IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 28

Suit No 392 of 2016

Between

Lim Seng Chye

… Plaintiff

And

(1) Pex International Pte Ltd
(2) Formcraft Pte. Ltd.

… Defendants

GROUNDS OF DECISION

[Tort] — [Vicarious liability]
[Tort] — [Negligence] — [Breach of duty]
[Tort] — [Nuisance] — [Private nuisance]
[Tort] — [Nuisance] — [Neighbouring properties]
[Tort] — [Rule in *Rylands v Fletcher*]
[Building and Construction Law] — [Construction torts] — [Contractor]
[Building and Construction Law] — [Construction torts] — [Negligence]
[Building and Construction Law] — [Construction torts] — [Nuisance]

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v
Pex International Pte Ltd and another

[2019] SGHC 28

High Court — Suit No 392 of 2016
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3–6, 10–11 July 2018; 3 September 2018

11 February 2019

Mavis Chionh Sze Chyi JC:

1 This matter arises from a fire which occurred at an industrial property at No. 15 Link Road ("No. 15") on 30 April 2013. The Plaintiff in this suit is the owner and occupier of No. 15. The issues in contention in the trial before me centred on whether the 1st Defendant – who owns the neighbouring property at No. 17 Link Road ("No. 17") – bore any liability for the damage and loss resulting from the fire. It was the Plaintiff's case that the 1st Defendant was liable in negligence[1] and/or alternatively nuisance[2], and/or alternatively, the rule in *Rylands v Fletcher* [1868] LR 3 HL 330 ("*Rylands v Fletcher*")[3]. At the close of the trial (which was a trial on liability alone), I dismissed the Plaintiff's claim in negligence but found the 1st Defendant liable to him in nuisance and the rule

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1 paras 14.15–19 of the Statement of Claim (Amendment No. 2).

2 para 22 of the Statement of Claim (Amendment No. 2).

3 para 21 of the Statement of Claim (Amendment No. 2).

in *Rylands v Fletcher*. As both the Plaintiff and the 1st Defendant have appealed against my decision, I am setting out my reasons in these written grounds.

The parties

2 At the material time, the Plaintiff operated a sole proprietorship under the name "LTL Electrical Trading", whose principal activities were described as "Repair of domestic electrical/electronic appliances except audio and video equipment (e.g. refrigerators, washing machines and room air-conditioners)"[4]. In addition to repairing domestic electrical appliances, the Plaintiff also did business in the export of second-hand electronic and other household items[5]. He acquired No. 15 Link Road in 2007 and had since used the property as an office and also a warehouse for the storage of such second-hand household items, which included polyurethane mattresses, sofa sets, tables, chairs, cupboards, television sets and loud speakers[6].

3 The 1st Defendant is a company engaged in (*inter alia*) the manufacturing and supply of electrical appliances. It supplies these electrical appliances to mechanical and electrical sub-contractors. The 1st Defendant's premises at No. 17 Link Road adjoin No. 15. The 1st Defendant moved into No. 17 in September 2010. At the material time, it was using the premises as a warehouse for the storage of metal conduits and metal fittings[7].

4 In February 2013, the 1st Defendant had engaged the 2nd Defendant to carry out addition and alteration ("A&A") works at the rear of No. 17 Link Road which included the construction of an extension to the rear. Prior to being

4 Tab A, exhibit LSC-1 of the Plaintiff's affidavit of evidence-in-chief ("AEIC").

5 para 4 of the Plaintiff's AEIC.

6 para 10 of the Plaintiff's AEIC.

7 paras 4–6 of Molly Chan Ai Teow ("Molly")'s AEIC.

engaged for these A&A works, the 2nd Defendant had been engaged by the 1st Defendant on two other occasions – in May 2012 and August 2012 – for two other jobs at No. 17 Link Road[8]. At the material time, the 2nd Defendant was a licensed builder in possession of the requisite Certificate of Licence from the Building and Construction Authority ("BCA")[9].

5 In the course of these proceedings, interlocutory judgment was entered by the Plaintiff against the 2nd Defendant on 3 May 2016.

The works at No. 17 Link Road

6 The scope of the A&A works in question is set out in the 2nd Defendant's quotation dated 25 February 2013[10]. In all, the 1st Defendant contracted to pay the 2nd Defendant a total sum of $88,150.50 for works which included "Steel Structural Works", "Metal Roofing" and a "Brickwall with plastering up to 2m high; from 2m onwards install one side trimdek & one side 1-hr fire-rated partition to 6m high". The last item appears to refer to the construction of a brick wall to separate No. 17 Link Road from No. 15. Until then, the backyards and the perimeter of No. 17 and No. 15 had been separated only by chain link fences, over which the Plaintiff had placed corrugated metal sheets[11].

7 The 2nd Defendant's quotation of $88,150.50 included an item for $16,000, which was described as "Preliminaries & Insurance, including hoarding & protection". The "Terms and Conditions" set out at the bottom of the second page of this quotation stated that the 2nd Defendant was "Excluding

8 paras 11–18 of Molly's AEIC.

9 pp 28–29 of Molly's AEIC.

10 pp 38–39 of Molly's AEIC.

11 para 26 of the Plaintiff's AEIC.

Lightning Certificate, Licensed Plumber, PE Endorsement and other Gov't submissions". The 1st Defendant accepted the quotation and paid the 2nd Defendant a 30% down payment of $28,296.15 on 15 April 2013[12].

8 In addition to engaging the 2nd Defendant to carry out the A&A works, the 1st Defendant also engaged a firm named ETS Design & Associates ("ETS") as the consultant for the said works. According to the 1st Defendant, it had engaged ETS at the behest of the 2nd Defendant, who had explained that it needed the help of a consultant to "make all the necessary submissions to the various authorities and to apply for all the necessary permits and approvals"[13]. ETS was "highly recommended" to the 1st Defendant by the 2nd Defendant.

9 ETS quoted the 1st Defendant a total fee of $16,000 on 25 September 2012 for its "professional services" which included making all the necessary submissions to the relevant government authorities in respect of the said works, applying for the permit to commence work, applying for the Temporary Occupation Permit and the Certificate of Statutory Completion, and issuing the Certificates of Supervision[14]. The quotation stated that ETS was to engage the services of "Qualified Person (QP), PE[ ](Civil) & Registered inspectors". It excluded, *inter alia*, "Clerk-of-works supervision fees" and "Accredited Checker's fee". The total fee of $16,000 was to be paid in stages, with a 30% down payment upon confirmation of ETS's appointment and then further sums contingent on the making of various submissions to the various government authorities.

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12 pp 40–41 of Molly's AEIC.

13 para 12.4 of the Defence (Amendment No. 2).

14 pp 30–31 of Molly's AEIC.

10 The 1st Defendant accepted ETS's quotation, and by 20 February 2013, had paid ETS a total of $12,000 comprising a down payment of $4,800 on 26 September 2012, a sum of $2,400 on 7 January 2013, and a sum of $4,800 on 20 February 2013[15]. The sum of $2,400 was invoiced by ETS on 4 December 2012 following the submission made to the Jurong Town Corporation ("JTC")[16]. It is not disputed that JTC issued its letter of consent on 31 December 2012[17]. The second sum of $4,800 consisted of a sum of $2,400 invoiced by ETS on 2 January 2013 upon the submission of the JTC-endorsed plan to the Urban Redevelopment Authority ("URA"), and another sum of $2,400 invoiced by ETS on 6 February 2013 upon the submission of structural plans to the BCA[18]. It is not disputed that URA issued its grant of planning permission on 6 February 2013[19].

11 It is not disputed that at the time of the fire on 30 April 2013, ETS had yet to submit the structural plans to the BCA for the latter's approval, despite its invoice of 6 February 2013 having required payment from the 1st Defendant of $2,400 "[u]pon submission of Structural plan to BCA for Structural plan approval"[20]. It is also not disputed that as at 30 April 2013, no fire safety plan had yet been submitted to the Singapore Civil Defence Force ("SCDF") for approval, nor had any permit to commence work been applied for.

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15 para 25 of Molly's AEIC.

16 p 33 of Molly's AEIC.

17 pp 89–90 of Volume 1 of the Agreed Bundle of Documents ("1ABD").

18 pp 35–36 of Molly's AEIC.

19 pp 91–93 of 1ABD.

20 p 36 of Molly's AEIC.

The SCDF investigation and the subsequent prosecution

12 The SCDF, which investigated the fire, concluded that it had been caused by sparks from hot works being carried out at the backyard of the neighbouring property at No. 17 Link Road[21]. These sparks formed the ignition source. The mattresses, bed frames, furniture and other items stored by the Plaintiff at the backyard of No. 15 provided the ignition fuel.

13 On 23 April 2014, the 1st Defendant pleaded guilty to an amended charge tendered by the SCDF under section 23(1) of the Fire Safety Act (Chapter 109A), of authorising the carrying out of fire safety works involving the erection of roof cover and wall partitions at the back of No. 17 Link Road without having obtained approval of plans for these fire safety works[22]. A fine of $5,000 was imposed[23].

The Plaintiff's claim

14 At the time of the fire, the premises at No. 15 were insured pursuant to a Fire Policy issued by United Overseas Insurance Limited ("UOI"), while the Plaintiff's goods were insured against accidental physical loss caused directly by fire or lightning, pursuant to a Fire-Commercial Policy issued by AXA Insurance Singapore Pte Ltd ("AXA")[24]. The Plaintiff brought the present suit pursuant to UOI's and AXA's rights of subrogation under the relevant clauses in the insurance policies, and also in respect of alleged uninsured losses[25]. The latter concerned in particular a claim for damages in respect of personal injuries

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21 para 9 of the SCDF Investigation Report at p 112 of 1ABD.

22 pp 149–150 of 1ABD.

23 pp 147–148 of 1ABD.

24 paras 4–5 of the Statement of Claim (Amendment No. 2).

25 para 6 of the Statement of Claim (Amendment No. 2).

allegedly suffered by the Plaintiff in the form of post-traumatic stress disorder ("PTSD") and panic disorder[26].

15 The Plaintiff's present action against the 1st Defendant was said to be based in negligence[27], nuisance[28], and the rule in *Rylands v Fletcher*[29]. Whilst the statement of claim also contained numerous references to the 1st Defendant's alleged "breach of duty under section 14A" of the Workplace Safety and Health Act (Chapter 354A) ("WSHA")[30], the pleadings taken as a whole as well as the approach taken by the Plaintiff's counsel indicated that the Plaintiff was not invoking the separate tort of breach of statutory duty but rather, relying on the alleged breaches of the WSHA as one of his grounds for contending that the 1st Defendant was liable in negligence.

16 In his statement of claim, the Plaintiff also invoked the doctrine of *res ipsa loquitur*[31].

The 1st Defendant's defence

17 The 1st Defendant, in denying any liability to the Plaintiff, asserted that it had engaged ETS to make submissions to the relevant government authorities for the necessary approvals and clearance in respect of the A&A works, and that it had also engaged the 2nd Defendant as an independent contractor to carry out the said works in accordance with ETS's submissions. It had exercised reasonable care in the selection of the 2nd Defendant as its independent

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26 paras 25–30 of the Statement of Claim (Amendment No. 2).

27 paras 14.15–19 of the Statement of Claim (Amendment No. 2).

28 para 22 of the Statement of Claim (Amendment No. 2).

29 para 21 of the Statement of Claim (Amendment No. 2).

30 paras 14.15 and 18 of the Statement of Claim (Amendment No. 2).

31 para 23 of the Statement of Claim (Amendment No. 2).

contractor for the A&A works[32]. Having appointed ETS and the 2nd Defendant, the 1st Defendant had relied on their expertise and professionalism to ensure that the works were carried out lawfully and in accordance with a proper system of work that would not cause any nuisance or damage to neighbours including the Plaintiff[33]. In particular, the 1st Defendant had been unaware of the 2nd Defendant's work schedule, and neither the 2nd Defendant nor ETS had told the 1st Defendant anything about obtaining a licence to carry out hot works[34].

18 The 1st Defendant denied the applicability of the doctrine of *res ipsa loquitur*. It further alleged that the Plaintiff had contributed to his alleged damage and loss by his own negligence in storing "a high quantity of flammable items in the backyard of No. 15 including a large quantity of polyurethane mattresses"[35].

The evidence

19 I will set out a summary of the key factual findings in this case before dealing with the question of whether the 1st Defendant may be held liable to the Plaintiff in negligence, nuisance and/or the rule in *Rylands v Fletcher*.

How the 1st Defendant came to engage the 2nd Defendant

20 The 1st Defendant's General Manager is Molly Chan Ai Teow ("Molly"). She is the sister of the 1st Defendant's Chief Executive Officer, Ross Tan Joo Kim ("Ross"). Molly testified that the 1st Defendant first came to know of the 2nd Defendant through one Madam Poh Hui Choo ("Mdm Poh"), the

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32 para 12 of the Defence (Amendment No. 2).

33 paras 4–5 of the Defence (Amendment No. 2).

34 paras 16 and 20 of the Defence (Amendment No. 2).

35 para 23 of the Defence (Amendment No. 2).

owner of No. 25 Link Road. Mdm Poh's company, Golden Champ Pte Ltd ("Golden Champ") had previously been a neighbour of the 1st Defendant's in Pasir Panjang Road, before both companies shifted premises to Link Road. Having visited No. 25, Molly and Ross were very impressed by the renovations which had been done to the property[36]. They asked Mdm Poh about the contractor who had carried out these renovations and were told by the latter that she was very happy with the contractor and had no hesitation in recommending him[37]. Sometime in April 2012, Mdm Poh brought her contractor to No. 17 so that the 1st Defendant could meet him[38]. This was Chong Nyuk Kwong ("Chong NK"), the director of the 2nd Defendant.

21 Prior to the A&A works at the rear of No. 17 Link Road, the 1st Defendant engaged the 2nd Defendant's services for two other jobs at No. 17. The first, in May 2012, involved the installation of a "skylight canopy", skylight windows and ventilation globes, as well as minor repair works. Molly and Ross were very impressed with the quality of the 2nd Defendant's work on this job. They paid the 2nd Defendant a total of $21,496.30 for the job[39]. The second job, in August 2012, involved the replacement of an office window, the installation of signage, and the tearing down of the existing structures at the rear of No. 17. Again, Molly and Ross were satisfied with the quality of the 2nd Defendant's work. They paid the 2nd Defendant $7,008.50 for the second job.[40]

22 Having engaged the 2nd Defendant to tear down the existing structures at the rear of No. 17, Molly and Ross decided to construct an extension to the

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36 paras 7–8 of Molly's AEIC.

37 para 9 of Molly's AEIC.

38 para 10 of Molly's AEIC.

39 paras 11–14 of Molly's AEIC.

40 paras 16–18 of Molly's AEIC.

rear (which would include the erection of a roof cover and wall partitions) in place of these existing structures. They contacted Chong NK in August 2012 to tell him of their plans to build an extension to the rear of No. 17 (similar to the works he had done at the rear of No. 25), and asked him for a cost quotation. According to Molly, Chong NK assured them that the 2nd Defendant had the expertise for the job. On their asking, he also assured them that the similar works at No. 25 had been "eventually approved by JTC". He stated that JTC approval would have to be similarly sought for the works at No. 17 and that he would give his quotation after calculating the cost of obtaining "the necessary approvals"[41]. As mentioned earlier (at [6]–[7] above), the 2nd Defendant eventually gave the 1st Defendant a quotation dated 25 February 2013 for the proposed A&A works to the rear of No. 17. This quotation for a total sum of $88,150.50 was accepted by the 1st Defendant who paid a 30% down payment of $28,296.15 on 15 April 2013.

23 I accepted Molly's testimony that the 1st Defendant's decision to engage the 2nd Defendant for the A&A works at the rear of No. 17 Link Road was based primarily on the recommendation of Mdm Poh, the visual inspections by Molly and Ross of the similar works done at No. 25, and their satisfaction with the 2nd Defendant's performance in the two jobs carried out at No. 17 prior to the A&A works. Molly struck me as an honest – indeed, guileless – witness not given to embellishment or exaggeration. In particular, she was frank in conceding that prior to the fire on 30 April 2013, she had not done any searches to check if the 2nd Defendant was a BCA-registered contractor[42].

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41 paras 20–21 of Molly's AEIC.

42 See transcript of 10 July 2018, p 33 line 4 to p 34 line 29.

24 In this connection, I would add that although Ross claimed in cross-examination that he had asked Molly to check that the 2nd Defendant was a "BCA registered contractor" and that she had informed him that the 2nd Defendant was a licensed contractor[43], I did not give any weight to this claim. Not only was it not mentioned in his AEIC, it was in any event contradicted by Molly's own testimony.

25 As stated earlier (at [4] above), it is not disputed that at the material time, the 2nd Defendant was a BCA-licensed contractor. As at the date of the fire on 30 April 2013, it held a Certificate of Licence issued by the BCA for the period 30 June 2012 to 30 June 2015[44].

How the 1st Defendant came to engage ETS

26 As for how the 1st Defendant came to engage ETS, there were varying accounts. As mentioned earlier (at [7] above), the 2nd Defendant's quotation of 25 February 2013 purported to exclude "Lightning Certificate, Licensed Plumber, PE Endorsement and other Gov't submissions". Molly testified that it was the 2nd Defendant's Chong NK who recommended ETS to the 1st Defendant after telling Molly that the 2nd Defendant would need a consultant to help make the submissions to government authorities for all the necessary permits and approvals[45]. Molly testified that prior to accepting ETS's quotation of 25 September 2012, she had met with ETS's representative Francis Toh Khim Eak ("Francis") and had introduced him to Ross[46]. She recalled Chong NK being present at the discussion. Francis explained to Molly and Ross that ETS

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43 See transcript of 11 July 2018, p 15 line 23 to p 16 line 32.

44 See p 29 of Molly's AEIC.

45 para 23 of Molly's AEIC.

46 See transcript of 10 July 2018, p 53 line 14 to p 58 line 11.

would make the "submission to relevant authorities"[47]. She subsequently received from Francis the ETS quotation dated 25 September 2012[48]. She was not very clear as to what some of the terms in the quotation – "CBPU", "FSB", "CSC", and so on – were, but was generally aware from reading the quotation that applications for various official approvals would have to be made, including an application for a permit to commence work. She was also aware that the quotation excluded certain items such as "Clerk-of-works supervision fees" and "Accredited checker's fee". Neither she nor Ross asked Francis if they would have to take any follow-up action on the excluded items[49]. She accepted the quotation and paid the 30% down payment to ETS on 26 September 2012.

27 Chong NK denied that he was the one who had introduced ETS to Molly. Instead, he said he had introduced to her a "consultant" named "TK Tan". He claimed not to know anything about ETS or ETS's representative, Francis[50]. He claimed not to know "TK Tan"'s full name or the name of his company or whether "TK Tan" was eventually engaged as consultant by the 1st Defendant.

28 Francis Toh Khim Eak is a design consultant at ETS. He testified that he was approached about the A&A works at No. 17 Link Road by an individual named "Tan Tuah Kiat" whom he also addressed as "TK". "TK" asked Francis whether, in respect of the A&A works at No. 17, ETS could do the submissions to government authorities. Francis agreed. ETS's role in respect of the A&A works was therefore to draft the plans for the submission and also to engage a Qualified Person ("QP") who would undertake the actual submission of these plans. Neither Francis nor "TK" was a QP. The QP engaged by ETS for this

47 See transcript of 10 July 2018, p 57 lines 15–16.

48 pp 30–31 of Molly's AEIC.

49 See transcript of 10 July 2018, p 60 line 2 to p 64 line 15.

50 See transcript of 5 July 2018, p 27 line 6 to p 28 line 28.

purpose was one Chong Seng Lai ("Chong SL"). Francis recalled that he had met with Molly to discuss with her the scope of the works to be carried out at the rear of No. 17[51].

29 Francis also testified that he had, in the course of doing up the plans for submission, met with the "boss of Formcraft [the 2nd Defendant]"[52]. This would appear to have been Chong NK. According to Francis, "TK" was the one who already knew the "boss of Formcraft" and who had introduced Francis to him. This meeting between the three of them took place at the 2nd Defendant's office[53]. TK was then helping Francis to prepare the structural drawings and to do the "structural calculation[s]" for the works, as TK was a "design engineer" whereas ETS did not have any engineer who could do the structural drawings. At the meeting at the 2nd Defendant's office, the "boss of Formcraft" explained to Francis and "TK" where the extension to the rear of No. 17 was to be built and "which part of the wall to be demolished"[54]. Nobody from the 1st Defendant was present at this meeting.

30 Francis also testified that he recalled having two or three meetings "with the owner and with the contractor" at No. 17 over a period of about one month prior to issuing the quotation of 25 September 2012[55]. After the quotation was accepted, he did not have further discussions with Molly apart from collecting the progressive payments from her[56].

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51 See transcript of 6 July 2018, p 29 line 15 to p 37 line 13.

52 See transcript of 6 July 2018, p 37 line 14 to p 38 line 16.

53 See transcript of 6 July 2018, p 39 line 2 to p 41 line 19.

54 It should be noted that the Plaintiff's counsel was in error when he informed Molly during cross-examination that Francis had testified that he "did not know who Formcraft were" (see transcript of 10 July 2018 at p 53 lines 26–32).

55 See transcript of 6 July 2018 at p 42 line 27 to p 43 line 14.

56 See transcript of 6 July 2018 at p 59 line 15 to p 60 line 11.

31 I accepted Francis's evidence as to how ETS came to be engaged by the 1st Defendant: in other words, that ETS had been approached by "TK", who already knew Chong NK beforehand, and that Francis had in his capacity as ETS's representative then met with Molly. Again, like Molly, he appeared to me to be an honest witness who did not try to avoid giving evidence which reflected unfavourably on his own firm (for example, the reason for the delay in the submission of structural plans to the BCA, which I will come to later). This did not mean that Molly was lying when she denied having met one "TK" or when she asserted that ETS had been recommended by Chong NK. Whilst Chong NK claimed that he had introduced "TK" to Molly, he was completely unable to recall how he had made this introduction – whether he had, for example, simply given Molly "a telephone number" or whether he had made the introduction in person[57]. Although Francis recalled having been approached by "TK" about the job at No. 17, he did not give any evidence of any meeting he had with Molly at which "TK" was also present. "TK" himself was never called as a witness by either party. It was entirely plausible, therefore, that ETS came to know of the job at No. 17 through "TK" but that Molly never met "TK".

32 Having reviewed the evidence given by Molly, Chong NK and Francis, I came to the following conclusions. Firstly, the 1st Defendant clearly did pay heed to Chong NK's request for a consultant to assist in making the submissions for government approvals; and by the time the 2nd Defendant's quotation of 25 February 2013 was accepted, ETS was already in place as the consultant responsible for making the submissions – and had in fact made several of the submissions.

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57 See transcript of 5 July 2018 at p 50 lines 8 to 12.

33 Secondly, given Francis's evidence about having met "with the owner and with the contractor" two to three times at No. 17 prior to giving Molly his quotation, I found that there was reasonable basis for Molly – and thus the 1st Defendant – to believe that the 2nd Defendant and ETS would be liaising and communicating with each other in relation to the commencement and execution of the A&A works at No. 17.

34 Thirdly, it was in fact true that the 2nd Defendant and ETS had communicated with each other in relation to the A&A works. Whilst Francis could not remember Chong NK's name, I did not find this surprising given the lapse of time. In any event, there was no suggestion by anyone – least of all Chong NK himself – that the 2nd Defendant had some other "boss" besides Chong NK. Francis's testimony – again unchallenged – was that after his first meeting with the "boss of Formcraft [i.e. the 2nd Defendant]" and after the issuance of ETS's quotation, he visited the Formcraft office again to provide the "boss" with a "draft copy" of the plans for the works at No. 17[58]. Francis explained that although at that point there were no structural drawings yet and therefore no detailed plans, he had given a draft to the "boss of Formcraft" to show him the extension works to be carried out at the rear of No. 17. Subsequent to providing the "boss of Formcraft" with the draft plans, Francis met him again at No. 17[59]; and this time, he observed that the "boss of Formcraft" had started "preparing the site" for the A&A works by putting up hoarding and trying to "clear the back"[60]. At this point, Francis thought that the "boss of Formcraft" "want[ed] to commence work", and he therefore spoke to the latter to say: "*You cannot do work until I got the structure approved and … obtain the permit to*

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58 See transcript of 6 July 2018 at p 49 line 15 to p 51 line 3.

59 See transcript of 6 July 2018 at p 48 lines 18–29.

60 See transcript of 6 July 2018 at p 48 lines 26–29; p 51 lines 27–31.

commence work from BCA." [emphasis added][61] According to Francis, the "boss of Formcraft" had responded to his reminder by stating that he was not starting work yet[62]. In all, Francis met with the "boss of Formcraft" three times prior to starting work on the architectural drawings[63]. He did not contact the "boss of Formcraft" after their third meeting because as far as he was concerned, he had already told the latter he was "supposed not to … start work". Francis also did not think it necessary to tell Molly not to let her contractor start work on the site yet since he had already told the contractor not to do so[64].

35 The above evidence from Francis also explained why Chong NK was so quick to disavow any knowledge of ETS or of Francis himself. It was apparent to me that Chong NK had persisted with commencing the A&A works despite Francis's express instructions not to do so until structural approval and the permit to commence work had been given by the BCA. It was also apparent that having flouted the consultant's instructions, Chong NK was desperate to distance himself from the said works, to the extent that he even claimed – absurdly – that he had "no plans, no consultant, no instructions" in relation to the A&A works[65].

Why no permit to commence work was obtained

36 Francis's testimony also explained why no permit to commence work had been obtained as at 30 April 2013. According to Francis, for "straightforward" cases, it would usually have taken 3 months from the grant of

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61 See transcript of 6 July 2018 at p 51 lines 18–21; p 48 lines 18–22.

62 See transcript of 6 July 2018 at p 52 lines 1–3.

63 See transcript of 6 July 2018 at p 58 lines 1–6.

64 See transcript of 6 July 2018 at p 59 line 21 to p 60 line 11.

65 See transcript of 5 July 2018 at p 45 lines 22–27.

planning permission by JTC for the permit to commence work to be obtained from the BCA[66]. Prior to the application for the permit to commence work being made, the structural plans and calculations would have to be checked by an Accredited Checker ("AC"). It will be recalled that ETS's quotation of 25 September 2012 had excluded the cost of an AC, whose fee was estimated at an additional $3,000[67]. In the present case, an AC was appointed by ETS on the recommendation of "TK" after "TK" reverted to ETS with the structural plans. Unfortunately, "TK" took a long time in reverting to ETS with the structural plans, and the AC recommended by him also took a long time to complete the checking of the plans and calculations. ETS apparently did not chase the AC because it was "a very busy period"[68]. By the time the AC did revert to ETS, the fire had already occurred, and Francis did not bother to arrange for the structural plans to be submitted to the BCA[69]. This would also account for why the QP appointed by ETS – Chong SL – testified that he had no records of having submitted the structural plans for the A&A works to the BCA for approval[70].

The cause of the fire

37 As noted earlier (at [12] above), the SCDF concluded after its investigations that the fire was caused by sparks from the hot works being carried out at the backyard of No. 17 Link Road. These sparks were fanned by strong winds and ignited flammable materials such as mattresses and furniture lying in the neighbouring backyard of No. 15.

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66 See transcript of 6 July 2018 at p 53 line 16 to p 54 line 12.

67 p 31 of Molly's AEIC.

68 See transcript of 6 July 2018 at p 55 lines 2–32.

69 See transcript of 6 July 2018 at p 75 line 16 to p 76 line 14.

70 See transcript of 4 July 2018 at p 20 line 26 to p 21 line 13.

38 According to the SCDF investigation report[71], arc welding equipment was found at the backyard of No. 17 in the aftermath of the fire, and a rebar welded to a steel column was also found at the perimeter wall between No. 15 and No. 17[72]. The SCDF report detailed an interview with one Arockiam Savarimuthu, a construction worker employed by the 2nd Defendant[73]. This worker informed the SCDF that on the morning of the fire, he had been performing hot works at the backyard of No. 17 which involved his using tack welding to join a rebar to a steel column to support the brick wall which had been built to separate No. 17 and No. 15. He had noted ***strong winds*** at the material time. Sometime after performing the tack welding and going for a break, he noticed fire in the backyard of No. 15, ***directly below the position from which he had been performing the tack welding***. His efforts to put out the fire with a fire extinguisher were unsuccessful.

39 The findings and conclusions of the SCDF investigation report were not challenged by either the Plaintiff or the 1st Defendant. Both Molly and Ross said that they had not been aware of the 2nd Defendant's work schedule and had not asked for a copy of its work schedule. Molly was aware that part of the A&A works included the construction of a wall between the backyards of No. 17 and No. 15[74], but the 2nd Defendant had not said anything to her or to Ross about obtaining a licence to carry out any hot works[75]. They did not give the 2nd Defendant instructions as to when it should commence the A&A works because as laymen, they had trusted the 2nd Defendant – as the independent contractor

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71 pp 105–135 of 1ABD.

72 para 7(a) of the SCDF Investigation Report at p 108 of 1ABD.

73 para 7(e)(4) of the SCDF Investigation Report at pp 110–111 of 1ABD.

74 See transcript of 10 July 2018 at p 101 line 30 to p 102 line 16.

75 para 31 of Molly's AEIC.

– to take the necessary precautions and to conduct any necessary risk assessments prior to commencing work[76].

40 Not surprisingly, Chong NK alleged that he was ignorant of any hot works being carried out at the perimeter wall between No. 15 and No. 17, and that his workers did not do welding work in any event[77]. When he was referred to the SCDF report showing photographs of the arc welding equipment found at the scene of the fire, and asked whether the equipment belonged to the 2nd Defendant, he protested he could not see the equipment from the photographs (although everyone else in court could), that he did not know, and that it had been "such a long time"[78].

41 I rejected Chong NK's allegations as a pack of lies designed to evade responsibility for the fire. In my view, Chong NK was an inveterate liar who claimed – incredibly – not to remember anything substantive about the A&A works at No. 17 despite it having been the first and only time he had encountered a fire in all his years as a contractor. Thus, for example, he claimed not to remember whether he had put up hoarding at the site[79], but this was refuted by both Francis[80] and the Plaintiff[81] who testified that he had done so. As another example, he claimed not to remember visiting No. 15 Link Road in the course of the A&A works[82] – but again this was refuted by both Molly[83] and the

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76 para 33–34 of Molly's AEIC; para 14 of Ross' AEIC.

77 See transcript of 4 July 2018 at p 59 line 26 to p 60 line 16.

78 See transcript of 4 July 2018 at p 60 lines 11–16.

79 See transcript of 4 July 2018 at p 56 line 27 to p 59 line 2.

80 See transcript of 6 July 2018 at p 48 line 28 to p 49 line 5.

81 para 30 of the Plaintiff's AEIC.

82 See transcript of 5 July 2018 at p 1 line 25 to p 3 line 1.

83 See transcript of 10 July 2018 at p 102 line 17 to p 103 line 31.

Plaintiff[84] who testified that he had done so in Molly's company some weeks before the fire.

42 It should be added that although in his AEIC, the Plaintiff had alleged that it was "the 1st Defendant's representative" (presumably Molly) who had spoken to him during this visit and that she had informed him that the 1st Defendant "would take the necessary precautions" to ensure that the A&A works did not affect the goods stored at No. 15[85], in cross-examination he conceded that he could not actually remember any such conversation, nor could he remember whether it was Molly or Chong NK who had spoken to him during the visit[86]. He did remember, however, being asked to shift his goods "slightly" away from the fence then separating the backyards of No. 15 and No. 17[87]. It was also clear from his evidence that the reason given to him for the need to shift his goods was so that the 2nd Defendant could "build and align the wall separating [the two] backyards"[88]; there was no mention of hot works or welding being done at the perimeter wall.

43 It should also be added that quite apart from his having commenced works without the requisite permit and despite reminders from the consultant not to do so, it was plain that Chong NK failed to supervise the workers he placed at No. 17 or to ensure adequate supervision. Whilst he asserted that his quotation included "site management costs" in the form of a "site foreman" who "goes to the worksite in the morning, does inspection and arranges the work for

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84 para 27 of the Plaintiff's AEIC.

85 para 33 of the Plaintiff's AEIC.

86 See transcript of 3 July 2018 at p 12 line 26 to p 13 line 9.

87 para 31 to para 32 of the Plaintiff's AEIC; also see transcript of 3 July 2018 at p 13 lines 17–19.

88 para 31 of the Plaintiff's AEIC.

the workers", and whilst he claimed that he himself had taken on the role of such a site foreman, his response when asked if he had gone to No. 17 every morning was: "I would go down *at times*" [emphasis added][89]. At one point, he claimed that he had assigned a "technical controller" from his company who "acts like a foreman" and "would check whether the workers were working" – but he was unable to provide any particulars of this individual beyond an uncertain first name[90]; and there was no evidence that anyone else had ever seen such an individual onsite. Further, Chong NK admitted that there was "no fulltime supervisor at the site": indeed, when asked point-blank whether he had a supervisor stationed at No. 17, his response – tellingly – was: "*That would be me, and I was running across a few different sites*" [emphasis added][91]. Realising no doubt the damning nature of this reply, he claimed that he had actually taken steps to ensure adequate supervision at the No. 17 worksite by assigning a "part-time" supervisor to the site – but when asked who this supervisor was, he said he could not remember[92]. Having regard to the vague and shifty nature of his testimony, I did not find his claims about having assigned a "technical controller" and/or a "part-time" supervisor at all credible.

44 The lack of adequate supervision of the A&A works was significant because whilst the Plaintiff's expert and the 1st Defendant's expert were divided on various issues, they were broadly agreed that there should have been supervision of the welding works. The evidence of the Defendant's expert was that once welding works commenced, there should have been "'standing'

89 See transcript of 5 July 2018 at p 43 lines 1 to 8.

90 See transcript of 5 July 2018 at p 37 line 24 to p 38 line 13.

91 See transcript of 5 July 2018 at p 44 lines 26–31.

92 See transcript of 5 July 2018 at p 46 lines 13–31.

supervision" in the form of a "supervisor to supervise the welding works" and a "safety supervisor during the welding works"[93]. The Plaintiff's expert said he would not suggest that there should have been standing supervision, but he too testified that there should have been "an ad hoc presence on site" to monitor the work being done and to correct any unsafe work practices[94]. Having regard to the statement given by the worker Arockiam Savarimuthu to the SCDF (see [38] above, particularly the emphasis in bold italics), it seemed clear to me that had a supervisor been present during the welding works on 30 April 2013, he would have noted and put a stop to the welding being done in the presence of strong winds and in close proximity to the mattresses and other goods in the No. 15 backyard.

45 There was no doubt, therefore, that the 2nd Defendant was negligent in the performance of the A&A works at No. 17, in that it had commenced these works without the requisite permit and in defiance of the consultant's express instructions not to so, and had also failed to ensure adequate supervision of these works – in particular, the welding works on 30 April 2013. There was also no doubt as to the direct causal link between the 2nd Defendant's negligence and the conflagration which broke out at No. 15.

The issues in contention

46 From the above conclusions, the following issues arose for determination:

(a) Whether the 1st Defendant could be held vicariously liable for the 2nd Defendant's negligence;

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93 para 118 of the 1st Defendant's expert's report (exhibit AJA-1 of Anand Jude Anthony's AEIC) ("Mr Anand's expert report").

94 See transcript of 6 July 2018 at p 3 line 21 to p 4 line 12.

(b) If not, and if the "independent contractor defence" applied, then whether the 1st Defendant had exercised due care in selecting and appointing the 2nd Defendant as their contractor;

(c) Further and/or in the alternative, whether the 1st Defendant was subject to a non-delegable duty of care vis-à-vis the Plaintiff to ensure that the 2nd Defendant carried out the A&A works with reasonable care;

(d) Further and/or in the alternative, whether the 1st Defendant could be held liable for the Plaintiff's damage and loss on the basis of the tort of nuisance and/or the rule in *Rylands v Fletcher*.

Whether the 1st Defendant could be held vicariously liable for the 2nd Defendant's negligence:

The "independent contractor defence"

47 In addressing the question of whether the 1st Defendant could be held vicariously liable for the 2nd Defendant's negligence, I first considered whether the 2nd Defendant was in this case an independent contractor. I decided that it was. My reasons were as follows.

48 The law in this area is settled: as the Court of Appeal ("CA") held in *Management Corporation Strata Title Plan No. 2297 v Seasons Park Ltd* [2005] 2 SLR(R) 613 ("*Seasons Park*") (at [37]), "[t]he 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". The CA has affirmed this general principle in a number of other decision, including – most recently – *Ng Huat Seng and another v Munib Mohammad Madni and another* [2017] 2 SLR 1074 ("*Ng Huat Seng (CA)*")[95], where it stated (at [43]): "… the

[95] Tab 18 of the 1st Defendant's Bundle of Authorities ("DBOA").

fact that the tortfeasor is an independent contractor will generally be sufficient, in and of itself, to exclude the application of the doctrine of vicarious liability".

49 The reason for this "blanket exclusion of independent contractors" (*Ng Huat Seng and another v Munib Mohammad Madni and another* [2016] 4 SLR 373 ("*Ng Huat Seng (HC)*")[96] at [34]) was explained by the High Court in *Ng Huat Seng (HC)* (at [34] to [38]) as follows:

> 34 … [T]here is generally no justification, either in policy or in principle, for the imposition of vicarious liability for the acts of independent contractors. In [*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540], Chan Sek Keong CJ, delivering the judgment of the court, explained at [76] that two important policy considerations underpinned the doctrine of vicarious liability, namely: (a) effective compensation for the victim and (b) deterrence of future harm by encouraging employers to take steps to reduce the incidence of accidents or tortious behaviour by their employees through efficient organisation and supervision. However, neither of these aims would be achieved through the imposition of vicarious liability for the acts of independent contractors.
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> 35 Independent contractors are hired in a variety of situations and engaged to perform a variety of tasks and it is very often the case that the hirers are individuals, rather than persons who are carrying on a business. Often, these hirers do not possess the financial wherewithal to make good the losses sustained by the torts of these contractors. Further, they are often in no position to exert any meaningful control over the activities of independent contractors since they are not part of their organisation. To make the hirers vicariously liable for the acts of independent contractors would neither serve the aim of victim compensation nor that of effective deterrence.
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> 36 But even if it could be shown that the aims of victim compensation and deterrence could be achieved through the imposition of vicarious liability on these hirers, it would not be enough. As Chan CJ cautioned at [81] of *Skandinaviska*, "[t]he courts are … neither welfare agencies nor workplace safety

[96] Tab 19 of the DBOA.

> regulators". The fact that a person can easily bear a loss does not, without more, justify the conclusion that the law ought to make him do so. Tort law is still primarily a system of norms of personal responsibility and a principled moral basis for the imposition of liability is required … This moral basis can be found in the concept of "enterprise risk", which Chan CJ alluded to at [77] of *Skandinaviska*, where he wrote, "a person who employs another to advance his own interests and thereby creates a risk of his employee committing a tort should bear responsibility for any adverse consequences resulting therefrom".
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> 37 The concept of an "enterprise risk" … is not just a unifying idea or grand theme but the normative foundation for the doctrine of vicarious liability. As Rix LJ put it in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Lt*d [2006] 2 WLR 428 at [55], "those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities even when performed negligently". In short, where the incidence of benefit falls, so, too, should the risk. Since employers, through engaging in business, have put the risk of tortious acts arising out into the world, they should be liable when the risk eventuates.
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> 38 The point, for present purposes, is that the imposition of vicarious liability for the acts of independent contractors can *never* be justified on the basis of the theory of enterprise risk. By definition, an independent contractor is one who is *not* part of the hirer's organisation and is instead a person who is "performing services as a person of business on his own account" … The independent contractor carries on business for *his own* benefit, and thus, any risks of harm arising from the independent contractor's conduct (the enterprise risk) should properly fall on the independent contractor alone …
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> [emphasis in original]

Whether the "independent contractor defence" applied in this case

50 In assessing whether the 2nd Defendant was an independent contractor of the 1st Defendant, I applied firstly the "control" test. To quote the learned editors of *Clerk & Lindsell on Torts* (Michael Jones gen ed) (22nd Ed, 2018) ("*Clerk & Lindsell*") at para 6-03, the distinction between employees and independent contractors has "[t]raditionally … [been] taken to lie in the

different amounts of control exercisable by the employer, particularly control over the manner in which the work was to be done". This was alluded to by the CA 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*")[97], in which the CA had to consider, *inter alia*, whether the company engaged by the National University of Singapore ("NUS") to supply lifeguards for its swimming pool was an independent contractor. In holding that it was, the CA stated (at [24]):

> … The distinction between the ability to tell a worker *what* to do and the ability to tell him *how* to do it is significant: in [*Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Limited* [1947] AC 1], the court held that the employment of the craneman was not transferred from the harbour authority to the stevedores because although the stevedores could tell the craneman what they wanted him to do, they had no authority to tell him how he was to handle the crane in doing his work …
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> [emphasis in original]

51 Applying the "control" test to the present case, it was plain that the 1st Defendant did not exercise any control at all over the manner in which the A&A works were to be done. Chong NK himself conceded that he was the one who would go to the worksite in the mornings to arrange the work for his workers and to do inspections, and he also took on the supervision of their work; and although, as noted earlier, he admitted that he split his time between a few different worksites, there was no suggestion – even by Chong NK himself – that in his absence, the 1st Defendant's personnel would step in to supervise the manner in which his workers carried out their work. Indeed, as noted at [43] above, Chong NK's claims about having assigned a "technical controller" and a "part-time supervisor" to the No. 17 site – whilst not credible in themselves –

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97 Tab 7 DBOA.

suggested that he was all too aware that supervision and thus control of the manner in which his workers did the work at No. 17 lay firmly with the 2nd Defendant and not with the 1st Defendant.

52 As the CA pointed out in *BNM* (at [28]–[29]), however, the control test "is not the only test for determining whether a contractor is an independent contractor, nor is it even necessarily the decisive factor. … [T]he fundamental test to be applied is whether the contractor was performing services as a person of business on his own account". In this connection, the CA quoted from the judgment of Cooke J in *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, in which Cooke J had noted, *inter alia*:

> … The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. …

53 Applying the CA's analytical approach in *BNM* (at [31]–[32]) to the present facts, it was evident that the 2nd Defendant deployed its own workers, undertook the financial risks of running its business, retained the profits to be made from its business, and charged for goods and services tax ("GST"). As to the deployment of workers, I have already referred to Chong NK's evidence about his going to the worksite in the mornings to arrange the work for his workers. As to the retention of responsibility for financial risks as well as the retention of profits, this could be seen in particular from the quotation issued by the 2nd Defendant[98], which charged items such as the cost of insurance and GST to the 1st Defendant, as well as from Chong NK's testimony when he was

[98] pp 38–39 of Molly's AEIC.

questioned about the quotation. Notably, in explaining the $16,000 item for "Preliminaries & Insurance", he stated that he had factored in the cost of "overheads from [his] office"[99] in coming up with the figure. It was also clear from his evidence that the 2nd Defendant decided how much of a discount to give the 1st Defendant[100]. Finally, Chong NK's testimony also confirmed that in respect of the A&A works at No. 17, the 2nd Defendant had undertaken responsibility for taking out its own insurance to "cover any accidents" at the worksite[101] – a factor which the CA found relevant in *BNM* (at [32]).

54 Having regard to the factors set out above, I had no doubt that in carrying out the A&A works at No. 17, the 2nd Defendant was (as the 1st Defendant alleged) an independent contractor. Applying the general principles espoused by the CA in *Seasons Park* and *Ng Huat Seng (CA*), this meant that the 1st Defendant could not be held vicariously liable for the 2nd Defendant's negligence in carrying out these works.

Whether the 1st Defendant had exercised due care in selecting and appointing the 2nd Defendant as their contractor

55 However, given that the "independent contractor defence" applied, the 1st Defendant did owe a duty of care to persons such as the Plaintiff, who might be affected by the actions of the independent contractor, to exercise reasonable care and skill in the selection of a suitable contractor (*Ng Huat Seng* (*HC*) at [43]). This was the next issue I had to consider – whether the 1st Defendant exercised reasonable care in selecting the 2nd Defendant as its contractor. I decided this issue in the 1st Defendant's favour, for the following reasons.

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99 See transcript of 5 July 2018 at p 42 lines 30–32.

100 See transcript of 5 July 2018 at p 43 line 2.

101 See transcript of 4 July 2018 at p 69 line 13 to p 70 line 6.

The applicable standard of care

56 As noted earlier, the 1st Defendant's selection of the 2nd Defendant as its contractor was based primarily on the recommendation of a neighbouring land-owner at No. 25 Link Road (Mdm Poh) who had arranged for similar works on her property, the visual inspections by Molly and Ross of the similar works done at No. 25, and their satisfaction with the quality of the 2nd Defendant's work in the two jobs undertaken at No. 17 prior to the A&A works.

57 In considering whether the above sufficed as due care, the standard which I had to apply was "that of a reasonable person in the circumstances of the defendant" (*Ng Huat Seng* (*CA*) at [73]). In other words, I had to "have regard to the particular circumstances of the present case, including the applicable industry practices, and then ascertain, on this basis, what a reasonable person in the [1st Defendant's] position would have done" (*Ng Huat Seng* (*CA*) at [73]).

58 As for industry practice, the CA in *Ng Huat Seng* (*CA*) has made it clear (at [74]) that:

> … Industry standards and common practice have long been viewed as important, although not necessarily conclusive, factors in ascertaining the appropriate standard of care … [W]hen receiving evidence of what is alleged to be a common and approved practice so as to assess the standard of care appropriate in a particular set of circumstances, the court should of course examine the practice against considerations of logic and common sense. This is only sensible since negligent conduct does not cease to be so simply on account of repetition and normalisation. In assessing the standard of care to be met, therefore, it would be just as unwise to accept a common industry practice uncritically as it would be to simply ignore it.

The relevance of expert evidence to the court's assessment

59 The Plaintiff and the 1st Defendant each called its own expert witness to give evidence of industry standards and practice. The experts' assistance would have been relevant and useful on the question of what the 1st Defendant could reasonably have been expected to do prior to appointing the 2nd Defendant as contractor. *Hong Cassley and others v GMP Securities Europe LLP and another* [2015] EWHC 722 (QB) is an example of how expert evidence may be used in such cases. This case concerned a claim in negligence brought by the family of the deceased Mr Cassley against his employers GMP Securities Europe LLP ("GMP") and another company called Sundance Resources Limited ("Sundance"). Mr Cassley was on a chartered flight passing over a remote area of the Republic of Congo when the aircraft he was in crashed into a hillside and killed all the persons on board. Mr Cassley was then on a business trip undertaken on behalf of GMP. The aircraft had been chartered from a Congolese charter flight company ("Aero-Service") by Sundance: Mr Cassley was on that trip because GMP had been trying to win the instruction to act as Sundance's representative in the raising of finance for the latter's mining project. The court found that the accident occurred for a number of reasons mainly related to failings on the part of Aero-Service, including the lack of any formal safety procedures at Aero-Service, its lack of any facility for flight planning and the absence of any aeronautical charts on board the aircraft. Having also found that both GMP and Sundance owed non-delegable duties of care to Mr Cassley, the court then considered what steps were reasonably required to be taken by GMP and Sundance in the discharge of their respective duties of care – whether, for example, GMP and/or Sundance should have engaged an independent aviation consultant; and in this connection, the court had regard to the evidence of the expert witnesses called by the parties.

Observations on the expert evidence provided in this case

60 Unfortunately, however, I found that the instructions provided to the Plaintiff's expert in the present case appeared to have confused and/or conflated those issues which he was qualified to address as an expert witness with legal and factual issues which were in contention between the parties and meant for the court's determination. In addition to being asked about "some of the steps or considerations that [the 1st Defendant], as an occupier, ought to have taken into account in the selection of [the 2nd Defendant] to carry out the A&A works at No. 17", the Plaintiff's expert was also asked to give his opinion, *inter alia*, on whether, "[o]n the facts of this case … [the 1st Defendant] had discharged their responsibilities in the appointment of [the 2nd Defendant]", and whether the 1st Defendant had acted "properly or reasonably as occupiers in allowing [the 2nd Defendant] to carry out their work, bearing in mind the need to obtain the various approvals and before the necessary approvals were given"[102]. With respect, it should have been clear to those instructing the Plaintiff's expert that answering these latter two questions would have required him to take a position on contentious legal and factual issues which he was not equipped to address.

61 This confusion as to the scope of his role as expert might explain why – regrettably – the Plaintiff's expert ended up making certain statements in his expert report about the 1st Defendant's "obligations" which were unsupported by any evidence or authority and which seemed at times so broad as to be unhelpful. Thus, for example, he stated that "[a]s an occupier of No. 17, [the 1st Defendant] having decided to carry out A&A works on their premises had a broad range of responsibilities. This included ensuring that the A&A works are only authorised and/or permitted after all necessary measures were taken to

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102 para 2.2 at p 4 of the Plaintiff's expert's report (exhibit GW-2 of George Wall's AEIC) ("Mr Wall's expert report").

ensure the works would be safely carried out to ensure it was safe and not hazardous for its visitors or employees, while the A&A works was going on"[103]. He did not cite the basis for this somewhat expansive statement of general principle, and taken at face value, this appeared to be a statement that the 1st Defendant had a non-delegable duty to ensure that the A&A works at No. 17 were carried out safely – which was precisely one of the key legal issues in contention.

62 The Plaintiff's expert also put forward in his report what appeared to be factual assumptions and/or factual conclusions, without explaining the basis for those assumptions or conclusions. For example, he stated that "[g]iven that [the 1st Defendant] is a supplier of materials to the construction industry", it would be "reasonable to assume that [the 1st Defendant] has a certain level of familiarity with the construction industry and that [the 1st Defendant] should not be considered a lay person"[104]. In the first place, the only evidence in the report which could conceivably lead to this conclusion was the reference to the blurb on the 1st Defendant's website regarding its "mission" – a website on which the information was, on his own admission, "limited"[105]. He did not explain how the 1st Defendant's business of supplying electrical conduits would render it "reasonable to assume" a "certain level of familiarity with the construction industry". Nor, for that matter, did he explain what that "certain level of familiarity" entailed, beyond the brief statement in cross-examination that this would involve awareness "of the general requirements and responsibilities within the construction industry"[106]. In the circumstances, I did

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103 para 5.2 at p 13 of Mr Wall's expert report.

104 para 5.3 at p 14 of Mr Wall's expert report.

105 para 4.2 at pp 8–9 of Mr Wall's expert report.

106 See transcript of 6 July 2018 at p 7 line 28 to p 8 line 14.

not give any weight to his assertions about the 1st Defendant's "familiarity with the construction industry".

63 Given my observations on the evidence of the Plaintiff's expert, I had serious reservations about his views regarding the steps which the 1st Defendant should reasonably have taken in selecting a contractor. Rather confusingly, the steps he listed as being "expected" of the 1st Defendant did not all appear to relate directly to the selection of contractors[107]. Of the one item which did appear to relate directly to the selection of contractors ("To go out to tender to a number of vendors, possibly three, to ensure that their planned scope of work was adequate and that they were obtaining a competitive price"), there was no explanation provided either in the expert report or in cross-examination[108] as to why it should be reasonable to expect a company in the 1st Defendant's circumstances to "go out to tender to a number of vendors". There was also no explanation as to how a tender exercise would have revealed that the 2nd Defendant's "planned scope of work" was not "adequate" and thereby led to it not being selected as contractor. As for ensuring "a competitive price", I did not see how this was in any way relevant to the issue of whether the 1st Defendant had exercised reasonable care in the selection process.

64 Much was also made by the Plaintiff's expert of the fact that the 1st Defendant had obtained ISO 9001 certification. Indeed, he postulated that the 1st Defendant "should have carried out a more rigorous investigation of [the 2nd Defendant's] experience and ability, especially in relation to whether [the 2nd Defendant] was competent to carry out the planned A&A work"[109]. Insofar as this statement appeared to suggest that a "more rigorous" standard of care

107 para 5.5 at p 17 of Mr Wall's expert report.

108 See transcript of 6 July 2018 at p 8 line 22 to p 9 line 11.

109 para 5.5 at p 17 of Mr Wall's expert report.

should apply to the 1st Defendant on account of its ISO 9001 certification, no evidence or authority was produced to demonstrate that industry practice generally expected "more rigorous" standards of care from ISO-certified property owners, as compared to owners lacking such certification. In any event, the Plaintiff's expert did not elaborate on why he found the 1st Defendant's reliance on recommendations from other owners and on its own experience of earlier works by the 2nd Defendant to be unsound practice[110]; nor did he clarify the precise steps which would have constituted a "more rigorous" investigation.

65 The views of the Plaintiff's expert were diametrically opposed to those of the 1st Defendant's expert. I would add as an aside that the report of the 1st Defendant's expert was not entirely free from some of the issues which tainted the report of the Plaintiff's expert – including, for example, being asked to state his views on whether the 1st Defendant and the 2nd Defendant were "liable for breach of [their respective] duties and obligations"[111]. On balance, however, I found certain portions of the testimony of the 1st Defendant's expert to be helpful, as his testimony appeared to me to comport with logic and common sense.

My findings on the issue of negligent selection

66 The 1st Defendant's expert testified that it was a "popular" industry practice – and one which he himself as a project management consultant recommended to clients – to seek the views of developers or owners who had engaged contractors, to see a contractor's completed works for themselves, and to try out a contractor by giving him "a smaller piece of work" first[112]. This

110 para 5.5 at pp 17 to 18 of Mr Wall's expert report.

111 para 216 of Mr Anand's expert report.

appeared to me to be logical and sensible. Indeed, in a case like the present, where the neighbouring owner's recommendations were based on works similar to those which the property owner intended to procure, and where the owner had the benefit of being able personally to inspect the works on the neighbour's property, it seemed to me all the more reasonable for an owner engaged in selecting a contractor to have regard to the recommendations of a neighbouring owner. Similarly, from the perspective of logic and common sense, it appeared to me reasonable that such an owner should have regard to his own experience of earlier construction jobs done by the contractor on his property. Indeed, the 1st Defendant's conduct in getting the 2nd Defendant to do two smaller jobs on its property before accepting the quotation for the A&A works seemed to me to be prudent and sensible.

67 I note that in cross-examination, the 1st Defendant's expert was willing to agree with the Plaintiff's counsel that as part of its selection process, the 1st Defendant "should check … whether the contractor is a licensed builder"[113]. However, I did not find this concession to be of any assistance to the Plaintiff's case. The assumption implicit in counsel's questions to the 1st Defendant's expert on this issue appeared to be that had the 1st Defendant carried out the check as counsel suggested, it would have discovered that the 2nd Defendant was unsuitable and would not have selected the latter as its contractor. With respect, this assumption was misconceived. To quote the High Court's judgment on a similar issue in *Ng Huat Seng (HC)* (at [45]):

> … The issue is one of causation. In order for the appellants to make out their case against the respondents on the ground of negligent selection liability, it would not be enough to show that the respondents had been derelict in their selection of a contractor; they must also show that *the respondents'*

112 See transcript of 11 July 2018 at p 63 line 27 to p 64 line 20.

113 See transcript of 11 July 2018 at p 65 line 26 to p 66 line 13.

> *dereliction of their duty of careful selection had caused them loss.* In other words, the appellants must show that the respondents would not have selected [the contractor] if they had exercised reasonable care in the selection process. …
>
> [emphasis in original]

68 In *Ng Huat Seng (HC)*, the High Court pointed out (at [47]) that "there was no evidence" that the "further industry inquiries" suggested by the appellants "would have made any difference". Esthetix (the contractor in that case) was a licensed builder; and no evidence had been led by the appellants to the effect that Esthetix had a bad safety record, that it had acquired a reputation for poor performance in the industry, or that there was otherwise anything irregular which would have been turned up in an inquiry that would have made a difference to the appointment. Shortly put (at [49]):

> … [E]ven if the respondents had done whatever [the appellants' counsel] submitted they ought to have done (and assuming further that their failure to do so constituted a breach of duty), there was no evidence that the respondents would have chosen any differently or that they would have had any reason to have chosen differently. Indeed, there was *no* evidence that the respondents were considering alternative contractors besides Esthetix. Without proof that the respondents would have made an alternative selection, the appellants could not succeed in establishing that the respondents' alleged breach of duty led to their loss and their claim failed.
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> [emphasis in original]

69 In the present case, there was no dispute that the 2nd Defendant held the requisite builder's licence at all material times. No evidence was led by the Plaintiff to show that the 2nd Defendant had a bad safety record, that it had acquired a reputation for poor performance in the industry, or that there was otherwise anything irregular which would have been turned up in the suggested inquiry that would have made a difference to the appointment. Here, as in the *Ng Huat Seng* case, even if the 1st Defendant had (as suggested by the Plaintiff) checked on whether the 2nd Defendant was a licensed builder, and even

assuming that their failure to do so was a breach of duty, there was no evidence that the 1st Defendant would have chosen differently or that it would have had any reason to have chosen differently. Here, as in the *Ng Huat Seng* case, there was no evidence that the 1st Defendant was considering alternative contractors besides the 2nd Defendant. Without evidence that the 1st Defendant would have made an alternative selection had it made the further inquiry suggested, the Plaintiff could not succeed in proving that the 2nd Defendant's alleged breach of duty had led to its loss; and its claim of negligent selection failed.

Whether the 1st Defendant was subject to a non-delegable duty of care vis-à-vis the Plaintiff to ensure that the 2nd Defendant carried out the A&A works with reasonable care

The Plaintiff's allegations

70 In addition to pleading that the 1st Defendant was vicariously liable for the negligence of the 2nd Defendant and negligent in the selection of its contractor, the Plaintiff also pleaded a lengthy list of particulars of negligence at paras 14.16–14.38 of the Statement of Claim (Amendment No. 2) which assumed the existence of a multitude of positive duties on the 1st Defendant's part vis-à-vis the execution of the A&A works at No. 17. *Inter alia*, these particulars assumed the existence of a positive duty on the 1st Defendant's part to "ascertain [and] ensure that the 2nd Defendant had conducted a risk assessment in relation to the safety risks posed to the Plaintiff['s] person, goods and premises prior to the commencement of" the A&A works (at para 14.16); a positive duty to "ensure that the 2nd Defendant exercised due care and caution at all material times in the management, control and/or carrying out of" the A&A works (at para 14.18); a positive duty to "ensure that the 2nd Defendant put in place sufficient or any protection or safety precautions and/or preventive measures before carrying out or attempting to carry out" the A&A works (at

para 14.22); a positive duty to "ensure that the 2nd Defendant noticed in time or at all the proximity of the Plaintiff['s] goods and/or his premises (No. 15) before carrying out the" A&A works (at para 14.24); a positive duty to ensure that the 2nd Defendant had all the relevant government approvals in place prior to commencing the works (at paras 14.31–14.33 and 14.35–14.38); and a positive duty to "ensure that the 2nd Defendant had taken out the necessary insurance policy to cover any losses and damages arising out of" the fire (at para 14.34).

71 With respect, it was somewhat confusing that in the Plaintiff's closing submissions, these particulars were dealt with individually without any real attempt to identify a unifying legal principle to support the positive duties they postulated[114]. In addition, there was considerable reliance placed on the narration of factual allegations, and, in particular, on the propositions put forward by the Plaintiff's expert. This was (with respect) not particularly illuminating insofar as an assessment of viability of the Plaintiff's cause of action was concerned. In substance, the pleadings at paras 14.15–14.38 of the Statement of Claim (Amendment No. 2) amounted to the assertion that vis-à-vis the Plaintiff, the 1st Defendant bore a non-delegable duty to ensure that the 2nd Defendant exercised reasonable care in the execution of the A&A works (or specifically, the hot works). The appropriate approach therefore was to consider whether the 1st Defendant bore such a non-delegable duty of care. I note that from the 1st Defendant's closing submissions, this appears to have been how its counsel understood this aspect of the Plaintiff's case[115].

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114 See for example paras 383–632 of the Plaintiff's Closing Submissions.

115 See for example para 35 of the 1st Defendant's Closing Submissions.

72 For the following reasons, I decided there was no basis for finding that the 1st Defendant bore a non-delegable duty vis-à-vis the Plaintiff to ensure that the 2nd Defendant took reasonable care in the execution of the A&A works at No. 17 (or specifically, the hot works). There was no basis, therefore, for finding that the 1st Defendant was subject to the numerous positive duties enumerated by the Plaintiff at paras 14.16–14.38 of the Statement of Claim (Amendment No. 2).

General principles with regard to the imposition of non-delegable duties of care

73 In *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd and another* [2016] 4 SLR 521 ("*Tiong Aik*")[116], the CA provided in its judgment a comprehensive survey of the general principles governing this area of law. Of particular relevance were the following passages (at [19]–[24]):

> 19 … [T]ortious liability is generally circumscribed by 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" … In this regard, Lord Sumption JSC, in delivering the leading judgment in the United Kingdom Supreme Court ("UKSC") decision of *Woodland v Swimming Teachers Association* [2014] AC 537 ("*Woodland*"), held at [5]:
>
> > The law of negligence is generally fault-based. Generally speaking, a defendant is personally liable only *for doing negligently that which he does at all*, or for omissions which are in reality a negligent way of doing that which he does at all. The law does not in the ordinary course impose personal (as opposed to vicarious) liability for what *others* do or fail to do. This is because … a common law duty of care
> >
> > > does not usually demand compliance with a specific obligation. It is *only when an act is undertaken by a party* that a general duty arises to perform the act with reasonable care.

116 Tab 16 DBOA.

…

In other words, in the context of the tort of negligence, a person is generally only held liable for his *own* carelessness, and not for the carelessness of *others*. The reason for this is that the nature of the duty imposed by common law is merely to *do what you are required to do with reasonable care*. One implication of this is that if the performance of a particular task is delegated to another party, the party who was originally responsible for the performance of that task … would, ordinarily, not be subject to *any* tortious liability for the negligent performance of that task (since he did not personally perform the task).

20 Vicarious liability stands, in a sense, as a derogation from this principle, or as a "true exception" to this … It permits the imputation of secondary tortious liability on an employer on the basis of its employee's primary tortious liability … The employer is liable not because of its *own* negligence, but because of its *employee's* negligence. The principles of vicarious liability, however, do not extend to imposing liability on employers for the negligence of their *independent contractors*. There is no basis in the doctrine of vicarious liability for suing an employer in tort for the negligence of its independent contractors …

21 A *separate* legal basis for such a cause of action may, however, exist in the doctrine of *non-delegable duties*. The liability incurred upon a breach of a non-delegable duty is *not vicarious* … Non-delegable duties are *personal* duties, the delegation of which will not enable the duty-bearer to escape tortious liability because the legal responsibility for the proper performance of the duty resides, in law, in the duty-bearer …

22 From another perspective, it has been said that "the concept of personal duty departs from the basic principles of liability and negligence by substituting for the duty to take reasonable care a more stringent duty, *a duty to ensure that reasonable care is taken*" … Separately, Lord Sumption JSC described a non-delegable duty as a duty which "extends beyond being careful, to procuring the careful performance of work delegated to others" …

23 It should be clarified that the concept of non-delegable duties does not *per se* import a higher or absolute standard of care. Referring to non-delegable duties, Gleeson CJ helpfully explained in *Lepore* at [26]:

> … It also seems clear that the increased stringency to which he was referring lay, not in the extent of the responsibility undertaken (reasonable care for the safety of the pupils), but in the inability to discharge that

> responsibility by delegating the task of providing care to a third party or third parties.
>
> …
>
> 24 From the above, it is clear that where a party is subject to non-delegable duties, he will be held liable in tort if those duties are breached, *even if* he had non-negligently delegated the performance of those duties to an independent contractor, and it was the independent contractor who was negligent. In this sense, non-delegable duties create an exception to the rule that an employer cannot be liable for the negligence of its independent contractors …

74 In *Ng Huat Seng (CA)*, the CA reaffirmed the two-stage test expounded in *Tiong Aik* for determining whether a non-delegable duty would arise on a given set of facts, summarising the test as follows (at [82] and [84]):

> 82 … [A]t the first stage of this two-stage test, the claimant would have to satisfy the threshold requirement that:
>
> (a) *either* his case fell within one of the established or recognised categories of non-delegable duties; *or*
>
> (b) his case possessed all of the five defining features outlined by Lord Sumption JSC in *Woodland* … namely:
>
> (i) The claimant was a patient or a child, or, for some other reason, was *especially vulnerable or dependent on the protection of the defendant to avoid the risk of injury*. Prisoners and residents in care homes were also mentioned in *Woodland* as likely examples in this regard.
>
> (ii) There was an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, which placed the claimant in the defendant's actual custody, charge or care, *and* from which it was possible to *impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not merely a duty to refrain from conduct which would foreseeably harm or injure the claimant*. In this regard, Lord Sumption JSC noted in *Woodland* that it was characteristic of such relationships that they involved an element of control by the defendant over the claimant, which would vary in intensity in different situations, but would

> "clearly [be] very substantial in the case of schoolchildren"…
>
> (iii) The claimant had no control over how the defendant chose to perform the obligations arising from the positive duty which it had assumed towards the claimant, that is to say, whether personally or through employees or third parties.
>
> (iv) The defendant had delegated to a third party some function that was an integral part of the positive duty which it had assumed towards the claimant; and at the time of the tortious conduct, the third party was exercising, for the purposes of the function thus delegated to him, the defendant's custody, charge or care of the claimant and the element of control that went with it.
>
> (v) The third party had 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.
>
> …
>
> 84 [T]he second stage of the *Tiong Aik* framework … would be triggered only upon the claimant satisfying the threshold requirement at the first stage. … [A]t the second stage, the court would additionally take into account the fairness and reasonableness of imposing a non-delegable duty of care on the defendant in the particular circumstances of the case as well as the relevant policy considerations in our local context …
>
> [emphasis in original]

75 In *Ng Huat Seng (CA)*, the CA also reiterated with emphasis its observation in *Tiong Aik* (at [38]) that non-delegable duties "'should remain *exceptional*'… [T]he development of such duties should proceed 'only "on the basis of a clear analogy to a recognised class [of non-delegable duties] and then only for compelling reasons of legal principle and policy"' … This was because in many instances, it would be unrealistic or even impossible for the duty-bearer to fulfil the non-delegable duty in question, and this could lead to very artificial outcomes." [emphasis in original] (at [85]).

76 In addition, in considering the first of the two approaches to the first-stage threshold requirement, whilst declining to come to a firm conclusion on whether the doctrine of ultra-hazardous acts should be recognised as an established category of non-delegable duties under Singapore law[117], the CA reviewed the "trenchant criticism" which had been levelled against the doctrine (at [92]). Noting that "the doctrine of ultra-hazardous acts imposes an extremely stringent duty on the duty bearer", the CA cautioned that "[f]or this reason, it should only be applied in very limited circumstances, namely, where an activity poses a material risk of causing exceptionally serious harm to others *even if* it is carried out with reasonable care. It is the *persistence* of such a risk *despite* the exercise of reasonable care which makes it fair, just and reasonable to hold the defendant liable for any negligence in the performance of the activity even if the negligent conduct was on the part of an independent contractor whom the defendant had engaged to carry out the activity." [emphasis in original] (at [96]). Expanding further on this point, the CA held (at [108]):

> … [The doctrine of ultra-hazardous acts], if it is recognised as part of our law, should only be invoked in exceptional circumstances precisely because it can potentially provide a claimant with an exceptionally far-reaching remedy: a claimant whose case comes within the ambit of this doctrine is in a position to make a *principal* answer for the negligent acts and/or omissions of another *even if the latter is an independent contractor*. Indeed, it is the very nature of the exceptional setting in which such a remedy can be availed of that makes it appropriate to extend liability in that setting beyond the party who actually performs the activity in question to the principal for whom that activity is performed. Because that activity poses a material risk of causing exceptionally serious harm to innocent parties, it is appropriate that the net of liability be widened as far as it may reasonably be, so that a person who suffers harm from that activity is unlikely to be left without a real remedy.

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117 The CA found it unnecessary to pronounce any firm conclusions on this issue because in *Ng Huat Seng (CA)*, even assuming the doctrine of ultra-hazardous acts were recognised as part of Singapore law, the facts of that case could not possibly come within its ambit (at [89]).

> [emphasis in original]

Applying the general principles to the present case

77 It is instructive to examine how the CA applied the above reasoning to the facts of the *Ng Huat Seng* case itself. In that case, the appellants and the respondents owned neighbouring properties built along a slope, with the appellants' house being the lower property (its ground floor being two metres below the appellants' property). The appellants had engaged an independent contractor ("Esthetix") to demolish the existing house on its property and to build another in its place. Whilst demolition works were being carried out by Esthetix on the respondents' property, falling debris damaged the appellants' property. The trial judge found that Esthetix had been negligent in failing to take a number of precautionary measures when executing the demolition works. On appeal, one of the issues canvassed before the High Court and the CA was whether the demolition works could be said to be ultra-hazardous, although the appellants' counsel added a gloss to his arguments by stating that his case was that "only demolition *considered in the light of* (a) the proximity and (b) the relative elevations of the two houses" [emphasis in original] was ultra-hazardous (*Ng Huat Seng (HC)* at [78]). The High Court dismissed the appellants' arguments. In upholding the High Court's decision, the CA stated that it was evident that the demolition works in this case "could not reasonably be said to be ultra-hazardous"; in particular, it noted the following points (at [97]):

> (a) The appellants did not put forward anything to explain how the damage to their property ensued from a particular risk arising from the demolition works on the respondents' property that remained substantial despite the exercise of reasonable care.
>
> (b) Demolition works are routinely done and there is nothing to suggest that despite the exercise of reasonable care, there

> remains a material risk of exceptionally serious harm arising from such works;
>
> (c) This analysis does not change even though landed properties in Singapore tend to be located in close proximity to one another. That simply establishes the element of factual proximity and the foreseeability of harm being caused if reasonable care is not taken when demolition works are carried out. It does not in any way shed light on whether such works are "exceptionally dangerous whatever precautions are taken" … which was the central issue here.

78 The above analysis applied with similar force in the present case. In the present case, even if one were to assume that the hot works – and in particular, the sparks arising from these works – created "a material risk of exceptionally serious harm", nothing was put forward by the Plaintiff to suggest that such risk would remain *even if reasonable care were taken*. To quote from what the CA said in *Ng Huat Seng (CA)*, the Plaintiff failed to put forward any material to explain how the loss and damage he had suffered "ensued from a particular risk arising from the [hot works] on the [1st Defendant's] property that remained substantial despite the exercise of reasonable care" (at [97]). Here, as in the *Ng Huat Seng* case, the close proximity of No. 15 and No. 17 Link Road simply established the element of factual proximity and the foreseeability of harm being caused if reasonable care were not taken when the hot works were carried out". This proximity did not in any way shed light on whether the hot works were "exceptionally dangerous *whatever precautions were taken*" [emphasis added]. In fact, if anything, much of the evidence of the Plaintiff's expert and the closing submissions of the Plaintiff's counsel were aimed at suggesting that had reasonable care been taken in the execution of the hot works (for example, by having a risk assessment done prior to the commencement of the hot works, by having "adequate" supervision of the 2nd Defendant's workers, *etc*), the risk of a fire occurring would have been minimised or eliminated.

79 Accordingly, even on the assumption that the doctrine of ultra-hazardous acts is part of our law, the Plaintiff was unable to show that the doctrine applied on the facts of his case. In other words, applying the first of the two approaches to the threshold requirement for non-delegable duties, the Plaintiff could not show that his case fell within an established category of non-delegable duties.

80 I next considered whether, in the alternative, the Plaintiff's case possessed the five defining features which would indicate the existence of a non-delegable duty. Again, it is instructive to examine how the CA in *Ng Huat Seng (CA)* applied this second approach to the threshold requirement for non-delegable duties. In that case, the appellants argued that in electing to demolish their existing property and build a new house in its place, the respondents had "assumed responsibility" towards their neighbours, the appellants; that the appellants were especially vulnerable because their property was two metres lower than the respondents', and they had no control over the demolition works carried out there; and that the respondents had control over the performance of the demolition works as they had control of the work site and the method of work, and could also make decisions on workplace safety and health. The CA rejected these arguments, holding at [103] that:

> … [T]he relationship which the appellants described was essentially that which would ordinarily exist between neighbours owning adjoining plots of land. Under such a relationship, liability would arise if one of the neighbours acted negligently and caused foreseeable harm to the other. There was nothing distinctive about the facts here which demonstrated the particular kind of relationship described in *Tiong Aik* so as to found a non-delegable duty of care on the respondents' part in respect of the demolition works carried out on their property. What was critical in this case was that unlike the relationship between a school and its students or that between a hospital and its patients, where it could meaningfully be said that the latter was in the "custody, charge or care" of the former, there was nothing to indicate that the appellants

> were in any sort of relationship of "special dependence" on or "particular vulnerability" in relation to the respondents so as to warrant the imposition of a non-delegable duty of care on the latter. Indeed, it could not be said that the respondents exercised any control over the appellants from which it was possible to impute to the respondents the assumption of a *positive duty to protect the appellant from harm* arising from the demolition works carried out on the respondents' property, as opposed to merely a duty to refrain from conduct which could foreseeably cause harm to the appellants.
>
> [emphasis in original]

81 Again, the above analysis applied with similar force in the present case. In the present case, the Plaintiff and the 1st Defendants owned adjoining properties. There was nothing distinctive about the present facts which could supply the basis for the particular kind of relationship described in *Tiong Aik* and in *Ng Huat Seng (CA)* as founding a non-delegable duty of care on the 1st Defendant's part in respect of the hot works being done at No. 17. Certainly there was nothing on the facts which could provide a basis for saying that the Plaintiff was in a relationship of "special dependence" on or "particular vulnerability" to the 1st Defendant such as to justify the imposition of a non-delegable duty of care on the latter. Nor was there anything on the facts to justify a finding that the 1st Defendant had assumed a positive duty to protect the Plaintiff from harm arising from the hot works carried out at the wall between their respective backyards.

82 In this connection, I note that there was some suggestion in the Plaintiff's AEIC that the 1st Defendant's representative (by whom he appeared to be referring to Molly) had informed him during a visit to No 15 together with "the contractors' boss" that "they [the 1st Defendant] would take the necessary precautions to ensure that the [g]oods stored in 15 Link Road were not affected in any way by the work which they intended to carry out"[118] at No. 17. It was

[118] para 33 of the Plaintiff's AEIC.

not entirely clear whether the Plaintiff was pitching these alleged remarks as amounting to an assumption by the 1st Defendant of a positive duty towards him to protect him from harm arising from the hot works. If he was, then the argument could not in my view possibly succeed. Firstly, it became clear from the Plaintiff's own admissions in cross-examination that he could not actually recall such remarks being made to him, much less their being made by "the 1st Defendant's representative"[119]. Secondly, and in any event, even assuming that such remarks had been made by Molly to the Plaintiff, they could not provide any basis for finding that the 1st Defendant had assumed a positive duty to protect the Plaintiff from harm arising from the A&A works or the hot works being done at No. 17. From the CA's judgments in *Tiong Aik* and *Ng Huat Seng (CA)*, it was clear that the issue of assumption of a positive duty by a defendant to protect a claimant from harm must be viewed in the context of an "*antecedent relationship*" between defendant and claimant, *independent of the negligent act or omission*, which "*placed the claimant in the defendant's actual custody, charge or care*" [emphasis added] (at [82(b)(ii)] of *Ng Huat Seng (CA)*). On the present facts, there was clearly no such antecedent relationship between the Plaintiff and the 1st Defendant in which the former could be said to have been placed in the latter's "actual custody, charge or care".

83 In light of the above reasoning, I was satisfied that there was no basis for holding the 1st Defendant to be subject to a non-delegable duty of care in respect of the hot works carried out at the wall between No. 15 and No. 17.

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119 See transcript of 3 July 2018 at p 12 line 1 to p 13 line 31.

Whether the Workplace Safety and Health Act imposes on the 1st Defendant non-delegable duties of care to the Plaintiff in respect of the A&A works at No. 17

84 It will be noted that in addition to the list of particulars of the 1st Defendant's negligence enumerated at paras 14.16–14.38 of the Statement of Claim (Amendment No. 2), it will be seen that at para 14.15, the Plaintiff also pleaded the following as one of the particulars of negligence:

> Breach of duty under section 14A of the Workplace Safety and Health Act (Chapter 354A) in failing, neglecting or refusing to take such measures as are necessary to ensure that the 2nd Defendant:
>
> > (a) had the necessary expertise and/or competence to carry out the construction works and/or hot works for which the contractor was engaged by the principal to do; and
> >
> > (b) had taken adequate safety measures in respect of the construction works and/or hot works' machinery or equipment used by the 2nd Defendant or the latter's employees to carry out the construction works and/or hot works

85 In gist, para 14.15 of the Statement of Claim (Amendment No. 2) reproduced most of the language of section 14A(1) of the Workplace Safety and Health Act (Chapter 354A, 2009 Rev Ed) ("WSHA"). The provisions of section 14A(1)–(3) read as follows:

> (1) It shall be the duty of every principal to take, so far as is reasonably practicable, such measures as are necessary to ensure that any contractor engaged by the principal on or after the date of commencement of section 5 of the Workplace Safety and Health (Amendment) Act 2011 —
>
> > (*a*) has the necessary expertise to carry out the work for which the contractor is engaged by the principal to do; and
> >
> > (*b*) has taken adequate safety and health measures in respect of any machinery, equipment, plant, article or process used, or to be used, by the contractor or any employee employed by the contractor.

> (2) The duty imposed on every principal under subsection (1)(a) includes ascertaining that the contractor engaged by the principal and any employee of the contractor —
>
> > (*a*) have sufficient experience and training to carry out the work for which the contractor is engaged by the principal to do; and
> >
> > (*b*) have obtained any necessary licence, permit, certificate or any other document in order to carry out the work for which the contractor is engaged by the principal to do.
>
> (3) The duty imposed on every principal under subsection (1)(*b*) includes ascertaining that the contractor engaged by the principal —
>
> > (*a*) has conducted a risk assessment in relation to the safety and health risks posed to any person who may be affected by the work for which the contractor is engaged by the principal to do; and
> >
> > (*b*) has informed any person who may be affected by the work for which the contractor is engaged by the principal to do of the nature of the risk involved in the work and any measure or safe work procedure which is implemented at the workplace.

86 In relation to the A&A works at No. 17, the Plaintiff's closing submissions did not explain the connection which he sought to draw between the 1st Defendant's alleged statutory duties pursuant to section 14A WSHA and the imposition of a common law duty of care on it vis-à-vis neighbouring property owners such as the Plaintiff. Parsing these submissions, the only conclusion that made sense was that he was asserting that section 14A WSHA imposed on the 1st Defendant a non-delegable duty of care to the Plaintiff, to ensure that the A&A works (and in particular, the hot works) at No. 17 were carried out with reasonable care. In *Seasons Park* (at [38]–[39]) and in *Tiong Aik* (at [27]–[34]), the CA recognised that non-delegable duties could be imposed both by statute and at common law.

87 In this connection, it must be pointed out that the existence of a statutory duty *per se* does not necessarily equate with the imposition of a common law duty of care. As the CA held in *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 ("*Animal Concerns*") at [22] (and as it affirmed in *Tan Juay Pah v Kimly Construction Pte Ltd and others* [2012] 2 SLR 549 ("*Tan Juay Pah*")[120] at [51]):

> … *A statutory duty does not* ipso facto *impose a concomitant duty of care at common law.* A statutory duty may, of course, form the backdrop to and inform the existence (or lack thereof) of a common law duty of care … but that does not mean the statutory duty *per se* is a duty of care, *even if it is phrased (as here) in terms of requiring the taking of "reasonable steps" and "due diligence".*
>
> [emphasis added]

88 In *Seasons Park*, the CA made it clear that the claimant who asserted the existence of a statutory non-delegable duty must be able to point to specific provisions in the relevant legislation which have so provided (at [40]). The need for express statutory language providing for the alleged statutory non-delegable duty was reiterated in *Tiong Aik*. In that case, defects were discovered in the buildings of the Seaview condominium. These were due to the negligence of a sub-contractor. The management corporation ("MCST") of the Seaview sued the main contractor and the architect for the building defects. One key issue which the CA had to consider was whether the main contractor and the architect owed the MCST a statutory non-delegable duty of care to build and to design the condominium with reasonable care ("the Proposed Non-Delegable Duty"). Pointing out that "nothing in the express words of the BCA countenance the imputation of the Proposed Non-Delegable Duty", the CA held that "the absence of any express statutory language to ground the Proposed Non-Delegable Duty was dispositive of the matter" (at [33]–[34]).

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120 Tab 24 DBOA.

89 In the present case, the Plaintiff took it for granted that the 1st Defendant must be subject to the requirements stated in section 14A WSHA and therefore presented no arguments on the issue. With respect, however, there appeared to me to be some doubt as to whether the 1st Defendant – as the owner of premises on which the works were being done – should be regarded as one of the "principals" referred to in section 14A. As the 1st Defendant's counsel highlighted in his reply submissions[121], the definition of "principal" in section 4 WSHA is quite specific – it states that "principal":

> … means a person who, in connection with any trade, business, profession or undertaking carried on by him, engages any other person otherwise than under a contract of service —
>
> (a) to supply any labour for gain or reward; or
>
> (b) to do any work for gain or reward.

90 The 1st Defendant is in the trade or business of supplying electrical conduit pipes. It would put a very strained construction on the statutory definition of "principal" if – in relation to the A&A works at No. 17 – one were to speak of the 1st Defendant engaging the 2nd Defendant "in connection with any trade, business, profession or undertaking carried on" by it.

91 Even putting aside the above issues of construction and even assuming that the statutory duties in section 14A WSHA applied to the 1st Defendant, "[a] statutory duty does not *ipso facto* impose a concomitant duty of care at common law … even if it is phrased (as here) in terms of requiring the taking of 'reasonable steps' and 'due diligence'" (see [87] above). The Plaintiff also needed to prove that the statute had clearly and expressly provided for a non-delegable duty of care of the nature and scope he was seeking to rely on. He failed to do so. To quote from the CA's judgment in *Tiong Aik*, therefore, "the

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121 paras 3–5 of the 1st Defendant's reply submissions.

absence of any express statutory language to ground the Proposed Non-Delegable Duty was dispositive of the matter" (at [34]).

92 Nevertheless, to be fair to the Plaintiff, I followed the approach of the CA in *Tiong Aik* in further considering whether the broader statutory scheme and object of the WSHA justified a broader view of the duties imposed under the WHSA. In my view, it did not.

93 In the course of the Second Reading of the 2011 WSHA Amendment Bill (*Singapore Parliamentary Debates, Official Report* (11 April 2011) vol 87 (Gan Kim Yong, Minister for Manpower)) which introduced, *inter alia*, section 14A, the Minister for Manpower spoke of how the extension of the WSHA (to cover all workplaces) was a "significant and timely move to *ensure the safety and health of our workers*" [emphasis added]. As for section 14A WSHA specifically, in his answers to parliamentary questions raised during the Second Reading, the Minister for Manpower alluded to the proposed section 14A as being "sufficient and yet practical for achieving *our objective of improving ownership of safety outcomes in the sub-contracting process*" [emphasis added]. To quote the CA in *Tan Juay Pah* (at [89]), therefore, the primary objective of the WSHA is "ensuring the safety of those present at workplaces (***particularly workers***), and ***attributing responsibility for workplace safety to those having operational control of workplaces*** *... [T]he WSHA is intended to protect persons present at workplaces from safety lapses by contractors and their subcontractors …*" [emphasis in original in italics; emphasis added in bold italics].

94 To sum up: both the express statutory language and the relevant Parliamentary debates provided no basis for supposing that the WSHA was

intended to impose on land-owners such as the 1st Defendant a non-delegable duty of care to neighbouring land-owners such as the Plaintiff.

Cases cited by the Plaintiff in support of its case against in negligence liability

95 In finding the 1st Defendant not liable in negligence, I did consider the cases cited in the Plaintiff's Bundle of Authorities ("PBOA") but did not find them to be helpful to the Plaintiff's case against the 1st Defendant.

96 *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd and others* [2014] 2 SLR 360 ("*Jurong Primewide*")[122] was a case in which the main contractor at a worksite ("JPW") and the sub-contractor ("MA") were held liable in negligence to the company ("Moh Seng") from which a mobile crane had been hired for lifting works at the worksite. The crane was hired by another company ("Hup Hin") who had a rental agreement with JPW to supply cranes to the worksite. The crane was damaged when it collapsed into a concealed manhole in the ground into which it had been driven. Both the Lifting Supervisor employed by MA and JPW's Safety Officer had assured the crane driver that the ground was safe. This case did not assist Plaintiff because the CA's decision – in holding JPW and MA liable in negligence for the damage to Moh Seng's crane – was premised on the status of JPW and MA as the main contractor and the sub-contractor for the worksite. The CA held that the main objective of the WSHA was ensure a safer working environment at construction sites by strengthening the accountability of and impose responsibilities on parties such as the main contractor and sub-contractors, who had "operational control" of workplaces and thus primary responsibility in all areas of safety. Contractors and sub-contractors are parties whose negligence on construction sites has the

122 Tab C PBOA.

most potential to result in fatal, or at least, costly consequences, given their well-placed abilities to foresee and be aware of the various possible mishaps that others without operational responsibilities and control may not be able to identify. In fact, the CA said, it was "very hard to think of situations where sufficient proximity to give rise to a common law duty of care [would] not be found to exist due to the control contractors and subcontractors have over the worksite and the on-going activities on it" (at [41]).

97 The CA's judgment did not aid the Plaintiff in its contention that the 1st Defendant should be found vicariously liable for the negligence of the independent contractor or that the 1st Defendant should be subjected to a non-delegable duty of care to ensure the safe performance of the A&A works by the independent contractor. Nor did it aid the Plaintiff in proving negligence by the 1st Defendant in selecting the 2nd Defendant as its contractor.

98 In *Chen Qiangshi v Hong Fei CDY Construction Pte Ltd and another* [2014] SGHC 177 ("*Chen Qiangshi*")[123], the plaintiff was a construction worker who was injured at the worksite when a rebar cage collapsed onto him while it was being lifted for repositioning. The first defendant was the plaintiff's employer and the sub-contractor engaged to carry out reinforcement, concreting and formwork at the worksite. The second defendant was the main contractor for that worksite. The High Court found that given the first defendant's status as the plaintiff's employer, there was clearly a relationship of proximity between them, and no reasons of policy which would suggest otherwise. The first defendant was found liable in negligence as the plaintiff had been asked to proceed with the lifting of the rebar cage when the first defendant, through its director and general supervisor Mr Chen, ought to have known that there was

123 Tab E PBOA.

no lifting supervisor or safety supervisor on the scene. In any event, the first defendant was also vicariously liable for the negligence of its other employee, Mr Masum, who had been negligent in proceeding with the lifting of the rebar cage without supervision, in requesting the plaintiff to assist in the rigging of the said rebar cage when the latter was not trained or qualified in rigging, and in failing to ensure that the load of the rebar cage was properly rigged up before instructing the tower crane operator to lift the load. The High Court also found the second defendant liable because under the Crane Regulations, it was the second defendant who was responsible for establishing and implementing a lifting plan in accordance with safe and sound practice: lifting operations were to be conducted in accordance with the lifting plan; and compliance was to be ensured by a lifting supervisor – in this case, Mr Arasu, who was an employee of the second defendant's. Evidence was given that despite the requirements of the Crane Regulations, there was little or no risk assessment or discussion within the lifting team or with the lifting supervisor about what was to be done each day. Evidence was also given that on the day of the accident, despite having been informed of the intended lifting of the rebar cage (which was a non-routine lift), Mr Arasu had failed to supervise the lifting operation and had also failed to instruct Mr Masum not to proceed until he could be present to supervise. Accordingly, the High Court found the second defendant to be negligent in that it had failed to take reasonably practicable measures which were necessary to ensure the safety and health of persons who might be affected by the lifting operations. The court also found the second defendant vicariously liable for Mr Arasu's negligence.

99 Again, there was nothing in the judgment in *Chen Qiangshi* which could aid the Plaintiff in its contention that the 1st Defendant should be found vicariously liable for the negligence of the independent contractor or that 1st

Defendant should be subjected to a non-delegable duty of care to ensure the safe performance of the A&A works by the independent contractor. Nor did *Chen Qiangshi* aid the Plaintiff in proving negligence by the 1st Defendant in selecting the 2nd Defendant as its contractor.

100 *Lee Swee Chon v Kiat Seng Metals Pte Ltd* [2018] SGHC 22 ("*Lee Swee Chon*")[124] was another negligence action arising from a workplace accident in which a stack of aluminium sheets stored at the defendant's warehouse fell on the plaintiff and injured him. The defendant was the plaintiff's employer. The principle issues in contention, as stated by the High Court (at [2]), were "whether the defendant … breached its duty of care as an employer to provide a safe work environment to the [p]laintiff, and whether (and if so, to what extent) the [p]laintiff was contributorily negligent." In other words, the court's decision in *Lee Swee Chon* turned on the specific facts of the case and in particular the employer-employee relationship between the plaintiff and the defendants. In the circumstances, there was nothing in *Lee Swee Chon* which could aid the Plaintiff in its contention that the 1st Defendant should be found vicariously liable for the negligence of the independent contractor or that 1st Defendant should be subjected to a non-delegable duty of care to ensure the safe performance of the A&A works by the independent contractor. Nor did *Lee Swee Chon* aid the Plaintiff in proving negligence by the 1st Defendant in selecting the 2nd Defendant as its contractor.

Two final points in relation to negligence liability

101 In the interests of completeness, I make two final points in relation to the claim in negligence liability.

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Effect of the 1st Defendant's conviction under Fire Safety Act

102 Firstly, I should add that I also considered the effect of the 1st Defendant's conviction for an offence under section 23(1) of the Fire Safety Act (Cap 109A, 2000 Rev Ed); specifically, whether the conviction aided the Plaintiff's case in negligence liability against the 1st Defendant. In this connection, section 45A(3) of the Evidence Act (Chapter 97, 1997 Rev Ed) provides that a person "proved to have been convicted of an offence under this section shall, unless the contrary is proved, be taken to have committed the acts and to have possessed the state of mind (if any) which at law constitute the offence"[125]. As framed in the charge, the offence to which the 1st Defendant pleaded guilty under section 23(1) of the Fire Safety Act was one of authorising fire safety works for which approval has not been obtained[126].

103 The essence of the tort of negligence is the imposition of a duty of care at common law vis-à-vis the claimant. Given the elements of the above offence, proof of the conviction did not assist the Plaintiff in persuading me that the 1st Defendant should be held vicariously liable to the Plaintiff for the negligence of its independent contractor in executing the works, or that the 1st Defendant should be subjected to a non-delegable duty of care to the Plaintiff to ensure safe execution of the works by the independent contractor. Nor did proof of the conviction establish that the 1st Defendant had been negligent in selecting the 2nd Defendant as its contractor, since the unauthorised safety works took place after the selection and appointment of the 2nd Defendant.

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125 In any case, the 1st Defendant did not dispute the conviction in these proceedings.

126 pp 149–150 of 1ABD.

The doctrine of res ipsa loquitur

104 Secondly, whilst the Plaintiff pleaded in his statement of claim that he intended to rely on the doctrine of *res ipsa loquitur*, I did not think there was any basis for the application of the doctrine in this case. One of the requirements for the application of the doctrine is that the cause of the accident must be unknown: see [39] of the CA's judgment in *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76[127]. In this case, both parties did not dispute the SCDF's finding that the fire was caused by sparks from the hot works at No. 17 coming into contact with the mattresses and other flammable materials in the backyard of No. 15. As such, it could not be said that the cause of the accident was unknown.

105 Finally, I would add that the Plaintiff's attempt to introduce evidence of an alleged "small fire" at another neighbouring property (No. 19 Link Road) – which he contended had also been caused by "the 1st and/or 2nd Defendant's servant and/or agents" prior to 30 April 2013 - came to nought in the course of the trial, as the only witness called for that purpose turned out to have no personal knowledge of the alleged fire. In any event, even if evidence of such a fire had been available, it would not have assisted the Plaintiff in persuading me that the 1st Defendant should be held vicariously liable to the Plaintiff for the negligence of its independent contractor in executing the works, or that the 1st Defendant should be subjected to a non-delegable duty of care to the Plaintiff to ensure safe execution of the works by the independent contractor. Nor would such evidence have assisted the Plaintiff in establishing negligence by the 1st Defendant in selecting the 2nd Defendant as its contractor.

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Summary of findings in relation to the Plaintiff's claim in negligence

106 For the reasons set out in [47] to [104] above, I found that the Plaintiff was unable to make out a case in negligence against the 1st Defendant – whether in terms of vicarious liability for the 2nd Defendant's negligence, in terms of negligence in the selection of its contractor, or in terms of a non-delegable duty of care.

107 Given the above conclusions, it was not necessary for me to make any findings on the 1st Defendant's allegations of contributory negligence by the Plaintiff.

Whether the 1st Defendant could be held liable for the Plaintiff's damage and loss pursuant to the tort of nuisance

108 In addition to his claim in negligence, the Plaintiff also claimed that the 1st Defendant should be held liable pursuant to the tort of nuisance. For the following reasons, I decided that the 1st Defendant was liable in private nuisance.

General principles relating to the tort of private nuisance

109 An actionable nuisance may be characterised as the causing or permitting of a state of affairs in one man's property from which damage to his neighbour's property is likely to arise. In *Crown River Cruises Ltd v Kimbolton Firewords Ltd and another* ("*Crown River Cruises*") [1996] 2 Lloyd's Law Reports 533, the first defendants were the sub-contractors responsible for the organisation and execution of a firework display on the Thames river. Hot debris from the fireworks fell on one of the plaintiff's barges which was then moored along the river. It appears that substantial portions of the barge ceiling were rotten, and that the loose slivers of timber would have been readily combustible.

A fire thus started on board the plaintiff's barge, which was not properly extinguished by the fire crew when it arrived, and which subsequently ignited into a serious fire, causing substantial damage to two of the plaintiff's barges and some heat damage to a third. Potter J held the first defendant liable in negligence to the plaintiff. He also found it liable in nuisance, holding as follows (at 545):

> … Where an activity creates a state of affairs which gives rise to risk of escape of physically dangerous or damaging material, such as water, gas or fire, then the law of nuisance is, and should be, available to give a remedy in respect of that state of affairs, albeit brief in duration. In my opinion, the holding of a firework display in a situation where it is inevitable that for 15-20 minutes debris, some of it hot and burning, will fall upon nearby property of a potentially flammable nature creates a nuisance actionable at the suit of a property owner who suffers damage as a result.

110 Whilst the first defendant in *Crown River Cruises* was found liable both in negligence and nuisance, "negligence is not an essential element in nuisance … An occupier may incur liability for the emission of noxious fumes or noise although he has used the utmost care in building and using his premises": *per* Lord Reid in delivering the judgment of the Privy Council in *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty and another* [1967] AC 617 ("*The Wagon Mound (No. 2)*") at 639. Atkinson J summed up the position neatly in *Spicer and another v Smee* [1946] 1 All ER 489 ("*Spicer v Smee*") at 493:

> … Liability for a nuisance may exist quite independently of [negligence]. In negligence a plaintiff must prove a duty to take care, but not so in nuisance. In *Rapier v London Tramways Co.* … Lindley, L.J., said ([1893] 2 Ch. 588, at p. 600):
>
> > … if I am sued for a nuisance, and the nuisance is proved, it is no defence on my part to say, and to prove, that I have taken all reasonable care to prevent it.
>
> Nuisance and negligence are different in their nature, and a private nuisance arises out of a state of things on one man's property whereby his neighbour's property is exposed to danger. …

111 Whilst the above statements of general principle may seem expansive, it must be remembered that a number of other principles have been developed by the courts to keep liability in nuisance under control: for one, the principle of reasonable user. Whether a land-owner's use of his land is reasonable depends on the facts of each case. In *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd* [2006] 3 SLR(R) 116 ("*Tesa Tape*")[128], the plaintiff and the defendant occupied adjoining premises. The defendant operated a container storage depot on its premises and had stacked multiple rows of 40-foot containers side by side, creating a large mono-block of containers (which was the standard practice). The two highest rows of containers were stacked up to seven tiers and were nearest the perimeter fence between the defendant's land and the plaintiff's. During a heavy thunderstorm, some of the defendant's containers fell into the plaintiff's land, damaging its property. The plaintiff sued the defendant, *inter alia*, in nuisance. In allowing the claim, the High Court held that the mere storage of containers on the defendant's premises could not be regarded as an unreasonable use of the premises for the purposes of ascertaining whether there was liability under the tort of nuisance. In the broad context of nuisance, the storage of containers itself attracted no liability. Liability would only attach if the stacking of the containers as done by the defendant was unsafe in the circumstances. The standard practice of stacking containers was a factor that had to be examined in the context of safety and the foreseeability of danger from mishaps arising from a collapse of the stacks. The High Court found that on a balance of probabilities, the collapse of the containers was caused by a sudden gust of strong wind during the thunderstorm; and that although the sudden gust of wind at the material time was in itself unusual, it was not so extraordinary as to constitute an event of *force majeure* when looked at in conjunction with the way the defendant had stacked its containers. Moreover,

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there were a number of precautions which could have been taken by the defendant and which would probably have precluded the collapse of the containers onto the plaintiff's premises had they been taken – including avoiding having the containers stacked up to so many tiers, and stacking them perpendicularly to the fence instead of parallel to it (*Tesa Tape* at [16]–[20]). In short, the element of unreasonable use of the land could be established in that while storing containers on land in an industrial zone was not in itself a nuisance, placing the containers in a manner which made them foreseeably unsafe rendered the use of the land unreasonable.

112 The High Court's analysis of the foreseeability of the harm in *Tesa Tape* reflects another important limiting principle in any consideration of nuisance liability. In *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 ("*Cambridge Water*"), the defendant was a leather manufacturer who had used a chlorinated solvent in degreasing pelts at its tannery, which was some 1.3 miles away from the plaintiff's borehole where water was abstracted for domestic purposes. The solvent seeped into the ground below the defendant's premises and was conveyed in percolating water in the direction of the borehole, subsequently rendering the water in the borehole unfit for human consumption. The plaintiff sued the defendant, *inter alia*, in nuisance. The House of Lords found that the plaintiff was unable to establish that pollution of their water supply by the solvent was in the circumstances foreseeable, and held that the defendant was not liable in nuisance, stating (at 299):

> … [I]t is still the law that the fact that the defendant has taken all reasonable care will not of itself exonerate him from liability, the relevant control mechanism being found within the principle of reasonable user. But it by no means follows that the defendant should be held liable for damage of a type which he could not reasonably foresee; and the development of the law of negligence in the past 60 years points strongly towards a requirement that such foreseeability should be a prerequisite of

> liability in damages for nuisance, as it is of liability in negligence. …

113 The above principles have been accepted and followed by Singapore courts. In *OTF Aquarium Farm (formerly known as Ong's Tropical Fish Aquarium & Fresh Flowers) (a firm) v Lian Shing Construction Co Pte Ltd (Liberty Insurance Pte Ltd, Third Party)* [2007] SGHC 122 ("*OTF Aquarium*")[129], for example, the High Court noted (at [23]):

> … Of importance to the issue of liability in private nuisance and negligence is the question whether the damage done was reasonably foreseeable. In [*The Wagon Mound (No. 2)*], Lord Reid, approaching the case under the rubrics of both nuisance and negligence at p 644 said:
>
> > If it is clear that the reasonable man would have realised or foreseen and prevented the risk, then it must follow that the appellant is liable in damages.

114 Lastly, it must be noted that the "blanket exclusion of independent contractors" (see [49] above) which applies in any consideration of vicarious liability for the negligence of third parties does not apply in the tort of nuisance. Instead, the position is as summarised (below) in *Clerk & Lindsell* (at para 20-72):

> **Nuisance created by independent contractor** Whether a person can be said to be a wrongdoer if the nuisance is created by his independent contractor depends on whether he could reasonably have foreseen that the work he had instructed the independent contractor to do was likely to result in a nuisance. In *Bower v Peate* [(1876) LR 1 QBD 321 ("*Bower v Peate*")], Cockburn CJ said:
>
> > "A man who orders work to be executed from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else

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> – whether it be the contractor employed to do the work from which the danger arises or some independent person – to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

115 *Spicer v Smee* illustrates the operation of the above principles. In that case, the plaintiff and the defendant owned adjoining bungalows. The defendant had let out her bungalow, but prior to letting it out, had engaged a contractor to install electrical wiring in the bungalow. The plaintiff's bungalow was destroyed by a fire which originated in the defendant's bungalow. On the evidence, it was found that the fire in the defendant's bungalow had resulted from defective electrical writing: the contractor engaged by the defendant to install the wiring had been negligent in leaving part of the live wire inadequately protected. The plaintiff sued the defendant in nuisance. The defendant argued that she could not be liable for the acts of her contractor. In rejecting her defence and allowing the plaintiff's claim, Atkinson J – who referenced, *inter alia*, the judgment of Cockburn CJ in *Bower v Peate* – held (at 495) that "usually a man is not liable for the default of an independent contractor, but in the law of nuisance an exception exists".

Applying the general principles to the present case

116 Applying the above principles to the present case, I found that the 1st Defendant could reasonably have foreseen that the work it had instructed the 2nd Defendant to do was likely to result in a nuisance to its neighbour, the Plaintiff.

117 From the 2nd Defendant's quotation of 25 February 2013, the 1st Defendant ought to have known that the A&A works to its rear included the construction of a brick wall up to 2 metres in height and steel structural works[130].

130 pp 38–39 of Molly's AEIC.

Indeed, in cross-examination, Molly agreed that she knew that part of the A&A works included the construction of a wall between the backyards of No. 15 and No. 17[131].

118 In cross-examination, Molly agreed that she was aware that "if there were no proper system of work in place, the A&A work[s] could cause a nuisance or damage to [the 1st Defendant's] neighbours, such as 15 and 19 Link Road"[132]. She stated that she had assumed that the 2nd Defendant would work responsibly and safely, but candidly admitted that "*[a]ccident[s] definitely will happen*" [emphasis added] – and that whilst the 1st Defendant was concerned to protect the safety of its staff, *any accident was likely to be confined to the backyard where the works were being done* and where the 1st Defendant's staff would usually not go[133].

119 Molly also agreed that on the occasion when she had brought Chong NK to speak to the Plaintiff at No. 15, she had walked through the backyard of No. 15 and noticed mattresses and other goods stored at the backyard[134]. She admitted that she was aware of the flammable quality of the mattresses, stating: "Mattresses … will ignite the fire very fast … Mattresses, when they get into fire, will burn up very fast."[135] She also admitted that this was something she was aware of even before the fire on 30 April 2013.

120 Whilst Molly stated at one point that the 1st Defendant did not specifically authorise the commencement of works by the 2nd Defendant[136], she

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131 See transcript of 10 July 2018 at p 101 line 30 to p 102 line 16.

132 See transcript of 10 July 2018 at p 91 line 24 to p 92 line 7.

133 See transcript of 10 July 2018 at p 109 line 26 to p 110 line 8.

134 See transcript of 10 July 2018 at p 105 line 9 to p 106 line 4.

135 See transcript of 10 July 2018 at p 126 lines 16–32.

admitted that the 2nd Defendant had been told its workers could enter the 1st Defendant's premises after 9 am. In her AEIC, she also stated that after the 2nd Defendant was paid the 30% down payment, it "began sending people in everyday (presumably to do the Alterations Works)"[137]. Moreover, whilst both Molly and Ross said that they had not been given a copy of the 2nd Defendant's work schedule and that they had not been told anything about approval having to be obtained for hot works, I found that from ETS's quotation of 25 September 2012, the 1st Defendant ought to have known that the works included some sort of hot works, as the ETS quotation expressly specified the "submission of plans to FSSD for Fire Safety approval"[138]. In fact, the penultimate 5% of the total payment to be made to ETS was stated to be due upon the submission of such "Fire Safety" plans.

121 Having regard to the above evidence, therefore, I found that the 1st Defendant ought to have known that the A&A works it had commissioned would involve at some point hot works; and it ought as well to have known that such works, if not done in a safe manner, would cause fire damage to its neighbour's property. In light of the evidence adduced, I also found that the element of unreasonable use of land was established. Whilst it might not be a nuisance *per se* to carry out A&A works in one's backyard, the execution of hot works at the perimeter fencing between the backyards of No. 15 and No. 17 in a manner which made such works foreseeably unsafe – in the presence of strong winds, in close proximity to the flammable mattresses stored at the backyard of No. 15, and in the absence of any supervision of the workers doing such works – rendered the use of the land unreasonable. As the High Court noted in *OTF*

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136 See transcript of 10 July 2018 at p 111 line 22.

137 [30] of Molly's AEIC.

138 p 31 of Molly's AEIC.

Aquarium (at [23]), it is "clearly not a reasonable use of land to create or to continue a hazard which the owner or occupier knows or should know carries a foreseeable risk of damage to one's neighbour." Having regard to the principles stated in *Bower v Peate* and *Spicer v Smee* (as summarised in *Clerk v Lindsell* – see [114]–[115] above) on a land-owner's liability for a nuisance created by an independent contractor, I also found that the fact that the fire hazard in this case was created by the 1st Defendant's contractor (rather than directly by the 1st Defendant itself) did not absolve it of liability for the tort of nuisance.

122 For the reasons set out above, I allowed the Plaintiff's claim in nuisance against the 1st Defendant.

Whether the 1st Defendant could be held liable for the Plaintiff's damage and loss pursuant to the rule in *Rylands v Fletcher*

123 In addition to his claims in negligence and nuisance, the Plaintiff also claimed that the 1st Defendant should be found liable pursuant to the rule in *Rylands v Fletcher* ("the Rule"). I found the 1st Defendant liable under the Rule. My reasons were as follows.

General principles relating to the rule in Rylands v Fletcher

124 The case of *Rylands v Fletcher* involved the flooding of Mr Fletcher's coal mine by water from Mr Rylands' mill reservoir. The Rule, as formulated by Blackburn J when the case was heard in the Exchequer Chamber, states as follows (*Fletcher v Rylands and another* (1866) LR 1 Exch 265 at 279):

> … [T]he person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. …

125 The Rule was approved on appeal by the House of Lords, with Lord Cairns LC adding the following refinements (*Rylands v Fletcher* at 338–339):

> The Defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I might term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained …
>
> …
>
> On the other hand *if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it,* for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then … that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose … of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that … the defendants would be liable. …
>
> [emphasis added]

126 In *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 ("*Transco*")[139], the House of Lords also stated that in order for the Rule to apply, the "thing" brought onto a defendant-occupier's land had to be a "dangerous thing" which posed an exceptionally high risk to neighbouring property should it escape (*per* Lord Bingham of Cornhill at 11–12).

127 In its closing submissions[140], the 1st Defendant noted that the High Court of Australia in *Burnie Port Authority v General Jones Pty Limited* (1994)

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179 CLR 520 ("*Burnie*")[141] "has done away with" the doctrine in *Rylands v Fletcher* – essentially, by pronouncing it "absorbed" into the law of negligence (see *Burnie* at 556, *per* Mason CJ, Deane, Dawson, Toohey and Gaudron JJ). As the 1st Defendant also acknowledged, however, the House of Lords in the United Kingdom has on more than one occasion rejected this path: see for example *Cambridge Water* and *Transco*. In the latter case, it was held that "the rule is, when properly understood, still part of English law and does comprise a useful and soundly based component of the law of tort as an aspect of the law of private nuisance. It derives from the use of land and covers the division of risk as between the owners of the land in question and other landowners" (*per* Lord Hobhouse of Woodborough at [52] of *Transco*).

128 Locally, too, our High Court has continued to apply the Rule as "part of the tort of nuisance": see, for example, [8] in *Tesa Tape*. In *Tesa Tape*, it was held that the stacking of containers of such weight and size as those on the defendant's premises – 7 tiers high – was "a non-natural use of the land, industrial or otherwise" (at [7]). The High Court also held that whilst a stack of containers "cannot escape into a neighbouring land any more than water can", "[*e*]*scape* in the tort sense of *Rylands v Fletcher* has a nuance, which, when translated into common terminology, would mean a situation in which things on one's land find themselves in the neighbouring land. The process by which they move or are moved from one property to the other constitutes an *escape* under the rules" [emphasis in original]. Citing from the judgment of the English Court of Appeal in *Hale v Jennings Brothers* [1938] 1 All ER 579, the High Court noted (at [9]):

> …

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140 para 67 of the 1st Defendants' closing submissions.

141 1st Defendants' Supplemental Bundle of Authorities ("DSBOA").

> The fundamental rule of the principle is that liability attaches because of the occupier of land bringing on to the land something which is likely to cause damage if it escapes.
>
> I am of the opinion that damage and injury were foreseeable should the defendant's containers fall onto the neighbouring land, and thus the collapse of the containers into the plaintiff's premises attracted the application of the rule in *Rylands v Fletcher*. Fault of the occupier was not an issue when this rule applied. …

129 From the above passage, it can also be seen that foreseeability of damage of the relevant type is a prerequisite of liability in damages under the Rule: see *Cambridge Water* at 306 *per* Lord Goff of Chieveley.

130 As stated earlier, the blanket exclusion of independent contractors – which applies in any consideration of vicarious liability in the tort of negligence – does not operate in relation to private nuisance, including cases falling within the parameters of the Rule. In *Ho See Jui (trading as Xuanhua Art Gallery) v Liquid Advertising Pte Ltd and another* [2011] SGHC 108[142], for example, the first defendant was the occupier of second-floor office premises in which it had procured the installation of a water dispensing unit ("WDU") by an independent contractor, the second defendant. The second defendant was also contracted to maintain the WDU. On the first defendant's instructions, the second defendant installed the WDU in an area of the first defendant's unit ("the WDU Area") where the flooring was made of timber through which water could pass. It was not disputed that the maintenance contract and the second defendant's maintenance service orders carried the disclaimer that the WDU should be installed at a wet pantry area – which the WDU Area was not. In installing the WDU, the second defendant fitted a water inlet hose to carry water to the WDU. Subsequently, the water inlet hose ruptured and water leaking from it seeped

142 Tab O PBOA.

through the timber flooring of the second-floor unit into the plaintiff's unit below. The plaintiff sued both defendants in negligence and nuisance and also pursuant to the Rule for the damage to his premises and to the paintings he had stored on his premises. Expert evidence led during the trial showed that the water inlet hose had a pre-existing fabrication defect in the form of two helical seam lines ("the Helical Line Feature"); further, the said hose was unsafe for use with a WDU because it was made of ester-based polyurethane which was susceptible to degradation when exposed to water (a process known as hydrolysis). Based on the expert's evidence, the High Court found that both the Helical Line feature and the hydrolytic degradation would not have been discovered on a reasonable inspection. In holding the first defendant liable, *inter alia*, under the Rule, the High Court held that "[a]lthough the use of a WDU, when viewed in the abstract, appears to be a natural use of land, it was not a natural use in the particular circumstances of this case. The placement of the WDU at the WDU Area, when combined with the Helical Line Feature and the gradual hydrolytic degradation of the Water Inlet Hose, made the use of *this* WDU a non-natural use of the Second Floor Unit" (at [76])[143].

Applying the general principles to the present case

131 In examining the 1st Defendant's liability for private nuisance earlier, I have explained why I found that the 1st Defendant ought to have known that the A&A works it had commissioned at the rear of its property included hot works. On the present facts, I found that the hot works which produced sparks or molten globules amounted to a non-natural use of the land. These sparks were

143 In this case, the High Court also found the first defendant liable in negligence because it found on the facts that the first defendant "went beyond simply engaging an independent contractor" (at [71]): it was the first defendant who had expressly instructed the second defendant to install the WDU at the WDU Area, despite there being a wet pantry area in its office premises and despite having been put on notice that the WDU should be installed in a wet pantry area.

something which in the "natural condition" of the land were "not in or upon it" (see [125] above). They constituted a dangerous "thing" which posed an exceptionally high risk to neighbouring property should they escape (see [126] above); and there was indisputably an escape of these sparks onto the Plaintiff's property which caused a fire, wreaking extensive damage to the Plaintiff's property.

Liability in nuisance versus liability in negligence

132 I pause to note that Ross (the 1st Defendant's chief executive) insisted throughout his testimony that they had entrusted the A&A works to a contractor to whom they had paid good money and whose experience they had trusted: it was clear that Ross and no doubt Molly too baulked at the notion of the 1st Defendant being held liable when theirs were not the hands that had wielded the arc welding equipment. It might also be argued that if the 1st Defendant were not liable in negligence, then it must follow logically that they could not be held liable in nuisance or under the Rule. Such an argument would, however, be fallacious. It must be remembered that the essence of property-based torts such as nuisance is risk management in the use of one's property. As Lord Hobhouse observed in *Transco* (at [55]), the law of private nuisance "reflects a social and economic utility":

> … The user of one piece of land is always liable to affect the users or owners of other pieces of land. An escape of water originating on the former, or an explosion, may devastate not only the land on which it originates but also adjoining and more distant properties. The damage caused may be very serious indeed both in physical and financial terms. There may be a serious risk that if the user of the land, the use of which creates the risk, does not take active and adequate steps to prevent escape, an escape may occur. The situation is entirely under his control: other landowners have no control. In such a situation, two types of solution might be adopted. One would be to restrict the liberty of the user of the land, the source of the risk, to make such use of his land as he chooses. The other is

> *to impose a strict liability on the landowner for the consequences of his exercising that liberty.* The rule [in *Rylands v Fletcher*] adopts the second type of solution as is clear from the language used by Blackburn J …
>
> [emphasis added]

133 In Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) ("*The Law of Torts in Singapore*"), the learned authors explained the position in similar terms (at paras 09.080–09.083):

> It is possible to succeed in both nuisance and negligence actions on the same facts …
>
> Nonetheless, nuisance and negligence are different torts. First, there is a difference between the strict liability in nuisance and the concept of reasonable care in negligence …
>
> The concept of unreasonable interference in nuisance actions involves balancing the factors relating to the defendant's conduct as well as factors impinging on the infringement of the plaintiff's right to the use and enjoyment of his land. In the tort of negligence, negligent conduct is assessed from the perspective of the standard expected of a reasonable man in the position of the defendant. Negligence is a defendant-oriented tort which hinges on the nature of the defendant's conduct whilst nuisance is a plaintiff-oriented tort that focuses more on the plaintiff's right to the use and enjoyment of his land.
>
> Nuisance is a land-based tort while negligence is not limited to claims related to the infringement of land-based rights, but also applies to physical damage to persons and chattels as well as economic loss. …

Whether damages for personal injuries may be recovered from a defendant found liable in private nuisance and/or under the Rule

134 The above commentary segues into my next point. Based on existing textbook and caselaw authorities, it would appear that damages for personal injuries are not recoverable in nuisance and/or under the Rule. As stated earlier (at [127]–[128]), the Rule has been treated by the English courts (and our local courts) as a sub-species of the tort of nuisance, and the tort of nuisance is a "tort based on the interference by one occupier of land with the right in or enjoyment

of land by another occupier of land as such" (*Transco* at [9], *per* Lord Bingham). Accordingly, it has been held that a claim in nuisance and/or under the Rule "cannot include a claim for death or personal injury, since such a claim does not relate to any right in or enjoyment of land" (*Transco* at [9])[144].

135 To be fair, it should also be noted that there is some academic commentary suggesting that damages for personal injuries should be recoverable in an action under the Rule: see for example *The Law of Torts in Singapore* at para 09.118. As the trial before me related to the issue of liability alone (the issues of liability and damages having been bifurcated for the purposes of trial), parties did not submit on the viability of the head of damages listed in the statement of claim for the Plaintiff's PTSD and panic disorder; nor did I make any ruling on the issue. In delivering my decision, I did indicate to parties that the recoverability or otherwise of damages for personal injuries such as these would have to be addressed in the ensuing trial for the assessment of damages.

The 1st Defendant's complaint about lack of apportionment of liability between itself and the 2nd Defendant

136 Finally, I note from the Notice of Appeal filed by the 1st Defendant that it has complained about the lack of apportionment of liability between itself and the 2nd Defendant. The issue of apportionment of liability was not raised by either party in the course of the trial or in closing submissions. In any event, for joint and several concurrent tortfeasors causing the same damage, the general rule is that each tortfeasor is liable in full for the entire damage suffered by the plaintiff, although the plaintiff is generally entitled only to the recovery of one

144 See also Lord Goff who held (at [35]) that "nuisance is a tort against land. It must … follow that damages for personal injuries are not recoverable under the rule."

sum awarded as damages: see in this respect *The Law of Torts in Singapore* at para 18.026.

Mavis Chionh Sze Chyi
Judicial Commissioner

Appoo Ramesh and Vinodhan Gunasekaran (Just Law LLC) for the plaintiff;
Chia Boon Teck and Ng Huan Yong (Chia Wong LLP) for the first defendant;
The second defendant absent and unrepresented.