

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

GROUND 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

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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 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 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 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 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 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 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.

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 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.

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.

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 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 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 Aeonix as the "purchaser". As a consolation prize, Teo decided to

give Tan the office equipment instead. There 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 10 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.

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 Aeonix. 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 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
