Singapore Journal of Legal Studies
[1994] 150 - 163

APPLICATION OF ENGLISH LAW ACT 1993: SALE OF GOODS AND *NEMO DAT*

I. INTRODUCTION

THE enactment of the Application of English Law Act[1] (the "AEL Act") is a very important step in the development of Singapore law. It represents a marked departure from the approach taken under section 5 of the Civil Law Act.[2]

Many statutes are covered by the AEL Act, but the aim of this legislation comment is more modest. It will focus on two provisions of the UK Sale of Goods Act 1979[3] (the "SGA 1979") relating to the principle of *nemo dat quod non habet* and examine the approach of the AEL Act from this angle. The law in sale contracts before the AEL Act will be discussed in detail to illustrate and provide a background for the evaluation of its approach.

The preamble to the AEL Act[4] describes it as "[a]n Act to declare the extent to which English law is applicable in Singapore and for purposes connected therewith and to make consequential amendments to [several Acts]." The aim of the Act was therefore not to change the law by creating new rules but merely to state the law. However, anyone familiar with Singapore law will realise that the task of declaring the law was a formidable one, given the then existing difficulty in deciding which English statutory provisions applied in Singapore.

Section 5 of the Civil Law Act, which stated the criteria under which English statutory provisions relating to mercantile law were to be continu-

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1 No 35 of 1993. See Republic of Singapore Government Gazette Acts Supplement, November 12 1993.

2 Cap 43, 1988 Rev Ed.

3 1979, c 54.

4 *Supra*, note 1.

ously received in Singapore,[5] was so difficult to apply[6] that even basic English mercantile statutes could not easily be accepted without question. For instance, when the UK Sale of Goods Act first came into force in the UK, the question was raised as to whether it applied in Singapore. Although it had been generally accepted that its predecessor, the Sale of Goods Act 1893,[7] did apply in Singapore in its original form by virtue of section 5 of the Civil Law Act, the position of the 1979 Act was not as clear.[8] The main argument for non-applicability was that the 1979 Act was a consolidating Act and incorporated amendments, insertions and extractions, not all of which clearly applied or should apply in Singapore.[9] Against this was the argument that the non-applicability of certain sections of the Act did not mean that the SGA 1979 should not apply at all in Singapore.[10] In any case, anyone who may have initially held the view that the SGA 1979 did not apply at all in Singapore would have stood corrected when the Singapore courts freely accepted and referred to it in their judgments without so much as question its application.[11]

The AEL Act came into force on 12 November 1993.[12] It repealed section 5 of the Civil Law Act[13] and in its place, specifically lists the English statutes that apply in Singapore. Section 4 of the AEL Act provides that the English enactments specified in the First Schedule apply in Singapore "to the extent

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5 Section 5(1) is well known, but will be set out for reference: "Subject to this section, in all questions or issues which arise or which have to be decided in Singapore with respect to [certain specific branches of commercial law] and with respect to mercantile matters 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, unless in any case other provision is or shall be made by any law having force in Singapore."

6 These have been described and analysed in numerous books and articles. General surveys of this area include Soon Choo Hock and Andrew Phang Boon Leong "Reception of English Commercial Law in Singapore – A Century of Uncertainty" in *The Common Law in Singapore and Malaysia* (Harding ed, 1985), 31, and Walter Woon "The Continuing Reception of English Commercial Law" in *The Singapore Legal System* (Woon ed, 1989), 137.

7 56 & 57 Vict, c 71.

8 See WJM Ricquier, "United Kingdom Sale of Goods Act 1979 and its applicability in Singapore" (1980) 22 Mal LR 145. Ricquier writes, at 146, "Does the new Act apply in Singapore? ... Suffice it to say that the matter is riddled with doubts."

9 The Sale of Goods Act 1893 had been amended by the Misrepresentation Act 1967 (c 7), the Supply of Goods (Implied Terms) Act 1973 (c 13), the Consumer Credit Act 1974 (c 39) and the Unfair Contract Terms Act 1977 (c 50).

10 For a discussion of the various arguments, see generally, Ricquier, note 8, *supra*.

11 The first reported judgement when the SGA 1979 was referred to was the case of *Harrisons & Crosfield (NZ) Ltd* v *Lian Aik Hang* [1987] 2 MLJ 286.

12 This is the date of publication in the *Gazette*. See s 10(b) of the Interpretation Act (Cap 1, 1985 Rev Ed). No particular date was specified for the coming into operation of the Act.

13 See s 6 AEL Act.

specified in the fourth column". The AEL Act confirms that, *inter alia*, the SGA 1979 and another related English statute, the Factors Act 1889[14] are, with some limits, both part of the law of Singapore.[15] Under the AEL Act:

(1) the whole of the SGA 1979 applies except sections 22 and 25(2); and
(2) the whole of the Factors Act 1889 applies except for the amendment to section 9 by the UK Consumer Credit Act 1974.

These sections of the SGA 1979 and the Factors Act 1889 which are excluded from applying in Singapore all relate to exceptions to the *nemo dat* principle.

II. *NEMO DAT* AND ITS EXCEPTIONS

A. *Nemo Dat Non Quod Habet*

Section 21(1) of the SGA 1979, which embodies the *nemo dat non quod habet* principle, states:

> 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....

A person who sells goods without the authority of the owner can only pass whatever title he may have in the relevant goods. If he has no title, no title can pass from him.

It is well-known that the general rule is subject to some exceptions provided for by the SGA 1979 and the Factors Act 1889, under which a non-owner can pass good title. In these cases, the law protects the commercial expectations of the person buying from the non-owner rather than the property rights of the true owner. The underlying reasons for the exceptions vary. They rest variously on custom;[16] on established legal principles such as

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[14] 3 & 53 Vict, c 45.
[15] S 4 and Sch 1 Pt II AEL Act.
[16] *Eg*, s 22(1) SGA 1979.

agency[17] and estoppel;[18] and on the idea of relative fault, usually in the sense that the owner was somehow to blame for the buyer being deceived because he had entrusted possession of his goods to the wrong person.[19]

The discussion that follows will be limited to the *nemo dat* exceptions which are affected by the exclusions made by the AEL Act. These exceptions are sale in market overt under section 22(1) of the SGA 1979, and sale by a buyer in possession under section 25 SGA 1979 and section 9 Factors Act 1889.

B. *Market Overt Exception*

1. *Market overt in England*

Section 22(1) of the SGA 1979 states:

> 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 the title on the part of the seller.

This is an ancient principle, with reported English cases dating back to the sixteenth century. There is no statutory definition of a sale in market overt. By custom, every shop in the City of London[20] is a market overt for such things only which by the trade of the owner are put there for sale.[21] Outside London, market overt refers to any "open, public, and legally constituted market".[22] To be "legally constituted", the market must be one that has been created by statute or charter, or established by long continual user.[23] Under section 22(1) SGA 1979, the sale must be according to the

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17 Under s 21(1) SGA 1979, the buyer will acquire title as long as the seller sells with the authority or consent of the owner. In addition, s 62 SGA 1979 preserves the common law regarding principal and agent.

18 *Eg*, s 21(1) SGA 1979 where the owner is precluded from denying the seller's authority to sell.

19 This is probably partly the rationale for exceptions such as sale by buyer in possession (s 25 SGA 1979 and s 9 Factors Act 1889), sale by seller in possession (s 24 SGA 1979 and s 8 Factors Act 1889) and sale by a mercantile agent (s 2 Factors Act 1889).

20 This is a small area of about 3 square kilometres in the heart of the modern metropolitan London.

21 See, *eg*, *L'Evesque de Worcester's Case* (1594) Moore 360; *Case of Market Overt* (1596) Co Rep 83b. For a detailed account of market overt in the City of London, see JG Pease, "Market Overt in the City of London" (1915) 31 LQR 270.

22 *Lee* v *Bayes* (1856) 18 CB 599.

23 See *Benjamin's Sale of Goods* (4th ed, 1992), para 7-018 and note 38.

usage of the market. According to case law, amongst the necessary requirements are that the sale must be on an ordinary market day and during the usual hours of the market; that the goods must be of a type which it is customary to find in the market and which the vendor is ostensibly offering there; and that the goods must be openly exposed for sale.[24]

One rationale for protecting the bona fide buyer without notice in a market overt could be related to the ancient policy of encouraging the growth of fairs and markets overt which were well stocked with a variety of commodities. This could have been why the common law decided that all sales in fairs and markets overt should be good not only between the parties but should bind others with rights to the goods.[25] The thinking might also have been that the true owner would not have suffered undue hardship under the market overt exception: Where stolen goods found their way to a market overt, the owner could go to those shops or stalls which specialised in the sale of goods similar to his own, and because the goods had to be openly exposed for sale, he would be able to spot them and reclaim them.

The precise scope of and justification for the market overt exception in modern times is unclear. In present-day London, it is not very useful to have a principle confined in its application to the City of London, an area of a mere three square kilometers which no longer has any special proliferation of retail outlets. Additionally, trade all over the country has shifted away from markets to retail shops. New markets have also been established which are not market places constituted by grant or statute. Increased mobility also makes the idea that the true owner can easily locate his goods by going to the local market quite ludicrous. Atiyah writes, "This exception can be explained, but scarcely justified, on historical grounds only, and it may be regretted that the Sale of Goods Act did not abolish it as was at one time proposed."[26]

2. *Market overt in Singapore*

Given the problems of retaining the market overt principle in England, one can well imagine the problems of applying it in Singapore. Already in the UK, it only applies to England and not to Scotland or Wales.[27] The

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[24] For a discussion of the general rules for sale in market overt, see *Benjamin's Sale of Goods*, note 23, *supra*, paras 7-06 to 7-022, *Halsbury's Laws of England* (4th ed, 1979, 1989 repr) Vol 29, paras 624-627, PS Atiyah *The Sale of Goods* (8th ed, 1990), at 368-369, and the cases cited therein.

[25] This was the view of Sir Edward Coke: Co 2 Inst 713, referred to by ERH Ivamy in "Revision of the Sale of Goods Act" (1956) 9 CLP 113.

[26] PS Atiyah, note 24, *supra*, at 368. The rule was also criticised by Ivamy writing in 1956 (note 24, *supra*), and the Law Reform Committee in its Twelfth Report (1966) Cmnd 2958.

[27] See s 22(2) SGA 1979 and s 47 Laws in Wales Act 1542, respectively.

principle is so steeped in the customs and history of England that transplantation to Singapore seems quite senseless and unjustifiable. Additionally, questions arise as to how the conditions necessary for the operation of rule can be satisfied in the Singapore context. In the first place, which Singapore market falls squarely within the requirement that it should be established by statute or charter or long established user? As for the custom in the City of London, even if a local equivalent of the City of London could be found, the requisite custom would probably be lacking.

Under the repealed section 5(3) of the Civil Law Act, the law of England to be administered in Singapore "shall be subject to such modifications and adaptations as the circumstances of Singapore may require". This provision has been seen as one giving judges discretion and flexibility to screen out English statutes unsuited to the circumstances of Singapore.[28] It also has been seen as allowing the adaptation or modification of statutes which have already been received under section 5(1) to the circumstances of Singapore.[29] The exact scope of such adaptation and modification is unclear. But section 5(3) was certainly a possible foundation for the argument that the application of the SGA 1979 in Singapore should be modified or adapted such that the market overt exception in section 22(1) of the SGA 1979 did not apply in Singapore.

However, arguments for non-applicability of the market overt exception have not been discussed in the local courts. One reported local sale of goods case where the *nemo dat* principle was relevant was *Commercial & Savings Bank of Somalia* v *Joo Seng Company*,[30] a decision of Lai Kew Chai J. The question was whether the buyers of a cargo of rice obtained good title although their sellers were non-owners and unauthorised to sell the rice. In discussing whether any of the exceptions to the *nemo dat* principle applied, Lai J said:

> Section 21(1) of the Sale of Goods Act 1979 provides that, subject to the 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 to the goods than the seller had. The exceptions relevant for present purposes are (a) in the case of a sale in market overt as provided under s 22 of the Act; (b) sale by a mercantile agent...; and (c) the doctrine of estoppel....[31]

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[28] See Helena Chan, *An Introduction to the Singapore Legal System* (1986), 16-17.

[29] See Andrew Phang Boon Leong, *The Development of Singapore Law* (1990), 47 and the citations therein.

[30] [1989] 2 MLJ 200.

[31] *Ibid*, at 202.

Later in the judgment, the learned judge decided, without further elaboration, "I am satisfied that the defendants did not buy from the market overt."[32]

Lai J was not saying that the market overt exception to the *nemo dat* rule did not apply in Singapore. He was merely saying that the particular sale in question sale was not in market overt. On the other hand, neither was he expressly stating or deciding that the market overt exception in section 22(1) SGA 1979 was part of the law of Singapore. Nevertheless, from the parts of his judgment quoted above, a reasonable inference could be drawn that he felt the market overt exception could apply in Singapore, in an appropriate case.

3. *Lessons from other jurisdictions*

It is interesting to note the fate of the market overt exception to the *nemo dat* rule in Commonwealth countries such as Australia, New Zealand and Canada. These countries have adopted sale of goods legislation based on the UK model, but the equivalent of the market overt provision in section 22(1) is found in some only of the statutes.[33] Others either omit reference to market overt altogether[34] or state expressly that it does not apply.[35]

Where the statute is silent as to market overt, one might ask whether the doctrine applies in that particular state or province by virtue of the common law. This question has been directly decided in Queensland, Australia. In *Sorley and Stirling* v *Surawski,*[36] the Full Court of Queensland held that since the enactment of the Sale of Goods Act 1896 which omitted any reference to market overt, the principle did not form part of the law of Queensland.

In this respect, the considerations in Singapore are different. Before the AEL Act, there was no need to consider whether the market overt principle was part of our common law. If the rule were to be applicable, it would more logically have been by virtue of the reception of the UK Sale of Goods Act by section 5 of the Civil Law Act rather than the common law. After the AEL Act, there is no possibility of the principle applying, as is discussed below.

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[32] *Ibid.*

[33] Examples are Tasmania in Australia (s 27(1) Sale of Goods Act 1896, 60 Vict No 14) and British Columbia in Canada (s 28 Sale of Goods Act 1960, 9 Eliz 2, c 344). Victoria used to have such a provision in s 28 Goods Act 1958 (No 6265/1958), but this section was repealed by s 34 of the Second-Hand Dealers and Pawnbrokers Act 1989 (No 54/1989).

[34] *Eg*, Queensland in Australia (Sale of Goods Act 1896, 60 Vict No 6) and Alberta in Canada (Sale of Goods Act, c S-2).

[35] *Egs*, New Zealand (s 2 Sale of Goods (Amendment) Act 1961, No 98) and Ontario in Canada (s 23 Sale of Goods Act, RSO 1990 c S1).

[36] [1953] QSR 110.

4. *Effect of the AEL Act*

The difficulty of transplanting the market overt exception to Singapore might have justified excluding the exception under section 5(3) of the Civil Law Act as discussed above. Yet Lai J's judgment in *Commercial and Savings Bank of Somalia* might have presented a conflicting position by throwing some doubt on the non-applicability of the exception in Singapore. On the other hand, if Lai J's judgment was taken to mean that the exception was part of Singapore law, one might have been sceptical whether that was a correct view since it was hard to imagine what would amount to a sale in market overt in the Singapore context. Given this state of affairs, the status of the market overt exception in Singapore was at best uncertain and at worst unjustifiable.

The provisions of the AEL Act resolve the issue. From the express terms of the First Schedule, it is clear that the market overt principle forms no part of the law of Singapore. The provisions of the Act state that the whole of the SGA 1979 applies except for, *inter alia*, section 22. The AEL Act might have been only aiming to state the law as it was. But it could arguably have brought about an abolition of a useless rule. The analysis above shows how hard it was to make a definitive statement on the legal status of the market overt exception. The act of stating the law therefore involved making a choice as to what was the best position to take. This position, once selected, would be taken to to be the correct view, both in the past as well as for the future. In such circumstances, the act of stating the law takes on an importance quite beyond its stated function and approaches the making of law.

C. *Buyer in Possession*

The Schedule to the AEL Act excludes section 25(2) of the SGA 1979 and the amendment to section 9 (by the Consumer Credit Act 1974) of the Factors Act 1889 from applying in Singapore. Both these sections address an exception to the *nemo dat* principle which involves a sale by a buyer in possession of goods. These two sections, although not identical, are in very similar terms. For economy, the following discussion will use only section 25 SGA 1979 for illustrative purposes. As discussed below, the effect of this exclusion on the law is minimal.

1. *Position under SGA 1979*

(a) *Sale by buyer in possession*

Section 25(1) SGA 1979 allows a buyer who is in possession of goods with the consent of the owner to pass good title notwithstanding that he is not the owner of the goods and does not have the owner's authority to sell. The section provides:

> Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

One of the basic requirements which must be emphasised for our purposes is that the non-owner (the first buyer in this case) must be a person who has agreed to buy goods[37] and who is in possession of the goods with the consent of the owner. Using the idea of relative fault discussed above, the rationale for the exception could be that the owner made a poor character judgment when he entrusted his goods to the first buyer. As between the owner and the innocent second buyer without notice of the rights of the owner therefore, the owner should be the one to suffer loss.

(b) *Buyer under a conditional sale*

Is a buyer under a condtional sale a buyer in possession? Section 25(2)(a) SGA 1979 provides that a buyer under a conditional sale agreement is not to be taken as a person who has agreed to buy goods under section 25(1). The position in the UK is thus that a buyer under a conditional sale in possesion of goods with the consent of the owner cannot pass a good title by invoking the buyer in possession exception to the *nemo dat* principle.

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[37] Strictly speaking, s 25(1) also covers someone who has bought goods. Atiyah writes, "This is a strange provision for it is not easy to see why there should be any special enactment to protect a person who has bought goods from a buyer in possession when the property has already passed to this buyer....It is to be hoped that a court will dismiss as mere surplusage the words 'bought or'...." For more discussion on this point see Atiyah, note 24, *supra*, at 376.

Generally, a conditional sale is one where the property in the goods does not pass from the seller to the buyer until the stipulated condition, normally full payment of the agreed price, is performed. The price may be payable in instalments, and possession of the goods is usually in the conditional buyer.[38] A more elaborate definition is provided by section 25(2)(b) SGA 1979 for the purposes of section 25(2)(a). Here, a conditional sale agreement is defined as an agreement for the sale of goods which is a consumer credit agreement within the meaning of the UK Consumer Credit Act 1974 under which the purchase price or part of it is payable by instalments and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled.

2. *Position in Singapore*

(a) *AEL Act and buyer under conditional sale*

Under the AEL Act, section 25(1) applies in Singapore but section 25(2) does not. A buyer under a conditional sale is therefore not automatically excluded from the ambit of section 25(1). This being the case, a buyer under a conditional sale could be a buyer in possession within section 25(1) as he is a person who has "agreed to buy goods". In Singapore, therefore, a buyer under any conditional sale agreement may be able to pass a good title under section 25(1) notwithstanding being a non-owner if he satisfies the other requirements in that section. Given the history of section 25(2) in the UK, the exclusion of its operation in Singapore by the AEL Act was probably aimed at replicating the existing position under section 5 of the Civil Law Act.

(b) *Section 5 Civil Law Act and Consumer Credit Act 1974*

Section 25(2) was first inserted into the Sale of Goods Act 1893 by the Consumer Credit Act 1974.[39] It is similar to the provision inserted at the end of section 9 of the Factors Act, also by the Consumer Credit Act 1974,[40] and which also does not apply in Singapore by virtue of the AEL Act.

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[38] This working definition is provided by Lee Chin Yen in *Law of Consumer Credit* (1980), at 314. Although slightly dated, this is the most comprehensive and detailed local text on the subject.

[39] Sch 4 para 4. Repealed by SGA 1979 Sch 3 before it came into force and replaced by equivalent position in SGA 1979.

[40] Sch 4 para 2.

Under section 5 of the Civil Law Act, English mercantile law would not have been applicable in Singapore in any area where we had a local statute dealing with the same subject matter.[41] As Singapore did have statutes regulating consumer credit, such as the Hire Purchase Act[42] and the Moneylenders Act,[43] this would have meant that the Consumer Credit Act 1974 did not apply in Singapore. Another reason for the non-applicability of the 1974 Act could have been that it was excluded from applying in Singapore as it aimed to regulate the exercise of any business or activity by providing for some method of control or by the imposition of penalties.[44] The insertions made to the SGA 1979 in the form of section 25(2) would therefore not have applied in Singapore under section 5 of the Civil Law Act and the AEL Act was faithful to this position.

(c) *Pre-Consumer Credit Act 1974*

Would the Singapore position under section 5 have involved adopting the pre-Consumer Credit Act position in the UK? Before the provisions introduced by the Consumer Credit Act 1974 came into force in 1985,[45] the position in the UK was twofold. Generally, a buyer under a conditional sale could pass a good title under section 25(1). However, in situations which were governed by the English Hire Purchase Act 1965,[46] the position was different. Under the 1965 Act,[47] a buyer under a conditional sale agreement which was within the limits of financial control of the Act was deemed not to be a person who has bought or agreed to buy goods for

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41 S 5(2) Civil Law Act stated, "Nothing in this section shall be taken to introduce into Singapore ... any provision in any Act of Parliament of the United Kingdom where there is written law in Singapore corresponding to that Act." S 5(3)(b) elaborated, "a written law in force in Singapore shall be regarded as corresponding to an Act of Parliament of the United Kingdom under subsection 2 (c) if (notwithstanding that it differs whether to a small extent or substantially, from that Act) the purpose or purposes of the written law are the same as or similar to those of that Act."

42 Cap 125, 1985 Rev Ed.

43 Cap 188, 1985 Rev Ed.

44 S 5(2)(b) Civil Law Act.

45 The Sale of Goods Act 1979 (Appointed Day) Order 1983, SI 1983/1572 made under s 25(4) of the SGA 1979. Under this order, 19 May 1985 was named as the appointed day for s 25(3) and Sch 1, para 9 of the 1979 Act. The effect of the order was that s 25(2) came into force on that day. Discussed in *Halsbury's Statutes* (4th ed, 1988), Vol 39, 129-30. The corresponding section in the Factors Act came into force on the same day *vide* the Consumer Credit Act 1974 (Commencement No 8) Order 1983, SI 1983/1551 made under s 192(4) of the Consumer Credit Act 1974.

46 1965 c 66. Repealed on 19 May 1985 by the Consumer Credit Act 1974 under the Consumer Credit Act 1974 (Commencement No 8) Order 1983, SI 1983/1551. See *Halsbury's Statutes* (4th ed, 1991 reissue), Vol 11, at 171-172.

47 S 54.

the purposes of section 9 of the Factors Act and of the predecessor of section 25(1) of the SGA 1979.[48] The position in the UK was therefore that buyers in conditional sales governed by the Hire Purchase Act 1965 could not pass good title under section 25(1). In contrast, buyers in conditional sales outside the monetary limits of the Hire Purchase Act 1965 and therefore outside its ambit could do so.

However, this dual pre-Consumer Credit Act position in the UK was not replicated in Singapore under section 5. The reason was one that has already been raised in another context above: The Hire Purchase Act 1965 did not apply in Singapore because we had our own Hire Purchase Act.[49] The local Hire Purchase Act did not contain a provision similar to that in the UK Act. It therefore did not take conditional sales outside the ambit of section 25(1) SGA 1979 and buyers in conditional sales remained within the *nemo dat* exception relating to buyer in possession.

(d) *Position under the AEL Act*

The AEL Act confirmed that the position in Singapore relating to conditional sales was the old common law position. A buyer under a conditional sale is someone who has agreed to buy goods. In the right circumstances, he can pass a good title under section 25(1) SGA 1979 even though he is not the owner.[50]

The rationale that an owner who made a mistake in entrusting his goods to the wrong person should be the one to bear the loss does not apply where the sale is a conditional sale. In a conditional sale, the seller lets the buyer have the goods before they are completely paid for and before property passes to the buyer not through any irregularity but because that is the way the transaction works. It seems unfair that the seller's title should be defeated when he was merely following the standard procedure in a conditional sale.

The Singapore position means that a seller who gives his buyer credit under a conditional sale agreement does not have much of a security. His security against non-payment is usually in the form of retention of ownership in the goods until the price is fully paid. However, the security is of limited value as his title can be defeated if the buyer makes an unauthorised sale to a *bona fide* purchaser without notice before paying the full price. Not surprisingly, conditional sales appear to be rarely used in Singapore.[51]

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48 The financial limit was £5000 under the Hire Purchase (Increase of Limit of Value) (Great Britain) Order 1978. See generally *Halsbury's Laws of England* (4th ed, 1979, 1988 reprint) Vol 22, paras 214-215.

49 See note 41, *supra.*

50 This was established in old cases such as *Lee* v *Butler* [1893] 2 QB 318.

51 See Lee Chin Yen, note 38, *supra*, at 314. The hire purchase transaction gets round these problems as the hirer does not agree to buy goods but merely has an option to purchase

One could argue that substantively, it might have been more desirable to take conditional sales outside section 25(1). However, this would not have been a permissible option, given the basic approach of the AEL Act. The position of section 25(2) is different from that of section 22(1) on market overt. Under the market overt exception, the drafters of the AEL Act had some flexibility to choose the more justifiable position from the substantive point of view. This was possible because it was unclear whether the English position on sale in market overt was to apply in Singapore. However, where section 25(2) was concerned, it was quite clear that the English position did not apply in Singapore under the existing law. As the aim of the AEL Act was to state the law, there was no flexibility. The drafters of the Act had to put technical considerations regarding the reception of English law above substantive considerations of fairness and policy.

III. Conclusion

The result of the AEL Act on the *nemo dat* principle is that (i) the market overt exception does not apply in Singapore; and (ii) a buyer under a conditional sale can be a buyer in possession and pass good title to the goods even though he is a non-owner.

Certainly, the non-applicability of the market overt exception is welcome. The AEL Act decided this authoritatively, without upsetting any established principles of law. In this case, as in other cases where it was uncertain whether particular English statutory provisions should apply in Singapore, the passing of the Act gave a clear guide and had especially far-reaching effects. By taking a firm stand in the face of uncertainty, the AEL Act did make law, whether or not it intended to do so.

As far as section 25(2) is concerned, however, the preferable substantive position might arguably be that conditional sales should not fall under section 25(1), *ie*, that section 25(2) should apply in Singapore. Nevertheless, that the AEL Act takes the opposite position might not be of much importance in practice as other vehicles of credit and security are available in place of conditional sales. However, a general point must still be made about the declaratory approach of the AEL Act. This means that in a situation where it is clear that an English principle does or does not apply in Singapore, the Act must replicate this position faithfully. To the extent that any substantive legal position replicated by the AEL Act can be improved upon, the declaratory approach does not go far enough to reform the law.

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which he can choose not to exercise. See, *eg*, *Helby* v *Matthews* [1895] AC 471. The hirer is, therefore, not a buyer in possession under s 25(1) and cannot rely on the exception to the *nemo dat* principle.

The AEL Act is just a beginning. Continuing efforts will have to be made to modify and refine the English principles which have been adopted so as to develop the best law possible for Singapore.

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