Animal Concerns Research & Education Society *v* Tan Boon Kwee [2011] SGCA 2

Case Number	: Civil Appeal No 60 of 2010
Decision Date	: 20 January 2011
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Suresh Nair Sukumaran and Rajaram Muralli Raja (Straits Law Practice LLC) for the Appellant; Quek Mong Hua and Sharon Chong (Lee & Lee) for the Respondent.
Parties	: Animal Concerns Research & Education Society — Tan Boon Kwee

Tort

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2010] SGHC 85.]

20 January 2011 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the trial judge ("the Judge"), who dismissed the claim of Animal Concerns Research & Education Society ("the Appellant") in the tort of negligence against Tan Boon Kwee ("the Respondent"), in the latter's capacity as clerk of works (see *Animal Concerns Research & Education Society v ANA Contractor Pte Ltd and another* [2010] SGHC 85 ("the Judgment")).

2 Despite the fact that the position of a clerk of works (now known as a "resident technical officer" (see regulation 2(e) of the Building Control (Amendment No 2) Regulations 2007 (S 495/2007) ("the 2007 Regulations")) and one of two species of "site supervisor" (the other being a "resident engineer") (see regulation 24(2) of the Building Control Regulations 2003) (S 666/2003) ("the 2003 Regulations")) is mandated by ss 7 and 10 of the Building Control Act (Cap 29, 1999 Rev Ed) ("the Act"), this appears to be the first time this role has arisen for consideration in the Singapore courts.

3 Notwithstanding the change in terminology under the 2007 Regulations, the term "clerk of works" (rather than the term "residential technical officer") will continue to be used throughout this judgment. The use of the term "clerk of works" is also more appropriate in the context of the actual facts of the present proceedings.

Background facts and the decision below

Background facts

4 The Appellant is an Institution of Public Character under the Charities Act (Cap 37, 2007 Rev Ed), while the Respondent was and continues to remain a director of A.n.A Contractor Pte Ltd ("A.n.A"), the first defendant in the trial below.

5 The Appellant had planned to establish a shelter ("the shelter") for animals on a plot of land along Jalan Lekar ("the site") leased from the Singapore Land Authority ("SLA"), and appointed A.n.A as the contractor for the project. A.n.A in turn appointed the Respondent as the clerk of works/site supervisor for the project (who was to be employed by A.n.A, rather than by the Appellant). A.n.A also appointed two qualified persons ("QPs"), a qualified architect ("QA") and a qualified engineer ("QE"), as the QPs for the architectural works and supervision of structural works, respectively, under s 11(1)(*d*)(ii) of the Act.

6 The project, however, was beset by a number of problems, which led to the Appellant suing A.n.A for breach of contract (and negligence) in the proceedings below.

7 Firstly, there was considerable delay in the execution of the project. Secondly, the Appellant alleged that A.n.A had failed to construct the shelter in accordance with the specified building plans. Finally, it transpired that, in the course of levelling the site, wood chips had been used as landfill, resulting in a foul smell and a discharge of blackish effluence from the site. This came to the attention of the SLA and the National Environment Agency ("NEA"), which considered that it amounted to pollution of the surrounding environment and contamination of Kranji Reservoir. As a result, the Appellant is obliged to excavate the rear portion of the site and reconstruct the animal enclosures located there before work at the shelter can begin in earnest.

8 In addition to its claims against A.n.A, the Appellant also sued the Respondent in his capacity as clerk of works of the project, alleging that he had negligently failed to supervise the levelling of the site and, in particular, failed to ensure that wood chips were suitable landfill material.

The decision below

9 The Judge found that, as the land at the site was not level, A.n.A was under a contractual duty to level it (see the Judgment at [16]). A.n.A did so by raising the lower-lying areas of the site in a process known as "backfilling", *ie*, bringing in earth from elsewhere to raise the lower regions (see the Judgment at [17]). A.n.A contracted with an entity known as Lok Sheng Enterprises ("Lok Sheng") to bring in wet soil and wood chips as backfill material for this purpose.

10 The Judge found, based on expert evidence adduced by the Appellant, that the wood chips A.n.A had caused to be used as backfill material were the cause of the pollution and contamination (see the Judgment at [28]).

11 The Judge held that the Appellant had proved its claims against A.n.A for breach of contract in respect of the delay, the failure to comply with the building plans, and the use of wood chips (see the Judgment at [34]–[35]). He considered that it was therefore unnecessary for the Appellant to have proceeded against A.n.A in negligence. There is no appeal against this portion of the Judge's decision.

12 However, the Judge dismissed the Appellant's action in negligence against the Respondent, on the basis that s 10(5) of the Act did not impose a duty on the Respondent to supervise the backfilling (see the Judgment at [39]). Section 10(5) of the Act provides as follows:

> (5) Every site supervisor appointed under this section in respect of any building works shall take all reasonable steps and exercise due diligence in giving –
>
> (*a*) in the case of large building works – full-time supervision to the carrying out of the structural elements of the building works; and

(*b*) in the case of small-scale building works – immediate supervision to the carrying out of the critical structural elements of the building works,

to ensure that the structural elements or critical structural elements, as the case may be, of the building works in question are carried out in accordance with the plans of the building works supplied to him in accordance with section 9(1)(*c*) by a qualified person, and with any terms and conditions imposed by the Commissioner of Building Control.

There was no dispute that the project works were "small-scale building works" for the purposes of the Act. However, in the Judge's view, s 10(5)(*b*) of the Act only obliges a site supervisor (including a clerk of works) to supervise the carrying out of "critical structural elements" of small-scale building works, and, according to s 2 of the Act, "structural elements" were "parts or elements of a building" (see the Judgment at [37]). Since earthworks (including backfilling) were not parts or elements of a building, much less "critical structural elements", the Judge held that the Respondent was not obliged to supervise the backfilling.

13 In addition, the Judge considered that, even if the backfill could be considered a "critical structural element" for the purposes of s 10(5)(*b*), a clerk of works' obligation under s 10(5) of the Act was merely to ensure that such elements were carried out "in accordance with the plans of the building works… and with any terms and conditions imposed by the Commissioner of Building Control". On the facts, however, there was no evidence that the building plans specified a particular material to be used as backfill, or that the Commissioner of Building Control had imposed any terms and conditions relating to the backfill.

14 The Appellant appeals against this portion of the Judge's decision.

Arguments on appeal

Appellant's arguments

15 The Appellant submits that, on its true construction, s 10(5) of the Act does impose a duty of care on the Respondent. The Appellant points out that s 2 of the Act includes "foundations" and "all other elements designed to resist forces and moments" within the definition of "structural elements". Under regulation 2 of the 2003 Regulations, "foundation" means:

that part of a construction immediately below the footings of a building, which is in direct contact with, and through which the weight of a building is transmitted to, the ground, and includes piling works …

The backfill, the Appellant argues, falls within the definition of "foundation" in the 2003 Regulations. Further, according to the testimony of the Appellant's expert witness, the backfill "wholly supports the weight of the structures built at the back of the [s]ite" and is "one of the critical factors that would affect the structural stability of the structures built on the [s]ite". As such, the Appellant submits, the backfill is a "structural element" within the meaning of s 2 of the Act, as it is both a "foundation" as well as an element which resists forces and moments, and, given its crucial significance, is therefore a "critical structural element" of the building works. Consequently, according to the Appellant, the Respondent was obliged, under s 10(5)(*b*) of the Act, to take all reasonable steps and exercise due diligence in giving "immediate supervision" to the carrying out of the backfilling to ensure that they were carried out in accordance with the building plans, which the Respondent failed to do.

16 In addition, the Appellant submits that the Respondent owed it a common law duty of care to supervise the backfilling, and to ensure that material used as backfill was suitable for its purpose. In this regard, the Appellant submits that the test for the existence of a duty of care, laid down by this court in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"), is satisfied on the facts of this appeal, and that the Respondent breached his duty of care to the Appellant, which caused loss to the Appellant that was not too remote.

Respondent's arguments

17 The Respondent, unsurprisingly, submits that the Judge's construction of s 10(5) of the Act is the correct one, and therefore that the Act did not impose the duty of care for which the Appellant contends.

18 In addition, the Respondent argues that the Act is conclusive as to a clerk of works' duties, and that there is no reason to impose any common law duty of care above and beyond the statutory duties prescribed by the Act.

19 Finally, the Respondent submits that, even if a duty of care was owed to the Appellant, there had been no breach of this duty by the Respondent.

Issues on appeal

20 The issues which arise for our determination in this appeal are as follows:

(a) whether s 10(5)(*b*) of the Act, on its true construction, imposes a duty on the Respondent to supervise the backfilling;

(b) whether, at common law, the Respondent owed the Appellant a duty of care to supervise the backfilling;

(c) whether, if a duty under (a) and/or (b) above existed, the Respondent breached either or both of those duties;

(d) whether, assuming that there had been a breach of either or both of those duties, such breach or breaches caused the Appellant's loss and were not too remote; and

(e) assuming that he was otherwise liable to the Appellant, whether the Respondent can avail himself of any defences.

Our decision

Section 10(5)(b) of the Act

Remedying a misconception

21 We should highlight at the outset that even if the Appellant's construction of s 10(5) of the Act is correct, s 10(5) is, strictly speaking, not determinative of the Respondent's civil liability to the Appellant in an action for negligence, for it is trite law that there is no common law tort of "careless performance of a statutory duty" (see the House of Lords decision of *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 ("*X v Bedfordshire CC*") at 732–735).

22 In other words, what the courts in this area are looking for is still a duty of care at common law (see, for example, the English Court of Appeal decision of *Connor v Surrey County Council* [2010] 3 All ER 905 at [102]), *ie*, the statutory duty which a plaintiff alleges sounds in negligence must have been previously held to give rise to a common law duty of care, or must be so declared by the court adjudicating the matter, applying the test in *Spandeck*. 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 (see, for example, *X v Bedfordshire CC* at 739), 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".

23 Even if the Appellant's construction of s 10(5)(*b*) of the Act is correct, therefore, the *mere existence* of a statutory duty on the Respondent to supervise the backfilling is not sufficient to establish an action in negligence at common law by the Appellant.

24 Nevertheless, if there is indeed such a statutory duty on the Respondent under s 10(5)(*b*) of the Act (as construed by the Appellant), and the Respondent had breached such a duty, another possible cause of action that the Appellant might have pursued against the Respondent would be one based on the tort of breach of statutory duty. However, this alternative legal route does not appear to have been adopted by the Appellant. Although s 10(5) of the Act clearly imposes some sort of statutory duty on site supervisors, the Act only states that breach of that duty will give rise to *criminal* liability under s 10(8) of the Act. As the Act is completely silent on whether breach of s 10(5) also gives rise to *civil* liability, and, if so, whether such liability is incurred to a private individual who has suffered loss as a result of the breach, the success of a claim for breach of statutory duty would, in the main, have depended on the construction of the Act in general and s 10(5)(*b*) in particular, in order to ascertain whether the Legislature impliedly intended to provide a right of civil action to enforce the statutory duty (see the leading House of Lords decision of *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 407 and 412).

25 The key precondition, however, to the validity of an action for breach of statutory duty would have been the existence and nature of the statutory duty contended for, *ie*, the correctness of the Appellant's construction of s 10(5)(*b*) of the Act, for the action would fail at the threshold if the relevant facts did not even fall within the ambit of s 10(5)(*b*) of the Act in the first place. Indeed, this is precisely what the Judge found, and it is to that finding that our attention now turns.

Our decision

26 We are of the view that the Judge's decision on the interpretation to be given to s 10(5)(*b*) of the Act is undoubtedly correct. The definition of "structural elements" in s 2 of the Act clearly refers to parts or elements of a *building*, and the definition of "building" in s 2 ("any permanent or temporary *building or structure*" [emphasis added]) contemplates an artificial construct or edifice, and not the ground upon which that construct or edifice rests.

27 Further, the only example of a "building" given in s 2 of the Act which could come close to covering the backfill in the context of the present proceedings is the term "earth retaining or stabilising structure, whether permanent or temporary" found in example (b). However, the term "earth retaining structure" is, in turn, defined in s 2 of the Act as "any structure, structural system or other means used to maintain the shape of excavation *during … earth filling*" [emphasis added], which suggests that earth filling *per se* cannot be a building.

28 Hence, the backfill does not form part of the "structural elements" of the building works, critical or otherwise, and s 10(5)(*b*) of the Act therefore imposed no statutory duty on the Respondent to

supervise the carrying out of the backfilling.

Common law duty of care

Introduction

29 It follows from the discussion at [21]–[23] above, however, that the construction of s 10(5)(*b*) of the Act is not determinative of the issue of the Respondent's common law duty of care, and it is therefore necessary to determine whether, under the *Spandeck* test, the Respondent owes a duty of care to the Appellant at common law. As this court observed in *Ngiam Kong Seng and another v Lim Chiew Hock* [2008] 3 SLR(R) 674 ("*Ngiam*") (at [20]–[21]):

> 20 The general position in Singapore with respect to liability for negligence in cases of pure economic loss and cases of physical damage has now been settled by the recent decision of this court in Spandeck ([2] supra). Briefly stated, the position in Singapore follows, in the main, the two-stage test laid down by Lord Wilberforce in Anns v Merton London Borough Council [1978] AC 728 ("Anns"), where the learned law lord observed, as follows (at 751-752):
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> > [I]n order to establish that a duty of care arises in a particular situation, *it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist*. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of it may give rise ... [emphasis added]
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> 21 More specifically, Chan Sek Keong CJ, delivering the judgment of the court in *Spandeck*, observed thus (at [73]):
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> > ***In our view, a coherent and workable test can be fashioned out of the basic two-stage test premised on proximity and policy considerations, if its application is preceded by a preliminary requirement of*** *factual* ***foreseeability. We would add that this test is to be applied*** *incrementally* ***, in the sense that when applying the test in each stage, it would be desirable to refer to decided cases in analogous situations to see how the courts have reached their conclusions in terms of proximity and/or policy*** . As is obvious, the existence of analogous precedents, which determines the current limits of liability, would make it easier for the later court to determine whether or not to extend its limits. However, the absence of a factual precedent, which implies the presence of a novel situation, should not preclude the court from extending liability where it is just and fair to do so, taking into account the relevant policy consideration against indeterminate liability against a tortfeasor. ***We would admit at this juncture that this is basically a restatement of the two-stage test in Anns, tempered by the preliminary requirement of factual foreseeability. Indeed, we should point out that this is the test applied in substance by many jurisdictions in the Commonwealth*** : see, for example, the Canadian case of *Cooper v Hobart* (2001) 206 DLR (4th) 193; the New Zealand case of *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 ... [emphasis added in bold italics]

In a similar vein, the learned Chief Justice summarised the applicable law in Singapore at the end of the judgment in *Spandeck* in the following terms (at [115]):

> To recapitulate: A *single* test to determine the existence of a duty of care should be applied regardless of the nature of the damage caused (*ie*, pure economic loss or physical damage). It could be that a more restricted approach is preferable for cases of pure economic loss but this is to be done within the confines of a single test. ***This test is a two-stage test, comprising of, first, proximity and, second, policy considerations. These two stages are to be approached with reference to the facts of decided cases although the absence of such cases is not an absolute bar against a finding of duty. There is, of course, the threshold issue of factual foreseeability but since this is likely to be fulfilled in most cases, we do not see the need to include this as part of the*** legal **test for a duty of care**. [emphasis added in bold italics]

[emphasis in original]

30 In *Ngiam* itself, the *Spandeck* test was extended to encompass liability for psychiatric harm (thus confirming that it is, indeed, a *single* test for the existence of a duty of care that is applicable across the board in the tort of negligence). In so far as the law in other Commonwealth jurisdictions was concerned, the following observations were made in *Ngiam* (at [105]–[107]):

> 105 It should also be noted that although the two-stage test in *Anns* ([20] *supra*), which forms the basis of the test laid down by this court in *Spandeck*, has not been followed in England, the law in that particular jurisdiction continues (as this court noted in *Spandeck* at [46]-[49]) to remain in a state of flux (see, for example, the House of Lords decision of *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181).
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> 106 It is also interesting to note that the position in Canada is similar to that presently applicable in Singapore, where (as mentioned earlier at [98] above) a somewhat modified version of the two-stage test in Anns has been adopted. In particular, whilst affirming the two-stage test in Anns, the Canadian courts have considered both reasonable foreseeability and proximity under the first stage (see, for example, the Canadian Supreme Court decisions of *Cooper v Hobart* (2001) 206 DLR (4th) 193 at [30]-[31]; *Odhavji Estate v Woodhouse* (2003) 233 DLR (4th) 193 at [46]-[50]; *Hill v Hamilton-Wentworth Regional Police Services Board* (2005) 259 DLR (4th) 676 at [47]; *Childs v Desormeaux* (2006) 266 DLR (4th) 257 at [9]-[12]; and *Syl Apps Secure Treatment Centre v BD* (2007) 284 DLR (4th) 682 at [23]-[30]). This approach is not necessarily at variance with that adopted in *Spandeck*, for (as we explained above at [104]) the concept of reasonable foreseeability is also an integral part of the process of ascertaining whether there is sufficient (legal) proximity between the plaintiff and the defendant, albeit on a preliminary (and factual) level.
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> 107 The position in Australia appears to be somewhat in a state of flux (see generally Francis Trindade, Peter Cane & Mark Lunney, *The Law of Torts in Australia* (Oxford University Press, 4th Ed, 2007) at ch 9).

31 It is interesting to note that the respective situations in the various jurisdictions as summarised in *Ngiam* above have not – to the best of our knowledge – changed substantially since then (see, for example, W V H Rogers, *Winfield & Jolowicz on Tort* (Sweet & Maxwell, 18th Ed, 2010) ("*Winfield & Jolowicz*") at ch 5 (with regard to England); Allen M Linden and Bruce Feldthusen, *Canadian Tort Law* (LexisNexis, 8th Ed, 2006) at ch 9, especially at pp 301–306, Lewis N Klar, *Tort Law* (Thomson Carswell, 4th Ed, 2008) at ch 5, especially at pp 165–185, as well as the Supreme

Court of Canada decision of *Fullowka et al v Pinkerton's of Canada Limited et al* (2010) 315 DLR (4th) 577 (with regard to Canada); and R P Balkin and J L R Davis, *Law of Torts* (LexisNexis, 4th Ed, 2009) at ch 7, especially at paras 7.12–7.13 (with regard to Australia)).

32 Returning to the facts of the present appeal, as noted above (at [29]), this court decided in *Spandeck* that a single test for the existence of a duty of care in the tort of negligence is applicable irrespective of the type of loss suffered, and it is therefore not fatal to the Appellant's case that the loss for which it seeks to be compensated is pure economic loss, *viz*, the cost of remedial work.

33 The *Spandeck* test requires this court to consider (assuming it was factually foreseeable that the Appellant would suffer damage from the Respondent's carelessness) whether there was sufficient legal proximity between the Appellant and the Respondent for a *prima facie* duty of care to arise (see *Spandeck* at [77]), and whether any policy considerations negated this *prima facie* duty (see *Spandeck* at [83]). This two-stage test is to be applied incrementally with reference to the facts of decided cases in analogous situations (see *Spandeck* at [73]).

34 In essence, what this court has to decide, in the context of the present appeal, is whether, at common law, a clerk of works owes a duty to the person commissioning the building works (who may or may not, contractually, be his employer) to take reasonable care in supervising the carrying out of those works. Even if such a duty of care exists, there must, *inter alia*, have been a breach of such a duty of care by the Respondent resulting in damage that must not have been too remote in order for the Respondent to be liable to the Appellant. However, the establishment of a duty of care is an obvious threshold requirement that must first be established (in this case, by the Appellant). It is this issue (and, in particular, the legal criteria laid down in the *Spandeck* test) that we must now address.

Factual foreseeability

35 The threshold requirement of factual foreseeability is easily fulfilled on the facts of this appeal: it was reasonably foreseeable that if the Respondent did not take care in supervising the backfill operation, the Appellant would suffer some sort of loss or damage. The land might not, for instance, have been backfilled to the proper depth, leading to subsidence and physical damage to any structures resting on the backfill.

Proximity

Introduction

36 As explained in *Spandeck* (at [78]–[79]), the focus of the inquiry at this stage of the test is on the closeness of the relationship between the parties, and it embraces physical, circumstantial and causal proximity, including (where the facts support it) any voluntary assumption of responsibility by the defendant and/or reasonable reliance thereon by the plaintiff (see *Spandeck* at [81]).

Physical proximity

37 There was evidently physical proximity between the parties: the Appellant was the lessee of the site, and the Respondent, by virtue of his appointment as clerk of works/site supervisor, was bound to be physically present at the site in order to carry out his duties (as to which see [44] below).

Legal proximity

Introduction

38 The concept of proximity requires more than just physical closeness between the parties, however, and in order to determine whether there was a sufficient degree of *legal* proximity between the Appellant and the Respondent, it is necessary to examine, in some detail, the status and position of a clerk of works.

The role of a clerk of works

39 According to the *Clerk of Works Manual* (Institute of Clerks of Works and Royal Institute of British Architects, 3rd Ed, 1994) (at para 1.01), the term "clerk of works" was historically "given to the cleric or other person appointed to *superintend* building operations" [emphasis added]. This is confirmed by John E Johnston, *The Clerk of Works in the Construction Industry* (Crosby Lockwood Staples, 1975) ("*The Clerk of Works*"), which states (at p 3) that:

> The title Clerk of Works has been in existence since the medieval period, when a clerk was recognised as a man of learning associated with Holy Orders …
>
> Medieval clerks were not always ordained priests, but acted in a lay capacity on behalf of the Church, *those nominated as Clerk of Works being responsible for the construction and upkeep of buildings. Because of the similarity of their duties, the title was later conferred upon those* who did not hold Holy Orders but who *were commissioned to* ***supervise*** *the erection and repairs to the Royal Buildings*.
>
> [emphasis added in italics and bold italics]

40 It is interesting to note from the above materials that since the Middle Ages, the role of the clerk of works at a building site has been of a supervisory nature. For example, *The Clerk of Works* cites (at p 6) records from the time of the restoration of St Paul's Cathedral in the seventeenth century which state that the clerk of works:

> … constantly attends the service of the work to take care that carpenters, labourers, etc, who work by the day, be employed in such business as the Surveyor has directed to be done …

41 The *Clerk of Works Manual* notes (at para 1.01) that the attributes of "ability, integrity and vigilance" were considered the most appropriate qualities of a clerk of works, and that these continue to be reflected in the official coat of arms of the Institute of Clerks of Works of Great Britain. The *Clerk of Works Manual* further states (at para 3.03) that the functions and attributes of a clerk of works include (*inter alia*):

> - *Inspection*: detecting workmanship which does not comply or materials which do not conform to the contract standards. This will usually mean inspecting in detail, and checking measurements regularly.
>
> - *Reporting*: keeping the architect fully informed on a regular pre-arranged basis. It also means alerting the architect immediately when situations arise which require decisions or actions.
>
> [emphasis in original]

42 Indeed, it has been the common understanding of the construction industry for over three centuries that (see *The Clerk of Works* at p 104):

> [t]he primary task of the Clerk of Works is to inspect the work as it proceeds to ensure it is carried out in accordance with the contract drawings and specifications.

For instance, British Standards Institution, *Glossary of Building and Civil Engineering Terms* (Blackwell Scientific Publications, 1993), defines (at 160 2015) a "clerk of works" as a "[p]erson appointed to verify, on behalf of a *client*, that *construction work* is executed in accordance with *drawings*, specifications and other *contract documents*" [emphasis in original]. That this understanding is shared locally by construction professionals is confirmed by Chow Kok Fong, *Construction Contracts Dictionary* (Thomson, Sweet & Maxwell Asia, 2006), who defines (at p 62) a clerk of works as:

> A representative of the architect, engineer or superintending officer in a construction contract who is deployed on site to assist the architect, engineer or superintending officer and to inspect the progress of the works on behalf of the architect, engineer or superintending officer.

43 Colin Tesch, *Construction - Law and Duties* (Butterworths, 1977), explains (at [215]) that:

> An architect, for his basic agreed fee, does not usually undertake to do more than periodic inspections. If the project is of a large size, or perhaps distant from the architect's office or maybe only small but complex, full-time supervision may be required. This is provided for by the appointment of a clerk of works.

44 It appears, therefore, that the industry practice has been that clerks of works assist the architect by monitoring the work of contractors on behalf of the person commissioning the construction works ("the client"), in order to ensure that work is carried out to *the client's* standards, specifications and schedule, that the correct materials are used and that proper workmanship is observed.

45 Turning to the relevant case law, in the English High Court decision of *Leicester Board of Guardians v Trollope* (reported in Alfred A Hudson, *The Law of Building, Engineering and Ship Building Contracts and of the Duties and Liabilities of Engineers, Architects, Surveyors, and Valuers; with Reports of Cases and Precedents*, vol II, (Sweet & Maxwell, 4th Ed, 1914) at p 419) ("*Trollope*"), the defendant architect had contracted with the plaintiffs to supervise the building works. A clerk of works had been appointed, who permitted the builders to lay the flooring without the specified precautions, thereby deviating from the defendant's design, and causing dry rot to set in some years later. The plaintiffs sued the defendant for breach of the contract of supervision, and the defendant denied liability on the ground that the damage had been caused by the negligence or misconduct of the clerk of works. In the course of his judgment, Channell J remarked (at p 423) that:

> I think there is no difficulty in seeing what are the respective functions and duties of an architect, and of a clerk of the works. I had a very clear idea of it myself, and the witnesses who have been called for the defendant, two gentlemen of position in the profession, and the defendant himself, who is a gentleman of position in the profession, all practical agree. They all agree that *the clerk of the works has to see to matters of detail*, and that the architect is not expected… to do so …
>
> Everybody knows that an architect cannot be there all the time, and everybody knows that *the clerk of the works is appointed to protect the interests of the employer against the builder, mainly because the architect cannot be there*. The same gentlemen who tell us that tell us also that the architect is responsible to see that his design is carried out. That fairly indicates what the respective duties of each are, but it leaves one in each case to say whether the matter complained of is a matter of detail or a matter of seeing whether the design is complied with.

[emphasis added]

On the facts, Channell J decided that the laying of concrete was a matter of design within the architect's purview, and not a matter of detail that could be left to the clerk of works, and therefore rejected the defendant's attempt to deny liability.

46 Although in stating that "the clerk of the works is appointed to protect the interests of the employer against the builder" (*Trollope* at p 423, and reproduced in the preceding paragraph), Channell J used the term "employer", we are of the view that the position is no different where the client does not formally (pursuant to a contract of service) employ the clerk of works. It is to be noted, however, that although Channell J's comments in *Trollope* on the scope of the duty of a clerk of works have generally been accepted (see *Jackson & Powell on Professional Liability* (John L Powell and Roger Stewart Gen Eds) (Sweet & Maxwell, 6th Ed, 2007) at para 9-246), his eventual decision is more questionable. Even if the laying of concrete had been a matter of design, it appears that the clerk of works had fraudulently colluded with the builder in not taking the necessary precautions, and then concealed the wrongdoing (see *Trollope* at p 422). In such circumstances, we would have thought that there would be scope for arguments based on contributory negligence or *novus actus interveniens* (see, for instance, the English decision of *Gray and Others (The Special Trustees of the London Hospital) v T P Bennett & Son (a firm) and others* (1987) 43 BLR 63). It should be borne in mind, however, that *Trollope* had been decided long before these defences were fully developed, and that, on the facts, the architect in *Trollope* made no effort to ensure that his design had been complied with.

47 In the English High Court decision of *Kensington and Chelsea and Westminster Area Health Authority v Wettern Composites and others* (1984) 1 Con LR 114 ("*Wettern Composites*"), the plaintiffs were the board of governors of a hospital to which an extension had been built, consisting of (*inter alia*) artificial stone mullions erected as part of the outer cladding, and which was eventually discovered to be defective. The defendants were, essentially, the architects, whom the plaintiffs had sued in negligence for failing to adequately supervise the erection. In the course of his judgment holding the architects liable, Judge David Smout QC referred (at 133) with approval to the division of duties between the architect and clerk of works commented upon in *Trollope*, and (at 137–138) stated that the clerk of works:

> … has been aptly described as the Regimental Sergeant-Major. It is accepted that *he acts as the eyes and ears of the architects, and has a responsibility to keep the architects informed as to what is or is not happening on site. He is also described as employed "to act solely as inspector on behalf of the employer under the direction of the architects*." [emphasis added]

48 *Wettern Composites* is also notable because the clerk of works concerned was also held to be negligent in failing to detect the defects, which holding demonstrates that, even in matters of detail, the presence of a clerk of works may not exempt an architect from responsibility. As the clerk of works was employed by the plaintiffs, they were held vicariously liable for his negligence, and their damages were reduced by 20% as a result of contributory negligence.

49 Closer to home, in the decision of this court in *Chuang Uming (Pte) Ltd v Setron Ltd* [1999] 3 SLR(R) 771 ("*Setron*"), the first respondent ("Setron") owned a building which had been designed by the second respondent ("the architect"), while the appellant ("the contractor") was the main contractor who was responsible for tiling works on the building's façade. As a result of defective design on the part of the architect and defective workmanship on the part of the contractor, tiles fell off the façade in such quantities that the entire façade had to be replaced. One of the issues on appeal was the architect's failure to supervise the tiling works, in breach of its contractual duty to

Setron to do so, and the architect attempted to argue that, as on-site supervision had been left to a clerk of works, who was employed by Setron, the architect was not liable for the clerk of work's negligence.

50 Rejecting this contention, this court held (at [40]) that the clerk of works was the "ears and eyes" of the architects in respect of the day to day on-site supervision of the construction works, and that he was "duty bound to report to the architects of any defect or shortcomings in the construction works".

51 This survey of authorities demonstrates that, both as a matter of industry practice and judicial observation, a clerk of works is regarded as being, by virtue of his functions and responsibilities at the building site, in fairly close proximity to *the client*, regardless of whether they are in a formal employer-employee relationship. If, of course, the clerk of works is in fact employed by the client, then there would also be a *contractual relationship* (which would, naturally, entail the corresponding legal obligations) between the parties. The clerk of works protects the interests of the client against the builder, by inspecting and supervising the works to ensure that they conform to the client's budget, standards and specifications, and that the client is getting value for money and proper workmanship. These matters have usually been described as matters of "detail", but might be more accurately be termed *operational* matters, in keeping with the military analogy employed in *Wettern Composites* (see [47] above). In respect of such operational matters, the clerk of works is predominantly responsible, although, a s *Wettern Composites* illustrates, depending on the circumstances, the architect may share some responsibility. In addition, as the *Clerk of Works Manual* and *Setron* indicate (see above at [41] and [50], respectively), regardless of whether the matter is one of design or operations, the clerk of works should keep the architect abreast of developments at the worksite, especially if he notices defects or shortcomings in the works.

52 All this having been said, however, we are inclined to think that, if a problem arises, the client would not generally sue the clerk of works concerned in either contract and/or tort. Indeed, we have seen that, even where a clerk of works has been at fault, the actual claim has (in the cases considered) been made against the architect (see *Trollope*, *Wettern Composites* and *Setron*, all of which have been discussed above), with the role of the clerk of works being relevant to the issue of *vicarious liability* and *contributory negligence*. This is not surprising as clerks of works are not generally substantial litigants in their own right (although, as we shall see, this is not the situation in the present appeal, which presents a rather exceptional fact situation). A more important point, however, is that, in the *tortious* context*, clerks of works might not even be liable to the client in the first instance*. Let us elaborate.

53 It is important to acknowledge the very real fact that *the qualifications of clerks of work can vary enormously*. As has been observed in a leading textbook in the field (see I N Duncan Wallace, *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 1995) vol 1 (at para 2-024)):

> Clerks of works are usually employed for a specific project, in many cases on the recommendation of the architect, though it is not unusual for building owners with their own building departments or organisations to put forward one of their own employees. They are almost invariably employed and paid for by the building owner. ... Their use is more common in building than in engineering contracts... *Their qualifications may vary from those of a retired tradesman or foreman to a fully qualified archit[e]ct or engineer, but in general their position is considerably inferior to that of a resident engineer, and the extent of their authority much more rigorously circumscribed by the contract documents* ... [emphasis added]

There are at least two legal consequences that arise from this variation in qualifications of clerks of

works.

54 First, the *scope* of any duty of care owed by a clerk of works will *vary* from case to case and, depending on the fact situation, the scope of the duty of care may not include the acts or omissions complained of. If so, there is no duty that can be *breached*, even assuming that a duty of care exists in the first instance.

55 *Secondly*, at a *threshold* level, *there might not even be a duty of care to begin with* (and, on the *overlap* between duty and breach, see below at [61]). We are, of course, assuming a situation in which there is *no contractual nexus* between the clerk of works concerned and the client to begin with. Whilst, following from the analysis above at [39]–[51], it might be argued that, in such a situation, there would, ordinarily, be a duty of care in *tort* owed by the clerk of works to the client (*cf* Stephen Furst and Sir Vivian Ramsey, *Keating on Construction Contracts* (8th Ed, London: Sweet & Maxwell, 2006) ("*Keating*") at para 13-049), we are of the view that, *in order for such a duty of care to exist, there must first be demonstrated that, on the facts of the case concerned, there had been legal proximity between the parties – for example, that there had been an assumption of responsibility by the clerk of works* vis-a-vis *the client. At this juncture, the universal and the particular (necessarily and, indeed, inevitably) intersect, with the focus tending towards the latter (as opposed to the former)*. This necessarily entails an application of the general legal principles to the *facts* of the case itself. However, unlike the issue of the *scope* of the duty of care referred to in the preceding paragraph, we are *not* here stating that the existence of a duty of care is *dependent on* the (variable) qualities of the clerk of works. Nonetheless, as we explain below, *the precise facts* are *still* important in ascertaining whether there has been an assumption of responsibility by the defendant and (correspondingly) whether the element of reliance on the part of the plaintiff has been satisfied.

56 However, can it be argued that a *particular or specific* consideration of the *facts* of *a given case* is *inconsistent* with the *general* principle that a clerk of works *ordinarily* owes a duty of care to his or her client? In our view there is *no inconsistency* (a key consideration in this regard, as we shall see, lies in the word "*ordinarily*").

57 As already alluded to above, the *general* principle is (*necessarily*) stated at *a high level of abstraction and* consideration must therefore (*and also necessarily*) be given to the *particular or specific facts* of the case itself.

58 One such example is to be found on the facts of the seminal House of Lords decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] 1 AC 465 ("*Hedley Byrne*"), where, although the House of Lords held that it was possible, as a matter of *general principle*, for a defendant to owe a duty of care with regard to *negligent misstatements*, there was no liability on the *facts* of that particular case as the defendant bank had included *a disclaimer of responsibility* in the response it had given to the plaintiff firm. We would observe – parenthetically – that there is, once again, *a n intersection between the universal and the particular* inasmuch as it could be argued that, *in addition to* the effect of such a disclaimer on the *particular facts* of the case itself, such a disclaimer represents (at the level of *general principle*) an instance of what might constitute *an exception* to the general proposition that a duty of care can be owed with respect to negligent misstatements at common law. However, what is important, for present purposes, is to acknowledge *the role of the particular facts* in ascertaining whether or not a duty of care exists in a given case.

59 Consequently, it is necessary, in the context of the present appeal, to now turn to the *application* of the general legal principles to the *facts* of this case.

60 Before proceeding to do so, however, we would emphasise that we have hitherto considered *only* the position between a clerk of works and the client. By way of a *summary* of the analysis rendered thus far, where a *contractual nexus* exists between these two parties, there will be contractual liability if a breach of contract can be established by the innocent party. Further, where such a nexus exists, there could well be *concurrent* liability for negligence in *tort* as well. Where, however, a contractual nexus does *not* exist between these two parties, it does *not necessarily* follow that there *must* be liability for negligence in *tort* between these parties simply because a duty of care might not even exist in the first place. As we have sought to emphasise, whilst it would be possible to argue that, on a *general* level, a duty of care ought *ordinarily* to be owed by a clerk of works to his client, whether or not such a duty of care *is* indeed owed in the case at hand would, in our view, depend on the *precise facts* in question – in particular, whether there had been an *assumption of responsibility* by the clerk of works concerned *vis-a-vis* the client (and a corresponding *reliance* by the latter on the former). Indeed, *even if* such a duty of care existed on the facts, there might *still* be *no* liability if, again on the *relevant facts* of the case concerned, the clerk of works had not *breached* that duty.

61 It is apposite, at this juncture, to point out that there is often an *overlap* between duty and breach (see generally *Winfield & Jolowicz* at para 5-23). Conceivably, in our view, whether the relevant facts of the case are considered at the (earlier) duty stage (as is the case in the present appeal) or at the later breach stage would depend very much on the characterisation as well as level of abstraction adopted by the court concerned. However, acknowledging (as we have done (see below at [66]–[74])) that the relevant *contractual matrix* ought (where it exists) to be considered (whether at the first and/or second stages of the *Spandeck* test) suggests that, in most of these cases, the court will probably consider (as we have in the present appeal (see below at [63]–[74])) the *particular facts in order to ascertain whether a duty of care exists*.

6 2 *It is also important to note that we leave open the point as to whether or not a clerk of works owes a duty of care (even on a general level) to other third parties (who are not the clients as such)*. There might well be a strong argument in favour of excluding such a duty of care (even on a general level; and *cf Keating* at para 13-049) but as this is not the fact situation before us, we say no more about this particular issue. We turn, instead, to a consideration of the facts of the present appeal.

Conclusion on legal proximity

63 It should be noted that the Respondent was the main director of A.n.A and that he procured A.n.A to appoint himself clerk of works (see [64] below). In such circumstances, the Respondent was *voluntarily assuming the various responsibilities the role carried and holding himself out as possessing the relevant qualifications and skills necessary to discharge that role*. This is exactly the sort of relationship that Lord Devlin in *Hedley Byrne* considered (at 529) to be "equivalent to contract", *ie*, where there is an *assumption of responsibility* in circumstances in which, but for the absence of consideration, there would be a contract.

64 As for whether there was *reliance* by the Appellant on care being taken by the Respondent in circumstances where the latter knew or ought to have known of such reliance, it must have been obvious to the Respondent that the Appellant was relying on him as a clerk of works. Indeed, the Respondent intended that he should be so relied on, for he procured his own appointment as clerk of works by naming himself the site supervisor/clerk of works in an application form ("the BCA form") submitted to the Building and Construction Authority ("BCA"), in which the Respondent declared that, as site supervisor, he was "not a partner, officer or employee of the builder". This was, of course, patently false, but was no doubt calculated to convey the impression that the Respondent was an

independent and reliable individual with no links to A.n.A, and could therefore be relied upon to act in the Appellant's interest as a clerk of works.

65 The Respondent contends, however, that if the Appellant had wanted the Respondent to assume some liability to it in the conduct of his responsibilities, it could have sought a personal guarantee from the Respondent or introduced the Respondent as a further party to its contract with A.n.A, but it chose not to do so (see, similarly, *Spandeck* at [96]). In such circumstances, the Respondent argues, it cannot be said that he had assumed any responsibility to the Appellant and/or that the Appellant was relying on him.

66 Before we address this argument, we should note that the presence of a contractual matrix is a factor that, whilst considered to be among the "relevant policy considerations" in *Spandeck* (at [83]) (and, hence, falling under the *second* limb of the *Spandeck* test), might, depending on the facts, be appropriately analysed, instead, in relation to the issue of proximity (under the *first* limb of the *Spandeck* test). That there is, on occasion at least, an overlap between both limbs of the *Spandeck* test is not, perhaps, surprising.

67 Indeed, in *Spandeck* itself, the contractual matrix was treated as both a proximity factor (at [108]) as well as a policy consideration (at [114]). Similarly, in the English Court of Appeal decision of *Pacific Associates Inc v Baxter* [1990] 1 QB 993 ("*Pacific Associates*") (which was, in fact, applied in *Spandeck*), the court did not adopt an altogether uniform approach towards this issue. Purchas LJ, for example, was of the view (at 1023–1024) that the precise reason adopted "may not in the present case matter very much" as the result would be the same, *regardless* of whether it was held (*inter alia*) that there had been no proximity between the parties *or* that it would not be just and reasonable to find that a duty of care had been established. Ralph Gibson LJ, on the other hand, appeared (at 1031–1032) to base his decision on what is presently the second limb of the *Spandeck* test, whilst Russell LJ *clearly* based his decision on that particular limb (at 1037–1039).

68 As was also observed in an article (see Andrew Phang, Cheng Lim Saw and Gary Chan, "Of Precedent, Theory and Practice – The Case for a Return to *Anns*" [2006] SJLS 1 (at p 54)):

> [D]espite the doctrinal separation of both limbs in the *Anns* test [which was adopted in *Spandeck* (see above at [29])], there would, at the level of application, nevertheless be an interaction between them. This is only to be expected since the Court concerned has to base its final decision on a *holistic* consideration of *both* limbs as applied to the facts of the case itself. [emphasis in original]

69 The overlap just referred to is, in fact, neatly illustrated by the facts of this particular appeal. In this case, the Respondent is suggesting that the legal relationship between the parties has been exclusively defined by contract, leaving no room for the tortious doctrine of assumption of responsibility to operate. This bears more affinity to proximity (pursuant to the first limb of the *Spandeck* test), which is, after all, a question of the closeness of the relationship between the parties (see *Spandeck* at [77]), than to far-reaching considerations of public policy (such as the notorious "floodgates" argument and the availability of insurance). However, we would observe – parenthetically – that the reasoning *as well as* (more importantly) the result would be the *same* even if we treat this particular issue under the second limb of the *Spandeck* test. This is not, of course, surprising, given the overlap just mentioned (see also, in a similar vein, *Spandeck* (at [114])).

70 Returning to the Respondent's submission, although this sort of argument defeated the claim in *Spandeck* and in *Pacific Associates*, in our view, on the facts of the present appeal, it is not as compelling.

71 The mere fact that there is a pre-existing contractual relationship or backdrop between the parties should not, in itself, be sufficient to exclude a duty of care on one of them to avoid causing pure economic loss to the other (the situation is *a fortiori* where, as here, there is in fact *no* contractual relationship between the parties, but merely a contractual backdrop, in the sense that each party was in a separate contractual relationship with a third party, *viz*, A.n.A). The true principle, in determining whether or not any contractual arrangement has this effect, should be whether or not the parties structured their contracts intending thereby to exclude the imposition of a tortious duty of care (see the House of Lords decision of *Henderson and others v Merrett Syndicates Ltd and others* [1995] 2 AC 145 at 193–194).

72 In *Spandeck* and *Pacific Associates*, the presence of an arbitration clause pointed unequivocally to the fact that the parties deliberately wished for their contractual arrangements to exclusively govern their respective liabilities, and to prevent a tortious duty of care which would cut across and be inconsistent with that contractual structure (see generally *Spandeck* at [98]–[102], [108]–[109] and [114]).

73 Here, however, there is no inconsistency between, on the one hand, the contract between the Appellant and A.n.A, and, on the other, a duty of care owed by the Respondent to the Appellant. Certainly, there is no evidence to suggest that the Appellant and A.n.A had deliberately organised their contractual arrangements to exclude any potential tortious liability on the part of the Respondent.

74 Hence, in the absence of any positive steps taken by the parties during the negotiation and conclusion of the contract between A.n.A and the Appellant, we are unable to see how the contractual matrix militates against the existence of a duty of care owed by the Respondent to the Appellant.

Policy considerations

Introduction

75 Given that there is sufficient proximity between the Appellant and the Respondent for a *prima facie* duty of care to arise, it is necessary to consider whether any reasons of policy militate against the imposition of a duty of care.

76 There are a number of such policy considerations, *viz*:

(a) whether imposing a duty of care on the Respondent might circumvent the prescribed statutory duties of a site supervisor;

(b) whether imposing a duty of care on the Respondent might amount to an impermissible lifting of the corporate veil; and

(c) the Respondent's conflicts of interest.

We will deal with each of these considerations seriatim. However, it is appropriate to make one preliminary observation.

77 With regard to consideration (c) above, it will be seen (at [87] below) that our conclusion thereon is that, far from negating the Respondent's *prima facie* duty of care, this particular consideration in fact *reinforces* it. It should not be thought, however, that this represents a

departure from *Spandeck*, and a return to the three-part test ("the *Caparo* test") in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 ("*Caparo*"). The second limb of the *Spandeck* test is essentially *negative* in nature. Put simply, the court, having determined that a *prima facie* duty of care has been established, applies policy considerations to the factual matrix to decide whether that *prima facie* duty is *negated or limited*. In contrast, the third limb of the *Caparo* test is a *positive* one: notwithstanding the existence of sufficient foreseeability of damage and proximity between the parties, a duty of care nonetheless cannot arise unless and until the factual matrix is "one in which the court considers it fair, just and reasonable" to *impose* a duty (see *Caparo* at 618). In other words, unlike the third limb of the *Caparo* test, the second limb of the *Spandeck* test does not require the presence of policy considerations militating in favour of the imposition of a duty of care ("positive policy considerations") – it merely requires the absence of policy considerations militating against the imposition of such a duty ("negative policy considerations"). We gratefully adopt the explanation of the difference between the two approaches supplied by Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (Oxford University Press, 3rd ed, 2008) (at p 141):

> The difference may aptly be characterised as one between an approach that starts from a presumption of duty, and requires the invocation of policy factors if the duty is to be negated, and one that starts from a presumption of no duty, and requires the invocation of policy factors if a new duty is to be established (see *Stovin v Wise* [1996] AC 923 at 949, per Lord Hoffmann).

Although it has been questioned whether the difference between the *Spandeck* and *Caparo* approaches is truly as stark as the above passage suggests (see John Murphy, *Street on Torts* (Oxford University Press, 12th ed, 2007) at pp 43–44), for present purposes we would merely observe that this difference in approach does *not* mean that courts cannot, under the second limb of the *Spandeck* test, have due regard to the presence of positive policy considerations. While the *Spandeck* test does not require this, it does not prohibit it either, for courts may sometimes need to deploy such countervailing positive policy considerations in order to dismiss spurious negative policy considerations raised by the defendant (see, for example, the Singapore High Court decision of *Amutha Valli d/o Krishnan v Titular Superior of the Redemptorist Fathers in Singapore and others* [2009] 2 SLR(R) 1091, where just such an exercise was undertaken by Lee Seiu Kin J at [81]). As this court stated in *Spandeck* (at [85]):

> The courts must, as far as possible, avoid giving the impression that there remain "unexpressed motives" behind their finding for or against a duty.

78 With this preliminary point settled, we turn now to consider the relevant policy considerations, both negative and positive, in this appeal.

Statutory duty

79 One possible negative policy argument is that the duties of a site supervisor are clearly set out in s 10 of the Act, and therefore if (as in this case) the actions of a site supervisor or clerk of works fall outside the ambit of s 10, this might indicate that the Legislature did not intend for them to owe any duties in respect of such actions, and that the courts should not therefore seek to superimpose a common law duty of care wider than the statutory duty imposed by s 10, which would (on such reasoning) contradict such legislative intention in the process.

80 Such an argument found favour with the House of Lords in *Murphy v Brentwood District Council* [1991] 1 AC 398 ("*Murphy*") at 457, 472, 482, 491–492 and 498, where the House of Lords overruled *Anns and others v Merton London Borough Council* [1978] 1 AC 728 ("*Anns*") and held that a local authority owed no duty of care to avoid negligently approving the purchase of houses with defective

foundations, which would thereby cause a purchaser of a house to incur pure economic loss. A number of their Lordships considered that, in what was essentially a consumer protection field, the precise extent and limits that should be imposed on builders and local authorities in the public interest was best dealt with by the Legislature and not the courts. As the UK Parliament had seen fit to enact the Defective Premises Act 1972 (c 35) ("the UK DPA 1972"), which imposed on builders a liability falling short of that imposed by *Anns*, there was no policy reason for the courts to impose a higher common law duty on builders or local authorities.

81 On closer scrutiny, however, the argument based on s 10 of the Act is not, in our view, strong enough to prevent the imposition of a duty of care on the Respondent. First, the preamble to the UK DPA 1972 states quite clearly that it is:

> An Act to *impose duties* in connection with the provision of dwellings and otherwise to *amend the law* of England and Wales as to liability for injury or damage caused to persons through defects in the state of premises. [emphasis added]

Further, s 1 of the UK DPA 1972 sets out in fairly substantial detail the persons to whom the duty is owed (s 1(1)(*a*) and (*b*)); the nature of the duty (s 1(1)); how the duty may be discharged (s 1(2) and (3)); and the persons on whom the duty is imposed (s 1(1) and (4)). In contrast, s 10 of the Act does not obviously create a private cause of action that sounds in damages (see [24] above). It would appear that a breach of s 10 of the Act results instead in purely criminal sanctions under sub-sections (7) to (9). In such circumstances, and given the rather general terms in which s 10 of the Act is phrased, it is unlikely that the Legislature had intended, when enacting s 10, to preclude common law civil remedies against negligent site supervisors or clerks of works. Second, the fact that the Act does not cover a particular situation is equally, if not more, consistent with the possibility that there is a lacuna in the law the courts should remedy, as opposed to the possibility that the Legislature intended for such a situation to be completely unregulated by the common law. Indeed, nothing in the debates during the Second Reading of the Building Control Bill indicates that the Legislature intended there not to be a civil remedy against negligent site supervisors (see *Singapore Parliamentary Debates, Official Report* (16 February 1989) vol 52 at cols 668–686). Third, the question of what common law duties a clerk of works owes is not merely one of "consumer protection", but is also one of public safety, especially in the local context, where construction takes place on an ongoing basis. In the field of public and workplace safety, there is no reason why the courts should not be astute to introduce minimum standards of skill and care via the tort of negligence.

82 For all these reasons, we consider that *Murphy* may be distinguished, and that s 10 of the Act, in itself, is not inconsistent with the Respondent owing the Appellant a duty of care at common law.

Lifting of the corporate veil

83 The Respondent also argues that the imposition of a duty of care in this case would in effect amount to an unwarranted lifting of the corporate veil.

84 This would only be true, however, if the Respondent was being sued for the tortious acts or omissions of A.n.A, rather than for his own tort (see, for example, the House of Lords decision of *Standard Chartered Bank v Pakistan National Shipping Corpn and others (Nos 2 and 4)* [2003] 1 AC 959 at [22] (*per* Lord Hoffmann) and [40] (*per* Lord Rodger)). As *Company Directors: Duties, Liabilities and Remedies* (Simon Mortimore ed) (Oxford University Press, 2009) states (at para 27.22):

> A director is personally liable for his own torts committed in relation to the company's affairs,

whilst acting as a director or employee of the company. In such circumstances the company will also be vicariously liable for the director's torts.

In other words, the corporate veil argument depends on the Respondent acting as A.n.A, rather than as its employee or agent (or indeed in a personal capacity). On the facts of the present appeal, however, the Respondent's liability is not predicated on any corporate acts *qua* organ of A.n.A, but on his personal acts *qua* clerk of works (albeit therefore as an employee of A.n.A (see above at [5])). If all the elements of the tort of negligence can be established against the Respondent, he will be personally liable, and the fact that he is also a director of a company is irrelevant to his personal liability, although it may be relevant to the company's vicarious liability, depending on whether (as here) the tort was committed in the director's course of employment.

85 In the circumstances, therefore, the separate legal personality of A.n.A is irrelevant, and a duty of care cannot be denied on that ground.

Conflicts of interest

86 One final positive policy consideration that points *in favour of* the imposition of a duty of care, and which merits special notice on the specific facts of this appeal, is the lack of checks and balances arising out of the Respondent's conflicts of interest.

87 We have already adverted to the Respondent's dual position as director of A.n.A and clerk of works (see above at [4], [63] and [64]), which would inevitably have compromised his ability to scrutinise the work of A.n.A and act in the Appellant's interest (as he ought to have done as clerk of works). Not for nothing, after all, has the virtue of "integrity" been considered a core attribute of a clerk of works (see [41] above). Clerks of works should not be allowed to flout the system of checks and balances envisioned by the Act, to the detriment of their clients, without the latter having some form of recourse.

Conclusion on duty of care

88 For all these reasons, the *Spandeck* test is satisfied, and we are of the view that the Respondent owed the Appellant a duty of care at common law.

Whether the Respondent breached his duty of care to the Appellant

89 Given that the Respondent was under a common law duty of care to the Appellant, it is necessary to consider whether, on the facts, this duty was breached. This raises, in turn, the issue as to what the *scope* of that duty is, for, if the duty does not even include or encompass the matters complained of, then there is no duty to breach. This will obviously depend heavily on the specific fact situation of each case and will include such factors as the contractual duties, if any, that the clerk of works concerned has undertaken.

90 On the facts of the present appeal, it is clear, in our views, that, *qua* clerk of works, the Respondent owed the Appellant a duty of care to supervise the backfilling works, which was undoubtedly an operational matter under the responsibility of the Respondent. This is because, as originally agreed, the levelling of the land was to be a relatively minor part of the contract, and was the product of negotiations and agreement between the Appellant and A.n.A, without any architectural input whatever. Although it is a question of fact in each case whether a matter is one of operation, as opposed to design, it is quite impossible to regard the backfilling in this case as a design element, unlike the concreting in *Trollope* or the tiling works in *Setron*, especially when, as matters

subsequently transpired, the backfilling operation was an unauthorised adventure on the part of A.n.A (see further at [93] below).

91 Also, as this court held in *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)* [2007] 4 SLR(R) 460 (at [69]), in determining whether there has been a breach of a duty of care, the standard of reasonable care is to be objectively assessed on the basis of knowledge then reasonably available.

92 Although the Respondent attempted to draw a sharp distinction between what he knew in his capacity as director of A.n.A, and what he knew as clerk of works, we regard this distinction as somewhat unreal. This sort of approach has been rejected in the context of directors' fiduciary duties (see, for example, the English High Court decision of *Industrial Development Consultants v Cooley Ltd*. [1972] 1 WLR 443 at 451 and the English Court of Appeal decision of *Mohan Singh Bhullar & ors v Inderjit Singh Bhullar & anor* [2003] EWCA Civ 424 at [41]), and we see no reason to adopt it in the context of the common law duties of a clerk of works.

93 Consequently, the knowledge reasonably available to the Respondent *qua* clerk of works was also the knowledge available to him *qua* director of A.n.A, which included the following matters:

(a) As the site was not level, the Appellant's contract with A.n.A envisioned that A.n.A was to level the land (see the Judgment at [16]) by using surplus earth from the higher-lying areas to raise the lower-lying areas (see the Judgment at [3]–[4]). The levelling operation was therefore supposed to be a "self-contained" job, involving no external elements.

(b) Instead, A.n.A departed from the terms of the agreement by engaging Lok Sheng to truck in backfill material consisting of wet soil and wood chips from off-site to raise the lower-lying areas of the site (see the Judgment at [17]).

(c) A.n.A did not know if Lok Sheng had any special qualifications in the area of earthworks (see the Judgment at [17]). During the course of the trial, it emerged that Lok Sheng's principal business activities consisted of "construction and engineering" and "freight transport by road" – a far cry from the "specialist" in earthworks it was asserted to be by both A.n.A and the Respondent in their pleadings and affidavits. In addition, as the Judge observed, Lok Sheng was "a one-man operation" (see the Judgment at [17]).

(d) In the contract between A.n.A and Lok Sheng under which Lok Sheng was to supply the soil and wood chips as backfill material, there were no specifications regarding the type and/or quality of soil and wood chips to be provided. The contract was completely silent as to whether, for example, the wood chips were to be chemically treated or inert, or whether the soil was to consist of organic or inorganic material (or both), or whether precautions had been taken to ensure the absence of contaminants.

(e) A.n.A did not have to pay for the backfill material (see the Judgment at [17]), and in fact appears to have received $40,000 in "compensation" from Lok Sheng for transport and labour costs allegedly incurred by A.n.A in facilitating the supply and delivery by Lok Sheng of the wood chips. Whether A.n.A actually incurred any such costs is open to question, given the testimony of Choo Kong Leong (A.n.A's project manager), that there were in fact *no* extra costs incurred in bringing in the backfill material. In any event, even if any such costs had been incurred, the fact of the matter is that A.n.A received the backfill material from Lok Sheng for free (see the Judgment at [17]). Indeed, under these circumstances, the Respondent ought, in our view, to have realised that something was amiss – particularly having regard to the dubious circumstances

under which the wood chips were brought onto the site and used as backfill material. It bears repeating that these circumstances resulted in A.n.A being able to level the land with at minimal or no cost, utilising material (here, wood chips) which Lok Sheng was only too eager to offload free-of-charge. Indeed, as we have already noted, Lok Sheng appears to have paid $40,000 in "compensation" to A.n.A as well.

94 Given the circumstances set out above, a reasonably competent and prudent clerk of works, knowing of all these matters, would have taken special care and redoubled his efforts in supervising the backfilling and checking that the backfill material used by Lok Sheng was suitable. At the very least, he would have informed the QPs (and, more importantly, the Appellant) that A.n.A was backfilling the site in a manner not contemplated by the contract (see [93] above), as well as of all the other matters in the preceding paragraph. In short, it was the Respondent's duty, as clerk of works, to act in a manner which was contrary to his interests as director of A.n.A.

95 The Respondent, however, did none of these things. There is no evidence that he took any steps to ensure that the wood chips were safe backfill material and would not contaminate the site, nor is there evidence that the QPs had been informed of the backfilling. Indeed, the Respondent himself admitted in cross-examination that, had the QE been informed of the backfilling, the QE would have applied for a permit from the Urban Redevelopment Authority ("URA"), as the backfilling involved a land area of more than 2,000m^2 and a change in the level of the land of more than 1.5m relative to the neighbouring land, and Condition 10 of the "Permit to Carry Out Structural Works" granted by the BCA to the Appellant required:

> A separate planning permission … from the Chief Planner, URA for earthworks at a remote site if the works for which this permit is granted also involve:
>
> (a) the borrowing or filling of earth at the remote site; and
>
> (b) such borrowing/filling of earth at the remote site involves a land area of more than 2,000m^2 or a change in level of land of more than 1.5m anywhere in the site relative to the neighbouring land.

It is not disputed that, notwithstanding this requirement, no planning permission was applied for prior to the commencement of the backfilling.

96 It should be added that, throughout this entire unhappy affair (*ie*, both before and during the trial, as well as at the hearing of the present appeal), the Respondent has repeatedly prevaricated and changed his story with regard to the provenance of the wood chips, attempting to suggest that they had been used on the access way of the site to provide traction for vehicles entering and leaving the site, and had been "accidentally buried" when they should have been removed at the end of the project (see, for example, the Judgment at [18]). These blatant attempts at evasion and dissemblance lead to the inevitable inference that the Respondent knew full well that A.n.A had no authorisation from the Appellant to use the wood chips as backfill, and was going to all possible lengths to hide the fact that A.n.A had gone off on a frolic of its own in engaging Lok Sheng to backfill the site.

97 In the circumstances, by reason of his failure to supervise the backfilling operation and to report it to the QPs, the Respondent was in breach of his duty of care to the Appellant.

Causation and remoteness

98 It is clear that, but for the Respondent's negligence, the Appellant would not have suffered the loss it has. Had proper supervision been observed, it is more likely than not that soil and wood chips would not have been used as the backfill material. More importantly, had the QPs (or the Appellant) been informed of the unauthorised backfilling, they would very likely have put a stop to it. In addition, they would have applied for the necessary permit from the URA; and if that had been done, it is unlikely that the URA would have granted the permit in the absence of the SLA's consent, and the SLA would not have consented because cl 6.11 of the Tenancy Agreement between the Appellant and the SLA obliged the former "[n]ot to dispose earth, debris or any other material" on the site.

99 With regard to the issue of remoteness, we do not consider the Appellant's loss too remote for the purposes of the Respondent's liability in negligence. The test for remoteness of damage in the tort of negligence is that of "reasonable foreseeability", *ie*, a tortfeasor is liable only for damage of a kind which a reasonable man should have foreseen (see the leading Privy Council decision of *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388, as well as the decisions of this court in *Ho Soo Fong v Standard Chartered Bank* [2007] 2 SLR(R) 181 at [39] and *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 at [56]). It was perfectly foreseeable that, if reasonable care was not taken by the Respondent in supervising the backfilling, ensuring that the backfill material was suitable and reporting the backfilling to the QPs, pure economic loss would have been caused to the Appellant in having to demolish any structures resting on the affected areas in order to excavate and replace the backfill.

100 Quite apart from this, as a result of the Respondent's negligence, the Appellant has had to suffer the unnecessary stress and inconvenience of having to deal with a number of government agencies regarding the environmental damage from the contaminated backfill, delay the opening of the shelter and the commencement of the good work the shelter was intended for, as well as put up with the unsightly and noxious effluence being discharged from the site. While these may not be legally recoverable losses, it is a testament to the fortitude and determination of the Appellant's staff that they were not deterred by these numerous setbacks.

Defences

101 We did not hear any argument on this issue, but we are of the view that the Respondent cannot avail himself of any defences to the Appellant's claim in negligence.

102 As we observed at [90] above, we regard the backfilling as an operational matter falling under the supervisory responsibility of the clerk of works. The QPs were entitled to expect the Respondent to carry out his duties diligently and to keep them informed if for some reason their attention was required on site. That being so, we do not think it can be said that the QPs have, in this case, been guilty of contributory negligence.

Conclusion

103 For all the foregoing reasons, we conclude that the Respondent was in breach of his duty of care to the Appellant, and that, by reason of his negligence, he caused the Appellant to suffer pure economic loss. The Appellant's appeal is therefore allowed with costs and with the usual consequential orders. The damages to be awarded to the Appellant are to be assessed by the Registrar.