Kimly Construction Pte Ltd *v* Lee Tong Boon (trading as Rango Machinery Services) (Tan Juay Pah, third party;
; Feng Tianming and another, fourth parties)
[2011] SGHC 26

Case Number	: Suit No 807 of 2008
Decision Date	: 28 January 2011
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Christopher Chuah and Joyce Ng (WongPartnership LLP) for the plaintiff; Roderick Edward Martin and Mohamed Baiross (Martin & Partners) for the defendant; Manjit Singh s/o Kirpal Singh and Sree Govind Menon (Manjit Govind & Partners) for the third party; Siaw Kheng Boon (Siaw Kheng Boon & Co) for the first fourth party; Ramasamy s/o Karuppan Chettiar and Navin Kripalani (ACIES Law Corporation) for the second fourth party.
Parties	: Kimly Construction Pte Ltd — Lee Tong Boon (trading as Rango Machinery Services) (Tan Juay Pah, third party — Feng Tianming and another, fourth parties)

Contract

Civil Procedure

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 208 of 2010 was allowed by the Court of Appeal on 2 March 2012. See [2012] SGCA 17.]

28 January 2011

Tay Yong Kwang J:

Introduction

1 This was a claim for damages arising out of a contract entered into between the plaintiff, Kimly Construction Private Limited ("the plaintiff"), and the defendant, Lee Tong Boon (trading as Rango Machinery Services) ("the defendant"), for the rental of a tower crane for a construction project. On 22 February 2008, the tower crane collapsed at the project site. On 3 November 2008, the plaintiff started this action, claiming the loss, damages, expenses and costs it suffered as a result of the collapse and which it claimed arose out of breaches by the defendant of his obligations under the rental contract. On 28 September 2009, the defendant issued a Third Party Notice to Tan Juay Pah ("the third party") claiming an indemnity against the third party in the event the defendant was found liable to the plaintiff. Subsequently, on 27 January 2010, the third party issued Fourth Party Notices claiming similar indemnities and/or contributions from Feng Tianming ("Fourth Party 1") and FES Engineering Pte Ltd ("Fourth Party 2").

2 The trial was heard over 11 days in October 2010 with the plaintiff leading evidence in support of its claim followed by the evidence of the defendant. All 5 parties present in court took part in the cross-examination of the witnesses. At the close of the defendant's evidence, counsel for the third party indicated that he would be submitting that the defendant had made out no case for the third party to answer. I directed the third party to undertake not to call any evidence against the

defendant and both fourth parties in the event the court disagreed with the said submission of no case to answer. The third party disagreed that his undertaking should extend to the fourth parties as well and submitted that he should be at liberty to call evidence against the fourth parties even if the court gave judgment for the defendant against the third party. Nevertheless, by virtue of the court's ruling, he gave the undertaking as directed by the court.

3 As the issues among the parties were intertwined, I heard the closing submissions of the plaintiff and the defendant on liability and damages followed by the third party's submission of no case to answer. The fourth parties were not involved in the closing submissions because of the third party's said undertaking not to call evidence should the court disagree with his submission.

4 At the conclusion of the submissions, I made the following orders:

(a) on liability, the plaintiff succeeded in its claim against the defendant;

(b) as between the defendant and the third party, I found that there was a case for the third party to answer and by virtue of the undertaking to call no evidence, the defendant succeeded in his claim against the third party for an indemnity;

(c) the third party's claim against the two fourth parties was dismissed by virtue of the undertaking to call no evidence against them;

(d) as for damages:

(i) I allowed the plaintiff's claim of $107,151.16 [note: 1] for the cost of overheads and preliminaries due to stoppage of work between 22 February and 17 March 2008 but deducted overtime wages for workers and site staff calculated by the defendant at $2,106.08 and $4,619.55 respectively;

(ii) I allowed the plaintiff's claim for prolongation cost for 25 out of the 77 days claimed and computed this amount at $109,399.85;

(iii) I allowed the plaintiff's claim for $63,817.00 as the cost of using alternative lifting equipment;

(iv) I disallowed the plaintiff's claim of $6,617.50 (which it has abandoned) for the cost of hiring machinery and equipment for hacking works;

(v) I allowed the plaintiff's claim for $121,008.21 as the cost of the expert reports and incidentals;

(vi) I allowed the plaintiff's claim for $112,434.50 as the cost of rectification, remedial and/or replacement works;

(vii) I allowed the plaintiff's claim for $31,143.50 for recovery works;

(viii) I allowed $28,462.50 as miscellaneous costs (including the cost of religious

ceremonies for the three deceased workers, the consultancy work done by Absolute Kinetics Consultancy Pte Ltd ("Absolute Kinetics") and the cost of delivery of ready-mixed concrete on 22 February 2008 which was not unloaded for use), having deducted $12,000 for consultancy work not related to the tower crane collapse from the plaintiff's original claim of $40,462.50;

(e) the interest payable on the amounts at (d) above would be at 5.33% per annum from 3 November 2008 (date of the writ of summons) till payment;

(f) on the issue of costs:

(i) the defendant would pay the plaintiff its costs of the action, to be taxed/agreed on the standard basis until 3 September 2010, and thereafter on an indemnity basis by virtue of an offer to settle not accepted by the defendant;

(ii) the third party would pay the defendant his costs of the action, such costs to be taxed/agreed on the standard basis up to 6 September 2010 and thereafter on an indemnity basis by virtue of an offer to settle not accepted by the third party;

(iii) the third party would pay Fourth Party 1 his costs of the fourth party proceedings to be taxed/agreed on the standard basis up to 2 August 2010 and thereafter on an indemnity basis by virtue of an offer to settle not accepted by the third party; and

(iv) the third party would pay Fourth Party 2 its costs of the fourth party proceedings on the standard basis;

(v) I also certified to the taxing registrar that the use of two solicitors for this trial by the plaintiff, the defendant, the third party and Fourth Party 2 was reasonable, to obviate arguments at taxation on this point. (Fourth Party 1 had only one solicitor at the trial.)

5 The third party has appealed to the Court of Appeal against the whole of my decision.

Background

The parties

6 The plaintiff was at all material times a company incorporated in Singapore and was the main contractor for the construction of one block of 5-storey Alumni House Building with basement, carpark, amenities and additions/alterations with 2/3-storey extension to the existing NUSS Kent Ridge Guildhouse at Kent Ridge Drive/Law Link ("the project"). The employers for the project were the National University of Singapore ("NUS") and the National University of Singapore Society ("NUSS") respectively.

7 The defendant, a sole proprietor, was the sub-contractor from whom the plaintiff rented a JASO J240 tower crane (the "tower crane").

8 The third party is a Professional Mechanical Engineer. Prior to October 2006, he was registered as an Approved Person ("AP") under the Factories Act (Cap 104) and its relevant regulations; after that date, he became an Authorised Examiner ("AE") under the Workplace Safety and Health Act (Cap 354A) and its attendant regulations. As an AP (later AE), the third party was approved by the Ministry of Manpower ("MOM") to inspect, test and certify lifting machines, including tower cranes, as

being safe for use. He was the AP/AE who was engaged by the defendant to inspect the tower crane in issue here.

9 Fourth Party 1 was the professional civil and structural engineer engaged by the defendant to design and supervise the construction of the foundation of the tower crane. Fourth Party 2 was the Approved Crane Contractor ("ACC") retained by the plaintiff to erect and to maintain the tower crane.

The facts

10 On or around 28 August 2006, the plaintiff entered into a sub-contract with the defendant for the purposes of renting the tower crane. The material provisions of the sub-contract are as follows:

Clause 1 Scope of Supply

Rango shall provide one (01) unit of tower crane (hereinafter referred to as "Tower Crane" hereinafter set forth. This shall include all incidental and minor works as may be necessary to enable the proper and safe function/operation of the Tower Crane and acceptance for operation by Authorities having jurisdiction over it.

Clause 3.2.1 Submission

Rango is responsible for obtaining all necessary clearances from relevant Authorities for the authorized operation of Tower Crane in due consideration of both Authorities and site requirements. Costs for preparation of documents by Professional Engineer shall be fully borne by Rango. This clause is to be read in conjunction with Clause 4.2.

Clause 3.2.2 Commissioning, Testing and Inspection

Rango shall be responsible for arrangement for commissioning, load test, certification, testing and inspection by Profession [sic] Engineer/Approved Person at a prescribed interval to fulfil [sic] Authorities' requirements. All original certificates shall be provided to Kimly for retention.

Clause 3.4 Monthly Servicing/Maintenance

Rango shall provide free monthly servicing/maintenance by competent mechanics throughout the whole rental period. This shall include provision of necessary and suitable materials/tools/equipment required for the servicing/maintenance. All original maintenance records shall be provided to Kimly for retention.

Clause 3.6 Insurance

Kimly shall keep the Tower Crane insured against loss or damage by an equipment-all-risks policy with effect from successful commissioning until the date of dismantling. Any deductible shall be borne by Rango in the event of a claim or accident of the Tower Crane caused by Rango. In the event of a claim or accident caused by Kimly, any deductibles shall be borne by Kimly.

Clause 4.1 Liability and Responsibilities

Sub-Contract

Rango shall observe, perform and comply with all the provisions of the Main Contract as far as they relate to her Sub-Contract Works. Rango shall assume towards Kimly, with respect to her

work and all operations of the Sub-Contract, all obligations and responsibilities that Kimly assume towards the Client/Consultants/Authorities as far as they are not repugnant to or inconsistent with the expressed provision of the Sub-Contract. …

Clause 4.4 Statutory Requirements

In addition to Rango's compliance with the conditions, specification, schedules and requirements issued under the Sub-Contract, Rango shall further be required to have her performance as well as the Sub-Contract Work in accordance with the laws of Singapore and in compliance with all relevant Acts of Parliament, subsidiary legislation, laws, by-laws and with all rules, regulations, directions, orders and guidelines of the Government or local Authorities having authority or jurisdiction over performance and/or Sub-Contract Works. Failing which, Rango shall indemnify Kimly all the consequence imposed by these Authorities or arises therewith."

Clause 4.8 Indemnity

Rango shall indemnify Kimly against all claims, damages, costs, expenses, litigation or liabilities made against or incurred by Kimly, arising out of Rango's negligence, default or non/poor performance of her contractual duties under the Sub-Contract."

11 The tower crane was erected onsite on or about 18 November 2006. By that point in time, the third party had carried out two inspections of the tower crane. The first was on 15 August 2006 at the yard belonging to the tower crane maker's Singapore agents. On or about that date, he also engaged Hi Tech NDT Inspection Services (S) Pte Ltd ("Hi Tech") to perform non-destructive tests ("NDT") on the critical parts of the tower crane and, on 18 August 2006, he prepared and signed a Third Party Inspection Report for the Ministry of Manpower ("MOM") certifying that the critical parts of the tower crane had been checked for surface flaws, that thickness gauging had been conducted at various points of the crane structure to ascertain the metal's thickness and that the tower crane was of sound material and suitable for use. The second inspection took place on or around 18 November 2006 itself. The third party inspected the tower crane at the project site after it was erected and conducted a load test on it. He then signed the Lifting Equipment Certificate, certifying that the tower crane had been examined thoroughly as far as construction permitted and that the tower crane complied in all respects with the requirements pertaining to lifting equipment as stipulated under the Workplace Safety and Health (General Provisions) Regulations and that it was safe for use.

12 The tower crane was erected according to the design drawings and calculations of Fourth Party 1. These had been submitted to MOM on 14 September 2006 as part of the submissions made to seek approval for the use and operation of the tower crane. MOM approved the design on 29 September 2006 and the crane was erected by Fourth Party 1 a few weeks later. On 9 November 2006, Fourth Party 1 issued a Certificate of Supervision certifying that he had supervised the foundation works and erection of the tower crane, that the foundation works were structurally sound and complied with all the requirements under the Workplace Health and Safety Act and that the tower crane was safe for use.

13 The tower crane was used in the project site from 18 November 2006 to 21 February 2008. During this period, the third party was engaged by the defendant to carry out a further post-installation check on the tower crane. This he did on or around 20 November 2007 and he signed a second Lifting Equipment Certificate certifying that the tower cane had been examined thoroughly as far as construction permitted and that the tower crane complied in all respects with the requirements pertaining to lifting equipment as stipulated under the Workplace Safety and Health (General Provisions) Regulations and that it was safe for use.

14 After more than a year's use on site, on 22 February 2008, at approximately 2.15pm, the tower crane collapsed. Part of the jib landed outside the boundary of the project's site, hitting two full grown trees which subsequently damaged a linkway, a bus-stop sign and a few motorcycles parked in the vicinity. The counterweight of the tower crane landed on the roof of a substation causing partial structural damage to it. Three people lost their lives as a result of the collapse. Two of the three dead were found inside the cabin of the tower crane at the time of the collapse. One of the two found inside the cabin was not an authorised crane operator or an employee of the plaintiff.

Cause of the collapse

15 The investigations carried out by MOM into the collapse of the tower crane revealed that it was operating without a load at the time of the accident. This position was apparently accepted by all the parties but at the trial, counsel for the third party challenged this common assumption vigorously in the course of his cross-examination of the witnesses.

16 The plaintiff averred in its pleadings that the primary cause of the collapse of the tower crane was the presence of defects and/or cracks in the mast anchors. It also averred that these were pre-existing defects, *ie* that they were found in the mast anchors prior to the installation of the tower crane onsite. These cracks and defects were identified and described in Report No. M08163, which was prepared by David Tay Yew Huat, the plaintiff's expert witness, of Matcor Technology & Services Pte Ltd ("Matcor"). Matcor is a consultancy providing services in forensic failure investigation, materials assessment and advanced NDT. It was commissioned by the plaintiff to investigate the damage and to prepare reports on the condition of the tower crane. However, Matcor had also been commissioned by MOM to investigate and report on the causes behind the collapse of the tower crane. A total of 7 reports were prepared by Matcor on the collapse of the tower crane – 3 of these were prepared for the plaintiff. The other 4 were, however, only submitted to MOM.

17 The three reports prepared for the plaintiff were:

(a) Report No. M08258 on NDT of the masts of the collapsed tower crane;

(b) Report No. M08259 on NDT of the jibs, counter jibs and A-frame of the collapsed tower crane; and

(c) Report No. M08260 providing an analysis of the cracked sections of the collapsed tower crane.

None of these reports, however, addressed the question of the primary cause of the collapse of the tower crane. The plaintiff sought to rely, therefore, on Report No. M08163 in order to identify the cause(s) of the collapse of the tower crane. That report was not prepared by Matcor for the plaintiff. It was produced for and handed over to MOM which, it appeared, handed a draft version of the report to the plaintiff. The report observed the presence of pre-existing cracks at joint e of all 4 mast anchors and joint b of mast anchor #4, as well as cracks and porosity in the columns of mast anchor #1. Report No. M08163, however, drew no conclusions as to the causes of the tower crane collapse; indeed, it bore the appearance of a preliminary report before further testing was carried out.

18 The defendant's Statement of Claim in the Third Party Proceedings, however, referred to a

completely different report – Matcor Report No. M08209 [note: 2] – which was also produced for MOM, but which had not, until the defendant's Statement of Claim was filed, been relied on in the pleadings. In the section entitled "Discussion", the report concluded that:

> The primary failure was located at the pin-joints of the mast anchor assembly which was not covered by non-destructive test or adequately inspected during the pre-erection stage. [note: 3]

It also made the following observations pursuant to a Document Review:

> The design for the foundation was adequately designed for the tower crane and was found in compliance with engineering code of practice. The ground stability measurement indicates that there was no significant settlement of the foundation or no ground movement at and after the incident on 22nd February 2008. *The erection submission document [Third Party Inspection Report dated 18 August 2006] only had a brief summary of the non-destructive test of the crane. Non-destructive test (NDT) was supposed to be conducted on the critical parts of the crane by [Hi Tech] during the pre erection inspection. The submitted NDT results, shown by marking on drawings, however did not cover the mast #1 and mast anchor assembly. The mast components and mast anchor assembly are deemed as critical parts*.
>
> [emphasis added]

19 None of the Matcor conclusions above was seriously challenged by any of the parties save for the third party. There was general acceptance that the cause of the collapse was the presence of pre-existing cracks in the pin-joints of the mast anchors #2 and #3 before the tower crane was erected. It was also not in dispute that the mast anchors (or foundation fixing angles or fixing anchors as they are also referred to commonly) were part of the tower crane supplied by the defendant. Indeed, the defendant's expert witness (Kenneth James Patterson-Kane) also referred to and exhibited the Matcor reports in his affidavit of evidence in chief and confirmed in court that he adopted the findings in the Matcor reports, particularly Report No. M08209. Counsel for the defendant also confirmed in court that where the cause of the collapse of the tower crane was concerned, the defendant's expert evidence was in agreement with Matcor's findings.

20 The third party suggested that the tower crane was being operated by an unauthorised person and was carrying some load at the time of its collapse. This was because some witnesses had mentioned during the investigations into the accident that the jib of the tower crane was swinging wildly at the time of its collapse. However, he led no evidence in support of this allegation. His expert witness (who was not called because of the submission of no case to answer) had affirmed an affidavit adopting MOM's press release which stated that the four anchors at the base of the tower crane had failed structurally and that it was not lifting any load when the entire structure toppled over. Further, the plaintiff's expert from Matcor testified that investigations ruled out the possibility of misuse of the tower crane. Any wild swinging of the jib was probably caused by the instability of the tower crane as its mast anchors gave way rather than by the operation of the tower crane whose turning mechanism did not permit the jib to move laterally at a fast speed.

21 The plaintiff submitted that the defendant breached clauses 1, 4.1 and 4.4 of the sub-contract (see [10] above). The defendant was also contractually bound to comply with all applicable legislation. Regulation 134(1) of the Workplace Safety and Health (Construction) Regulations 2007 provides that the owner of a tower crane had to ensure that its tower crane was of good construction, sound material and adequate strength and was free from patent defects. Regulation 21(16) of the Workplace Safety and Health (General Provisions) Regulations imposes a similar duty on

the owner of a tower crane. Bearing in mind the cause of the collapse, it could not be said that the tower crane was of good construction, sound material and adequate strength and free of patent defects. Alternatively, the plaintiff based its claim on the defendant's breach of an implied duty to supply a tower crane that was good, proper, of satisfactory quality, reasonably fit for purpose and/or safe for use.

22 The defendant's position was that he was not liable to the plaintiff for breach of contract as he had done everything that he was required to do under the sub-contract. The defendant's argued that he had fulfilled his contractual obligations by engaging the third party as the AP/AE to test, certify and approve the safe use of the tower crane and engaging the two fourth parties to design the foundation of the tower crane and to erect and maintain it respectively. Bearing in mind that the cause of the collapse of the crane was pre-existing cracks in the mast anchors, it could not be said that the defendant had not fulfilled his contractual obligations. The defendant contended that he was not required to guarantee the work of the third party.

The decision of the court

The case between the plaintiff and the defendant

23 At the trial, the defendant did not seriously contest his liability to the plaintiff. All that he wanted was essentially an indemnity in his favour against the third party as he had done whatever he was required by the sub-contract to do by appointing professionals (including the third party) for the inspection, installation, testing and maintenance of the tower crane to ensure it was safe for use.

24 The plaintiff pleaded that the pre-erection report and/or the third party inspection did not cover the failed mast anchors, the critical portions of the tower crane, and this was not disputed by the defendant. The evidence adduced showed that the mast anchors were not inspected or tested prior to erection of the tower crane. The expert witnesses for the plaintiff and for the defendant were in agreement as to the cause of the tower crane's collapse. They also agreed that the party responsible for the lapse leading to the collapse was the third party and that the defective mast anchors had pre-installation cracks and could have been inspected and tested even after installation as they were all erected above ground level. If the relevant test had been conducted, the defects would have been detected. I accepted their evidence. The defendant's contractual obligation here was one of strict liability. Since the defendant had no good defence in law, he was liable to the plaintiff as pleaded and would have to look to the third party for recourse.

25 No evidence was led that there was a supervening event causing or contributing to the collapse of the tower crane. This allegation only surfaced during cross-examination by the third party and was introduced into the pleadings by an amendment in the midst of trial. As mentioned in [14] above, one of the two men found dead inside the tower crane's cabin was not an authorised crane operator or an employee of the plaintiff. He appeared to have been someone undergoing a stint of familiarisation of the tower crane's functions under the supervision of the tower crane's operator. As stated earlier, the evidence pointed to absence of hoisting activity at the time of the collapse and no fallen load was found on site. There was no evidence that having an extra person in the cabin would have destabilized the tower crane in any way. The turntable had a speed-limiting device and could not have been operated to swing the jib rapidly even if the tower crane was in operation.

26 As the defendant was clearly liable for breach of the express terms of the contract, I need not go into the alternative arguments on implied terms. Accordingly, I held that the plaintiff succeeded in its claim against the defendant.

27 On the issue of damages, the plaintiff claimed $107,151.16 as costs of overheads and preliminaries incurred as a result of stoppage of work ordered by the authorities between 22 February and 17 March 2008 (25 days). Included in this sum were overtime wages for site staff and manual workers. It was not immediately clear why the site staff and manual workers had to put in extra hours despite the stoppage of work on site and what extra work they had to put in as a result of the accident. The recovery plans and housekeeping work on site could have been done during the normal working hours since there was no construction activity anyway. The 24-hour security guard and pest control work would have been necessary even if the incident had not taken place. I therefore allowed the plaintiff's claim but deducted overtime wages for the manual workers and site staff calculated by the defendant at $2,106.08 and $4,619.55 respectively.

28 The plaintiff claimed prolongation costs incurred as a result of the delay caused to the completion of the project. This was initially computed at 81 days (after taking into account the 25 days of stoppage of work) but revised during the trial to 77 days (up to the date of Temporary Occupation Permit on 9 September 2008). The said costs amounted to $336,951.55. There was no dispute that the project had been delayed by the stoppage of work ordered. Apart from this, however, there was insufficient evidence to prove the correlation between the collapse of the tower crane and the subsequent delay of completion of the project. I therefore allowed prolongation costs for the period of 25 days only, computed at $109,399.85.

29 The plaintiff also claimed $63,817.00 as the costs of using alternative lifting equipment in place of the collapsed tower crane, after deducting the rental that would have been payable for the tower crane for the period (calculated at 45 days in total) that such alternative lifting equipment was used on site. As this was directly attributable to the collapse, I allowed the amount claimed in full.

30 The plaintiff originally claimed $6,617.50 as the costs of hiring machinery and equipment for the hacking works to the foundation of the tower crane but abandoned this claim during the trial. I held that this amount could not be claimed from the defendant in any case as the plaintiff was contractually responsible for the said hacking works had the tower crane been available for use throughout the construction period.

31 Insofar as the expenses incurred for the Matcor reports and incidentals were concerned, I allowed the total claim of $121,008.21 in full as the expenses were obviously attributable to the collapse of the tower crane and were reasonable in amount.

32 The plaintiff's claim of $112,434.50 for the rectification, remedial and/or replacement works was also allowed in full. These expenses were incurred as a result of the damage caused by the collapsing tower crane to the structures already erected on site.

33 Similarly, the plaintiff had to incur costs of $31,143.50 for the recovery works to clear the collapsed tower crane and the debris both in and outside the project site before construction work could resume. This amount was allowed to the plaintiff accordingly.

34 I allowed $28,462.50 as miscellaneous costs incurred as a result of the collapse (including the cost of religious ceremonies for the three deceased workers, the consultancy work done by Absolute Kinetics and the cost of delivery of ready-mixed concrete on 22 February 2008 which was not unloaded for use). I considered the costs of $4,000 incurred for the religious ceremonies as reasonable in principle and in quantum. The plaintiff was not wrong in showing compassion to the unfortunate dead workers and in assuaging the feelings of their fellow workers who might otherwise feel uneasy about continuing to work on the site where 3 deaths had taken place in one day. Following the incident involving 3 fatalities, the plaintiff was placed by MOM in the Business Under

Surveillance programme. Absolute Kinetics was engaged to assist with the preparation, submission and implementation of the action plan so that the plaintiff could get out of the said programme. However, some of the consultancy work amounting to $12,000 was not related to the tower crane collapse. This amount was therefore deducted from the plaintiff's original claim of $40,462.50. The ready-mixed concrete was not unloaded for use as all work on site had to stop.

35 Interest at 5.33% pa was awarded on the damages from the date of commencement of action (3 November 2008) to the date of payment.

36 The plaintiff also sought an indemnity from the defendant for any liquidated damages that may be imposed by NUS and/or NUSS, the employers of the project, for the delay in completion. However, since the completion of the project in September 2008, more than 2 years have passed without any hint from the said employers that liquidated damages would be imposed. I therefore did not think it necessary to make any order for an indemnity.

37 Although the plaintiff made a claim under its insurance policy for the rectification, remedial and/or replacement works, no payment has been made by the insurers and the plaintiff was not pursuing its insurance claim. There was therefore no issue of a double-claim.

38 On 20 August 2010, the plaintiff made an offer to settle ("OTS") to the defendant which was not accepted. The offer was for the defendant to pay the plaintiff $500,000 in full and final settlement of its claim (with each party to bear its own costs and disbursements). The damages awarded to the plaintiff by the court added up to more than $500,000 (even without accounting for interest). The plaintiff therefore asked for costs to be awarded on the standard basis up to the date of service of the OTS plus another 14 days for acceptance and on the indemnity basis thereafter. The defendant did not resist this. He informed the court that he had in turn made the same OTS to the third party which was rejected and asked that the same costs order be made in his favour against the third party. In the light of my findings, the third party did not contest the costs orders sought by the plaintiff and the defendant. I granted the costs order sought by the plaintiff against the defendant. I will deal with the costs issue among all the other parties subsequently.

The claim between the defendant and the third party and between the third party and the fourth parties

39 The third party contended there was no case for him to answer after the plaintiff and the defendant had called their witnesses to testify. He submitted that such a contention could succeed here if the defendant's evidence at face value did not establish a case in law against the third party or it was so unsatisfactory or unreliable that his burden of proof was not discharged. He urged the court to dismiss the plaintiff's case against the defendant as well as the defendant's case against the third party.

40 The dispute between the defendant and the third party focused on the additional issue whether fixing angles were the same things as mast anchors and whether the mast anchors were made available for the third party to inspect or test before the erection of the tower crane. However, the experts (one each for the plaintiff and the defendant) agreed that foundation anchors or fixing angles or mast anchors all referred to the same four support structures at the base of the tower crane. It was merely a choice of different names to refer to the same parts.

41 It was also said that the third party had charged only several hundred dollars for the inspection work on the tower crane done by him and that it was therefore unfair to impose such a heavy responsibility and a huge liability on him by way of the oral agreement between the defendant and

him. As the defendant's expert witness pointed out, perhaps the third party did not fully appreciate the extent of his duty of inspection in law and/or he undercharged for the scope of work required. It was clear on the documents that the third party had endorsed the checklist for inspection and testing of the tower crane under the relevant regulations even if he did not have the opportunity to inspect the mast anchors before erection of the tower crane took place.

42 The third party also argued that professional engineers could not venture outside the area of their expertise, as provided in section 10 of the Professional Engineers Act (Cap 253) which reads:

> 10 (1) Subject to the provisions of this Act, no person shall engage in any of the prescribed branches of professional engineering work in Singapore or draw or prepare any plan, sketch, drawing, design, specification or other document relating to any of the prescribed branches of professional engineering work in Singapore unless the person –
>
> (a) is a registered professional engineer who has in force a practising certificate authorising him to engage in that branch of professional engineering work;
>
> …
>
> (8) In this section, "prescribed branches of professional engineering work" means –
>
> (a) civil engineering;
>
> (b) electrical engineering;
>
> (c) mechanical engineering; and
>
> (d) such other branches of engineering as may be prescribed.

It was contended that the plaintiff's expert witness is a mechanical engineer and was therefore not qualified to comment on the civil and structural aspects of the tower crane. The same objection was also directed at the defendant's expert witness (said to be a consulting engineer) in addition to the fact that he had applied to practise as an engineer in Singapore some years ago but was turned down by the profession's governing body. If the expert reports were excluded, there would be no evidence as to the cause of the collapse of the tower crane and hence no case for the third party to meet.

43 The plaintiff's expert witness described himself as a professional forensic engineer involved in consultancy work pertaining to forensic failure investigation and assessment of equipment including tower cranes. He has a B. Eng. (Hons) in mechanical engineering from the National University of Singapore and a Master of Science in material engineering from the same university. He did forensic work on the mast anchors after having inspected them. He relied on the findings of a structural engineer (not called as a witness at trial) that the cause of the collapse was not the failure in the structure's foundation. The failure of the mast anchors was a mechanical issue which the plaintiff's expert witness was qualified to give his findings and views on. He coordinated a forensic team and audited the reports. I found nothing objectionable in law in admitting his evidence. It was to avoid unnecessary duplication of investigative work that he was engaged by the plaintiff for this case despite his earlier appointment by MOM as well. Although MOM would be taking legal action against the third party, the plaintiff's expert witness could not be said to be lacking in independence and objectivity because of this.

44 Where the defendant's expert was concerned, he holds a Bachelor's degree in civil engineering

from the University of Auckland. He had 46 years of working experience as a consulting engineer. I did not think it was unlawful for him to testify as an engineering expert in this case even though he was not registered as a professional engineer in Singapore. In my view, the Professional Engineers Act does not prohibit a non-registered engineer from testifying as an engineering expert in a court here, in the same way that it does not forbid an engineer without a practising certificate from conducting classes on engineering. In neither of these cases could the engineer in question be considered as "engag[ing] in any of the prescribed branches of professional engineering work in Singapore". They would be merely giving an opinion on someone's engineering work and teaching about engineering work rather than engaging in engineering work itself. Even if the defendant's expert's testimony was excluded, there was still the plaintiff's expert witness (whose findings the defendant's expert agreed with) that the third party had to reckon with.

45 As set out above (at [24] and [25]), the cause of the collapse was not due to a supervening event. In the light of the matters set out earlier, there was clearly a case for the third party to answer. He had to rebut both expert witnesses' conclusion as to the cause of the collapse and that he was negligent in his duty of inspection. He had failed to discredit their findings or to make them change their mind in cross-examination. As the third party had given an undertaking to call no evidence against the defendant should his submission of no case to answer fail, the defendant therefore succeeded in his claim for an indemnity against the third party.

46 The only issue left for consideration is whether the third party's undertaking to call no evidence should extend to his case against the two fourth parties as well. The third party argued that his undertaking should extend only to the defendant's claim against him and not to his case against both fourth parties.

47 The third party submitted that third party proceedings had a life of their own independent from the main action between the plaintiff and the defendant and that even if the main action was settled, the third party proceedings could still proceed as if they were a separate action (*Halsbury's Laws of Singapore Volume 4 a*t [50.197], citing *Stott v West Yorkshire Road Car Co Ltd* [1971] 2 QB 651). Should the court agree with the submission of no case to answer, it would dismiss the defendant's claim against the third party and the third party would not proceed further against the fourth parties. However, should the court decide that there was a case for the third party to answer, then judgment would be entered for the defendant and the third party would continue with his claim against both fourth parties. It was argued that the third party (who was effectively in the position of a plaintiff in the fourth party proceedings) could not therefore be compelled to undertake that he would not lead evidence on his own claim against the fourth parties (who would be in the position of defendants). The undertaking would be given only by a party who was in a position of defendant and not plaintiff. The third party further asserted that even if there was overlapping testimony during the fourth party proceedings which could impact the plaintiff and the defendant, that was not a ground for depriving the third party here of his right to pursue his case against the fourth parties for an indemnity or contribution and to lead evidence against them.

48 The third party relied on *Singapore Court Practice 2009* (LexisNexis, General Editor Professor Jeffrey Pinsler, SC) at pages 861 and 862 and gave the example of a case with multiple defendants. If only one defendant in the case elected to make a submission of no case to answer, the court would continue to hear the whole case against the other defendants. At the conclusion thereof, the court would evaluate the evidence and make its ruling. Similarly, in this case, the court would not need to make an immediate ruling on the outcome of the case between the defendant and the third party. The trial could continue with the third party proving his case (as plaintiff) against both fourth parties for an indemnity or contribution should judgment be given for the defendant against the third party. The evidence led would only be between the third party and both fourth parties. At the conclusion of

the trial, the court would review all the submissions and then make its findings accordingly. According to the third party, his pleadings and his affidavit of evidence-in-chief ("AEIC") were neatly compartmentalized to meet the defendant's claim and to advance his case against the fourth parties and the evidence would therefore not be overlapping. The two parts of the trial could therefore be dissected with a "red line", so that evidence led in one part would not be used in the other.

49 The plaintiff submitted that the facts and issues in this trial were inextricably intertwined and indivisible. The third party had implicated the plaintiff, the defendant and both fourth parties in his AEIC (see [179] and [180] thereof). He had also raised the allegation that some unauthorised person had caused the collapse. There would also be difficulties if the court took the path suggested by the third party and let him proceed separately against the fourth parties. There could be inconsistent findings. Should the questions already put by the third party to the plaintiff's witnesses be disregarded? The plaintiff would not be permitted to cross-examine the witnesses called by the third party and the fourth parties as it would not have a role in that portion of the proceedings. That would prejudice the plaintiff. Further, in the course of cross-examination by the third party, a line of questioning may amount to adduction of evidence, thereby circumventing the undertaking given. The plaintiff contended that a blanket undertaking must be given by the third party, that is to say, that no evidence would be called at all against any party, and the trial should terminate in a dismissal of the case against the third party or judgment against him at that stage.

50 The defendant agreed completely with the plaintiff's submissions on this point. He argued that if the issues for trial were not intertwined, then the court could proceed to hear a submission of no case to answer. If there were interlocking issues, the court could decide not to hear such a submission and direct the third party to proceed with the trial. At that stage, the third party could still invoke O 35 of the Rules of Court (Cap 322, R 5) and elect not to call any evidence. He further submitted that the plaintiff and the defendant should be allowed to cross-examine the witnesses in the fourth party proceedings.

51 Fourth Party 1 adopted the submissions made by the plaintiff and the defendant. He agreed that the undertaking should extend to the third party's case against both fourth parties.

52 Fourth Party 2 also agreed that the undertaking should be an absolute one, extending to the fourth parties. The issues for trial were intertwined and it could not be the case that the third party could re-litigate the issues decided against him in the main action upon a submission of no case to answer. In answer to the third party's contention that his case against the respective parties was neatly compartmentalized, Fourth Party 2 gave the example of [244] to [246] of the third party's AEIC (relating to the fourth party proceedings) where reference was made to the case against the plaintiff and the defendant and reliance placed thereon.

53 In response, the third party disagreed that his undertaking should be an absolute one. He argued that the court could not restrain him from making a submission of no case to answer if he wanted to. He submitted that even if he was liable for the collapse of the tower crane, the court could still decide on the question of indemnity or contribution from the fourth parties and that deferring the ruling on such a submission would not be irregular. If the absolute undertaking were imposed, the fourth parties need not give evidence and would "get away if they are the crooks".

54 On the facts of this case, I agreed with the submissions that the third party's undertaking to call no evidence should extend to his case against the fourth parties. If the decision on the submission of no case to answer were deferred while the fourth party proceedings carried on, the plaintiff and the defendant would be left in limbo. They would not be participating in the fourth party proceedings when they were supposed to as all the issues had to be decided at one trial and, as

highlighted by everyone except the third party, the issues were intricately linked to one another. On the facts here, the liability of the parties downstream was contingent on judgment being given against the defendant and the third party respectively. If the plaintiff had no case against the defendant and/or the defendant had no case against the third party, then the entire proceedings need not proceed further. To proceed in the manner advocated by the third party would not result in any significant time or cost saving, the underlying purpose of the undertaking to call no evidence. Moreover, it would leave the court in the untenable position of having to decide the case as if there were two separate trials with separate evidence when that was clearly not so. If the court could not use evidence led in one part of the trial for the other (see the "red line" approach advocated in [48]), how would the court be able to review the whole case in order not to arrive at inconsistent findings?

55 Accordingly, I made the following rulings on the arguments relating to the undertaking in a submission of no case to answer:

(a) the third party had the right to make a submission of no case to answer;

(b) if he did so, he had to give an absolute undertaking not to call any evidence and would stand or fall by his submission;

(c) if the court agreed with him, the case by the defendant against him would be dismissed;

(d) if the court disagreed with him, judgment would be entered for the defendant against him (assuming judgment was given for the plaintiff against the defendant);

(e) since he had undertaken to call no evidence, there would be no evidence against the fourth parties and the claim by the third party against them would also be dismissed accordingly;

56 My rulings were premised on the facts and issues to be decided in this case and would not necessarily be applicable to all third party and fourth party proceedings. Where the issues between different parties were completely distinct and separable, I might well hold a different view as to the further conduct of the case after a submission of no case to answer.

57 The third party was given time to consider the rulings. After the lunch break, he elected to make the submission but was willing to give an undertaking only in respect of the defendant and not the fourth parties. Nevertheless, by virtue of the court's ruling, he gave the undertaking as directed by the court. As indicated earlier, I found that there was a case for the third party to answer and by virtue of the undertaking to call no evidence, the defendant succeeded in his claim against the third party for an indemnity and the third party's claim against the two fourth parties was dismissed.

58 The defendant had made an OTS to the third party (see [38] above). I awarded the defendant the costs of his action against the third party, such costs to be taxed/agreed on the standard basis up to 6 September 2010 and thereafter on the indemnity basis.

59 Fourth Party 1 made on OTS to the third party on 19 July 2010. The terms were that the third party was to discontinue his claim against Fourth Party 1 in full and final settlement of the fourth

party proceedings with each party to bear its own costs. The OTS was open for acceptance until judgment or until it was withdrawn at any time by written notice. On 15 September 2010, Fourth Party 1 sent a letter to the third party to remind him of the OTS. On 16 September 2010, the third party replied indicating that he could not accept the OTS as there was no similar withdrawal of the action by the defendant. In the circumstances, I ordered the third party to pay Fourth Party 1 the costs of the fourth party proceedings, such costs to be taxed/agreed on the standard basis up to 2 August 2010 (allowing 14 days for acceptance) and thereafter on the indemnity basis.

60 Fourth Party 2 did not issue any OTS. I ordered the third party to pay Fourth Party 2 the costs of the fourth party proceedings on the standard basis.

61 In view of the factual and technical issues and the many documents involved in this action, I certified to the taxing registrar that the use of two solicitors for this trial by the plaintiff, the defendant, the third party and Fourth Party 2 was reasonable, so as to obviate arguments at taxation on this point (see O 59 r 19(3)). Fourth Party 1 was represented by only one solicitor at the trial. No application was made for a certificate for more than two solicitors.

[note: 1] Tan See Yen's AEIC, pg 22

[note: 2] Plaintiff's Core Bundle, pg 140

[note: 3] Plaintiff's Core Bundle, pg 147