IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1995] SGCA 34

CA 120/1994

Between

Caterpillar Far East Ltd

… *Appellant*

And

Cel Tractors Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Civil Procedure — Pleadings; Tort — Conversion; Tort — Conversion

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Caterpillar Far East Ltd v Cel Tractors Pte Ltd

[1995] SGCA 34

CA 120/1994
Goh Joon Seng J; Karthigesu JA; L P Thean JA
27 March 1995

1 Cur Adv Vult

2 This is an appeal against the decision of the High Court dismissing the appellants` claim for conversion by the respondents of certain Caterpillar spare parts belonging to the appellants. The facts that gave rise to the appeal are briefly set out below.

3 The facts

4 In 1983, two security guards employed by the appellants at their warehouse namely, Mohammad Taz Khan (`Mohammad`) and Ramachandra s/o Ahinoo (`Ramachandran`), conspired to steal some Caterpillar spare parts from the warehouse. To dispose of the spare parts to third parties at a profit, they sought the help of one Doris Liauw (`Doris`) to find potential buyers. She introduced her then husband one Ng Kin Sai (`Ng`) to Mohammad and Ramachandran as someone with experience in the sale and disposal of spare parts. The trio, Mohammad, Ramachandran and Ng then devised the plan. On the nights when both Mohammad and Ramachandran were on duty, they would steal the spare parts from the warehouse and in the mornings, Ng using a rented

vehicle would collect the stolen parts at a point just outside the warehouse. Having collected the parts, it was Ng`s responsibility to find a suitable buyer for the stolen goods. In the meantime, Ng had been looking for a buyer for these spare parts. He found the respondents in the ***Yellow Pages*** of the telephone directory and contacted the respondents` sales director, Jimmy Lim Chee Teck (`Lim`). Representing himself to be the director of a company called Unibone Enterprises (`Unibone`), Ng said that he had Caterpillar spare parts for sale at competitive prices. This was followed by a visit to the respondents` office and some telephone conversations between them. Finally, Lim was persuaded to place an order by choosing an item from a list produced by Ng. The item was first offered to Lim at a discount of 30%. After some negotiation, a further reduction of 55% was given to the respondents. The result was that the respondents paid 31% of the then consumer list price of the part concerned.

5 Subsequently, the respondents bought more stolen Caterpillar spare parts from Ng at similarly reduced prices. The transactions were conducted thus. Each time, Lim would write down on foolscap paper a list of spare parts he wished to purchase, hand a copy of the list to Ng and retain one for his own reference. Mohammad and Ramachandran would steal as many of the parts contained in the list as were available from the warehouse. In the early hours of the morning, Ng would arrive at the warehouse as arranged and collect them. These were then usually delivered to Lim between 7.30am to 8am the same morning. On receiving the goods, Lim would pay Ng by means of a cash cheque or by cash. In return, an official invoice from Unibone would be issued to Lim. There were ten separate transactions evidenced by invoices and payment vouchers. According to the documents, Lim paid to Ng a total of $181,000.

6 In October 1983, the appellants discovered the pilferage and reported the matter to the police. This led to the arrests and convictions of Mohammad,

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Ramachandran, Ng and Doris for theft of the Caterpillar spare parts. On 31 July 1986, the appellants commenced an action against the respondents for conversion of the stolen goods which the appellants valued at $500,000. The action was heard before the learned Chief Justice in the High Court. There was really no dispute that the spare parts acquired by the respondents from Ng were goods stolen from the warehouse of the appellants and prima facie the respondents had not acquired any title to the goods: ***nemo dat quod non habet*** . However, the respondents in resisting the claim raised the defence that they purchased the goods in market overt in good faith and without any notice of any defect in the title of the goods. This defence featured in the arguments of counsel before the learned Chief Justice, although it was not raised in their pleadings.

7 **The decision of the High Court**

8 In a reserved judgment, reported in [1994] 2 SLR 702 , the learned Chief Justice dismissed the claim of the appellants. He considered the common law rule of sale in market overt, which is now encapsulated in s 22(1) of the English Sale of Goods Act 1979. He held that this rule in the form as developed in England was inapplicable in the Singapore context, but the principles underlying the rule were germane to the circumstances of the case before him and were applicable. Reverting to the facts before him, he found first, that in Singapore there existed a regular and open market in Caterpillar spare parts, and secondly, that the respondents acted in good faith and without notice of the defect in title in the goods when they purchased them. On that basis, he held that the respondents had obtained good title to the Caterpillar spare parts, and therefore the appellants were unable to maintain the action for conversion. The appellants` claim therefore failed.

9 **The appeal**

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10 Before us, the appellants raised three grounds of appeal. First, they argued that the defence of market overt was not specifically pleaded by the respondents and hence it was not open to them to raise this defence and it was wrong for the court to decide this issue. Secondly, the appellants contended that the rule of sale in market overt is not applicable to the present case or to Singapore on the ground that there is no such thing as a market overt in Singapore similar to markets dedicated as such in England. Thirdly, the appellants challenged the learned Chief Justice`s finding that the respondents acted in good faith when they purchased the stolen spare parts from Ng.

11 On the first ground, we think it is too late in the day for the appellants to argue that the defence of market overt has not been pleaded and it was not open to the respondents to raise it and therefore the court below should not have decided it. The defence was raised and was fully argued below by counsel for both sides. It was on the basis of their arguments that the learned Chief Justice gave his decision. We are not disposed to decide this appeal purely on the procedural point that this defence was not specifically pleaded.

12 **Section 5 of the Civil Law Act**

13 We now turn to the second contention mounted on behalf of the appellants, namely, that the rule of sale in market overt has no application in Singapore. It is common ground that by virtue of s 5 of the Civil Law Act (Cap 43, 1988 Ed), the provisions of the Sale of Goods Act 1979 of the United Kingdom apply in this case. Section 5 has been repealed by the Application of English Law Act (Cap 7A, 1994 Ed) which came into effect on 12 November 1993. However, s 6(2) of the later Act provides:

> *In respect of any proceedings instituted or any cause of action accruing before 12th November 1993, section 5 of the Civil Law*

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> *Act shall continue to apply as if it had not been repealed by this Act.*

14 As the cause of action in this case accrued and the proceedings were instituted before 12 November 1993, s 5 of the Civil Law Act continues to apply in the determination of the issue before us. It would be helpful at this stage to set out the well known provision of s 5 of the Civil Law Act, so far as material, which is as follows:

> *(1) Subject to this section, in all questions or issues which arise or which have to be decided in Singapore ... with respect to mercantile law generally, the law with respect to those matters to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England ...*
>
> ...
>
> (3) For the purposes of this section -
>
> (a) the law of England which is to be administered by virtue of subsection (1) shall be subject to such modifications and adaptations as the circumstances of Singapore may require; ...

15 In terms of s 5, the issue before us is clearly with respect to mercantile law generally and the law as would be administered in England in the like case at this date is undoubtedly the Sale of Goods Act 1979 and, in particular, ss 21(1) and 22(1) thereof. This position was accepted by both parties. Both these provisions embody rules or principles of common law. Section 21(1) provides:

> *Subject to this Act, where goods are sold by a person who is not their owner and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller`s authority to sell.*

16 This, in essence, is the principle of ***nemo dat quod non habet*** . Section 22(1), on the other hand, is an exception to that principle: it is the rule of sale in market overt. It provides:

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> *Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.*

17 In applying the law `as would be administered in England in the like case`, regard must be had to s 5(3) of the Civil Law Act and such law will have to be `subject to such modifications and adaptations as the circumstances of Singapore may require`. As we have said, s 21(1) of the Sale of Goods Act embodies the common law principle of ***nemo dat quod non habet*** , and, as far as we can see its application in Singapore does not call for or require any modification or adaptation. However, it is in relation to s 22(1) of the Sale of Goods Act that such a question arises.

18 **Market overt**

19 The rule of sale in market overt is one of great antiquity. It dates back to the sixteenth century: . In , Lord Denning MR gave a historical account of this doctrine. His Lordship said, at p 559:

> *... we have to go back to the works of Sir Edward Coke. In 1596 there was an important case about market overt:* ***Market-Overt Case*** *(1596) 5 Co Rep 83b. Coke reported it. He afterwards expounded the law of market overt in* ***Coke`s Second Institutes****,* ***v****ol 2, pp 713, 714. He first stated the rule of the common law which was, he said:*
>
> *`... that all sales and contracts of any thing vendible in faires or markets overt, should not be good only between the parties, but should bind those that right had thereunto. But this rule hath many exceptions.`*
>
> *Coke then set out 12 exceptions. The only one material for our purpose is no 11, which says:*
>
> *`The sale must not be in the night, but between the rising of the sun, and the going down of the same: for he that hath a fair or market, either by grant or prescription, hath power to hold it per unum diem, seu dous, vel tres dies, etc, where (dies) is taken for dies solaris; for if it should be taken for dies naturalis, then might*

> *the sale be made at midnight. And yet the sale that is made in the night is good between the parties, but not to bind a stranger that right hath.`*

20 His Lordship later continued, at pp 559-560:

> *... in the* ***Market-Overt Case****, 5 Co Rep 83b, the judges laid emphasis on the need for the goods to be openly on sale in a* ***place*** *where those who stand or pass by can see them. Thus, when a thief stole a silver basin and ewer belonging to the Bishop of Worcester and they afterwards appeared on sale in a scrivener`s shop in London, the purchaser got no title: because people go to a scrivener`s shop for pen and paper, not for gold or silver plate. Sir Edward Coke said, 5 Co Rep 83b:*
>
> *`But if the sale had been openly in a goldsmith`s shop in London,* ***so that anyone who stood or passed by the shop might see it****, there it would change the property. But, if the sale be in the shop of a goldsmith, either behind a hanging, or behind a cupboard upon which his plate stands,* ***so that one that stood or passed by the shop could not see it****, it would not change the property: so, if the sale be not in the shop, but in the warehouse, or other place of the house, it would not change the property, for that is not in market-overt, and* ***none would search there for his goods****.`*
>
> *If such be the requirement as to* ***place****, a similar requirement may be expected as to* ***time****. The goods should be openly on sale at a* ***time*** *when those who stand or pass by can see them. Thus it must be in the day-time when all can see what is for sale: and not in the night-time when no one can be sure what is going on. And if in the day-time, what better test can you have than between sunrise and sunset? No half-light then, but full daylight.*

21 A similar account was given by Scarman LJ at p 562.

22 The rule discussed above applies only to a sale made in a market overt. Every shop in the City of London is a market overt `for such things only which by the trade of the owner are put there for sale`. Outside the City of London, the rule applies to any `open, public, and legally constituted market`. To be `legally constituted`, the market must be one that has been created either by statute or charter, or established by long continual use. Moreover, in order to convey a good title to the purchaser, the sale must be conducted according to `the usage

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of the market`. The requirements are, inter alia, that the sale must be made at the place of the market on an ordinary market day during the hours between sunrise and sunset; the goods must be openly displayed for sale and the goods must be of a description which it is in the ordinary course of the seller`s trade to sell, and the whole transaction, that is, the sale and the delivery of the goods, must be begun and completed openly in the market. Thus, in , the sale of a silver basin and ewer stolen from the Bishop of Worcester in a scrivener`s shop in the City of London was held not to be a good sale, as the scrivener`s shop was not the usual place for the sale of such articles. In , there was a sale of some jewellery by a vendor to a jeweller in the City of London in a showroom above the jeweller`s shop where customers were only admitted by special invitation and that was held not to be a sale in market overt on two grounds: first, that the sale was not made in the open area of the shop where the public could have access, and secondly, it was a sale to the shopkeeper and not one by the shopkeeper to his customer. Similarly, in , the sale of a watch by auction held at an auction room on the second floor of a building in the City of London was held not to fall within the rule of a sale in market overt. In , a sale of a pair of Adam candelabra at a stall in a statutory market before sunrise was held not to be one falling within the rule. On the other hand, in , the sale of a motor car by private treaty in a market overt after the motor car had been put up for sale twice by public auction for which there was no bidder in the same market overt was held to be a good sale at market overt. There was evidence in that case that motor cars were sold by private treaty as well as public auction in that market and that the particular sale was conducted in accordance with market usage.

23 The rationale for holding that such sale is valid and capable of passing title to the goods sold is the openness of the transaction. In , Scarman LJ explained the rationale thus, at p 562:

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> *The reason why the law permitted a sale in market overt to confer a good title upon the bona fide purchaser was the openness of the transaction: see the judgment of Scrutton J in [1911] 2 QB 1031, 1040-1045. When shops were scarce, the market was the place, and market day the occasion, for the public to buy and sell. The market was regulated by the franchise-holder. The place, the day, and the hours of business were established under the authority of the franchise and were well known. Thus any person whose goods had been stolen would know where and when the thief was likely to seek to dispose of them, and would have an opportunity of finding and recovering them before they were sold in the open market. , ol II, p 449, describes the ancient safeguards for the true owner (including in Saxon times `the presence of credible witnesses`) and at p 450 of his , ol II, says:*
>
> *`By which wise regulations the common law has secured the right of the proprietor in personal chattels from being divested, so far as was consistent with that other necessary policy, that purchasers, bona fide, in a fair, open, and regular manner, should not afterwards put to difficulties by reason of the previous knavery of the seller.`*

24 The crucial question here is whether such a rule of sale in market overt is applicable to Singapore. It is true that in two cases before the High Court, it was said rather summarily that sales in question were not made in market overt. In decided in 1985 (unreported), LP Thean J (as he then was) said:

> *The defendants contended that the purchase of the tea was made in a market overt according to usage and therefore they had acquired a good title thereto. That clearly was not so and on the materials before me I find that the defendants had no basis for such a contention.*

25 Similarly in [1989] 2 MLJ 200 at p 202, Lai Kew Chai J said:

> *In my judgment, the plaintiffs have successfully shown that the defendants were not acting in good faith and without notice that the sale to them was made without the owner`s authority. They were buying at about half the market price and I find the evidence of Lim You Chong about his knowledge of the market price very unsatisfactory. He was obviously not keeping to the truth. I am sure he knew he was getting the rice on the cheap, that the circumstances were highly suspicious and I think he took a calculated risk, hoping to make an unusual amount of profit within a very short time. I am satisfied that the defendants did not buy from the market overt.*

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26 Thus, it can be said that it was implied in these cases that the rule of sale in market overt is applicable to Singapore. In both cases, however, the question whether the rule of sale in market overt has any application in Singapore was never addressed.

27 In contrast, in decided in 1988 (also unreported), Chan Sek Keong J made a summary pronouncement that there had been never and there was not then any market overt in Singapore. In refuting an argument that the sale in question took place at a market overt, he said:

> *In connection with the issue of title, I should, at this juncture, deal with the related argument of counsel for the second defendants that her clients have obtained a good title to the said goods by reason of their having bought them in market overt in good faith and without notice of the first defendants` lack of title thereto. This argument was made on the assumption that the law of Singapore applied to the sale. The short answer to the argument is that there has never been and there is not now any market overt in Singapore.*

28 The learned judge, however, did not go further to set out the basis on which he arrived at this conclusion; nor was any argument canvassed before him on the question whether the rule of sale in market overt has any application in Singapore.

29 The essence of this rule is steeped in the history and culture of England. It is an ancient rule which is becoming harder to justify in modern times. It seems to us that with the increasing number of shops in England, it is of limited use to innocent purchasers since it is confined to small geographical areas. The idea that the property owners are protected by the openness of transactions in markets is also becoming quite unreal considering the increased mobility of thieves and stolen goods. We do not think that the rule of sale in market overt,

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whether as it exists at common law or as it is encapsulated in s 22(1) of the Sale of Goods Act, is capable of being applied in Singapore.

30 One obvious and fundamental difficulty in the way of applying the rule of market overt in Singapore is the absence of any statute or charter creating any particular market in Singapore. Nor is there in existence any market that has been established by prescription or custom. There was certainly no evidence of such market in this case or in either of the two cases, and . Nor is there a custom by which every shop in a certain geographical area in Singapore, the equivalent of the City of London, is a market overt. It is therefore clear that the rule or doctrine of market overt is totally incapable of application in Singapore. This was recognized by the learned Chief Justice, who said, at p 706:

> *It is plain ... that in order for a sale to constitute a sale in market overt in the City certain conditions must be fulfilled. Equally plain is the fact that these conditions were delineated in an era and in circumstances far removed from a contemporary Singapore. It would scarcely be desirable or necessary, therefore, to import wholesale into the Singaporean context the rule of market overt as it has evolved within the English legal system, lest we become entangled with the specific characteristics of markets overt in England, which derive from circumstances alien to us.*

31 We respectfully agree with him entirely.

32 However, the learned Chief Justice having decided that it would not be desirable or necessary `to import wholesale into the Singapore context the rule of market overt` held that the principles underlying the rule of market overt are capable of application in Singapore. He said, at p 706:

> *... it appears to me that the principles underlying the rule of market overt are germane to the circumstances of the present case. The defence of market overt was made available in England simply because of the need to give recognition to the fact that any established and regular market in goods is a living entity, in which the sheer volume of trading transactions in everyday practice not only makes it impossible to afford complete*

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> *protection to ownership in goods when possession is lost, but also makes it necessary to accord protection to an innocent buyer of goods in the market. Commerce has tended to proceed to a not inconsiderable degree on the assumption that a man in possession of goods and disposing of them in the way of his business is entitled to do so.*

33 He then referred to a passage from ***Coke`s Second Institute*** , Vol 2, p 713 and continued, at pp 706-707:

> *In a very real sense, these principles are not unique to the English context although, as the English example has shown, the precise scope of their operation in any particular place may well be constrained by local conditions and habits. The applicability of the principles to trading in goods in Singapore was indirectly recognized by Lai Kew Chai J in when he said, in passing, at p 102F: `I am satisfied that the defendants did not buy from the market overt`. For over a century Singapore has thrived as a free port and busy trading centre for all kinds of goods within the region, a fact of which judicial notice can be taken. Merchants and traders compete freely with each other to purchase goods from the cheapest sources, and resell them on the market at the most competitive prices. We would materially hamper the transactions of the many established markets existing in Singapore if we refuse to concede the crucial relevance of the principles underlying the market overt rule.*

34 Reverting to the facts, the learned Chief Justice found that in Singapore there existed a regular and open market in Caterpillar spare parts. He said, at p 707:

> *The existence in Singapore of a regular and open market in such parts is thus obvious from the above evidence, as are the quantity and variety of transactions being conducted in this market. It is clear that great public inconvenience and confusion would result if the rationale of the market overt rule could not operate. Of course, the relative facility of transfer of property in goods may in various instances make a `loser` of the original owner of goods which are converted, but such an `evil` (if indeed one can even call it that) is counterbalanced by the general practical virtues of a system that facilitates the passing of property in goods. It should also be pointed out that in the majority of cases, the original owner of the goods is covered by insurance, whereas it may be difficult for the innocent purchaser*

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> *to enforce his remedy (and even if he is able to do so, it will be expensive).*

35 It is quite evident that the learned Chief Justice has adopted the underlying principles of the rule of market overt and adapted and applied them to trading of goods which are conducted on substantial scales in Singapore, freed from all the restrictions which hedged around a sale in market overt in England. In particular, he has, in effect, treated the whole of Singapore as a `market overt` for the Caterpillar spare parts. With the utmost respect, we have two difficulties in the way of accepting such an extensive and wide rule as propounded. First, the operation of such a rule hinges on the question whether or not there is a `regular and open market` for a particular type of goods in question and is not dependent on a particular geographical area or locality where such goods are normally sold, and the answer to such question in turn depends on a finding of fact made by the court. Hence, with reference to any particular type of goods, it would not be possible for anyone who deals in those goods to know with certainty whether or not there is a `regular and open market` for those goods until it is found and determined to be so by the court. In our opinion, the operation of such a rule would create uncertainty in trade and commerce.

36 Secondly, the rule of sale in market overt is an exception to the principle of ***nemo dat quod non habet*** and any exception made to the rule of ***nemo dat*** principle should strike a balance between the two competing interests: the interest of the owner of the property and that of an innocent purchaser. The rule as propounded by the learned Chief Justice would tilt the balance far too much in favour of the innocent purchaser and would effectively erode almost completely the principle of ***nemo dat quod non habet*** .

37 Much as we accept that the purpose or object of the rule of sale in market overt is to encourage the growth of markets, keep them well replenished with

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goods and protect commercial transactions, it also protects the interests of the property owners. The fundamental principle underlying such a rule is the openness of the market where the goods in question are sold openly in shops that normally sell such goods at normal sale hours between sunrise and sunset. In that connection, various restrictions have developed circumscribing such rule which render it of very limited application. These restrictions serve an important function of protecting property rights of owners. For instance, a person who has his goods stolen may go to his local market to trace the goods. The openness of the conduct of the transaction, the time and the place of the transaction are all important factors which would help to give the owner a sporting chance of recovering his goods.

38 In conclusion, for the reasons we have given, the rule of market overt as developed at common law and now encapsulated in s 22(1) of the Sale of Goods Act has no application in Singapore. Nor, with respect, do we find applicable the principles underlying such rule as propounded by the learned Chief Justice.

39 Having dealt with the crux of the appellants` appeal, we find it unnecessary to address the third contention raised by the appellant, namely, that the respondents did not purchase the Caterpillar spare parts bona fide and without notice of any defect of title.

40 **The respondents` case**

41 We now turn to the issues raised by the respondents. Pursuant to O 57 r 9A(5), the respondents raised in their case the following additional grounds on which the decision of the learned Chief Justice should be varied or affirmed. They contended that the claim of conversion was not pleaded specifically by the appellants, that the appellants had not proved their claim of conversion and

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finally, that the damages of $500,000 as claimed have not been sufficiently proved.

42 On the matter of pleading, the respondents` argument has no merit. The appellants had pleaded sufficiently conversion as shown in para 4 of their statement of claim which averred as follows:

> *All the said stolen Caterpillar spare parts of the said value of $500,000 were sold and delivered by ... to the defendants during the said period from January 1983 to September 1983. The defendants then being in possession of the said stolen Caterpillar spare parts have sold, pledged, delivered and/or otherwise dealt with or disposed of the said Caterpillar spare parts to a person or persons unknown without the plaintiffs` consent express or implied, whereby the plaintiffs have suffered loss and damages.*

43 This paragraph clearly stated the essential elements of the cause of action for conversion.

44 Next, the respondents submitted that the appellants have not proved their claim of conversion. This is plainly unsustainable on the evidence. Lim said in evidence that they resold to third parties some of the spare parts bought from Ng. The remainder was mixed with their own stocks in their warehouse. The taking into possession of the spare parts, and the mixing and selling them were, in our view, acts which constituted dealings with the goods in a manner inconsistent with the appellants` rights of ownership. We find that the conversion has been proved.

45 We now turn to the question of the quantum of damages. The appellants had claimed damages in the region of $500,000. However, the respondents objected to this figure as it was a mere estimate and damages have not been proved. In our opinion, this argument does not change the outcome of the question of liability. The respondents are liable to the appellants on the claim of

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conversion, and as there was no assessment of damages below, such damages should be assessed by the registrar.

46 **Conclusion**

47 In the premises, we allow the appeal, set aside the order made below, and order that interlocutory judgment be entered for the appellants with damages to be assessed by the Registrar. The appellants will have the costs here and below, but the costs of assessment will be reserved for the Registrar. There will be the usual consequential order for repayment to the appellants the deposit in court as security.

48 ***Appeal allowed*** .

Goh Joon Seng J
Karthigesu JA
L P Thean JA

P Selvadurai and Lok Vi Ming (Rodyk & Davidson) for the appellants
Nathan Issac (Nathan Isaac & Co) for the respondents

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