IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 65

Suit 2001/1991, WSS 42/1992, Interpleader Summonses No 2, 3 and 4 of 1992

Between

Leowood Industries (S) Pte Ltd

… *Plaintiff*

And

Annho Pte Ltd
Tan Swee Heng trading as T S H Timber Trading (Claimants)
Aeonic International Trade Pte Ltd (Claimants)
Kim Soon Huat Timber Trading (Claimants)

… *Defendant*

GROUNDS OF DECISION

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Leowood Industries (S) Pte Ltd v Annho Pte Ltd and Others

[1994] SGHC 65

Suit 2001/1991, WSS 42/1992, Interpleader Summonses No 2, 3 and 4 of 1992
Warren Khoo L H J
16 March 1994

1 **Judgment:**

2 C A V

3 Judgment

4 On 25 September 1991, the plaintiffs Leowood Industries (S) Pte Ltd took out a writ against Annho Pte Ltd to recover the sum of $102,105.32, the balance of the price of sawn timber sold and delivered to Annho and bundling, transport and storage charges.

5 On 18 November 1991, an Assistant Registrar on an application for summary judgment by the plaintiffs, gave Annho unconditional leave to defend. The plaintiffs appealed the decision. On 27 January 1992, Chan Sek Keong J varied the decision so that the plaintiffs were given partial final judgment in the sum of $82,402.01.

6 On 3 February 1992, a writ of seizure and sale was issued. On 10 February, timber identified as that which had been sold to Annho was seized at two timber yards and certain office equipment was seized at the offices of Annho at Carlton Building. Thereafter, three claimants laid claim to the goods seized. They are Mr Tan Swee Heng trading as T S H Timber Trading, Aeonic International Trade Pte Ltd, and Kim Soon Huat Timber Trading. In due course, the Sheriff took out interpleader summonses. They are entered as No 2, 3, and 4 in respect of the claims of these respective claimants.

7 Affidavits were filed by the plaintiffs and the claimants. The claimants all claim that the goods subject of their claim had been sold to them to offset pre-existing trading debts which Annho owed each of them.

8 The plaintiffs' submission is that, firstly, the purported sales were not true sales within the meaning of the law of sale of goods, and secondly, the transactions were not bona fide but were intended to defeat the execution process; they were not good against the sheriff.

9 The law point: was it a sale? As stated above, in each of the cases, the claimants claim to have had previous business dealings with Annho, resulting in Annho owing them sums of money. They each claim that the goods were sold to them for a price which was to be settled by offsetting it against debts owed by Annho to them.

10 Plaintiffs' counsel says that a sale, in the eyes of the law, is an exchange of property for money or in consideration of money. He submits that the alleged transactions, if indeed they took place, were in the nature of an agreement to extinguish a debt in exchange for the transfer of goods. That, he submits, is not

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a true sale. He cites the case of Simpson v Connolly < 1953 > 2 All E R 474 and Robshaw Bros. Ltd v Mayer < 1957 > 1 Ch. D. 125.

11 In Simpson v Connolly, Finnemore J found that the essence of the transaction before him was a contract whereby a debt due from the defendant to the plaintiff should be discharged on condition that the defendant transfer a portion of his land to the plaintiff. He held that this was not a money consideration and the transaction was not a sale of the land. The consequence was that none of the rules concerning delays in a contract for the sale of land applied. The defendant having performed his part of the bargain the plaintiff was simply entitled to accept that repudiation and the plaintiff remained the creditor of the defendant in respect of the original debt.

12 In the Robshaw case, there was a contract to sell certain leasehold property held under a lease. The leasehold was held at a substantial rent, and the consideration for the transfer was the assumption that the tenant would undertake the obligations contained in the lease. For this reason, the price was shown as "nil" in the contract of sale. The question in that case was whether the transaction was a "sale or purchase of property" so that a summary judgment for specific performance could be signed under the then Order 14A of the English Rules of the Supreme Court (equivalent to the former Order 81 of our Rules) providing for summary judgment to be given for specific performance of contracts for the sale and purchase of property. Upjohn J held that the transaction was not a sale and purchase of property, and that, as a matter of construction, the order did not apply to the case, and the application for summary judgment was dismissed on that preliminary ground.

13 These cases show that the usefulness of a determination whether a transaction is a sale or not lies in the consequences that follow from such a

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distinction. Counsel for the plaintiffs, apart from saying that the transactions if proved were not a true sale, does not say what consequences flow from this. He certainly does not say that no property would pass or that such an arrangement would have no legal effect. It seems to me that unless he is able to say that, the submission is no more than of academic interest, and need not detain one for very long.

14 Plaintiffs' counsel also submits that the purported sale being intended to discharge a debt which had accrued previously, the consideration was a past consideration and there was no contract. This point can be answered very shortly. A debt, although incurred in the past, is still an existing debt. If there was in fact a debt at the date when the purported sale was contracted, there was a present existing liability. A discharge or diminution of that liability must surely be a present consideration.

15 I shall now proceed to consider plaintiffs' counsel's contention that the transactions were not bona fide. But first the principles that should govern.

16 The governing principles It is important to bear in mind the principles applicable to contests of the kind under consideration. The judgment of the court in this case was a monetary judgment. Although the judgment resulted from a dispute over the timber sold by the plaintiffs to Annho, the judgment created a mere judgment debt. It was not a judgment in rem against the timber subject of the dispute between the plaintiffs and Annho. It did not have the effect of impressing the timber with a trust. Neither did it have the effect of turning the plaintiffs into secured creditors having a security interest in the timber.

17 Secondly, under the original contract of sale of the timber from the plaintiffs to Annho, the property in the goods had at some point of time passed

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to Annho. It follows from the passing of the property that Annho had the right to deal with the timber in any way they pleased as owners. They could certainly sell it or contract to sell it, or transfer it in exchange for the extinction of a debt, or otherwise dispose of it. In the absence of any vitiating factors, title would in the normal course pass to a third party, and if that took place, the effect would be to place the goods beyond the reach of Annho's creditors or the sheriff.

18 Disposition to defeat execution: the effect It has been established by a long line of cases that a disposition of property for good consideration is not void merely because it was made with the intention of defeating the expected execution of a judgment creditor. In Wood v Dixie < 1845 > 7 Q B 892, the plaintiff had lent money to Phillips. In October 1843, Phillips being unable to pay, executed a conveyance to the plaintiff of the house and furniture at a price to be valued. The valuation was completed on 7 October, and afterwards on the same day the sheriff sought to execute against the plaintiff on a writ of fi. fa. It was contended by the defendant's counsel that the conveyance was fraudulent as against the execution creditor. The judge told the jury that if there was no real payment the whole transaction was colourable, and the defendant was entitled to succeed. He also told the jury that even if there was a payment but if the intention of the transaction was to defeat the execution creditor, the conveyance was void as against the defendant, and in that case the defendant was also entitled to succeed. The jury returned a verdict for the defendant.

19 On a new trial, obtained on the ground of misdirection, the three judges of the Queen's Bench unanimously held that the direction was wrong. Lord Denman C J said:

20 "...we are bound to say that the ruling was incorrect. The jury were given to understand that, although the conveyance was made bona fide, and with a full

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intention that the property should be parted with, it would yet be fraudulent if made with intent to defeat the execution. Such a motive does not defeat the assignment...a mere intent to defeat a particular creditor does not constitute a fraud. We do not say that many considerations may not exist which would induce a jury to come to the conclusion which they arrived at: but we hold the direction wrong."

21 In Sutton v Bath < 1858 > 1 F & F 152, the headnote of the report reads as follows:

22 "In an interpleader issue between claimant and execution creditor, plaintiff claiming under a bill of sale for alleged advances to the assignor, a son, the question is whether the property was really intended to pass, and this will greatly depend upon whether the advances were really made; but it is not conclusive that the assignor's object was to evade an execution, because, except in case of bankruptcy or insolvency, a debtor may prefer a particular creditor and pay him in money or in goods; and the question will be whether he really meant to do so, or only to pretend and appear to do so, for the purpose of escaping the execution, the goods to be afterwards resumed by the assignor."

23 See also Hale v. Saloon Omnibus Co. < 1859 > 4 Drew 494; Darvill v. Terry < 1861 > 6 H & N 807.

24 It seems to me that the following propositions are supportable by authority. Firstly, except in a case of insolvency, where special rules about undue preferences apply, the mere intention to prefer a particular creditor or to defeat an expected execution does not invalidate a disposition of property. Secondly, for such a disposition to be valid, it must be for valuable consideration and made in good faith. Thirdly, whether the disposition was made in good faith

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is to be decided on a consideration of all the facts and circumstances of the case. The adequacy of the consideration, the relationship of the parties, the manner in which the transaction was affected are all relevant considerations. If the judgment debtor continues to be in possession after the purported disposition, when this is not in accordance with the tenor and object of the disposition, that is a strong indicator of fraud. However, this is a presumption that, like presumptions of fact generally, can be rebutted. Fourthly, in any event, a transaction that is a mere sham, which pretends to be what it is not, of course cannot qualify as a valid disposition.

25 S 26 of Sale of Goods Act 1893 The proviso to S 26 of the Sale of Goods Act 1893 provided that a writ of execution or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed. However, no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time he acquired his title notice that such writ or any other writ by which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted by the sheriff.

26 The provisions were re-enacted in s 138 of the U K Supreme Court Act of 1981, with the useful addition of a definition of "good faith" - a thing shall be treated as done in good faith if done honestly, whether it is done negligently or not.

27 No submission was made to me as to the applicability of these provisions in Singapore. In any event, on the case as postulated by each of the claimants here, these provisions would not apply because the writ of seizure and sale was

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issued to the sheriff on 3 February 1992. That was after the alleged disposition of the goods to each of the claimants. So I do not need to consider the point.

28 Burden of proof On the question of the burden of proof, the goods in question had been the goods of Annho; in the case of the timber, subject of IP No. 3 and 4, it was held by the timber yards on account of Annho. In the case of the office equipment, subject of IP No. 2, it was on the premises of Annho themselves. In these circumstances, any person seeking to show the coming into being of a contrary state of things must, in my view, bear the burden of proving it; he who asserts must prove. This view is consistent with the approach of Mohamed Azmi J in Sigma Air Conditioning Sdn Bhd v. World Wide Agencies (M) Sdn Bhd < 1980 > 1 M L J 179. It is also consistent with the following statement by the learned editor of Mallal's Supreme Court Practice 2nd ed. at p.173:

29 In a Sheriff's interpleader the claimant is as a general rule made the plaintiff, and the burden of proof rests upon him where the goods seized were at the time of seizure in the possession of the judgment debtor, possession being prima facie evidence of title. Yorke v. Smith (1851), 21 L.J.Q.B. 53. If, however, the claimant was in possession at the time of the seizure, the burden of proof may be upon the execution creditor, thus reversing the ordinary rule, and the execution creditor may be made plaintiff; Gerhard v. Montagu & Co (1889), 61 L.T. 564. See also De La Rue v. Hernu, Person & Stockwell Ltd. < 1936 > 2 K.B. <164>; 2 All E.R. 411, C.A. where furniture was deposited with a warehouseman.

30 I now proceed to consider the individual claims.

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31 Kim Soon Huat's claim: Interpleader Summons No 4 Kim Soon Huat's claim is to 34 tons of dark red meranti which Annho had bought from the plaintiffs. This was part of the consignment of timber which Annho had claimed to be not up to contract. It was seized at the Sin Nam Huat Sawmill, who were Annho's contractors. Kim Soon Huat's claim is supported by an affidavit filed by Tan Chuan San, who describes himself as a person responsible for its marketing department. It is also supported by an affidavit of Stephen Teo, the then executive director of Annho. They both also gave evidence in court.

32 Tan produced what purports to be an invoice evidencing the sale of timber from the claimant to Annho dated 27 December 1991 for the sum of $28,861.38. He said that on 27 January 1992, on behalf of the claimant, he negotiated by phone with Stephen Teo for the purchase of the 34 tons of rejected dark red meranti wood, the subject matter of the claim. Teo told him that the timber was rejected timber, and offered to sell it to him for $350 a ton. Tan had machinery which could recut the bad timber for re-sale. Tan offered $300 a ton, and the sale was concluded at that price. He produced an invoice evidencing the alleged sale. This invoice purports to show a sale of the rejected timber at $300 a ton totalling $10,232.04. There is a note at the foot of the invoice to the effect that the amount was to offset the debt of $28,861.38 owed by Annho. Mr Tan said that he did not inspect, neither did he have to inspect the timber before offering a price because he knew what rejected timber was worth. He agreed that the price for good dark red meranti would be $780 a ton, but he did not agree that the $300 a ton price he bought it at was grossly under value. The timber was not collected for the reasons I shall refer to in a moment.

33 Mr Tan as a witness was not impressive. He tried his best in the witness box to distance himself from any knowledge or notice of any connection between the timber and the plaintiffs. First, although Teo offered him this rather

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substantial amount of reject timber, he told the court that he did not ask who had supplied the timber. For someone who is in the timber trade, it seems to me strange that he was not curious to find out, if only for future references for his business. I do not accept his explanation that even if he had asked, Teo would not have told him because this was a trade secret.

34 Secondly, he had a telephone conversation with Ann Lee, the director of the plaintiffs, on the 12 or 13 of February 1992, after he had found out from the storeman at Sin Nam Huat Sawmill that the timber had been seized by the sheriff. He told me that he was illiterate and could not find out from the storeman who had caused the timber to be seized. He told me that it was not until he went to his lawyers more than a week later that he found out it was the plaintiffs who had initiated the seizure. This, however, does not square with the fact that the sheriff had received a notice of the adverse claim of his firm as early as 14 February, 1992. It is also quite improbable that he did not make other inquiries, such as with Mr Teo of Annho, who I am sure would have able to tell him. It seems strange to me that a person who was astute enough to instruct his lawyers to lodge a claim would not make or was unable to make the necessary inquiries to establish who had caused the sheriff to seize the goods. Mr Tan also denied that when he spoke to Ann Lee on 12 or 13 February, she had told him about the seizure of the timber at the instance of the plaintiffs. He also contradicted himself as to whether Ann Lee had told her in this conversation that the plaintiffs were going to take legal action against Annho or whether the plaintiffs had taken action. The re-examination by his counsel on this point did not help to undo the damage to his credibility resulting from his unwillingness to tell the court the whole truth about what he knew of the difficulties between Annho and the plaintiffs.

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35 Against this, Ann Lee's evidence is that during the telephone conversation between Tan and her on the 12 or 13 February, she had told Tan that the plaintiffs had had the timber seized at Sin Nam Huat Sawmill. Tan said to her "At least you have some timber to seize", implying that in his case although Annho owed him money he had been left with no recourse. Ann Lee struck me as an honest witness, and I accept what she says on this point.

36 It is the plaintiffs' case that it was from the telephone conversation with Ann Lee that Tan found out that the plaintiffs had had timber seized at the Sin Nam Huat Sawmill, and that the claimant then lodged a claim to it. It is part of the plaintiffs' case that if the claimants had indeed bought the timber from Annho as Mr Tan sought to say they had, then Tan would at least have mentioned that fact in the phone conversation, or protested at the seizure to Ann Lee.

37 The claimants never took delivery of the timber. Mr Tan says that on 28 January 1992, the day after he concluded the negotiations with Teo, he went with his lorry driven by his driver Ah Yong to collect the timber at the Sin Nam Huat yard. He was told by someone in the office that there were no workers available to help load the timber. They had all gone back to Malaysia to celebrate the Chinese New Year, which fell on 4 February in that year. On 12 or 13 February, he went again to try to collect, but he was then told that the timber had been seized by the sheriff. The driver of the lorry was not called to give evidence. Neither was anyone from Sin Nam Huat Sawmill. The fact that the goods were left in the Sin Nam Huat yard after the alleged sale from Annho to the claimants raises a presumption against them, which in the circumstances has not been rebutted.

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38 Stephen Teo gave evidence in support of Tan's evidence of the negotiations and conclusion of the agreement to sell the 34 tons of timber to the claimants. He also produced what purported to be a copy of a letter dated 29 January to Sin Nam Huat Sawmill informing them of the sale to the claimants and instructing them to release the goods to the claimants.

39 Mr Teo's evidence I must treat with some caution. From the evidence, it is evident that Annho, through Teo, did not take kindly to the plaintiffs taking legal action against Annho. After the commencement of the suit, the plaintiffs' solicitors demanded the return of the timber as Annho had not paid for it. In answer, Annho, through their solicitors took the position that the timber would not be returned because the plaintiffs had "taken the liberty" to commence legal action against Annho. That was also the reason that Teo gave in the witness box for selling the timber at such a low price to the claimants rather than returning it to the plaintiffs towards settlement of the plaintiffs' claim for the purchase price.

40 I am satisfied that Teo was going out of his way to make it difficult for the plaintiffs to recover anything. The disposal of the 34 tons of the dark red meranti was one manifestation of this intention.

41 Furthermore, as a witness, Teo was less than satisfactory. In an apparent attempt to forestall any suggestion that he was attempting to defeat an execution by the plaintiffs, he went to the extent of saying that he did not know that a judgment creditor could enforce a judgment by seizing the debtor's goods. He is a 45-year old man having had a great deal of experience in the business world, including experience as the regional controller for Fisons, a leading pharmaceutical firm. I think on the whole that his animosity towards the

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plaintiffs and the lack of candour on his part have affected his credibility as a witness for the claimants.

42 I do not think that Kim Soon Huat the claimants have discharged the burden of proving that there was a bona fide sale of the timber to them in return for the reduction of the debt outstanding between them and Annho, the purported invoice notwithstanding.

43 Tan Swee Heng's claim: Interpleader Summons No. 2 The subject matter of the claim is certain items of office equipment of Annho's in their offices in Carlton Building. It consists of photocopiers, typewriters, computers and furniture. Mr Tan Swee Heng, the proprietor of the claimants, said that he had sold timber to Annho on 20 November 1990 for a price of $25,105.54. Annho paid $15,000 on 4 January 1991, leaving a balance of $10,105.54. In late December 1991, Stephen Teo approached him with an offer to sell some office equipment to him to offset the outstanding debt. Annho's estimate of the price of the equipment was $27,923.50, but Teo agreed to a discount of 70% because the equipment was old. He said the negotiations were concluded on 29 January 1992. That was two days after Chan J partially confirmed the judgement for the plaintiffs.

44 A document purporting to be an invoice dated 29 January 1992 was produced to support the alleged sale. Tan says that he was not able to collect the equipment at that time because it was near the festive season and his employees had gone on leave; he also had difficulty arranging transport.

45 This is not the only property belonging to Annho which Tan Swee Heng has tried to claim. Tan is the proprietor of Ceetee Bundling Yard. It was known to the plaintiffs that about 65 tons of the timber which they had sold to Annho

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was lying in the yard. On 10 February, the sheriff, accompanied by Shaun Lee (Ann Lee's brother and a director of the plaintiffs) and three others, went to the yard to seize that lot of timber. According to Shaun Lee, whose evidence withstood some fairly rigorous cross- examination by counsel for Tan, when the party arrived at the yard, Tan told them that there was no timber belonging to Annho in the yard. Shaun did not believe him, and went around the yard to look. He found some timber stencilled with the name "Annho" under the shed. Tan was very surprised and said at once that the timber belonged to him; it had all been sold to him. He was asked to produce documentary proof. He said he had to get it from Stephen Teo. He then rang Stephen Teo. Within a few minutes, a fax came from Teo. Contrary to what he had expected, instead of an invoice addressed to Tan Swee Heng Timber Trading, it was an invoice addressed to Aeonic (the claimants in I P No 2). Tan was visibly stunned, and reluctantly gave the fax to Shaun Lee. On seeing that there was no documentary proof that the timber had been bought by Tan, the sheriff and his party proceeded to seize the timber. This lot of the timber is the subject of the claim by Aeonic below.

46 To return to the subject matter of the claim by Tan Swee Heng, the sheriff's party went to the offices of Annho at Carlton Building after they finished with the seizure proceedings at the Ceetee Bundling Yard. They had some difficulty getting in. When they finally were allowed in, Stephen Teo told them that all the office equipment had been sold to Tan, and that Tan was coming to collect it on that day. The sheriff nevertheless proceeded to seize the equipment.

47 The evidence suggests that Teo might have discussed the possibility of disposing of the timber to Tan, but unknown to Tan, Teo had changed his mind and at some point decided to substitute Aeonic as the "purchaser". As a consolation prize, Teo decided to give Tan the office equipment instead. There

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was a breakdown in communication, and the manoeuvres were not as well co-ordinated as they might have been. Hence the confusion when the sheriff called at the Ceetee yard. The conduct of Tan in trying to conceal the presence of the Annho timber on his yard does not speak well of his credibility. I do not think there was a genuine sale of the office equipment to him. I do not attach any weight to the alleged invoice purporting to show a sale of the equipment on 29 January 1992. I think Tan's claim to the office equipment fails.

48 Aeonic's claim :Interpleader Summons No 3 As stated above, Aeonic's claim is to some 65 tons of timber seized by the sheriff at Ceetee Bundling Yard.

49 Aeonic was closely related to Annho. It owned 85,000 out of a total of 110,000 shares in Annho. Aeonic was almost wholly owned by Mr Ng Liang Kwong, who gave evidence in support of Aeonic's claim. He said that although closely related, Aeonic and Annho had had a trading relationship with each other for more than l0 years. It had been the practice for the two companies to offset their accounts with each other. In support of this, a list of nine invoices the subject of such practice was produced, including one dated 23 January 1992 purporting to show the sale of the 65 tons of timber from Annho to Aeonic.

50 Mr Ng said that the goods were supposed to have been delivered to Aeonic on 28 January. He said that it was the intention that the goods would be taken to Aeonic's warehouse. However, when Aeonic's representative Mr Koh went to collect, he discovered that some of the timber was loose and not tied up properly, and because it was very close to the Chinese New Year there were no workers available to bundle up the timber. No evidence apart from his own words was produced to substantiate these alleged difficulties.

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51 Mr Ng said that in August 1991, Aeonic had given advances totalling $20,000 to Annho. It was common practice for one timber trader to advance to another against timber to be supplied. In this instance, however, no specific order for timber had been placed. About a month and a half before the sheriff seized the goods, Ng found out from Teo that Annho had stock, and he insisted that Teo should give him the 65 tons of timber to offset the outstanding debt owed by Annho to Aeonic. He asked Teo to name a reasonable price. The price of $500 was agreed. He said that as the timber had lain in the yard for over a year, he had to make allowance for deterioration. He however did not inspect the timber.

52 As to the financial position of Annho, Mr Ng insisted that he knew nothing about its difficulties. He left Stephen Teo to run Annho on his own. He did not like to ask too many questions and risk offending Teo. He did not know about the suit by the plaintiffs against Annho. He even said he came to know of Annho's financial difficulties from people in the market.

53 I hesitate long before accepting Ng's evidence. I find it inherently incredible that as a person with a major stake in Annho through Aeonic he should have been so indifferent to and so ignorant of the state of Annho's financial health. This is as good a measure of this witness's credit as any other. Add to this the strange occurrences at the Ceetee yard on the sheriff's visit which I have mentioned earlier, and the closeness of the relationship between Annho and Aeonic one cannot help but have the gravest reservations about Aeonic's claim.

54 In the result, all three claims are dismissed with costs. Plaintiffs' counsel, I regret to say, has raised legal issues which have no bearing on the case and

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have not assisted the court on the principles that are really applicable. The plaintiffs shall have three quarters of the costs, not the full.

Warren Khoo L H J

Thomas Lei for the plaintiffs
Annho Pte Ltd (not represented)
S K Kumar for Claimant No 1
Chen Chuen Tat for Claimant No 2
Henry Lim for Claimant No 3

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