IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1996] SGHC 287

DCA 19/1996

Between

Pars Carpet Gallery Pte Ltd

… *Appellant*

And

Marina Centre Holdings Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Contract — Contractual terms — Exclusion clauses

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Pars Carpet Gallery Pte Ltd v Marina Centre Holdings Pte Ltd

[1996] SGHC 287

DCA 19/1996
Warren Khoo L H J
12 December 1996

1 The plaintiffs are a company dealing in ornamental carpets and rugs. The defendants are the owners of the Marina Square development at Raffles Boulevard. Under a tenancy agreement, the plaintiffs leased from the defendants a shop unit on the third level of the shopping centre, which is part of the development, for a period of three years commencing on 1 March 1991, for use by the plaintiffs as an office and showroom for the display of their goods.

2 On the morning of 17 April 1992, which was a public holiday (Good Friday), an accident happened, in which water came through the false ceiling above the plaintiffs` shop and damaged a substantial portion of the plaintiffs` stock of carpets and rugs. It was subsequently established that the water which damaged the plaintiffs` stocks was pressurised chilled water from a pipe forming part of the air-conditioning system of the complex under the control of the defendants. The pipe was suspended from the concrete slab within the ceiling void above the plaintiffs` shop. The metal rods holding the pipe had given way, and the pipe sagged. The resultant stress caused a joint of the pipe to be dislodged, allowing the pressurised water to escape.

3 In a suit brought in the plaintiffs` name (I understand by insurers by subrogation) claiming damages for the loss sustained by the plaintiffs, the learned district judge Miss Jasvender Kaur found that the escape of the pressurised water was due to the negligence of the defendants. However, her honour held that cl 36.1(b) of the tenancy agreement exempted the defendants from liability for their negligence, and she accordingly dismissed the plaintiffs` claim.

4 There is no appeal against the finding of negligence. The sole question before me on this appeal is whether the learned district judge was correct in holding that cl 36.1(b) of the tenancy agreement applied so to exempt the defendants from liability for their negligence. The arguments centre around the application of the `tests` enunciated by Lord Morton in ***Canada Steamship Lines v R*** [1952] 1 All ER 305 at p 310 for the interpretation of exemption clauses in contracts. Citing the principles enunciated by Lord Greene MR in ***Alderslade v Hendon Laundry Ltd*** [1945] 1 All ER 244, Lord Morton proposed as follows:

> *(i) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called the proferens) from the consequence of the negligence of his own servants, effect must be given to that provision (ii) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens (iii) If the words used are wide enough for the above purpose, the court must then consider whether `the head of damage may be based on some ground other than that of negligence` The `other ground` must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it, but, subject to this qualification, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are, prima facie, wide enough to cover negligence on the part of his servants.*

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5 The assumption of the law is that a party to a contract is not to be taken as having exempted himself from liability for his own negligence unless he uses express language to that effect. If he does not use express language, but uses language which is capable of being construed as having such an effect as well as having the effect of exempting him from some other species of liability, then the court will lean in favour of construing the language as having the latter effect. As explained by Lord Greene in the ***Alderslade*** case, the reason for this is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms, and in the absence of such clear terms, the clause is to be construed as relating to a different kind of liability than that based on his negligence.

6 As has repeatedly been pointed out, the `tests` in the ***Canada Steamship*** case are merely guidelines for a restrictive interpretation of exemption and indemnity clauses. They do not form a rule of law. Furthermore, the court will not construe such a clause as capable of covering a head of liability other than the negligence of the proferens if it would be fanciful to do so. In ***Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd*** [1973] QB 400 at p 415; [1973] All ER 193 at p 199, Lord Denning MR said that the correct position is simply this: even though the words of a clause are wide enough in their ordinary meaning to exclude liability for negligence, nevertheless if it is apparent that sufficient content can be given to them without doing so, then they will be given that content only; they will not be held to cover negligence.

7 **The case at hand**

8 In the instant case, cl 36.1(b) is part of a whole series of provisions in the tenancy agreement whereby the defendants seek generally to modify in the defendants` favour their rights and obligations as the landlords under the

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common law. These provisions may conveniently be put in three categories: exemption, insurance, and indemnity. Clause 36.1 is in the nature of an exemption clause. It provides as follows:

> *It is hereby agreed between the landlord and the tenant that the landlord and its officers, servants, employees or agents shall not be liable or in any way responsible:*
>
> (a) for any damage to property (whether belonging to the tenant or to others) entrusted to the landlord`s officers, servants, employees or agents in the shopping centre or Marina Square;
>
> (b) for any injury or damage to persons or property or any consequential loss resulting from short circuit of electrical wiring, explosion, falling plaster, steam, gas, electricity, water sprinkler, rain plumbing or other pipe and sewerage system, leaks from any part of the shopping centre or Marina Square, the roof, street, sub-surface or any other place, dampness, or any appurtenances being out of repair unless caused by the wilful misconduct of the Landlord or its officers, servants, employees or agents;
>
> (c) for any damage caused by other tenants or persons in the shopping centre or Marina Square or by buildings or other operations in the neighbourhood;
>
> (d) to pay compensation to the tenant nor shall the rent abate for any delay in the supplying, for failure to furnish, or for any limitation, curtailment, rationing, restriction or interruption of service of any water, gas, electricity, telephone, cold air serving the premises, the shopping centre or Marina Square or for interruption of use of any equipment in connection with the supplying of any of the aforesaid services, caused by fire, accident, riot, strike, labour dispute, act of God, the making of any repairs or improvements, or causes beyond the control of the Landlord. The landlord shall use reasonable efforts diligently to remedy any interruption in the supply of such services.
>
> (e) for any loss, damage or injury howsoever caused in the premises, the shopping centre or Marina Square;
>
> (f) for any representations, promises or warranties with respect to the premises, its appurtenances, the shopping centre or Marina Square;
>
> (g) to the tenant or others in respect of any act, omission or negligence of any porter, attendant or other servants or

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> employees of the landlord in or about the performance or purported performance of any duty relating to the provision of the said services or obligations or any of them;
>
> (h) for any diminution or obstruction of the light, air or view by any structure which may be erected on lands within or adjacent to Marina Square.

9 In addition, cl 36.2 and cl 36.3 provide as follows:

> 36.2 The landlord does not expressly or impliedly warrant that the premises at any time during the continuance of the term of this lease shall remain suitable or adequate for all or any of the purposes of the tenant and all warranties (if any) as to suitability and adequateness of the premises implied by law are hereby expressly negated.
>
> 36.3 Notwithstanding anything herein contained, the obligations of the tenant under this lease to pay rent and other sums due or to be due herein and to perform the tenant`s obligations herein, shall in no way be abated, affected, impaired or excused nor shall the landlord be in any way liable for damages to the tenant if the landlord is unable to fulfil any of its obligations under this lease, or to supply or is delayed in supplying any service covenanted for herein or is unable to make, or is delayed in making, any repair, addition, alteration or decoration which it is required to make herein where such delay or inability is caused by circumstances beyond the control of the landlord.

10 The insurance provisions appear in cl 17.1, which provides as follows:

> *The tenant shall at its own cost and expense at all times during the term and for so long thereafter as the tenant shall continue to be in possession of the premises take out and keep in force the insurance policies as follows:*
>
> (a) in the joint names of the landlord and the tenant insurance against all risks and damage to the furniture, plate and tempered glass, fixtures and fittings of the premises and all parts thereof which the tenant is obliged to keep in repair under the provisions of this lease in an amount not less than dollars eight hundred ($800.00) per square metre of the floor area.
>
> (b) in the joint names of the landlord and the tenant comprehensive general liability insurance against claims for

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personal injury, death or property damage or loss arising out of all operations of the tenant on or from the premises in an amount as follows:

(i) not less than dollars three million ($3,000,000) for any one occurrence if the premises are operated as a restaurant; or

(ii) not less than dollars one million ($1,000,000) for any one occurrence if the premises are operated as a shop; or

(iii) such amount as the landlord may specify for any one occurrence if the premises are operated for a purpose other than any of the aforesaid.

(c) in the name of the tenant insurance against all risks and damage in respect of the tenant`s merchandise and stock-in-trade for the replacement value thereof and the tenant agrees and undertakes that upon receipt of any payment under this sub-clause 17.1(c) the tenant will utilise such payment solely for the purpose of restocking the premises with merchandise and stock-in-trade of equivalent value and quality to that for which the insurance moneys were paid.

11 The indemnity provisions are in cl 17.2, which provides as follows:

The tenant shall indemnify and keep indemnified the landlord from and against:

(a) all claims, demands, writs, summonses, action, suits, proceedings, judgments, orders, decrees, damages, costs, losses and expenses of any nature whatsoever which the landlord may suffer or incur in connection with loss of life, personal injury and/or damage to property arising from or out of any occurrence in, upon or at the premises or the use of the premises or any part thereof by the tenant or by any of the tenant`s agents, employees or visitors;

(b) all loss and damage to the premises, its adjoining or neighbouring premises, to Marina Square and to all property therein caused whether directly or indirectly by the tenant or the tenant`s agents, employees or visitors and in particular but without limiting the generality of the foregoing caused whether directly or indirectly by the use or misuse, waste or abuse of water, fire or electricity or faulty fittings or fixtures of the tenant.

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12 In the court below, as indeed in the appeal before me, attention was directed solely to cl 36.1(b) (exemption) and cl 17.1(c) (insurance). In regard to cl 36.1(b), the argument for the defendants is that the dislocation of the chilled water pipe comes within the reference to appurtenances being out of repair and cl 36.1(b) operates to exempt the defendants from liability for the damage and loss resulting from it in the absence of wilful misconduct on the part of the plaintiffs or their servants and agents. The learned district judge, applying the guidelines in the ***Canada Steamship*** case, held that the clause in question satisfied Lord Morton`s first test in that the words used were tantamount to an express exemption for the negligence of the defendants` servants and agents. However, in case this was wrong, the learned district judge considered the second and third propositions of Lord Morton. She said:

> *In other words, if there are two potential grounds of liability, but one involves negligence, prima facie, any words of exemption will be directed at the non-negligent ground of liability. In this case, the other heads of liability are breach of the convenant for quiet enjoyment and breach of the convenant to repair. In my judgment, the qualifying words of the clause cannot be construed as to be limited to these two heads of liability as they do not impose an absolute liability, but require fault on the part of the landlord which has been equated to be `negligence`. Hence, I concluded that the defendants were protected under the said clause from all three heads of liability.*

13 I must explain here that in addition to negligence, the plaintiffs had framed their claim on the basis of the breach by the defendants of the covenant for quiet possession and covenant to repair. This explains the reference by her honour to these matters in her judgment.

14 As for cl 17.1(c) (insurance), the learned district judge held that while the clause by itself did not have the effect of relieving the defendants from liability for negligence, it supported the defendants` contention that the exemption clause was intended to exempt the defendants from liability for their

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own negligence. Her honour took the view that the risk of damage from such negligence had been allocated to the plaintiffs and that that explained the need for the plaintiffs to take out insurance in the manner provided in cl 17.1(c).

15 ***Precedent cases***

16 Provisions of a contract must always be construed in the context of that contract. Caution therefore is called for when referring to cases containing clauses with wording similar to a clause under consideration. With that caveat in mind, however, counsel for the defendants fairly refers me to two cases in which words similar to the concluding words in cl 36.1(b) had come up for interpretation by the courts. In ***Lewis v Great Western Railway Co*** (1877-78) 3 QBD 195, the standard contract of the defendant railway company provided for two rates of carriage: a higher rate where the defendants undertook the ordinary liability of carriers, and a lower rate where they were relieved of all liability except that arising from `the wilful misconduct of their servants.` The plaintiffs delivered cheeses to the defendants for carriage, and opted for carriage on the lower rate. The defendants` servants packed the cheeses in such a manner that they were damaged in transit, but the defendants` servants did not know that damage would result from the mode in which the cheeses were packed. The Act of Parliament under which the railway company operated provided that `nothing herein contained shall be construed to prevent [railway companies] from making such conditions as shall be adjudged by the court to be just and reasonable.` So the case turned on the question whether the condition imposed in the contract of carriage was just and reasonable. It was held that it was just and reasonable for the railway company to stipulate two different rates, depending on whether and the extent to which they would accept liability for loss of or damage to goods in their care.

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17 In ***Graham v Belfast & Northern Railway Co*** [1901] 2 Ir R 13, there was a similar clause as that in the ***Lewis*** case. The issue turned solely on the question whether the defendant railway company`s servants were as a matter of fact guilty of wilful misconduct. It was found by a majority of the Queen`s Bench Division of the Irish High Court on a case stated that they were.

18 It is clear that neither of these cases assists in a resolution of the issue before me; the issues are so different. Of greater assistance perhaps is the more recent English Court of Appeal case of ***Airline Engineering Ltd v Intercon Cattle Meat Ltd*** (Transcript No 18, 1978) (unreported). In this case, under a written agreement entered into between the plaintiffs AEL and the defendants ICM, AEL agreed to carry out regular maintenance of ICM`s turbo-prop aircraft. On 30 July 1977 the aircraft crashed while approaching to land. The probable cause of the crash was found to be an uncovenanted alteration in the pitch of the blades of one of the engine propellers, resulting in the propeller going into a reverse pitch and causing excessive vibration and loss of control of the aircraft.

19 AEL instituted an action against ICM for a sum due under the maintenance contract for services rendered. ICM counterclaimed for damages for negligence and breach of contract in the carrying out by AEL of the maintenance work, and consequential losses. The action came on trial before McCullough J, who found for ICM on their defence and counterclaim, and according gave judgment in ICM`s favour.

20 AEL appealed, and, for present purposes, one of the grounds of appeal concerned the effect of an indemnity clause (cl 6) in the maintenance contract, which read as follows:

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> *ICM undertakes and agrees to indemnify and hold harmless AEL against all actions, claims, proceedings, costs, losses, charges and expenses which AEL and/or ICM may sustain, incur or pay, arising out of or in connection with any of the services provided by AEL, its servants, agents and sub-contractors, unless such claim results from the wilful misconduct of AEL*

21 The second part of the clause provided that:

> *ICM undertakes and agrees that in respect of all actions, claims, proceedings, costs, losses, damages and expenses the subject of the aforesaid indemnity ICM will use its best endeavours to arrange for its underwriters and/or insurers to renounce their rights of recourse against AEL*

22 With obvious reference to the second and third `tests` proposed by Lord Morton in the ***Canada Steamship*** case, the argument in the appeal on this point was whether the words `losses, charges and expenses` in cl 6 referred to, or included, losses, charges and expenses suffered by ICM as a result of the negligence of AEL`s servants or agents, or whether they should be confined to claims made by, or liabilities incurred to, third parties, as well as to losses, charges and expenses occasioned by the negligence of AEL. It was conceded, and no doubt properly so, that the preceding words in cl 6, `actions, claims, proceedings`, were restricted to claims by or liabilities incurred to third parties.

23 Upholding the learned trial judge`s views, Purchas LJ, who delivered the main judgment of the Court of Appeal, held that the words `losses, charges and expenses` indeed referred to losses, charges and expenses incurred by third parties, and that the clause as a whole did not absolve AEL from the negligence of its own servants and agents. His Lordship also rejected the submission that the use of the words in cl 6 exempting AEL from liability except for `the wilful conduct of AEL its servants or agents` satisfied the first test in ***Canada Steamship*** . He rejected the argument that this provision was synonymous with

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a provision exempting liability for negligence, or that it was so by necessary implication.

24 In regard to the second and third `tests` of the ***Canada Steamship*** case, Purchas LJ referred to two neighbouring clauses in the maintenance contract as supporting his view. Clause 5 (the insurance clause) provided as follows:

> *ICM shall be responsible for the insurance at its own cost of all its property and goods, including the aircraft, which may at any time during the period of this agreement be on the premises of AEL.*

25 Clause 7 (the exemption clause) provided as follows:

> *Notwithstanding any provisions to the contrary in this agreement, AEL, its servants and agents, shall be exempt from liability due to, or arising from, any failure, whether total or partial, to perform all or any of the obligations set forth in this agreement arising from (a) labour disputes and (b) force majeure or any other cause or causes beyond the control of AEL, including but without in any way limiting the generality of the foregoing, accidents to or failure of any machinery, plant or parts thereof used in connection with the services provided hereunder by AEL.*

26 In respect of cl 5, Purchas LJ noted that, first, it was not qualified by the words found in cl 6, `arising out of or in connection with any of the services provided by AEL`. Secondly, there was no undertaking, as in cl 6, by ICM to use their best endeavours to prevent their insurers having recourse against AEL. Thirdly, the duty upon ICM to insure against damage to the aircraft and other things whilst on AEL premises did not extend to damage caused by AEL`s servants or agents. In respect of cl 7, his Lordship says: `Again it is not suggested that the words accidents to or failure of any machinery etc used in connection with the services provided would extend to accidents or failures caused by the negligence of the servants or agents of AEL unless, in the case of agents, it was beyond the control of AEL.`

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27 His Lordship therefore rejected the view that the `losses` in cl 6 `necessarily refer, and only refers to losses arising from the negligence of AEL and directly suffered by ICM, and cannot extend to claims by third parties.` His Lordship therefore accepted the submissions made for ICM that cl 6 `on its ordinary and natural meaning, is to be confined to liability for claims against either or both AEL and ICM by third parties, and that therefore AEL fail in any event under the second of the guidelines of Lord Morton.

28 ***Back to the case at hand***

29 The ***AEL*** case is a good illustration of the application of the ***Canada Steamship*** guidelines. Bearing in mind the caveat I entered at the beginning of this section of my judgment, I nevertheless find the approach of Purchas LJ extremely helpful towards a proper resolution of the matter before me. Clause 36.1(b) must be considered in the context of the contract as a whole, particularly the exemption, insurance and indemnity provisions set out above. The provisions were inserted, as I said, to modify the rights and obligations of the defendants under the general law of landlord and tenant in favour of the defendants. This is a good reason to construe cl 36.1(b) contra proferentum. Indeed, as I see it, Lord Morton`s guidelines are perhaps nothing more than an application or elaboration of this sensible rule of construction.

30 Applying the Morton guidelines, and following the approach of Purchas LJ in the ***AEL*** case, I find that cl 36.1(b) does not in terms exempt the defendants from the negligence of their servants and agents; neither does it contain anything synonymous with negligence. It may be noted in this connection that in cl 36.1(g), there is specific reference to the negligence of the servants of the defendants. If the draftsmen had desired to refer to `negligence` expressly, he would have done so. The clause therefore fails the first `test`.

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31 As to the second and third limbs of the Morton guidelines, my view is that although, on the face of it, the clause is sufficiently wide to have the effect of exempting the landlord from the negligence of its servants and agents, sufficient content can be given to it by confining its operation to claims by and liability to third parties arising from the events set out in the clause.

32 As Purchas LJ did in the ***AEL*** case, I ask myself whether the injury, damage and loss referred to in cl 36.1(b) necessarily refer, and only refer, to injury damage and loss arising from the defendants` servants` and agents` negligence and suffered directly by the plaintiffs or whether they are capable of being construed to extend to injury damage and loss sustained by third parties arising from the events stipulated. Reading this provision contra proferentum as I must in the circumstances of this case, I note, firstly, that, unlike the preceding para (a), which uses the words `whether belonging to the tenant or not`, there are no such words in para (b). The avoidance of using these words in para (b) may be regarded as an indicator that the damage to property referred to in para (b) is intended to refer to damage to property of third parties, rather than of the tenant.

33 Secondly, para (b) refers to liability and responsibility for injury to persons. This must mean ordinarily natural persons, rather than juridical ones. In the context of a contract between the landlord and a tenant which is a company, the natural person cannot be the corporate tenant itself; it must be a party other than the corporate tenant. Even a shareholder or an officer or employee of a corporate tenant is a third party vis-a-vis the tenant. The reference to injury to a person in cl 36.1(b) cannot therefore be to the person of the tenant itself, but to a person who is a third party. The reference to damage to property in para (b), being in the same breath as it were, can reasonably be given

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sufficient content if it is construed to mean damage to third parties` property, rather than the property of the tenant itself.

34 ">Thirdly, confining the operation of para 36.1(b) to liability to third parties is consistent with the indemnity provisions of cl 17.2. There, it can be seen clearly that the draftsman has provided that the tenant is to indemnify the landlord against claims, losses and so on arising from personal injury and damage to property arising from any occurrence on the premises. By these two sets of provisions, which are complementary to each other, the draftsman was attempting to shift the liability for third party personal injury and property damage claims and liabilities to the tenant. Reading 36.1(b) as applying to liabilities to third parties is consistent with this scheme.

35 ">In so far as cl 36.1(b) can be read as extending to or covering third party claims for injury damage and loss, whether or not it can also be read as covering injury damage and loss arising from the negligence of the defendants` servants and agents, it should be confined to such third party claims.

36 To borrow the words of Purchas LJ, the clause does not necessarily refer, or only refer, to injury, damage and loss arising from the negligence of the defendants` servants and agents. It should therefore not be construed as exempting the defendants from liability for the negligence of their servants and agents. To borrow the words of Lord Denning MR in the ***Gillespie*** case, sufficient content can be given to cl 36.1(b) by confining its ambit and operation to third party claims and liabilities to third parties.

37 In this connection, it seems to me that the learned district judge did not pose quite the right question when she merely referred to the two heads of liability (other than the defendants` negligence) which had actually been

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asserted, rather than considering generally whether the clause was capable, on its ordinary and natural meaning, of referring to a liability other than that for the defendants` negligence.

38 ***Insurance clause***

39 It is argued for the defendants that the insurance provisions in the tenancy agreement support their contention that cl 36.1(b) allocates to the tenant the risk of the landlord`s liability for its negligence. The two provisions I have to consider in this connection are cl 17.1(b) and (c). It is to be noted that cl 17(b) requires the taking out of general liability insurance in the joint names of the landlord and the tenant against claims for personal injury and property damage arising out of operations of the tenant. It is obvious that it does not require the taking out of insurance against the landlord`s liability for its own negligence.

40 Clause 17.1(c) also does not require the taking out of insurance against damage caused by the negligence of the landlord. Like the insurance provisions in the ***AEL*** case, this clause does not require the insurers of the tenant to give up their right of subrogation. In other words, if any damage has been caused by the negligence of the landlord, the responsibility for that damage remains with the landlord. This detracts from the validity of the argument that the insurance provisions allocate the risk of the landlord`s negligence to the tenant.

41 I therefore do not think that the insurance provisions of the tenancy agreement assist the defendants in their argument that cl 36.1(b) exempts them from liability for the negligence of their own servants and agents. It is not enough in any event for the defendants to say that cl 36.1(b) has such an effect. As indicated above, the defendants have to show that it can refer only to the

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negligence of their own servants and agents and is incapable of referring to other heads of liability than such negligence.

42 For these reasons, I allow this appeal. I make an order (subject to any application to vary by either party, to be made within seven days) that the defendants pay the plaintiffs the sum of $87,678 claimed and interest at the rate of 6% per annum from date of writ, and costs here and below.

43 ***Appeal allowed.***

Warren Khoo L H J

Liew Teck Huat (Niru & Co) for the plaintiffs
Chan Hock Keng (Bih Li & Lee) for the defendants

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