words `public duties` is firmly hinged to the matters mentioned in sub-s (2). It is a mistake to try to seek an interpretation of the words `exercise of the public duties of the Government` by reference to the dictionary or ordinary meaning; the subsection provides its own definition of these words. Had the draftsman intended to give a popular meaning of the words, he would certainly have used more general and abstract language; he would not have provided such a specific and exhaustive list or any list at all.

48 Any interpretation of the words `public duties` in their popular sense would lead to intolerable uncertainties. The senior state counsel said that not all

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things done by the government can be said to be done in the exercise of public duties; he suggested that only those things which the government is obliged to do may be so considered. This argument opens up more questions than it provides answers. If by obligation one means obligation by law, then there are many activities the government is engaged in which it is not obliged by law to do. The argument would take away great areas of government activity from the general provision of s 5. If obligation is in the moral or political sense, then different people with different concepts of what governments should do would give very different meanings to these words. A government with a laissez faire outlook would conceive of its obligations in quite a different way from a government with a more interventionist view. The courts would also have to deal with the dispute, which would be bound to arise in almost every case, without any sensible guidance in the language of the section. We do not think that the Act was ever intended to be operated in such a way that in any action against the government the parties and the court should have to consider whether the act or omission complained of was in relation to the performance of some ill-defined `duty` of the government.

49 It is not surprising that our attention has not been drawn to any case or any practice in which a defence based on s 7 has been raised otherwise than in relation to acts and omission in connection with public works in the terms of the section. In ***Government of Malaysia & Anor v Akasah bin Ahad*** , referred to in the judgment below, the claim arose from the construction of a highway and interchange near the plaintiff`s station. There it was held that the defence succeeded because the plaintiff failed to establish negligence, as provided in sub-s (3).

50 **Conclusion**

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51 For the reasons we have set out in this judgment, we respectfully differ from the learned judge in his interpretation of s 7. The case should have been tried on the basis that s 7 did not apply. We remit the case to the High Court for reconsideration on other grounds.

52 The appellants shall have their costs here. Swee Hong Investment and Swee Hong Exim should share one set of costs, though separately represented, since the issue between them and the Attorney General was exactly the same in both appeals.

53 We are grateful for counsel`s diligence in the research on the legislative history and for bringing to our attention useful authorities. Unfortunately, we have not been able to draw much assistance from the submissions made on the proper interpretation of the relevant legislative provisions. In these circumstances, we think that the appellants, ie Swee Hong Investment in one appeal and Swee Hong Exim in the other, although they have won the point, should together have only half of the one set of costs of the appeal.

54 As for the costs below, we note from the judgment that the learned judge invited the parties to address him. We have not been told what order the learned judge might have made. In the circumstances, the appropriate order for us to make would be to set aside any order as to costs which the learned judge might have made, and to direct that the whole question of costs be reconsidered by the High Court having regard to the outcome of this appeal and the outcome of the reconsideration by the High Court of the case as a whole.

55 ***Appeal allowed.***

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Chao Hick Tin J
Karthigesu JA
Warren Khoo L H J

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