Management Corporation Strata Title Plan No 3322
v
Mer Vue Developments Pte Ltd and others
(King Wan Construction Pte Ltd and others, third parties)

[2016] SGHC 38

High Court — Suit No 563 of 2011/L
Chan Seng Onn J
3, 6 July 2015; 3 August 2015; 20, 21, 22, 27, 28, 29, 30 October 2015; 3 November 2015; 29 January 2016

Building and construction law — Architects, engineers and surveyors — Delegation of duties

Building and construction law — Architects, engineers and surveyors — Statutory obligations

Building and construction law — Construction torts — Negligence

Building and construction law — Construction torts — Sub-contractor

Building and construction law — Developers

Tort — Vicarious liability

Tort — Breach of statutory duty

16 March 2016 Judgment reserved.

Chan Seng Onn J:

Introduction

1 This is an action commenced by the Management Corporation Strata Title Plan No 3322 ("the Plaintiff"), the management corporation of the

condominium at 29 to 41 Amber Road known as "The Seaview Condominium" ("the Development"), against the developer as the 1st Defendant, Mer Vue Developments Pte Ltd ("Mer Vue"); the main contractor as the 2nd Defendant, Tiong Aik Construction Pte Ltd ("Tiong Aik"); the architect as the 3rd Defendant, RSP Architect Planners & Engineers (Pte) Ltd ("RSP"); and the mechanical and electrical ("M&E") engineer as the 4th Defendant, Squire Mech Private Limited ("Squire Mech") (collectively, "the Defendants"). The action is made on behalf of subsidiary proprietors in respect of building defects and is based on contract and tort, and for breach of statutory duty under the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) ("BMSMA"). For the first tranche of the suit, I allowed the question of the applicability of the independent contractor defence as pleaded by Mer Vue, Tiong Aik and RSP, and the question of a private right of action for breach of statutory duty under the BMSMA to be tried as preliminary issues.

Background to the dispute

Overview

2 The Development comprises six 22-storey residential blocks of apartments, totalling 546 units, and common property facilities that include, among others, a two-storey clubhouse, a basement car-park, swimming pools and tennis courts. The construction of the Development commenced sometime in 2005 and was completed in 2008. The Temporary Occupation Permit ("TOP") for the Development was issued in two stages—on 22 April 2008 and 28 May 2008—and the Certificate of Statutory Completion was issued on 24 December 2008. Mer Vue managed the Development from the issuance of TOP until 12 July 2009 when the Plaintiff was constituted as the management corporation of the development at their first Annual General Meeting ("1st AGM"). The Plaintiff has alleged that numerous defects were discovered in the

common property of the Development after the 1st AGM and commenced this suit against the Defendants on 12 August 2011. The list of pleaded defects (which include, among others, units plagued with foul odours, falling concrete blocks and the debonding of swimming pool tiles) is an extremely long one with the Scott Schedule amounting to over a thousand pages and the Plaintiff seeking S$32 million in compensation for damages.[1]

Parties involved and relevant claims

3 Tiong Aik was selected as the main contractor for the construction of the Development pursuant to a tender exercise held from 25 October 2004 to 6 December 2004,[2] and this appointment was formalised under a contract dated 5 October 2005 ("Main Contract").[3] The Main Contract incorporated the Singapore Institute of Architects Articles and Conditions of Building Contract (Measurement Contract) Third Edition, January 1987 ("SIA Conditions"). Pursuant to the Main Contract, Tiong Aik thereafter sub-contracted several items of work for the Development to various nominated sub-contractors ("NSCs") and domestic sub-contractors ("DSCs").

4 RSP was appointed by Mer Vue as the architect for the Development under an Agreement for Appointment of Architect, Engineers and Consultants dated 12 November 2004 ("Architect Agreement").[4] Pursuant to the Architect Agreement, RSP engaged, among others, Squire Mech for professional M&E engineering services and Sitetectonix Pte Ltd ("Sitetectonix") for landscaping

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[1] Transcript dated 3 July 2015, p 106.

[2] Ung Chung Ing's ("Ung") 1st AEIC, paras 28–29.

[3] AB 16916.

[4] AB 04522.

architecture design services.[5] Sitetectonix was originally engaged by Mer Vue, but was subsequently seconded or designated to be a sub-contractor of RSP pursuant to a Memorandum of Agreement dated 31 May 2004.[6] Lighting Planners Associates Inc ("LPA") was also engaged for lighting design services for the Development by Squire Mech.

5 Against Mer Vue, the Plaintiff has brought claims for breach of statutory duty under the BMSMA and for alleged defects in the Development:

(a) in contract, for breach of the sale and purchase agreements with the subsidiary proprietors who were original purchasers ("Sale and Purchase Agreements"); and

(b) in tort, for failing to ensure proper design and construction of the Development.

6 The Plaintiff has likewise brought claims in tort against Tiong Aik for negligent construction and for breach of warranties issued jointly and severally by Tiong Aik and its sub-contractors. Against RSP and Squire Mech, the Plaintiff is claiming for negligent design and/or supervision in tort. Subsequently, Tiong Aik issued a third party notice on six of its sub-contractors, seeking an indemnity or contribution from them based on, among others, indemnity clauses in their respective sub-contracts.

7 The Defendants, with the exception of Squire Mech, plead the independent contractor defence as a complete defence to the Plaintiff's claim in

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[5] Lee Kut Cheung's ("Lee") AEIC, para 15.

[6] AB 01678.

tort against them. In response, the Plaintiff relies on the Building Control Act (Cap 29, 1999 Rev Ed) ("BCA") that was in force at the material time to argue that Tiong Aik and RSP owe the Plaintiff non-delegable statutory duties as an exception to the independent contractor defence. To save time and costs for the main trial, this first tranche of trial was set down to hear the preliminary issues regarding the independent contractor defence and the availability of a private right of action under the BMSMA. Another preliminary issue as to whether certain pleaded defects form part of the common property of the Development and thus affect the Plaintiff's *locus standi* to bring claims for these defects under the BMSMA was initially set to be heard in a second tranche of trial, but parties have agreed to defer this to the main trial itself.[7] I note that the Plaintiff (in the closing submissions for this first tranche) has belatedly submitted that I need not decide on the preliminary issue regarding the independent contractor defence due to the complexities of the matter. However, I see no reason why I cannot decide on this preliminary issue and hence save time and costs for all parties in the main trial.

8 I will also be dealing with three specific areas of alleged defects that involve certain Defendants in relation to the independent contractor defence raised by them in this tranche. They are, namely:

(a) the incomplete and/or inconsistent fibre optic cabling for some apartment units in the Development ("Fibre Optic Cable Issue");

(b) the alleged bad odour in certain apartment units in areas such as the kitchens and bathrooms due to a design flaw ("Foul Smell Issue"); and

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[7] Transcript dated 3 Nov 2015, p 1.

(c) the complaint about the choice of trees and plants around the pool that led to small leaves falling into the pool, and consequently difficulties in maintenance ("Poolside Landscaping Issue").

Preliminary issues for determination

9 I set out the following questions to be determined for this first tranche:

(a) Whether Tiong Aik and RSP are independent contractors of Mer Vue;

(b) Whether the various DSCs and NSCs are independent contractors of Tiong Aik;

(c) Whether Squire Mech and Sitetectonix are independent contractors of RSP;

(d) Whether there has been any lack of proper care in the selection and appointment of independent contractors;

(e) Whether Tiong Aik and RSP have statutory non-delegable duties under the BCA, and if so, how do these duties affect the application of their independent contractor defence;

(f) Whether RSP has any non-delegable duties under the common law as a construction professional;

(g) Who, in light of the above, is responsible for the alleged defects with respect to the Fibre Optic Cable, Poolside Landscaping, and Foul Smell issues; and lastly

(h) Whether a civil remedy is available to the Plaintiff for alleged breaches of the BMSMA by Mer Vue (hereafter referred to as the breach of statutory duty issue, and in short the "BOSD issue").

The defence of "independent contractor"

10 The general principle is that an employer is not vicariously liable for the negligence of an independent contractor, his workmen or agents in the execution of his contract: *Charlesworth & Percy on Negligence* (Sweet & Maxwell, 13th Ed, 2014) at para 3-107 and *Clerk & Lindsell on Torts* (Sweet & Maxwell, 21st Ed, 2014) ("*Clerk & Lindsell*") at para 6-59. The principle of "independent contractor" was authoritatively applied by the Court of Appeal in *Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd* [2005] 2 SLR(R) 613 ("*Seasons Park*") in the context of a developer delegating its duty to build a condominium in a good and workmanlike manner to an independent contractor.

Fundamental test of independent business

11 The inquiry to distinguish an independent contractor from an employee/servant is relevant only when there is an attempt to attribute vicarious liability on an employer for the negligent acts of the employee/servant. The extent of the control exercised by the employer over the servant (the "Control Test") was traditionally regarded almost as the conclusive test in this determination, but has hence been rationalised as being only a factor to be considered, albeit an important one.

12 The overarching and fundamental test in the inquiry is whether the contractor was performing services as a person of business on his own account (the "Independent Business Test", or the "personal investment in enterprise"

test as referred to in Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2015) ("*The Law of Torts*") at para 19.015). This was clarified by the Court of Appeal in *BNM (administratrix of the estate of B, deceased) on her own behalf and on behalf of others v National University of Singapore and others and another appeal* [2014] 4 SLR 931 ("*BNM*") at [28]–[29], with reference to Cooke J's remarks in the decision of *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 ("*Market Investigations*") at 183–185 which were approved by the Privy Council in *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 at 382. Even a reservation of a right to direct or superintend the performance of work cannot transform into a contract of service what is in essence an independent contract: *Queensland Stations v Federal Commissioner of Taxation* (1945) 70 CLR 539 at 552 ("*Queensland Stations*"). Thus, the Control Test is not necessarily the decisive factor in the inquiry, and cannot be the sole determining factor.

13 Other relevant factors cited by Cooke J in *Market Investigations* that may point to a contractor being an independent contractor as opposed to an employee include:

(a) Whether the contractor performing the services provides its own equipment;

(b) Whether the contractor hires its own helpers;

(c) What degree of financial risk the contractor takes;

(d) What degree of responsibility for investment and management the contractor has; and

(e) Whether and how far the contractor has an opportunity of profiting from sound management in the performance of his task.

14 Generally, if a contractor performing services does so in the course of an already established business of its own, the application of the fundamental Independent Business Test is "easier" as this strongly points to the contractor being an independent contractor and its contract being a contract *for* services. This is opposed to the contract being a contract *of* service with an employer-employee relationship where vicarious liability can be attributed to the employer for the employee's tortious acts.

Duty to exercise proper care in appointing an independent contractor remains

15 Even if it is established that an independent contractor has been appointed, the employer still has the duty to exercise proper care in appointing an independent contractor: see *Seasons Park* at [37]. Liability may still arise due to the employer's negligence in selecting and appointing an independent contractor. The liability here may be personal to the employer for his negligent selection of an incompetent contractor (see *Clerk & Lindsell* at para 6-59), or liability may be attributed to the employer secondarily through its independent contractor. In the latter situation, delegating duties to an independent contractor without first exercising reasonable care to ascertain if it is competent to do the job would result in an employer being *vicariously* liable for the negligence of its independent contractor (see *Hygeian Medical Supplies Pte Ltd v Tri-Star Rotary Screen Engraving Works Pte Ltd (Seng Wing Engineering Works Pte Ltd, third party)* [1993] 2 SLR(R) 411 at [18]). The nature of the employer's liability when it has negligently selected an incompetent contractor has not been authoritatively determined, and I make no comment on this question as no such situation has arisen from the current facts (see [93]–[98] below), except to note that *primary* liability for the employer's own tortious act of negligent selection would be more principled.

"Exceptions" to the general principle: non-delegable duties

Nature of non-delegable duties

16 The Court of Appeal in *Seasons Park* at [38]–[39] referred to a few "exceptions" to the general rule of independent contractors, where "the employer of an independent contractor could be held *liable for the acts of the latter*" [emphasis added]. These are not true exceptions as they are premised on a primary and *personal* non-delegable duty owed by the employer to the claimant, as opposed to a "disguised form of vicarious liability" where secondary liability is still imposed on the employer for its independent contractor's tortious acts in certain situations (see Robert Stevens, "Non-Delegable Duties and Vicarious Liability" in *Emerging Issues in Tort Law* (Neyers *et al* eds) (Hart Publishing, 2007) ch 13 ("*Non-Delegable Duties and Vicarious Liability*") at p 331; see also *Clerk & Lindsell* at para 6-60).

17 The following situations are mentioned in *Seasons Park* where non-delegable duties are said to arise, with reference to English cases:

(a) Extra-hazardous acts commissioned by employers who have the non-delegable duty imposed on them to ensure that care is taken;

(b) Dangers created by work done in or on a highway, where employers have the duty to see that due care is taken for the protection of those who use the highway;

(c) Non-delegable duties of employers for the safety of employees;

(d) Where the case falls within the rule in *Rylands v Fletcher*;

(e) Withdrawal of support for neighbouring land; and

(f) Where non-delegable duties are imposed statutorily.

18 In our local jurisprudence, several of these non-delegable duties have been considered, mainly in the area of employee safety, in cases such as *Mohd bin Sapri v Soil-Build (Pte) Ltd and another appeal* [1996] 2 SLR(R) 223 (see [32]–[34]); *The "Sunrise Crane"* [2004] 4 SLR(R) 715 (see [30]); and *The Lotus M* [1998] 1 SLR(R) 409 (see [30]–[37]).

Justification of non-delegable duties at common law

19 As the Court of Appeal in *Seasons Park* observed at [39], no general principle can be deduced as to the circumstances under which non-delegable duties arise in common law. There may indeed be no "universal solvent, capable of explaining all of the cases" (as Stevens in *Non-Delegable Duties and Vicarious Liability* at p 367 puts it). However, recognition that there are various possible rationales underlying the imposition of non-delegable duties can help anchor their juridical bases for future principled expansion of non-delegable duty categories, if any.

20 In the UK Supreme Court case of *Woodland v Swimming Teachers Association and others* [2014] AC 537 ("*Woodland*"), Lord Sumption's survey of the law on non-delegable duties is instructive. The trial judge in *BNM* adopted Lord Sumption's analysis (see *BNM (administratrix of the estate of B, deceased) on her own behalf and on behalf of others v National University of Singapore and another* [2014] 2 SLR 258 at [56]–[62]), but this issue was not explored on appeal.

21 Lord Sumption identified two major classes of non-delegable duties: the first category deals with cases where an employer appoints an independent contractor to perform a function that is inherently hazardous or liable to become

so in the course of work, and he included the highway cases (such as *Penny v The Wimbledon Urban District Council* and another [1899] 2 QB 72) in this category. I note that the broad principle relating to "extra-hazardous" operations in *Honeywill & Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191 had since been circumscribed by the UK House of Lords in *Read v J Lyons & Co Ltd* [1947] AC 146.

22 A second category of non-delegable duties can be gleaned from Lord Sumption's analysis of the law, at [23], comprising cases with the following features:

> (1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.
>
> (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.
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> (3) The claimant has no control over how the defendant chooses to perform those obligations, ie whether personally or through employees or through third parties.
>
> (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.
>
> (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

23 Underpinning this category of cases is the concept of an assumption or imputation of responsibility by virtue of the special character of the relationship (see *Woodland* at [11]–[12]) that justifies the imposition of *positive* non-delegable duties, where both principle and case authority identify relevant factors such as the vulnerability of the claimant, existence of a relationship between the claimant and defendant by virtue of the latter's degree of protective custody over former, and the delegation of that custody to another person. As for the first category of cases relating to extra-hazardous situations, the element of risk seems to be the underlying principle behind the imposition of non-delegable duties. It has been argued though, that the risk-based justification can be reconciled with the concept of assumption of responsibility as the creation of exceptional risk can be invoked to justify the imputation of responsibility: see John Murphy, "Juridical Foundations of Common Law Non-Delegable Duties" in *Emerging Issues in Tort Law* (Neyers *et al* eds) (Hart Publishing, 2007) ch 14 at p 386.

24 In the construction context, counsel for RSP submits, on the basis of a line of authorities examining whether construction professionals (such as architects, engineers and quantity surveyors) can avoid liability by delegating their tasks to independent contractors, that a different starting point and set of considerations apply[8] when the independent contractor defence is raised by a construction professional, as opposed to when the defence is raised by a non-construction professional. The better view is that this set of considerations is relevant not during the independent contractor inquiry *per se*, but when examining whether certain tasks are delegable by construction professionals.

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[8] 3rd Df closing submissions, paras 72-78.

25 As to the rationalisation of non-delegable duties of construction professionals—if any exists—after the *Woodland* approach to non-delegable duties was expounded, it has been suggested that the former could be consistent with the latter, even though the former lacks the element of vulnerability: *Clerk & Lindsell* at para 10-200 and n 1204. However, non-delegable duties premised on professional responsibility, though similarly justified based on an assumption of responsibility, probably belong to a separate third category from those expressed in *Woodland* where situations involved are inherently hazardous and risky or where the responsibility of the defendant for protective custody over a vulnerable claimant features strongly.

26 That said, non-delegable duties are exceptional, and its categories should not be readily or easily expanded. A new category of non-delegable duties for construction professionals that is premised on a risk-based justification (for example, in ensuring that buildings are designed and constructed to be fundamentally safe) is not necessary as these are already statutorily provided for (see below at [40]–[47]). As for justifying such an expansion on professional responsibility, it would be a more nuanced approach to consider the reasonableness of delegation in each factual matrix (see below at [57]), rather than create a new amorphous category of non-delegable duties for construction professionals.

Statutory non-delegable duties

27 Apart from non-delegable duties under the common law, non-delegable duties can also arise by statute. In *Seasons Park*, the appellant unsuccessfully argued that the Housing Developers (Control and Licensing) Act (Cap 130, 1985 Rev Ed) and the rules made under it gave rise to non-delegable duties on the part of the respondent-developer to build the condominium in a good and

workmanlike manner. Here, the Plaintiff has alleged that the BCA at the material time gave rise to non-delegable duties on the part of Tiong Aik as the main contractor and RSP as the architect of the Development. As I will explain below at [40]–[47], the standard and *scope* of duty imposed is one of statutory construction, and an examination of the BCA does not lead to the effect contended by the Plaintiff.

Distinguishing between independent contractors and* pro hac vice *situations

28 Counsel for Mer Vue relies extensively on the House of Lords decision in *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd and another* [1947] AC 1 ("*Mersey Docks*") to interpret and apply the Control Test in the independent contractor inquiry. However, it is important to distinguish between an inquiry as to whether B is an independent contractor or an employee/servant of A (to determine *whether* to impose vicarious liability on A for *B*'s tortious acts), and a separate but possibly concurrent inquiry as to whether negligent employees of B can be considered *pro hac vice* employees of A (to determine, between A or B, *whom* to impose vicarious liability for *B's employees*' tortious acts).

29 In *Chua Chye Leong Alan v Grand Palace De-luxe Nite Club Pte Ltd* [1993] 2 SLR(R) 420, the car jockeys, who were employees of an independent contractor engaged by a nightclub owner to provide valet parking services, were considered *pro hac vice* employees of the nightclub owner as the management of the nightclub gave the necessary instruction to, had overall control over, and had the right to dictate the manner and mode of the work of, the independent contractor's employees. Similarly in *BNM* at [20], the Court of Appeal, relying on the case of *Mersey Docks*, commented that the trial judge should have looked at the question of control NUS had exercised over the lifeguards, and not over

Hydro which was engaged by NUS to supply lifeguards and maintenance services for a swimming pool. Essentially, since it was clear that Hydro had employed the lifeguards who were negligent, the proper approach should have been to consider whether the presumption that Hydro would be vicariously liable for the negligence of its own employees had been displaced by the temporary transfer of employment to NUS (see *BNM* at [21]). Similarly, Lord Macmillian in *Mersey Docks* (at pp 12–13) observed that the rule was that the general employer was *prima facie* responsible for the employee's negligence, unless the general employer could prove that there was a transfer of employment.

30 In the current case, the Plaintiff has not claimed negligence on the part of the Defendants' employees; the *pro hac vice* inquiry is separate from the independent contractor inquiry, and the two should not be conflated. In a situation where A engages B who has its own employees to carry out work, the Control Test in the independent contractor inquiry focuses on A's control with respect to B as to the manner of B's work in the execution of his contract with A. This is for the purpose of determining the existence of an employer-independent contractor relationship. On the other hand, the Control Test in the *pro hac vice* inquiry (if it is relevant) focuses on A's control over B's negligent employee in relation to the way in which the employee's relevant act is performed. This is to determine, "for a particular purpose or on a particular occasion", whether the services of that employee has been "temporarily transferred…to [A] so as to constitute him *pro hac vice* the servant of [A] with consequent liability for his negligent acts" (*Mersey Docks* at p 13). The *pro hac vice* inquiry is thus more specific to examine transference for a particular situation to determine vicarious liability on the part of either the general employer or an alleged temporary employer.

Independent contractors in the construction context

31 Having set out the relevant law above, I will now examine its application in the construction context, specifically on issues relating to the application of the Control Test and the existence of statutory and common law non-delegable duties relevant to builders and construction professionals.

Commercial realities and the test for "independent contractor"

32 The development process typically involves the three principal parties (developer, consultant and (main) contractor) with their roles as described by Mr Chow Kok Fong in *Law and Practice of Construction Contracts: Volume 1* (Sweet & Maxwell Asia, 4th Ed, 2012) at paras 1.1 and 1.2:

> It is convenient to describe the essence of the transaction relating to a building project as a process which involves three principal players: the developer (alternatively called the client, owner or employer), the consultant and the contractor. The developer initiates the process when he conceives the business case for the construction project and decides to proceed with the project. Once this decision is made, the broad requirements of the project are set out in a project or design brief. The contractor is the party responsible for carrying out the construction work for the project either on the basis of the project brief or according to the design of the project commissioned by the developer.
>
> A design consultant, typically a firm of architects or engineers, is engaged to formulate the design of the project on the basis of the requirements in the brief. As the design develops, other consultants may be employed to undertake more specialised aspects of detailing design and documentation work.

33 The availability of the independent contractor defence to a developer in the construction context has been affirmed by the Court of Appeal in *Seasons Park*. However, the application of the independent contractor defence as pleaded by various parties involved in the development process with various levels of sub-contracting and the incorporation of the nomination mechanism

has not been explored. The nomination mechanism that is typically built into the main contract between the developer and main contractor provides for the developer and/or his architect/engineer to nominate particular sub-contractors for certain portions of work within the main contract.

34 Commercially, the complexities of modern buildings and the growth of specialisation have necessitated reliance on specialist sub-contractors, even by construction professionals such as architects (see *Hudson's Building and Engineering Contracts* (Robert Clay & Nicholas Dennys eds) (Sweet & Maxwell, 13th Ed, 2015) ("*Hudson's*") at para 2-043). The range of possible sub-contractors may be too diverse to list here exhaustively, but sub-contractors employed may typically include M&E engineers, interior designers, lighting consultants, acoustic engineers and landscape designers.

35 Due to the diversity of skills and materials required, the involvement of various parties of different disciplines and specialisations is only to be expected. Further, with the prevalent system of nomination and the reality of sub-contracting, the content of the work that resides with the main contractor is largely confined to planning, organisation, coordination and administration. It may be even said that in most construction projects, only "a relatively small part of 'building' work is undertaken directly by the main contractor" (see Chow Kok Fong, *Law and Practice of Construction Contracts: Volume 2* (Sweet & Maxwell Asia, 4th Ed, 2012) at paras 15.1–15.3). Additionally, the nature of the joint enterprise in the development process requires specialists of different disciplines interacting and communicating with one another and necessitates coordination and cooperation. Many aspects of construction also involve multiple disciplines, and parties cannot operate in silos. Every party may have its own set of responsibilities with its own separate scope of work contracted (or sub-contracted) for. However, the work of each party must necessarily

interface and be integrated with the work of one or more of the other parties in order for the overall development to take place. It naturally follows that there will be extensive communication, discussions and coordination of work among parties during the development process.

36 Thus, it is against this background that the independent contractor inquiry must be examined. The Control Test may pose certain problems for main contractors, who can be expected to exercise a high degree of supervisory control on site over at least those more traditional trades whose work can be expected to be within the area of expertise of the main contractors' supervisory staff (see *Hudson's* at para 1-205). In the same vein, analysing the requisite *type* of control to distinguish employees from independent contractors may not be as simple in a situation where the work demands that parties consult one another and raise issues among themselves for discussions.

Policy issues surrounding the application of the defence of "independent contractor" in the construction context

37 The Plaintiff submits that the independent contractor defence ought not to be available to Tiong Aik and RSP as the main contractor and architect respectively due to public policy considerations.[9] The Plaintiff contends that the management corporation has little or no recourse if the defence applies. The Plaintiff also cites the difficulties in identifying "indeterminate" independent contractors and the potential problems in finding a duty of care in law owed by these independent contractors to the management corporation.

[9] Pf's closing submissions, para 68.

38 I find that it is disingenuous of the Plaintiff to claim that only a limited number of subsidiary proprietors of the Development have a claim in contract against Mer Vue and that the Plaintiff's claims only lie in tort, when they had only at a very late stage of the proceedings sought to amend their pleadings to add more subsidiary proprietors to the contract claim after the limitation period had expired (see the Grounds of Decision in Registrar's Appeal No 238 of 2015 at [25]–[41]).

39 More importantly, the fundamental fault-based principle in the law of torts that liability lies with the party that has engaged in the tortious acts in question should not be easily abrogated. The Court of Appeal's reference (in *Seasons Park* at [50]) to Lord Bridge's comments in *D & F Estates Ltd v Church Commissioners for England* [1989] 1 AC 177 ("*D & F Estates*") at 210 that there was no legal principle to disentitle developers from relying on the defence of "independent contractor" albeit in the context of liability for a dangerous defect in the work caused by the negligence of an independent contractor, and that such "social policy" would be best left to the Legislature to determine, is instructive. Thus, Tiong Aik and RSP are entitled to argue that they had delegated work to competent independent contractors as a defence to the claims in negligence they face for the allegedly negligent acts of their independent contractors.

Statutory non-delegable duties under the BCA

Whether Tiong Aik and RSP have statutory non-delegable duties under the BCA

40 Counsel for the Plaintiff submits that Sections 9 and 11 of the BCA create statutory non-delegable duties owed by RSP, as a Qualified Person ("QP"), and Tiong Aik, as a Builder, under the statutory scheme of the BCA to

ensure that the entire Development is in order,[10] and that these duties therefore operate as "exceptions" to the independent contractor defence pleaded by RSP and Tiong Aik. However, a close reading of the BCA does not reveal it to have the effect contended by the Plaintiff.

41 It is a question of statutory construction whether any non-delegable duties are imposed. The BCA was enacted to ensure safe building standards and practices, by regulating the design, checking, supervision, construction and inspection of building works, so as to prevent tragic incidents as in the cases of Hotel New World and Cheng Hong Mansion: *Singapore Parliamentary Debates*, Official Report (30 March 1988) vol 50 at cols 1739–1741 (S Dhanabalan, Minster of National Development). It is clear that the BCA imposes duties on architects and main contractors: architects, who are regulated and appointed as QPs under the BCA by virtue of certification under the Architects Act (Cap 12, 2000 Rev Ed), have statutory duties enumerated under Section 9 of the BCA; while main contractors, who were specifically brought under the ambit of the law after amendments to the BCA in 1989, have specific statutory duties listed under Section 11 of the BCA. Criminal sanctions are also in place in both sections to prevent the contravention of these duties.

42 However, it is important to construe the statute carefully to determine the scope and extent of the duties owed (see *Clerk & Lindsell* at para 6-62). Here, the statutory duties of architects (be it in relation to preparing the plans for building works or supervising the carrying out of building works) and the statutory duties of main contractors undertaking building works are only limited to their duties as stated in the BCA and no more. Thus, beyond the key duties

[10] Pf's closing submissions, para 72.

to ensure compliance with the provisions of the BCA, the building regulations, the approved plans and the terms and conditions imposed by the Commissioner of Building Control, other aspects of RSP and Tiong Aik's work that go beyond these regulatory requirements are not covered by the BCA.

43 It may also be important to note that the *standard* of statutory duties imposed on QPs under Section 9(1)(*a*) and on main contractors under Section 11(1)(*a*) of the BCA are not the same. Main contractors have an *absolute* statutory obligation in that they "shall ensure" that building works are carried out in accordance with the BCA, the building regulations, the approved plans and any terms and conditions imposed by the Commissioner of Building Control, whereas the standard of the statutory duties imposed on QPs is to "take all *reasonable* steps and exercise due diligence" to ensure that the building works are designed in accordance with the BCA and the building regulations.

44 The standard of duty imposed is one of statutory construction: see *MCST Plan No 641 v Public Prosecutor* [1993] 1 SLR(R) 568 at [14]; and also Keith Stanton *et al*, *Statutory Torts* (Sweet & Maxwell, 2003) at pp 283–310, and *Non-Delegable Duties and Vicarious Liability* at pp 348–349. It is interesting to trace how the "qualifying phrase"—to "take all reasonable steps and exercise due diligence"—came to be introduced for the statutory duties for QPs. The Building Control Bill (Bill 3 of 1988) read on 4 March 1988 did not prescribe any statutory duties on main contractors. Statutory duties were prescribed only for QPs but they *did not* contain such qualifying words. In contradistinction, the Building Control Bill (Bill 5 of 1989) read on 16 January 1989 introduced the qualifying phrase in the provision that laid out the duties of the QPs. A new provision was added to impose statutory duties also on main contractors. Instead of incorporating the same qualifying phrase, much stronger language of "shall

ensure" was used in relation to the statutory duties applicable to main contractors.

45 That said, the core responsibility to be borne by both supervising QPs and main contractors to ensure that all building works are designed and carried out in accordance with the provisions of the BCA, the building regulations, the relevant approved plans and any terms and conditions imposed by the Commissioner of Building Control in the interest of public safety must be impliedly (and equally) non-delegable. For the former (*ie* QPs), this is exemplified in the Parliamentary comments made regarding the crucial role played by QPs (*Singapore Parliamentary Debates*, Official Report (30 March 1988) vol 50 at col 1756 (S Dhanabalan, Minster of National Development)):

> [T]he responsibility of seeing that building operations are carried out in accordance with approved plans and approved specifications lies with the *qualified person*, ie, the architect or the engineer. That is why we have the whole system of registering engineers and architects and only people who qualify and meet certain criteria are registered. This has to do with some of the basic professions in a society and it is *they who must take the responsibility…* [emphasis added]

46 Similarly, the importance of the main contractor in ensuring safety of buildings and adherence to approved building plans, approved specifications and building regulations was also emphasised when the regulatory scheme was expanded to bring the main contractor within the ambit of the law (*Singapore Parliamentary Debates*, Official Report (16 February 1989) vol 52 at cols 670–671 (S Dhanabalan, Minster of National Development)):

> …[C]ontractors play a *crucial role in ensuring that a building is built safely and constructed in accordance with approved building plans and building regulations* … the 'builder' as defined, refers to the main contractor who carries out building works for the developer. It excludes sub-contractors… [Clause 11] *requires* the builder to build in accordance with the requirements of the building regulations and the approved plans of the building. For example, the builder must ensure

> that the actual concrete strength achieves the designed value and all reinforcement bars are placed in accordance with the approved building plans… [emphasis added]

Implication of non-delegable duties under the BCA

47 With the extent of non-delegable duties of RSP and Tiong Aik under the BCA limited to their responsibility to ensure building safety and construction in accordance with the relevant approved plans, building regulations and provisions of the BCA and the terms and conditions (if any) imposed by the Commissioner of Building Control, there will be no implication on the independent contractor defence as pleaded by RSP and Tiong Aik against the Plaintiff's claims in tort if no allegations of a lack of compliance with any approved plans, building regulations or provisions of the BCA, or with any terms and conditions imposed by the Commissioner of Building Control are proven in relation to the defects claimed.

Delegation of duties by construction professionals under the common law

48 Additionally, counsel for RSP has referred me to a relevant line of English authorities that deal with the delegation of duties by construction professionals (such as architects, engineers and quantity surveyors) to sub-contractors.

49 It was held at first instance in the case of *Moresk Cleaners Limited v Hicks* [1966] 4 BLR 50 ("*Moresk v Hicks*") that an architect could *not* delegate his or her design duties. This proposition has been criticised as being too simple in today's commercial realities where architects or engineers are not the sole designers of work in construction projects (see Richard Wilmot-Smith, *Construction Contracts: Law and Practice* (Oxford University Press, 2nd Ed, 2010) at para 5.18; see also *Hudson's* at para 2-043). The complexities of

developments may necessitate architects to assemble a team of specialist sub-contractors with each performing a specific scope of design work that would be beyond the expertise of the general architect. The expectation that a single architect will have all the expertise to undertake the responsibility for the whole design of an entire modern building complex may not be realistic.

50 In *London Borough of Merton v Lowe* (1981) 18 BLR 130 ("*Merton v Lowe*"), Waller LJ distinguished *Moresk v Hicks* on the basis that the architect then had virtually handed over to another the whole task of design and that "the architect could not escape responsibility for the work which he was supposed to do by handing it over to another". It was thus held in *Merton v Lowe* that the defendant architects' decision to use Pyrok, an NSC, for a specialised task using its own proprietary materials was reasonable.

51 Subsequently, Mr Justice Ramsey in the UK Technology and Construction Court decision of *Cooperative Group Limited v John Allen Associates Limited* [2010] EWHC 2300 ("*John Allen Associates*") at [159]–[181] surveyed the relevant case law on this matter and highlighted that the court has to consider all the circumstances in determining whether construction professionals act reasonably in seeking the assistance of specialists to discharge their duties to their clients (see *John Allen Associates* at [180]). The circumstances considered would include the following:

(a) whether the assistance was obtained from an appropriate specialist;

(b) whether it was reasonable to seek assistance from other professionals, research or other associations or other sources;

(c) whether there was information which should have led the professional to give a warning;

(d) whether and if so to what extent the client might have a remedy in respect of the advice from the other specialist; and

(e) whether the construction professional should have advised the client to seek advice elsewhere or should have himself taken professional advice under a separate retainer.

52 Mr Justice Ramsey thus provided a broad framework in *John Allen Associates* to analyse when construction professionals would have acted reasonably in delegating their responsibilities to other specialist sub-contractors. I find it useful as a starting point to examine the construction professional's contract as that delineates the scope and nature of the duties that the construction professional has agreed to undertake for his client, and thereafter to consider the relevant terms and conditions stipulated in the contract, including all the relevant facts and circumstances in each situation to establish what principles and factors are applicable to determine whether the construction professional has acted reasonably in selecting the particular construction specialist and in relying on that specialist to provide the specialist advice or carry out the specialist work on his behalf.

Whether the delegation by RSP as a construction professional had been unreasonable

53 With the architect in *Moresk v Hicks* as an example, it would seem that if a construction professional has agreed to perform the task in question *personally*, delegating the whole or a substantial part of his or her professional duties to another will not be reasonable. On the other hand, it will not be unreasonable to delegate and rely on another competent, qualified and well

established specialist sub-contractor if the construction professional's contract either expressly or impliedly permits delegation and sub-contracting of the construction professional's work to specialist sub-contractors, particularly in areas which are not within the expected expertise or specialisation of the construction professional, *ie* this will be a question of construction, and the terms of the employment of the construction professional must be considered in each case (see *Jackson & Powell on Professional* Negligence (John L Powell & Roger Stewart gen eds) (Sweet & Maxwell, 5th Ed, 2002) at para 8-177 and Stephen Furst & Vivian Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 9th Ed, 2012) at para 14-034).

54 In the present situation, the Architect Agreement that was concluded between Mer Vue and RSP expressly provided for a situation where RSP could engage other consultants with prior written approval of Mer Vue through Clause 2.12 under which RSP undertook to be:[11]

> …fully responsible to [Mer Vue] for all services to be performed by any other consultants employed or engaged by the [RSP] at [RSP]'s own cost, expense and arrangements with the prior written approval of [Mer Vue].

55 *A fortiori*, Mer Vue had expressly approved five named consultants that would provide specialist services to RSP (with the Appendix of the Architect Agreement enumerating their detailed scope of services, and Clause 5.1c setting out their agreed fees for working on the Development):

(a) Squire Mech as the M&E engineer;

(b) Suying Design Pte Ltd as the interior designer;

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[11] AB 04525.

(c) Sitetectonix as the landscape architect;

(d) LPA as the lighting consultant (sub-contracted under Squire Mech); and

(e) Duet Design Pte Ltd as the graphics and signage consultant.

56 Further, these consultants appear to me to specialise in areas which RSP as a firm of architects might not have expertise in. RSP's engineering expertise only extends to civil and structural engineering and RSP does not claim expertise in matters relating to M&E engineering.[12] No issue has also been raised in relation to the lack of competence or the absence of an established track record of these consultants or specialist sub-contractors of RSP. On the contrary, I am satisfied as to the evidence led relating to the track record of the sub-contractors in their respective fields of expertise.[13] Thus, RSP as a construction professional had not unreasonably delegated any of its professional design duties in those specialised areas when proper consideration is given to all the relevant facts and circumstances including the express approval granted by Mer Vue under the Architect Agreement.

57 It may be said that analysing the reasonableness of delegation of duties by construction professionals is different from saying that there are non-delegable duties (if there are any such categories under the common law) owed by construction professionals. Where non-delegable duties are concerned, they are in law *incapable* of being delegated and hence, it is irrelevant that the delegation would have been reasonable. The reasonableness of delegation does

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[12] Transcript dated 27 Oct 2015, p 4.

[13] Lee's AEIC, paras 8–18 and Exhibits LKC-1, LKC-2, LKC-3.

not turn a non-delegable duty into a delegable duty. Thus, the better and more nuanced approach for the common law is to consider the reasonableness of delegation of professional responsibilities given all the facts and circumstances, as opposed to setting out an additional category of non-delegable duties for construction professionals under the common law.

Finding on the relationships between various parties

58 In this next section, I turn to examine the relationships among the parties involved, to determine whether each was more akin to that of employer-employee/servant or that of employer-independent contractor. As stated above at [11] and [28], this determines whether the principle of vicarious liability operates. For ease of reference, I will refer to the party delegating work as the employer, and the party in question being employed (to be determined either as an employee/servant or an independent contractor) as a contractor.

Mer Vue's position vis-à-vis RSP and Tiong Aik

RSP as an independent contractor of Mer Vue

59 The general principle is that an employer is not vicariously liable for the negligence of an independent contractor in the *execution* of its *contract* (see above at [10]). As a starting point, it would be necessary to examine the scope and nature of the work and responsibilities presumably delegated by the employer to the contractor. The scope and nature of the contracted work is also relevant to the Control Test which looks to the employer's extent and degree of control over the manner in which the contracted work is performed.

RSP's contracted work

60 Under the Architect Agreement, RSP undertook design and supervision work for the Development. The recital of the Architect Agreement clearly states that RSP agrees to "provide a full and complete package of the professional services including architectural, structural / civil / geotechnical engineer works, mechanical & electrical engineering and other consultancy for the Project", with Clause 2.2 requiring RSP to perform all duties and responsibilities under the Architects Act, Professional Engineers Act and other relevant regulations.[14]

61 Clause 3.2 sets out the design services to be provided during the "Design Development, Working Drawings and Approval Stage", and I reproduce Clauses 3.2.1, 3.2.2 and 3.2.6 as an illustration:[15]

> 3.2.1 Based upon the schematic drawings and plans as approved by the Company, the Architects will develop *preliminary drawings, final layouts, colour schemes, materials, finishes and dimensions* which will identify the basic concept of the Project.
>
> 3.2.2 *Preparing all necessary drawings and documents* and submitting, amending and re-submitting these to relevant government departments statutory bodies and utilities undertakers as required to obtain all relevant permits, clearances and approvals as may be required by all legislation government departments, statutory bodies and utilities undertakers having control over the works comprised in the Project.
>
> 3.2.6 *Developing and producing all necessary working drawings, details, specification, schedules*, etc. as are required for the purpose of executing and of obtaining competitive tenders for the Project…
>
> [emphasis added]

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[14] AB 04523.

[15] AB 04526 and AB 04527.

62 Clause 3.4 sets out the supervision, coordination and inspection responsibilities of RSP during the construction of the Development. Specifically, Clauses 3.4.10 and 3.4.11 are demonstrative:[16]

> 3.4.10 The Architect throughout the construction and installation of the works (including M&E systems of the Project) until final completion thereof, shall be responsible for *programming, supervising, implementing and co-ordinating the execution of the works* in conjunction with the contractors and subcontractors, suppliers and specialist of the Project to ensure that the works and the design shall be as approved by the Company. …
>
> The Architect shall further be responsible for *efficient site supervisio*n throughout the said period and shall form and implement a strong project management team to the satisfaction of the Company *for monitoring of works in progress and co-ordination of workmanship* to ensure that all works executed are in accordance with the contracts. …
>
> 3.4.11 The Architect shall make *diligent inspection* of the works and shall liaise with the contractors and sub-contractors and suppliers for obtaining day-to-day information that may be required on matters relating to the works and implementations of the construction contracts.
>
> [emphasis added]

Control by Mer Vue over RSP's performance of its work

63 The Control Test traditionally focuses on the right to control *how* the work is done, *ie*, the *manner* in which the work is to be actually executed by the contractor (see *Yewens v Noakes* (1880) 6 QBD 530 at 532–533 and Latham CJ's remarks in *Queensland Stations* at 545). The evidence before me does not bear out the existence of such control by Mer Vue over RSP.

64 The Plaintiff points me to several clauses in the Architect Agreement that require RSP to comply with Mer Vue's standard practice and procedure

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[16] AB 04530 and AB 04531.

manual, to coordinate and work with Mer Vue's project management system, to seek instructions and approvals and confirmation from Mer Vue, and to have due regard to economy and costs in their design while still being within the standard of quality approved by Mer Vue. The Plaintiff also focuses on how Mer Vue was involved in commenting on and approving shop drawings when RSP sought concurrence, with Mer Vue having "end control" on certain issues with cost implications during the development process. As an example of how Mer Vue controlled the manner of how RSP performed its work, the Plaintiff also raises the example of how Mer Vue decided not to accept RSP's suggestions for frosted glass windows as opposed to clear glass windows in the bathrooms as previously shown in the Development's show flats.

65 It is crucial to note that in the construction context, the owner developer is entitled to tell its architect *what* to do in terms of setting the project brief, defining its requirements and making certain aesthetic decisions that affect the development's commercial value and strategic positioning in the market. These do not go to establishing control over the manner of execution of RSP's design and supervision responsibilities. An independent contractor, may, by the terms of its contract, be subject to the directions of its employer in terms of *what* to do, but, apart from contract, it is its own master as to the *manner* in which its work is performed: see *Charlesworth & Percy* at para 3-108.

66 Similarly, reviewing, approving and making suggestions as to its contractor's work do not establish the requisite control by the developer to impute an employer-servant relationship. The developer as the owner of the development has the largest stake in the outcome of the project, and would need to be updated on its progress at various stages. Both the Plaintiff and Squire Mech take issue with the fact that Mer Vue had given some inputs and comments (on either shop drawings or other matters) during the development

process, and they rely on this as an instance of control over RSP. Giving comments, suggestions and ideas and providing inputs in the process would by no means amount to directing or controlling the manner in which the contractor's technical work is to be carried out.

67 It is also disingenuous for the Plaintiff to argue that the fact that Mer Vue's team consisted of people with relevant expertise and background in design and construction (such as architecture and building surveying) meant that Mer Vue wanted to "retain control" and thus could not "wash their hands of the matter".[17] It is not unreasonable for developers to be staffed by individuals with such expertise to manage projects of such scale and complexity involving parties of various technical disciplines. This point on overlapping expertise will only be relevant if perhaps it can be shown that Mer Vue's employees with architectural expertise had in fact directly interfered with RSP's manner of architectural work, for instance in relation to its design plans and drawings. Similarly, direct communications between Mer Vue and its various sub-contractors do not imply or establish control. The development process is complex and requires coordination and communication among all parties (see above at [34]).

68 In arguing against Mer Vue's independent contractor defence, RSP has also specifically contended that Mer Vue had interfered with its manner of carrying out its work relating to the Fibre Optic Cable, Poolside Landscaping and Foul Smell issues. I do not find that Mer Vue's actions with regard to these issues amount to establishing the requisite control and I will be explaining so below (see below at [99]–[122]).

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[17] Pf's closing submissions, para 44.

RSP as a separate established business

69 More crucially, I find that RSP was clearly an independent contractor of Mer Vue based on the fundamental and more general Independent Business Test (see [12]–[14] above). RSP was performing architectural and consultancy services in the course of an established business of its own, as a body corporate, with its own employees and taking on separate financial risks and responsibility for its own management.

Tiong Aik as an independent contractor of Mer Vue

70 Similarly, I find that Tiong Aik was an independent contractor of Mer Vue in relation to its contracted work.

Tiong Aik's scope of work

71 Tiong Aik's scope of contracted work in relation to the Development under the Main Contract consisted of the construction, completion and maintenance of the Development, together with an oversight over the site operations. Article 1 of the Main Contract states as follows:[18]

> 1. CONTRACTOR'S OBLIGATIONS
>
> The Contractor hereby agrees with the Employer *to carry out, bring to completion, and maintain* for the Employer the building and other works comprising 6 Blocks of 23-Storey Residential Buildings with Basement Carparks, Swimming Pool, Other Communal Facilities and Conservation of the Existing 2-Storey Bungalow on Lots 3432T, 3434K, 3654P, 3656A, 3660K, 4920M, 3841L and 6209 PT (SL) MK 25 at Amber Road/Marine Parade Road." [emphasis added]

[18] AB 16928.

72 Tiong Aik was also responsible for the quality of the materials used and the standard of workmanship in relation to the construction of the Development under Clause 11 of the Main Contract:[19]

> 11.(1) Without prejudice to the Contractor's responsibilities under clause 3 of these Conditions, *all materials, goods and workmanship* comprised in the Works shall, save where otherwise expressly stated *or required, be the best of their described kinds and shall in all cases be in exact conformity with any contractual description or specification and of good quality*… [emphasis added]

73 Clause 2(1) of the Main Contract also provides Tiong Aik with the right to control the construction site operations of the Development as the main contractor, as well as the sole right and responsibility to choose methods of working and temporary works:[20]

> 2.(1) Unless expressly stipulated or described in the Specification or other Contract Documents, control over the Contractor's site operations and the choice of methods of working and temporary works shall be the sole right and responsibility of the Contractor.

No requisite control by Mer Vue over Tiong Aik

74 A number of examples of control by Mer Vue over Tiong Aik that are raised by the Plaintiff's counsel relate to decisions made by Mer Vue with regard to the aesthetics of the Development, such as Mer Vue's approval of colour samples with regard to the aluminium roof trellis.[21] As I mentioned above at [65], developers are rightfully entitled to make such decisions and direct their contractors accordingly. These cannot amount to control over the manner that

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[19] AB 16937.

[20] AB 16933.

[21] 1st Df closing submissions, para 166.

Tiong Aik was performing its work to carry out construction of the Development. Similarly, an allegation of direct communications *per se* between Mer Vue and Tiong Aik's sub-contractors[22] cannot indicate control of the manner Tiong Aik carried out its work, unless it is demonstrated that the instructions that were directly communicated to the sub-contractors amounted to control of the manner they were performing their duties. In this regard, I cannot make such a finding based on the evidence presented.

75 It would be difficult to imagine in a typical construction context that a builder or main contractor would have an employer-employee relationship with its client. In the construction industry, liability for torts committed in the course of the work has come to be accepted as a "necessary incident of the contract" for the main contractor against which the main contractor would usually protect itself by insurance: see Patrick S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) at pp 83–85. A degree of control retained by the client has also come to be expected, be it over the nomination of sub-contractors, expenditure or other matters. It is important to examine the type of control, *ie* whether the control was over the manner the main contractor performed its construction work.

76 The Plaintiff further claims that Mer Vue had directed Tiong Aik to obtain its insurance policies from Acclaim Insurance Brokers to support their contention that there was control by Mer Vue over Tiong Aik.[23] This is wholly irrelevant to the issue of the employer's control over how the contractor performs his work.

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[22] Pf's closing submissions, p 37.

[23] Pf's closing submissions, para 44.

77 As the Builder for the Development, Tiong Aik was engaged by Mer Vue in accordance with Section 8(1)(*c*) of the BCA, and Mer Vue had not interfered with the actual construction and installation work, and cannot be said to have control over the manner Tiong Aik carried out its work. During the cross-examination of Mr Eugene Soon, Tiong Aik's General Manager (Senior Contracts Manager at the material time) ("Soon"), Soon himself confirmed that Mer Vue did not direct Tiong Aik in the execution of their work:[24]

> Q: Okay. Now, let's talk about decision-making. Do you agree with me that the developer doesn't teach you how to go and install the waterproofing system? Do you agree with me?
>
> A: Yup.
>
> Q: He doesn't stand there over your shoulders and direct your workers, "So this is how you go about it". You agree with me, he doesn't do that, right? Yes? *Mer Vue doesn't do that, right?*
>
> A: *Yeah, yeah, no.*
>
> Q: So, whilst Mer Vue may tell you, "I want this brand" or "I don't agree with this brand", once he makes the decision, the actual construction and installation of it is left to you or your sub-contractors. Agree with me on that?
>
> A: Yes.
>
> [emphasis added]

78 Soon also expressly agreed that it was the owner developer's "prerogative" to make decisions that affected the aesthetics of the Development, such as the choice of granite or stones for walls,[25] and that it was standard practice for developers to give comments and suggestions to contractors in such

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[24] Transcript dated 22 Oct 2015, p 75: 4—19.

[25] Transcript dated 22 Oct 2015, p 82—83.

projects.[26] On the present facts, I find that Mer Vue had no control over the manner that Tiong Aik performed its work.

Tiong Aik as a separate established business

79 Further, Tiong Aik was clearly a separate entity that had contracted with Mer Vue under the Main Contract to undertake the construction work for the Development. The Independent Business Test and the other factors as set out by Cooke J in *Market Investigations* also point to Tiong Aik's role as an independent contractor of Mer Vue.

Tiong Aik's position with its sub-contractors

Tiong Aik's structuring of its employees and sub-contractors

80 As the main contractor, Tiong Aik was the Builder for the Development as regulated under the BCA. As I have alluded to the usual situation during such construction projects at [34] above, main contractors generally deal with planning, organisation, coordination and supervisory work while they manage various sub-contractors that perform specialist jobs. This is the case here where Tiong Aik's own direct labour force consisted of employees for only general work such as housekeeping, supervision of general safety and miscellaneous work,[27] with Tiong Aik itself having sub-contracted many items of work to numerous DSCs and NSCs.

81 There were a total of nine NSCs for the following areas of work:[28]

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[26] Transcript dated 22 Oct 2015, p 76.

[27] Transcript dated 22 October 2015, p 83.

[28] Soon's AEIC, paras 32—33; Sim Kim Koon's ("Sim") AEIC, para 16.

(a) Powen Electrical Engineering Pte Ltd for electrical installation works;

(b) Dai-Dan Co Ltd for air-conditioning and mechanical ventilation systems;

(c) Sumitomo Densetsu Co Ltd for the fire protection system;

(d) Hitachi Asia Ltd for the vertical transportation system;

(e) Tractel Singapore Ptd Ltd for façade cleaning equipment;

(f) Men's Pool Pte Ltd for the pool filtration and circulation, and water feature systems;

(g) ABS-Kimsign (Singapore) Pte Ltd for signages;

(h) Nature Landscapes Pte Ltd ("Nature Landscapes") for carrying out of landscaping work; and

(i) Yuanda Aluminum Industry Engineering for the design, supply and installation of aluminium works and glazing, certain walling, balustrades, lourves, trellis and skylight works.

82 As for the DSCs, these were the 12 sub-contractors engaged by Tiong Aik:[29]

(a) King Wan Construction Pte Ltd, for sanitary, plumbing and gas installation, rainwater pipes, fire hydrants and lead-in pipes;

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[29] Soon's AEIC, para 159; Sim's AEIC, para 17.

(b) Jason Parquet Specialist (S) Pte Ltd for timber decking;

(c) Heng Boon Seng Construction Private Limited for waterproofing works;

(d) Everpaint Enterprise Pte Ltd for painting works;

(e) Degussa Construction Chemicals (S) Pte Ltd for waterproofing works to basement walls and floors;

(f) Nam Lee Pressed Metal Industries Ltd for BCA blast-proof storey shelter door system, aluminium hopper and stainless steel letter boxes;

(g) Eng Hua Furniture Manufacturing Pte Ltd for timber doors and frames;

(h) Gliderol Door (s) Pte Ltd for fire-rated roller shutter doors;

(i) Tedi Enterprise Pte Ltd for false ceilings, and fire-rated box-ups for roller shutters;

(j) Star Chemical Manufacturers Pte Ltd for epoxy coating works;

(k) Ying Cheng Construction for providing labour to architectural works; and

(l) Hong Yuen Construction Pte Ltd for providing labour to architectural works and reinforced concrete works.

Control over the manner of work performed by sub-contractors not established

83 The nature of work sub-contracted out to NSCs and DSCs was largely specialist in nature and was dependent on the contractor's proprietary system at times. In these instances, Tiong Aik's role was to ensure that they had skilled supervisors to supervise their sub-contractors' work to ensure that their jobs were completed in a timely manner. Some of these sub-contractors under Tiong Aik were large and well-established companies in their respective fields of specialisation. Due to the expertise of these sub-contractors, Tiong Aik could not and did not control the manner they carried out their work, and had to rely on them instead to decide how their work was to be carried out according to the project requirements and specifications in the Main Contract. In this respect, the sub-contractors would have to prepare their method statements and detailed shop drawings for construction purposes, and decide on the number of people required to carry out those works, or the time that they needed.[30] Tiong Aik would then facilitate and oversee them accordingly when they carried out their work thereafter.

84 The Plaintiff points to various instances of supervision as examples of requisite control: the coordination and organisation of sub-contractors in terms of overall sequencing of workflow at the construction site of the Development, as well as the right to direct sub-contractors not to deviate from preapproved shop drawings or contract specifications and requirements during the process of checking.[31] However, supervisory control of this type, especially on-site, should not be taken to establish the necessary control over the manner of work under

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[30] Transcript dated 22 Oct 2015, pp 96—98.

[31] Pf's closing submissions, pp 44—55.

the Control Test (see above at [36]). The main contractor may supervise and also check on the quality of the finished work of its sub-contractors, but does not exercise control for the purposes of vicarious liability. Even though Tiong Aik coordinated among its sub-contractors, provided and charged for site services or facilities such as use of electricity, tower cranes, etc., and organised and directed sub-contractors in terms of timing and sequencing of operations, these supervisory actions do not go towards establishing Tiong Aik's control over the method of work done by its sub-contractors (whether NSCs or DSCs) with regard to their respective scope of work. Individual shop or working drawings were still prepared by the sub-contractors; employees executing work on the ground were employed by the sub-contractors directly and Tiong Aik was entitled to ensure that its sub-contractors complied with their contractual obligations to Tiong Aik.

85 Mr Brian Selby, Chairman of the Management Council of the Plaintiff (and their only witness in this tranche of the trial) acknowledged, during his cross-examination by counsel for Tiong Aik, the lack of specific evidence demonstrating the requisite control the Plaintiff alleges Tiong Aik had over its various sub-contractors:[32]

> Q: I will put it to you that Tiong Aik engaged independent subcontractors who carried out their work for various items of work. Are you in a position to agree, disagree or you don't know?
>
> A: Since we're suing you, I would guess we disagree.
>
> Q: You disagree?
>
> A: Yes.
>
> Q: So you have knowledge that --

[32] Transcript dated 3 Jul 2015, pp 99—100.

> A: I do not have personal knowledge of what you're -- your statement, but as an overarching statement, if we're suing you, then presumably we have evidence to show that that isn't the case.
>
> Q: And you are unaware of this evidence that would show -- right?
>
> A: I have not seen that particular evidence.
>
> Q: No, answer my question. You are unaware of this evidence?
>
> A: I am unaware of specific evidence tying [Tiong Aik] to specific subcontractors that would show the lack of independence, from a personal view.

86 This is unsurprising, since management corporations are only formed after TOP and are generally not privy to details of the happenings during the construction phase of developments. Then, when no particulars are given of the requisite control, the fact that these NSCs and DSCs were body corporates in already established businesses that contracted with Tiong Aik to perform services would weigh heavily in the fundamental Independent Business Test in favour of them being independent contractors. These NSCs and DSCs had also hired their own employees to carry out their sub-contracted work, provided their own equipment and taken on their own separate financial risks in this project as separate companies. Thus, I find that these NSCs and DSCs were independent contractors of Tiong Aik for their various sub-contracted items of work.

87 For the sake of completeness, I will also add that there is no evidence to impute vicarious liability on Tiong Aik under the *pro hac vice* inquiry as well. No evidence was adduced to show that any employees of the nine NSCs or 12 DSCs were under the control and directions of Tiong Aik in respect of the manner that they had carried out their work either on-site or off. As was observed in *BNM* at [21], *prima facie* vicarious liability would lie with the general employers of negligent employees, and control over these employees

would have to be considered to displace this presumption to find vicarious liability on the part of alleged temporary employers instead.

88 Thus, for the alleged defects within the contracted scope of work of the independent contractors engaged by Tiong Aik, I find that Tiong Aik would not be liable for the tortious acts of its independent contractors. This is of course barring any evidence that may be surfaced in the upcoming main trial establishing that Tiong Aik had condoned negligence on the part of any sub-contractor after coming to know that the sub-contractor's work was being done in a defective way (see *D & F Estates* at 209), or any finding that Tiong Aik had for a particular purpose or occasion exercised control over a sub-contractor's employee actions to constitute the latter *pro hac vice* the servant of Tiong Aik with consequent vicarious liability for the employee's tortious acts. I also note that this finding does not excuse Tiong Aik from any primary liability for want of care in its performance of supervisory responsibilities as the main contractor of the Development.

RSP's position with its contractors

89 Next, for RSP's independent contractor defence, RSP is contending that it is not vicariously liable for the negligence of Squire Mech, Sitetectonix and LPA with regard to the execution of, respectively, M&E engineering work, landscaping design work and lighting design work in relation to the Development. Squire Mech and Sitetectonix were sub-contractors of RSP, while LPA was engaged by Squire Mech.

Squire Mech as an independent contractor of RSP

90 There is no dispute that Squire Mech is a separate established business from RSP and has its own engineering practice with involvement in various

notable projects prior to working on the Development. Under the fundamental Independent Business Test, this strongly points to Squire Mech being an independent contractor, and not a servant, of RSP. As for the analysis under the Control Test, the Plaintiff seems to be grabbing at straws while misunderstanding that the crux of the inquiry is to determine whether there is control over the manner in which the contracted work is performed. The Plaintiff argues that RSP had, despite presenting itself as having delegated part of its work to sub-contractors due to its lack of expertise, conceded during the trial that they marketed themselves as being multi-disciplinary. However, the *reasons* parties engage contractors to execute certain work are irrelevant to establishing the requisite control under the Control Test. Likewise, RSP's motivations for mounting an independent contractor defence are irrelevant; the fact that RSP was contractually liable to Mer Vue for breaches by their sub-contractors and was motivated to seek an "indemnity" from their sub-contractors does not go towards establishing the requisite control. While it may be true that RSP is a shareholder of Squire Mech and that the two companies have common directors, these practices are not rare among companies in the same industry and are not directly on point to establishing control over the manner of work performed by the contractor. Additionally, RSP as the architect had no right to interfere in the manner Squire Mech carried out its *professional* work in M&E engineering, which is totally different from that of architectural design or civil and structural engineering. I thus find that RSP had engaged Squire Mech as an independent contractor for M&E works.

Sitetectonix as an independent contractor of RSP

91 Similarly, Sitetectonix was an independent contractor of RSP and was engaged for landscaping design services for the Development. Sitetectonix was the landscape consultant, whose expertise was outside that of RSP. As the

architect, RSP played the traditional role of coordinating and interfacing work among the various consultants, and had not in fact controlled how Sitetectonix's work was carried out. RSP's "control" only extended to "administrative" control, much akin to how Tiong Aik as the main contractor coordinated among its sub-contractors (see [83]–[84] above). In fact, it was Mer Vue, and not RSP, that had direct discussions on the landscaping plan that was part of Sitetectonix's contracted work.[33] Once Sitetectonix's landscape design drawings were done, RSP would incorporate the landscape drawings into the overall architectural drawings to ensure that nothing was in conflict.[34] Such overall co-ordination and oversight as the lead consultant must not count as the necessary control over the manner that the work was done. Additionally, Sitetectonix was clearly a separate business, hired its own employees and undertook fully the financial risk of its business and operations for the Development. In fact, Sitectonix's remuneration for its work on the Development was contractually provided to be settled directly by Mer Vue, and not even (unlike the case for Squire Mech) paid through RSP as the lead consultant and architect.[35]

Question of vicarious liability does not arise between RSP and LPA

92 As for LPA's relationship with RSP, the independent contractor inquiry is not relevant since LPA was engaged by Squire Mech, and not RSP, in the first place. As I mentioned at [11], the independent contractor inquiry only kicks in if vicarious liability is being pinned on a party for its alleged employee/servant's

[33] Transcript dated 20 Oct 2015, p 115.

[34] Transcript dated 6 July 2015, p 55—56.

[35] AB 04533.

tortious actions. Since LPA was not engaged by RSP, the question of vicarious liability for LPA's acts does not even arise.

Proper care taken in the appointment of contractors

93 Next, I also find that the Defendants had exercised proper care in their appointments of their respective independent contractors.

94 In the appointment of Tiong Aik as the main contractor, Mer Vue had engaged in a formal tender exercise.[36] Both Tiong Aik and RSP are established firms with an extensive track record in the construction industry in Singapore, and Mer Vue demonstrated that it had engaged its independent contractors with proper care after ensuring their competence and experience.

95 As for Tiong Aik's independent contractors which were nominated by Mer Vue, RSP or Squire Mech, it is contended by Tiong Aik that any consequence of a finding that any NSCs were not competent and were negligently appointed would defeat Mer Vue's independent contractor defence.[37] This is misguided as Mer Vue had not argued that these NSCs were its independent contractors, and it is clear that the intention was for each of the sub-contractors to enter into a sub-contract with the main contractor rather than directly with the developer. Under the SIA Conditions, Tiong Aik was still entitled to object to the nomination of any sub-contractor, and under Clause 29(2) of the Main Contract, Tiong Aik could raise such objections based on several grounds:[38]

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[36] Ung's 1st AEIC, paras 28—29; Soon's AEIC, paras 12—18.

[37] 2nd Df closing submissions, para 255.

[38] AB 16951; 1st Df closing submissions, para 207.

(a) there are reasonable grounds for supposing that the financial standing or solvency or technical competence or reliability of the selected sub-contractor or supplier is not such that a prudent contractor, having regard to the nature and extent of the sub-contract work materials or goods and their possible effect on the remainder of the Works, would be justified at the time of the instruction in engaging the sub-contractor or supplier to carry out or supply such work materials or goods;

(b) the terms of the sub-contract offered by the selected sub-contractor or supplier are unsatisfactory in that:

(i) the sub-contractor or supplier is not prepared to accept equivalent responsibilities in the sub-contract consistent with those undertaken by the Main Contractor under the Main Contract;

(ii) the sub-contractor or supplier is not prepared to indemnify the Main Contractor against liabilities, claims and damage arising out of negligence, breach of contract or default in the carrying out of the sub-contract work in the same terms as the Main Contractor is required to indemnify the Employer in the Main Contract;

(iii) the sub-contractor or supplier is not prepared to offer firm completion or delivery dates consistent with the Main Contractor's completion dates or a reasonable programme having regard to those dates;

(iv) the sub-contractor or supplier is not prepared to accept liability for liquidated or other damages for delay;

(v) the sub-contractor or supplier is not prepared to accept terms for payment within 14 days of receipt by the Main Contractor from the Employer of the sums certified by the Architect as due in favour of such sub-contractor or supplier;

(vi) the sub-contractor or supplier is not prepared to accept the terms for termination of the sub-contract by the Main Contractor upon the certificate of the Architect that the sub-contractor is in default on one of the grounds stated in clauses 32(3)(d), (e) and (g) of the Main Contract;

(vii) the sub-contractor or supplier is not prepared to accept liability for making good or replacing defective work or materials and for reimbursing the Main Contractor for any expenditure or damage incurred or suffered by him in consequence of such defects; or

(viii) the sub-contractor or supplier is imposing any other unreasonable exclusion of liability having regard

> to the Main Contractor's obligations under the Main Contract.

96 If it could be shown that Tiong Aik had not taken proper care in raising any objections that should have been *reasonably* raised within the nomination framework in its Main Contract, it should not be entitled to deny liability due to its own lack of care. Due diligence on the part of the main contractor must still be required. On the present facts, no parties have made such allegations and it should suffice to note that I am satisfied that Tiong Aik had not lacked proper care in its engagement of its independent contractors (for both its NSCs and DSCs). Its DSCs were appointed either on the basis of having worked well with Tiong Aik in the past or their track record generally,[39] and I am satisfied that proper care was taken with regard to their appointments.

97 An interesting question may arise as to whether the duty to take proper care in the appointment of NSCs is placed on *both* the nominators, *ie* Mer Vue and RSP/Squire Mech, as well as the main contractor (who merely has the right to object on limited grounds). Fortunately, this issue does not arise here as the pre-qualification exercise (where sub-contractors were short-listed based on several criteria such as their track record, financial standing, etc.) in the nomination framework and the short-listing of sub-contractors for invitations to tender ensured that due diligence was carried out by Mer Vue, RSP and Squire Mech before the final selection of their respective NSCs to be sub-contracted under Tiong Aik.

98 Lastly, on the appointment of RSP's independent contractors, there are no allegations of negligence on RSP's part in its engagement of its contractors,

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[39] Soon's AEIC, para 156.

and based on the present facts I am satisfied that there was no lack of proper care in this regard.

Findings on specific issues

99 I now turn to my findings on the applicability of the independent contractor defence in respect of the Defendants' involvement in three specific areas of alleged defects explored in this tranche of trial. It is important to note that these preliminary issues neither conclusively establish tortious liability on the part of any party, nor have any implications on the separate question of contractual liability.

Fibre Optic Cable Issue

100 The Plaintiff pleaded that there was incomplete and/or inconsistent fibre optic cabling up to and serving apartment units as a defect against all four Defendants.[40] Although there were no contractual, statutory or regulatory obligations on the part of Mer Vue to ensure that the Development was installed with fibre optic cables and Mer Vue had expressly declined Singtel's offer to install fibre optic cables for the Development due to the late stage of the offer before the handover to purchasers,[41] the cables were installed for two out of six apartment blocks eventually, and it was inconclusive how Singtel had gained access to the construction site which was under the control of Tiong Aik, the main contractor.

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[40] SOC, para 31, s/n 8A.

[41] AB 35835.

101 Regardless, ensuring that the Development was cabled up for the fibre network was not provided for in the specifications in the Sale and Purchase Agreements between Mer Vue and the original purchasers,[42] and was similarly not within the scope of work of Tiong Aik and RSP or the other sub-contractors under the Main Contract or Architect Agreement.[43] On the other hand, the control of the construction site was with Tiong Aik throughout the construction process.[44] As such, any negligence relating to the installation (or lack thereof) of the cables would not lie with how the Defendants performed their contracted work, save for perhaps Tiong Aik's possible lack of care over its control of the construction site. Any negligence, *if found*, regarding Tiong Aik's performance of its duty as main contractor in overseeing the site operations would not be vicariously imputed on Mer Vue, as Mer Vue had engaged Tiong Aik as an independent contractor and not as a servant (see [70]–[79] above). Tiong Aik would also not be able to use the independent contractor defence with regard to this issue as they had not sub-contracted or delegated overall responsibility over the construction site to any other party.

Poolside Landscaping Issue

102 As for the Plaintiff's complaint about the choice of trees and plants around the pool that led to the nuisance of small leaves falling into the pool, this concerns an alleged *design* and not workmanship defect. Responsibility for landscaping design work in terms of designing the environment and softscape (the part of the landscape with horticultural elements) lay with Sitetectonix,

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[42] Ung's 1st AEIC, pp 234—261; Ung's 2nd AEIC, para 11.

[43] Transcript dated 20 Oct 2015, p 108.

[44] Transcript dated 22 Oct 2015, p 32.

while the carrying out of the softscape plan was done by Nature Landscapes, an NSC under Tiong Aik.[45]

103 Thus, this alleged defect falls under Sitetectonix's contracted scope of work that included, among others, the completion of a detailed softscape design and a landscape planting plan showing the location, size, quantity, and type of plant materials selected.[46] As Sitetectonix was an independent contractor of RSP (see [91] above), RSP would not be vicariously liable for any negligence on the part of Sitetectonix in carrying out its work in designing the softscape of the Development. Sitetectonix would, *prima facie*, be liable for its own negligence (if established).

Analysis of primary liability for the authorisation or ratification of torts

104 Nonetheless, RSP also argues that Mer Vue had interfered with the manner Sitetectonix carried out its work, and had directly instructed Sitetectonix on the selection of the poolside landscaping, and had hence authorised or ratified Sitetectonix's alleged tort.[47] This language of interference, authorisation and ratification was lifted with reference to *Clerk & Lindsell* at para 6-59. However, RSP was mistaken that the effect of any interference, authorisation or ratification was a disapplication of the independent contractor defence. Interference with the manner an independent contractor carried out its work that resulted in damage would lead to Mer Vue committing a tort for which it could be held primarily liable itself, whereas an authorisation or ratification of an independent contractor's tort would lead to Mer Vue being jointly liable for that

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[45] Transcript dated 3 Aug 2015, p 99.

[46] AB 04563 and AB 04559.

[47] 3rd Df closing submissions, paras 155, 156 and 161.

tort (*Clerk & Lindsell* at para 6-59, and also para 4-04, n 7). Similarly, joint liability might be imposed on an employer who in the course of supervision condoned negligence on the part of its sub-contractor after knowing that the sub-contractor's work was being done in a defective and negligent way (see *D & F Estates* at 209).

105 The attribution of liability in these instances is not vicariously arrived at through another party, but would be instead a form of *primary* liability on the part of Mer Vue. Under the Control Test in the independent contractor inquiry, *specific* instances of control or interference with the manner a contractor performs his work may constitute relevant evidence to negate the existence of a *general* relationship of employer-independent contractor. Thus, if the employer-independent contractor relationship is established on the evidence to be non-existent, then *vicarious* liability may be attributed to the employer for the contractor's tortious acts in *general* (beyond those specific situations). On the other hand, under the analysis of attributing *primary* liability in these instances listed above, *specific* instances of control or interference by the employer would only affect the attribution of liability in those *specific* situations and are not relevant with regard to liability for tortious acts in general outside the scope of these situations.

106 Without going into the requirements or rationalisation of the different types of joint tortfeasance that are not relationship-based (or the scope of various "participation links" such as procurement, authorisation, etc. as termed by Hazel Carty in "Joint tortfeasance and assistance liability" (1999) 19 Legal Stud 489), I would venture to say that a high threshold is necessary to impute joint liability in an employer-independent contractor context where the joint tort is based on negligence. It would be necessary to show that the employer had actually authorised or ratified the *negligent mode* of the independent contractor

performing the act in question, and not merely that he authorised or ratified the act. Thus, the employer would have to know that the independent contractor's work was being done in a defective and negligent way while condoning it (as was envisaged by Lord Bridge in *D & F Estates* at 209).

107 As for the level of interference in the manner of the independent contractor's performance of its work, the employer would probably be primarily liable for the resultant damage if, for example, it overrides the expert recommendations of its independent contractor against the latter's advice or it instructs its independent contractor to perform the work in a manner that is against the latter's advice.

108 The various instances of liability mentioned above are ways to attribute liability on an employer despite the fact that they are in an employer-independent contractor relationship. In this case though, Sitetectonix was *not* a direct sub-contractor of Mer Vue. Sitetectonix was a sub-contractor of Mer Vue's sub-contractor, RSP. Nevertheless, even on a general application of these principles of attributing primary liability to Mer Vue or for that matter "accessory" liability in the form as submitted by RSP, there is no evidence showing that Mer Vue had authorised, ratified or condoned any of the alleged negligent acts of Sitetectonix in selecting plants and trees that shed leaves relatively more frequently for planting around the pool. In fact, it is clear that Mer Vue had explicitly warned Sitetectonix to ensure that the type of plants and trees selected to be planted near the edge of the swimming pool should not shed leaves frequently and cause maintenance problems (see below at [109]). Mer Vue had relied on Sitetectonix (albeit indirectly through RSP) to stipulate the right type of plants and trees for the softscape design at the edges of the swimming pool that would address those concerns of Mer Vue.

109 In any event, I am not convinced that Sitetectonix would be excused from liability for its negligence, if any, with regard to any of its recommendations in relation to the softscape design (and more particularly on the choice of the plants and trees that supposedly do not shed leaves frequently which were to be planted around the edge of the swimming pool) merely because Mer Vue had directly communicated with it or had been proactive in the process in commenting on its landscape plans as RSP had alleged. Indeed, certain aesthetic decisions regarding the choice of plants and trees in terms of the landscaping concept (from an aesthetic perspective and not from the botanical aspect of the frequency of leaves shedding, which would be within the special expertise of Sitetectonix), or other landscaping specifications such as the need for plants that provided more shade around the Development's pool areas, were up to Mer Vue to rightfully decide. However, where the nature of the alleged defect lies within the expertise of Sitetectonix, its negligence is its own. It is clear that Mer Vue, RSP and Sitetectonix were all aware of the potential issue of leaves falling into the swimming pool based on the Minutes of the Client/Consultants' Meeting No 21 dated 11 May 2004, but it is even clearer that it was Sitetectonix's expertise in softscape design, horticulture and plant science that was being relied on to address the issue:

> 9.4 *SPL [i.e. Sitetectonix] to address concern* of possible maintenance problem for planters in the swimming pool. Plants to be planted near the edge of swimming pool should not have problem of leaves frequently dropping into the swimming pool. [emphasis added]

Foul Smell Issue

110 The third and last area of defects dealt with in this tranche was the alleged bad odour in certain areas of the apartment units. Although the Defendants unanimously agree that this was not a "defect" in the sense that the design of the plumbing and sanitary system was fully in compliance with the

relevant regulations and codes of practice,[48] I am not concerned at this preliminary stage with the standard and breach of care applicable to the Defendants. I am also not currently dealing with whether the alleged defects relating to the Foul Smell Issue occurred on or affected the common property of the Development.

Salient facts and background to the Foul Smell Issue

111 The Plaintiff pleaded that there were bad odours at the kitchen and wash areas as well as adjoining bathrooms and some bedrooms in various apartment units, due to the lack of a floor trap provided at the kitchen area and/or a design flaw in the Development's common duct and pipework.[49] This again is an alleged design defect concerning the design of the plumbing and sanitary system in the Development, which falls under the scope of the contracted work of Squire Mech as the M&E engineer of the Development. This was set out specifically in Clause 1.1(e)(vi) of the Appendix to the Architect Agreement, which stipulated that Squire Mech was to produce a set of combined building services engineering works including, among others, the "Plumbing and Sanitary System".[50]

112 The Foul Smell Issue concerns the design of the kitchen waste discharge pipe system ("KWDP"). The KWDP in each apartment unit operates to channel sullage away from the kitchen sink of each unit into a common waste discharge stack ("common stack") in the apartment block that will subsequently transport the waste out of the Development and into the public sewage system. The

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[48] Transcript dated 29 Oct 2015, p 130; 1st Df closing submissions, para 238.

[49] SOC, para 33, s/n 17(a).

[50] AB 04546.

KWDP for a unit typically comprises pipes installed below the kitchen sink in that unit, connecting to the pipes below the floor slab of that unit. As such, the KWDP for a fifth-storey unit for instance would have pipes that run below the floor slab of that unit and along the space above the false ceiling of the fourth-storey unit directly below ("Ceiling Space"). The pipes in this space slope downwards to channel sullage from the kitchen sink to either a common stack directly, or to a floor trap in another area (*eg* the toilet in the utility area or the common bathroom) before joining a common stack.[51] Thus, the amount of Ceiling Space available is a constraint on the eventual design of the KWDP. Consequently, the decided ceiling height of the kitchen and yard areas (*ie* the height from the finished floor level of the apartment to its false ceiling) has a direct impact on the amount of Ceiling Space available for the KWDP. The amount of Ceiling Space available for the KWDP may then also influence the diameter and gradient of the pipes installed for the KWDP and the provision of floor wastes or floor traps below the kitchen sinks in various units in the Development. Floor wastes are outlets (usually covered with a grating) affixed onto drainage pipes that receive waste discharges, while floor traps serve the same function with additional fittings to prevent foul air from escaping from the drainage system. Generally, installation of floor traps requires more ceiling space than floor wastes.

113 The as-built layout and design of the KWDP for the Development is not in dispute.[52] Among the 546 units in the Development, there are six types of units—types A, B, C, D and E—each with its own respective KWDP as-built design (that use 75 mm diameter pipes) as follows:

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[51] Eng Kwee Chew's ("Eng") AEIC, para 43.

[52] 4th Df closing submissions, paras 66—69.

(a) For type A units, a floor waste is affixed onto the drainage pipe leading from the kitchen sink, and across the kitchen (below the floor slab) to a floor trap at the kitchen area designated for the placement of a washing machine, *ie* there is a separate common stack at the kitchen and the KWDP pipes are not connected to the pipes in the common bathroom.[53]

(b) For type B units, a floor waste is affixed onto the drainage pipe leading from the kitchen sink and then (below the floor slab) to the floor trap in the toilet at the utility area, before discharging into a common stack next to the utility area, *ie* the KWDP pipes are not connected to the pipes in the common bathroom.[54]

(c) For type C, D and E units, a floor waste is affixed onto the drainage pipe leading from the kitchen sink and then (below the floor slab) to a floor trap in the common bathroom, before discharging into the common stack, *ie* there is no separate stack in the kitchen and the KWDP pipes are connected to the pipes in the common bathroom.[55]

114 On 29 November 2005, there were discussions with the National Environment Agency ("NEA") where NEA had actually advised an upgrade from the planned use of 75 mm pipes to 100 mm ones to avoid potential choking of waste pipes and foul smell concerns in the KWDP.[56] Notwithstanding this, the suggestion was not taken up eventually as the provision of 75 mm pipes in

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[53] Eng's AEIC, paras 25—26, and p 112; 3rd Df closing submissions, para 67.

[54] Eng's AEIC, paras 27—28, and pp 114—115; 3rd Df closing submissions,para 68.

[55] Eng's AEIC, paras 29—34, and pp 116—124; 3rd Df closing submissions, para 69.

[56] AB 20189 for Squire Mech's response.

the KWDP was in fact already code-compliant with prevailing standards. The Plaintiff alleges that floor traps, instead of floor wastes, should have been installed for the drainage pipes leading from the kitchen sinks in the units, and that there should have been a separate common stack for the discharge of sullage from the kitchen sinks to the main sewage system.

115 In total, there are five decisions relevant to this pleaded defect that the Defendants dispute as to who had the final say, or had interfered with the manner that Squire Mech was carrying out its work:

(a) that the ceiling height of the kitchen and utility yard areas was to be set at 2600 mm;

(b) that a floor waste instead of a floor trap was to be installed at the kitchen sink;

(c) that 75 mm diameter pipes were to be used;

(d) that there were no separate stacks for sullage discharged at the kitchen areas; and

(e) that rectification work as apparently advised by Squire Mech was not carried out.

RSP's independent contractor defence in relation to Squire Mech

116 Although RSP was *contractually* responsible for ensuring the due compliance and performance of Squire Mech's duties and scope of services under the Architect Agreement, RSP would not be vicariously liable in *tort* for Squire Mech's acts with the latter being an independent contractor of the former (as I found above at [90]). Squire Mech contends that the design of the KWDP

was a collaborative effort. However, mere joint discussions among the client and consultants regarding the issue in the construction context which necessitated coordination (see [35] above) would not establish control over Squire Mech's *manner* of performing its professional work in relation to the KWDP.

117 It is also disingenuous for Squire Mech to claim that the ceiling height as set by RSP (due to the input of Mer Vue to have high ceilings in the units for prestige purposes in relation to the Development) had amounted to involvement in the design to disapply RSP's independent contractor defence. Squire Mech submits that the smaller Ceiling Space below the floor slab had meant that only a floor waste, and not a floor trap, could be affixed at the drainage pipe leading from the kitchen sink. However, Mer Vue, as the owner of the Development, was entitled to make known its preference as to the ceiling height of its units, and RSP, as the architect, had thus proposed the ceiling height of 2600 mm at the kitchen and utility yard areas to meet this preference. This stipulation merely amounted to setting a design brief and requirement around which Squire Mech had to design a suitable KWDP, and hence did not amount to control over the manner Squire Mech performed its work. Squire Mech had not raised any objection that the ceiling height requirement as stipulated by RSP limited the amount of Ceiling Space which could not be accommodated or was unworkable to ensure an appropriate KWDP.

Mer Vue's involvement in the design of the KWDP

118 Squire Mech claims that Mer Vue had interfered or was involved in the design of the KWDP to the extent that Mer Vue is not entitled to raise the independent contractor defence. Similar to the situation above between Mer Vue and Sitetectonix, Squire Mech was an independent contractor of RSP, and was

not directly engaged by Mer Vue. Regardless, I do not find that Mer Vue's involvement amounted to control over the manner RSP or Squire Mech performed their professional work in relation to the design of the KWDP. There was also no interference, authorisation or ratification of the alleged defect known to Mer Vue to exist in the KWDP at the time of the design or installation so as to make Mer Vue potentially liable to the Plaintiff jointly with Squire Mech and/or RSP in tort.

119 It is clear from an e-mail from Squire Mech to Tiong Aik dated 14 December 2005 that it was Squire Mech's expressed professional opinion that the 75 mm diameter pipes and floor wastes for the KWDP were sufficient and the foul smell would be contained and Squire Mech therefore decided to continue using the floor waste with the same diameter pipes as per its original M&E design for the various units:[57]

> We are in the opinion that our initial upgrade of floor waste pipe from diameter 50mm to 75mm is adequate and this will address the potential choking problem. In addition, the floor waste is located under the kitchen cabinet and should be able to contain the foul smell.
>
> As such, we have decided to provide diameter 75mm pipe for the floor waste at the kitchen as per original contract provision.

120 Similarly, the decision to use floor wastes instead of floor traps was also made at a meeting between the consultants, *without* Mer Vue's presence, and this is evident from Squire Mech's Senior Mechanical Engineer Mr Koh Choon Tee's e-mail to RSP's Managing Director, Ms Lau Shuh Ling dated 19 March 2004:[58]

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[57] AB 20189.

[58] AB 01100.

> We refer to our technical discussion on 19/03/04 with Ms Jean S Cabalinan of M/s Suying and Mr Harry of RSP (S) and wish to record as follows:-
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> …
>
> 7. [Squire Mech] highlighted that [floor trap] minimum depth is 400mm. It was agreed that *kitchen will only be provided with floor waste* connected to floor trap in the yard. Therefore, sufficient height is required at the yard.
>
> [emphasis added]

121 Squire Mech also alleges that Mer Vue disregarded their recommendation to implement a particular option of rectification. However, even if it is true that Mer Vue had chosen (or not chosen) to embark on certain rectification works with regard to the KWDP due to cost considerations, this does not implicate or relate to the issue at hand: the *original* cause of the alleged Foul Smell Issue, *ie* the design of the KWDP by Squire Mech. Furthermore, the eventual rectification solution of a "magic trap" was a unanimous decision made by Mer Vue, Tiong Aik, RSP and Squire Mech[59] with Squire Mech not making any of its objections known at that point in time.

122 In any event, Mer Vue's participation in trying to find a solution to a foul smell problem created by an allegedly defective KWDP present in the units does not render Mer Vue in any way jointly liable in negligence for any defect in the *original* KWDP design that was undertaken entirely by Squire Mech, in which Mer Vue never participated in but had instead relied fully on the technical expertise of Squire Mech as the M&E engineer for the Development. Squire Mech should not be relieved of any potential liability for its own technical plans or technical designs by pleading that RSP and/or Mer Vue were "involved in

[59] Transcript dated Oct 22 2015, p 135.

the design development of the KWDP",[60] if the pleaded design defect is one of a technical character within its professional M&E engineering expertise (see *Hudson's* at p 254). Even though discussions had occurred jointly and design plans were jointly reviewed, Squire Mech as an independent contractor still had to take professional care in its technical design work. Thus, any negligence regarding Squire Mech's design of the KWDP which was within its contracted scope of work as the professional M&E engineer of the Development is its own, and cannot be vicariously attributed to either RSP or Mer Vue by Squire Mech.

The BOSD issue

123 Lastly, I come to the question on whether an alleged breach of the statutory duty to maintain the common property of developments under Sections 16, 17 and 21 of the BMSMA gives rise to a civil right of action against Mer Vue as the owner developer of the Development. This preliminary issue is a question of law, and the approach to this issue was laid down in *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731 and adopted in *Loh Luan Choo Betsy (alias Loh Baby) (administratrix of the estate of Lim Him Long) and others v Foo Wah Jek* [2005] 1 SLR(R) 64 at [25]. The underlying rationale is the significance attached to parliamentary intention (see *The Law of Torts* at para 09.008); whether a private right of action arises under a statute is dependent on a construction of the statute in question that establishes:

(a) a statutory duty imposed for the protection of a limited class of the public; with

[60] 4th Df reply submissions, paras 31.2 and 31.4.

(b) Parliament's intention to confer on members of that class a private right of action for breach of that duty.

124 Section 16 of the BMSMA requires the owner developer of a development to establish a general maintenance fund on or after the date of the first TOP issued to a development but before the collection of maintenance charges from any purchaser starts. The maintenance fund is set up for the principal purpose of managing the common property of the estate with *maintenance of the common property* as its main objective; Section 16(2) lists the specific purposes that the general maintenance fund is to be used for. Section 17 stipulates the owner developer's duties regarding the fund in relation to its administration, collection of moneys and records. In addition, Section 21 specifically points out that appointment of a managing agent by the Commissioner of Buildings ("Commissioner") when the management and maintenance of a development has not been carried out satisfactorily by the owner developer shall not relieve the owner developer of its obligations under the BMSMA towards the purchasers to carry out repairs and to make good any defects to the common property.

Protection of a limited class

125 For the first element, the Plaintiff is required to show that it falls within the limited class of the public protected under the statutory scheme. The Plaintiff, being the management corporation formed with its members being subsidiary proprietors of the estate, is clearly within the limited class that the statute seeks to protect: the subsidiary proprietors of developments.

Parliament's intention to confer a private right of action

Relevant criminal sanctions

126 However, the *general* rule is that where criminal sanctions are provided in the event of a breach of statutory duty, there is no private right of action (see *The Law of Torts* at para 09.017 and *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another suit* [2009] 4 SLR(R) 788 at [210]).

127 As counsel for Mer Vue points out, the BMSMA provides for criminal sanctions in the event of breaches of the statutory duties under Sections 16 and: Section 16(4) provides for criminal sanctions for a breach of Section 16(1); Section 17(9) stipulates criminal penalties for a contravention of Section 17(1) read with Sections 17(2), (4) or (5); and Section 17(10) prescribes criminal sanctions for breaches of Sections 17(6), (7) or (8). However, a careful construction of the BMSMA is necessary to examine if the statute provides for *relevant* criminal sanctions in the event of contravention of the statutory duty in question. Here, the pertinent statutory duty is to maintain the common property of the Development by Mer Vue. Section 16(4) targets the breach of this duty only tangentially via the duty to establish maintenance funds which are meant to be used to maintain the common property. Sections 17(9) and 17(10) stipulate penalties for breaches of duties regarding the administration of maintenance funds, and not for breaches of duties to maintain the common property of developments. These criminal sanctions are hence not very helpful in indicating a parliamentary intention not to confer a civil remedy against an owner developer for breach of its statutory duty to maintain the common property.

Provision for alternative remedies

128 Nonetheless, the BMSMA seems to provide an alternative remedy for the enforcement of the relevant statutory duty. Counsel for Mer Vue has directed me to Sections 6, 19 and 88 of the BMSMA as examples of alternative specific remedies that reveal a parliamentary intention to deny a private right of action for a breach of statutory duty to maintain common property.

129 Although Section 88 entitles subsidiary proprietors to apply to the court for remedies against breaches of Part V of the BMSMA (that does include Sections 16 and 17), the remedy provided under Section 88 targets only breaches of provisions in Part V by a *management corporation or subsidiary management corporation*, and is thus not relevant to alleged breaches of Sections 16 and 17 by *owner developers*. Importantly, there is no express provision in the BMSMA equivalent to Section 88 that entitles the subsidiary proprietors to apply to the court for remedies against *owner developers*.

130 Sections 6 and 19, on the other hand, empower the Commissioner to require the building owner or the owner of the common property to undertake repairs, work or alterations when any common property has not been kept or maintained in a state of good and serviceable repair or in a proper and clean condition (Section 6(1)(*a*)), and even appoint a managing agent to manage and maintain the development when the management and maintenance of the development has not been satisfactorily carried out after due inquiry by the Commissioner or a person appointed by him (Section 19(1)). Thus, Section 6 enforces the owner developer's obligation to maintain the common property through the Commissioner, first via a notice from the Commissioner, and when the notice is not complied with, via direct enforcement by the Commissioner to

carry out or cause to carry out repairs and then recover expenses incurred thereafter under Section 6(4) from the person in default, *ie* the owner developer.

131 Furthermore, the duty of a building owner or the owner of the common property to maintain the common property is also enforceable by criminal proceedings. Under Section 6(5), a building owner or the owner of the common property that fails, without reasonable excuse, to comply with the requirements of the notice from the Commissioner to undertake repairs shall be guilty of an offence and may be liable to a fine.

132 The statutory scheme under the BMSMA has thus provided an alternative remedy to enforce the owner developer's duty to maintain the common property of the development, albeit an indirect one not immediately available to the Plaintiff. This "indirect" remedy does not detract from the inference that Parliament intended for the statutory duty to be enforced under this framework through the Commissioner and did not intend to confer a private right of action. Thus, taking into account this regulatory framework and the presence of the criminal sanction in Section 6(5), I find that I cannot determine (in the absence of an express provision in the BMSMA) that Parliament intended the breach of the duty to maintain common property under the BMSMA to give rise to a private right of action against the owner developer.

Conclusion

133 In conclusion, I find that:

(a) Tiong Aik and RSP were independent contractors of Mer Vue;

(b) the various DSCs and NSCs were independent contractors of Tiong Aik;

(c) Squire Mech and Sitetectonix were independent contractors of RSP;

(d) Tiong Aik and RSP had limited statutory non-delegable duties under the BCA with no apparent implications on their independent contractor defences;

(e) RSP had not unreasonably delegated any of its professional duties;

(f) Mer Vue, Tiong Aik and RSP had taken proper care in the selection and appointment of their respective independent contractors; and that

(g) no private right of action is available to the Plaintiff for the alleged breach of statutory duty by Mer Vue under the BMSMA.

134 Once more, I must note that my decision on these preliminary issues neither conclusively establishes tortious liability on the part of any party, nor

implicates the separate question of contractual liability or indemnities.

Chan Seng Onn
Judge

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Melvin Chan, Koong Len Sheng and Darren Tan (TSMP Law Corporation) for the third defendant;
Goh Phai Cheng, SC and Tan Joo Seng (Goh Phai Cheng LLC) for the fourth defendant.