IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 11

Magistrate's Appeal No 14 of 2017

Between

Soil Investigation Pte Ltd

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Law] — [Statutory offences] — [Public Utilities Act (Cap 261, 2002 Rev Ed)]

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Introduction

1 This judgment addresses the question remitted by the Court of Appeal following its decision in Criminal Reference No 1 of 2018, namely, whether the Appellant is able to invoke the statutory defence in s 56A of the Public Utilities Act (Cap 261, 2002 Rev Ed) ("PUA") in respect of damage caused to a water pipe by persons drilling under its supervision, on the basis that the damage was not attributable to the Appellant's neglect.

2 In my judgment, as the risk of some damage was known, and appropriate steps were not taken, the defence is not made out.

Background

3 The Appellant, a company incorporated in Singapore, was awarded a contract by the Public Utilities Board ("PUB") to carry out soil investigation works for the Deep Tunnel Sewerage System Phase 2 project ("the Project"). The consultant appointed by the PUB to oversee the whole Project was M/s Black & Veatch+AECOM Joint Venture ("BV/AECOM").[1] As part of its obligations under the contract, the Appellant was required to set out borehole locations and carry out underground detection services at a number of locations, including one at Pioneer Road. The Appellant was to dig boreholes up to 70m deep to conduct tests.[2] The contract stipulated that the Appellant was responsible for the final positioning of the boreholes,[3] while the Superintending Officer (*ie*, BV/AECOM) had to approve each borehole location, its depth and the details of required field tests prior to the start of drilling.[4] The Appellant was to be responsible for the quality of all works undertaken.[5] The contract also set out a specific investigation technique to be adopted to minimise damage to underground services. Clause 1.5 of Section B of the contract required the Appellant to purchase all relevant utility and service plans to determine if any of them were located in the vicinity of the works. Drilling was only to be commenced after underground services had been checked for by means of cable detection and digging a trial pit 1.5m deep, followed by hand augering for a further 1.5m. Any obstruction encountered was to be notified to BV/AECOM,

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1 ROP Vol 1 at p 40.

2 ROP Vol 1 at p 444.

3 ROP Vol 1 at p 414.

4 ROP Vol 1 at p 397.

5 ROP Vol 1 at p 413.

who would decide on whether to expose the obstruction or shift the drilling location.[6]

4 The Appellant engaged a cable detection worker, H. H. Tan Technical Services ("H H Tan"), to obtain a copy of the PUB's water mains service plan ("the PUB Plan"), which was sent by the PUB's Water Supply Network department via email on 29 January 2015. The PUB Plan indicated that there were water mains in the vicinity. The email stated that the locations of water mains reflected in the PUB Plan were only approximate, and instructed that precautions would have to be taken to safeguard and avoid damage to PUB water mains.[7] A "Dos and Don'ts" list was also attached which recommended, among others:[8]

(a) using trial holes to identify the exact location of existing water mains;

(b) using pipe locaters with the assistance of valve chambers and hydrants to identify the location of existing water mains; and

(c) consulting with the PUB on the location of existing water mains.

5 The Appellant engaged Geotechnical Instrumentation Services ("GIS") to drill some of the boreholes. In the course of this engagement, GIS's workers were subject to the Appellant's instructions.[9]

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6 ROP Vol 1 at p 413.

7 ROP Vol 1 at pp 378, 450

8 ROP Vol 1 at p 453.

9 ROP Vol 1 at pp 103–105.

6 On or about 15 March 2015, the Appellant instructed GIS to commence drilling the borehole termed V-V1/BH104 ("the Borehole"), first by digging a 1.5m trial pit, before switching to a hand auger for a further 1.5m.[10] These instructions were carried out by one of GIS's drilling operators, Parvez Masud ("Parvez"). As nothing was initially found, the Appellant instructed Parvez to commence drilling a borehole.[11] Parvez eventually encountered an obstruction at a depth of approximately 6.5m.[12]

7 This information was communicated by S Gam Shawng ("Gam"), GIS's site supervisor, to the Appellant's site coordinator, Min Min Zaw ("Min").[13]

8 Instructions were allegedly obtained from Min and the Appellant's project manager, Yin May Thant ("Yin"),[14] for the drilling to be continued after offsetting by 600mm in the direction of a nearby canal ("the Offset Location").[15] Thereafter, on 16 March 2015, at the Offset Location, Parvez once again dug a 1.5m trial pit before switching to a hand augur for a further 1.5m. Parvez then commenced drilling a borehole, but when he had drilled to a depth of 6.7m, the drill encountered and damaged a NEWater main, leading to a loss of 7,491,600 litres of water.[16]

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10 ROP Vol 1 at p 379.

11 ROP Vol 1at p 118.

12 ROP Vol 1at p 118.

13 ROP Vol 1at p 104.

14 ROP Vol 1 at p 138; Prosecution's submissions at para 10.

15 ROP Vol 1at p 138.

16 ROP Vol 1at p 120.

9 The Appellant claimed trial to the following charge under s 47A(1)(*b*) read with s 56A of the PUA:[17]

> You … are charged that you, on or about 16 March 2015, did cause to be damaged a water main belonging to the Public Utilities Board, to wit, one S Gam Shawng and one Pervez Masud who were subject to your instruction for the purpose of employment to carry out drilling works at the construction site located near to lamppost 96 Pioneer Road, Singapore, without determining the exact alignment and depth of one 900mm in diameter Newater main before commencement of the said works, and you have thereby committed an offence punishable under section 47A(1)(b) read with section 56A of the Public Utilities Act, Chapter 261.

10 At first instance, the District Judge convicted the Appellant of the charge and sentenced it to pay a fine of $50,000. The District Judge's grounds of decision are reported as *PP v Soil Investigation Pte Ltd* [2017] SGDC 249 ("the GD").

11 In brief, the District Judge found that a main contractor could be held liable for the acts of its subcontractor under s 56A of the PUA (GD at [14]). GIS took instructions on how the boreholes were to be drilled and how much to offset when its drilling encountered obstructions (GD at [19]). The statutory defence in s 56A of the PUA was not available to the Appellant as the offence was committed due to its negligence. The Appellant did not ascertain the exact alignment of water mains in the vicinity and simply instructed GIS to dig a trial hole and hand augur to a depth of 3m. Contrary to PUB's warnings, the Appellant also failed to consult PUB when the water mains that were shown in the PUB Plan to be in the vicinity were not detected when the trial hole was carried out (GD at [25]–[26]).

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17 ROP Vol 1 at p 9.

12 I had allowed the appeal on the question of the Appellant's responsibility for GIS's drilling. The matter was then referred to the Court of Appeal on the question of the proper construction of s 56A of the PUA, specifically, whether it limited liability to personnel of the principals or employers who were interposed between the primary offender and the principals or employers, and the directing mind and will of the principals or employers.

The Court of Appeal's decision

13 The Court of Appeal answered the question posed in the negative, *ie*, that liability under s 56A of the PUA was not so limited. Section 56A of the PUA applies to those who supervise or instruct a primary offender pursuant to an engagement, whether or not there is a contract of service: see *Public Prosecutor v Soil Investigation Pte Ltd* [2019] 2 SLR 472 ("*Soil Investigation (CA)*") at [37]. The acquittal was set aside, and the Court of Appeal remitted the matter for a determination of whether the statutory defence under s 56A of the PUA was made out on the facts.

The Appellant's case

14 The Appellant cites *Abdul Ghani bin Tahir v PP* [2017] 4 SLR 1153 ("*Abdul Ghani*") for the proposition that an offence can only be attributable to the neglect of any person if there is a sufficient connection between that person and the primary offender. There must be a direct relationship where there is an assumption of responsibility by the secondary offender vis-à-vis the primary offender such that it would be fair and just to hold the former liable.[18] The Appellant argues that such a connection is not present here as the primary

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[18] Appellant's skeletal submissions at paras 37–40.

offenders in this case were not subject to its supervision or instruction for the purposes of any employment in the course of which the offence was committed.[19] The instructions were given to the primary offenders by Yin and Min, who were the Appellant's employees. To impute liability on the Appellant "would engender employers to be directly and primarily (rather than vicariously) liable for the acts of their employees".[20]

15 The Appellant also argues that, in any event, the damage to the water main was not attributable to its neglect. The Appellant had adhered to the prevalent industry practices vis-à-vis the digging of trial holes by having dug them to a depth of 1.5m, before using a manual hand auger to a depth of 3m.[21] The Appellant had also consulted with the PUB-appointed consultant for the project, BV/AECOM on the Offset Location.[22]

16 The Appellant contends that it would be absurd to require the Appellant to consult PUB every time a trial hole is dug.[23] The PUB Plans, having been made in the 1980s and not revised since, showed the incorrect, rather than the approximate locations of the water mains.[24] The Offset Location was used to ensure that drilling was conducted even further away from any water mains shown on the PUB Plan.[25]

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19 Appellant's skeletal submissions at para 26(c).

20 Appellant's skeletal submissions at para 31.

21 Appellant's reply submissions at paras 22, 24.

22 Appellant's reply submissions at para 23.

23 Appellant's reply submissions at para 26.

24 Appellant's reply submissions at paras 28–29.

25 Appellant's reply submissions at para 30.

17 The Appellant also maintains that it had no control over the drilling. The manner of drilling is entirely dependent on the drilling operator, taking into account his or her experience. Additionally, the drill bit used was made of tungsten, which should not have been able to penetrate pipes. This means that there was nothing anyone could have done to prevent the water mains in this case from being damaged.[26] The Appellant had already done what was needed to ensure that GIS and its employees heeded all instructions from the PUB.[27]

The Prosecution's case

18 The Prosecution essentially defends the District Judge's decision that the statutory defence in s 56A of the PUA is not made out. The Prosecution argues that the burden lies on the Appellant to make out the statutory defence. The statutory defence in s 56A of the PUA requires the offence committed by Gam and Parvez to have been done without the Appellant's consent or connivance, and also not be attributable to any neglect on its part.[28]

19 While the Prosecution accepts that any offence committed by Gam and Parvez was done without the Appellant's consent and connivance as it did not have actual knowledge, the Prosecution's position is that the Appellant has not shown that any such offence was not attributable to any neglect on its part.[29]

20 The Prosecution submits that the High Court decision of *Abdul Ghani*, which considered s 59(1)(*b*) of the Corruption, Drug Trafficking and Other

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26 Appellant's reply submissions at paras 39–50

27 Appellant's skeletal submissions at para 41.

28 Prosecution's submissions at para 18.

29 Prosecution's submissions at para 20.

Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("CDSA"), is helpful in interpreting s 56A of the PUA, particularly with regards to the phrase "attributable to any neglect".[30] According to *Abdul Ghani*, neglect is made out if the defendant (at [63]):

> (a) knows or ought to have known of the existence of facts requiring him to take steps within the scope of the functions of his role to prevent the commission of an offence; and
>
> (b) fails to take such steps.

Further, in determining whether an offence by a body corporate is "attributable to" any neglect on the part of its officer, any degree of attribution will suffice; it is not necessary to prove "but for" causation.[31] Applying the same approach to s 56A of the PUA, the Appellant would not be able to establish the statutory defence if it knew of facts requiring it to take steps which fell within the scope of its role to prevent damage to water mains and failed to take such steps.[32]

21 Here, the Appellant knew of facts requiring it to take steps which fell within the scope of its role to prevent damage to water mains, and there was evidence of a failure on its part to take such steps. As such, it is unable to discharge its burden of proof in making out the statutory defence under s 56A of the PUA. The Appellant's contracts with PUB and GIS obligated it to take steps to safeguard and avoid damage to water mains. The practice on the ground

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30 Prosecution's submissions at para 19–23.

31 Prosecution's submissions at paras 21–22.

32 Prosecution's submissions at para 23.

reflected this arrangement, with GIS's workers taking instructions from the Appellant on the drilling of boreholes.[33]

22 The Appellant was aware of facts requiring it to prevent damage to water mains:[34]

(a) First, by 30 January 2015, it was aware that there were water mains in the vicinity, with the PUB Plan indicating that only the approximate locations were provided.

(b) Second, the Appellant had the obligation under its contract with the PUB to identify the actual location of water mains in the vicinity before commencing drilling.

(c) Third, by 15 March 2015, the Appellant knew that Parvez had encountered an obstruction while drilling at a depth of approximately 6.5m.

(d) Fourth, the Appellant had sight of a fire hydrant which was at a different alignment vis-à-vis the borehole from what was shown in the PUB Plan, which would have demonstrated that the locations of the water mains on the PUB Plan were only approximate, and could not be taken literally.

Given the circumstances, the Appellant should have located the existing water mains. There was no evidence to show that the water mains were difficult to locate or that it was unreasonable to do so. Alternatively, the Appellant should

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33 Prosecution's submissions at paras 24–26.

34 Prosecution's submissions at para 27.

have consulted with the PUB between 30 January 2015 and 16 March 2015. Instead, the Appellant took the risk by commencing drilling on 30 January 2015 without checking for the location of the water mains.[35]

23 Furthermore, upon learning that Parvez had encountered an obstruction while drilling in a location known to contain water mains, the Appellant could have dug a trial hole or trench to determine the nature of this obstruction, or contacted the PUB.[36] It took a risk by instructing that drilling be done at the Offset Location, which was arbitrarily set, with no evidence adduced to show how it had been determined.

24 There was no evidence to show that any consultation with BV/AECOM had occurred. The Appellant's incident notification report showed that it had merely informed BV/AECOM about drilling at the Offset Location. Even so, the responsibility for locating existing water mains lay on the Appellant, not BV/AECOM.[37]

25 The fact that Parvez was instructed to dig a trial pit at the Offset Location and to be careful was not sufficient to satisfy the statutory defence as the water mains had not been identified or located.[38]

26 On the whole, the Appellant has not put forth any evidence to justify overturning the District Judge's finding that the Appellant could not invoke the

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35 Prosecution's submissions at para 28.

36 Prosecution's submissions at para 29.

37 Prosecution's submissions at paras 34–36.

38 Prosecution's submissions at para 40.

statutory defence in s 56A of the PUA as it has not shown that the damage caused was not attributable to its neglect.[39]

The Decision

27 The remittal to this Court was only in respect of the statutory defence under s 56A of the PUA. This court cannot revisit other aspects of the case, which have been disposed of by the Court of Appeal in its decision.

28 Considering the submissions and evidence, I am of the view that the Appellant has not made out its defence, and accordingly the charge was made out. Given that neither party has appealed against sentence, there is no reason to disturb the sentence imposed by the District Judge.

Analysis

29 The analysis will consider: (a) the relevant statutory provisions; (b) the proper construction of the phrase "attributable to any neglect"; and (c) its application to the facts.

The statutory provisions

30 The primary provision which features in this case is s 56A of the PUA, which reads:

> **56A**. Where an offence under this Act is committed by any person acting as an agent or employee of another person, or being otherwise subject to the supervision or instruction of another person for the purposes of any employment in the course of which the offence was committed, that other person shall, without prejudice to the liability of the first-mentioned person, be liable for that offence in the same manner and to the

[39] Prosecution's submissions at para 42.

> same extent as if he had personally committed the offence unless he proves to the satisfaction of the court that the offence was committed without his consent or connivance and that it was not attributable to any neglect on his part.

The effect of s 56A of the PUA is to impose secondary liability on any person who supervises or instructs a primary offender for the purposes of any engagement, regardless of whether or not there is a contract of service: *Soil Investigation (CA)* at [35]. Such liability can only be avoided if the secondary offender can establish two conjunctive requirements on a balance of probabilities: (a) that the primary offence was committed without the secondary offender's consent or connivance; and (b) that the primary offence was not attributable to any neglect on the part of the secondary offender.

31 In the present case, the primary offence allegedly committed was the damage caused to water mains, contrary to s 47A(1)(*b*) of the PUA. At the time of the alleged offence in 2015, that section read as follows:

> **47A.**—(1) Any person who, whether wilfully or otherwise, removes, destroys or damages or causes or permits to be removed, destroyed or damaged, any water main belonging to or under the management or control of the Board, shall be guilty of an offence and shall be liable on conviction —
>
> …
>
> (*b*) if the water main is 300 mm or more in diameter, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding 3 years or to both.

The primary offence is thus committed so long as damage is caused to a water main of 300 mm or more.

32 It is common ground that the primary offence here was committed without the consent or connivance of the Appellant. There is no allegation that the Appellant was aware that damage would be caused.

33 The question then is whether the Appellant can establish that the primary offence was not attributable to any neglect on its part. The onus lies on the Appellant to make out the absence of neglect (see [30] above).

Attributable to neglect

34 The focus of the appeal is now on whether the Appellant can prove on a balance of probabilities that the primary offence committed by Gam and Parvez was not attributable to its neglect.

35 *Abdul Ghani* was cited by the Prosecution as the guiding authority on the interpretation of the statutory defence in s 56A of the PUA. The accused person, who was the resident non-executive director of a company, faced charges under s 47(1)(*b*) punishable under s 47(6)(*a*) read with s 59(1)(*b*) of the CDSA for the company's transfer of stolen moneys out of Singapore being attributable to his neglect as its officer. The accused person had assisted in incorporating a number of companies in Singapore on behalf of foreign acquaintances and acted as their resident director since their other directors were not ordinarily resident in Singapore. The accused person assisted in setting up bank accounts for one of these companies, WEL. There were certain warning signs which came to the attention of the accused person, the most important being that one of the companies was being investigated for money laundering. Eventually, numerous deposits and withdrawals took place in one of WEL's bank accounts, a number of which were eventually determined to be of stolen moneys.

36 WEL was proved to have committed an offence under s 47(1)(*b*) of the CDSA by transferring the benefits of criminal conduct out of Singapore. The

accused person was convicted as a secondary offender under s 59(1)(*b*) of the CDSA, which reads:

> **Offences by bodies corporate, etc.**
>
> 59.—(1) Where an offence under this Act committed by a body corporate is proved —
>
> (a) to have been committed with the consent or connivance of an officer; or
>
> (b) to be attributable to any neglect on his part,
>
> the officer as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

In finding that the offences committed by WEL were attributable to the neglect of the accused person, Chan Seng Onn J adopted the following approach to s 59(1)(*b*) of the CDSA (at [63]):

> To prove neglect, it must be shown that the officer knew or ought to have known of the existence of facts requiring him to take steps which fell within the scope of the functions of his role to prevent the commission of the offence by the company, and that he failed to take such steps. In assessing the state of his knowledge and the scope of action which he allegedly neglected to perform, the functions of his office will be a relevant consideration. The more remote his office from the facts surrounding the offence, the more difficult it is to infer that the officer was negligent, and hence stronger evidence would be required of the Prosecution.

Chan J's approach in *Abdul Ghani* calls for a consideration of the accused person's functions within the company which committed the primary offence. The closer the accused person's functions are to the facts of the primary offence, the easier it will be for the Prosecution to show that the officer failed to take steps falling within the scope of his functions to prevent the commission of the primary offence. On the facts of *Abdul Ghani*, even though the accused person was a non-executive director, he was still subject to duties imposed on directors by the common law and statute (at [65]). The numerous warning signs relating

to WEL's activities ought to have put the accused person on notice, and his failure to take any active steps to investigate or adopt preventive action meant that the CDSA charges were proven beyond a reasonable doubt (at [64]–[78]).

37 The statutory language in s 56A of the PUA and s 59(1)(*b*) of the CDSA are certainly similar. Both provisions impose secondary liability on an accused person for an offence committed by another. That being said, two observations are pertinent. First, an offence under s 59(1)(*b*) of the CDSA must be proven beyond a reasonable doubt (*ie*, that the primary offence was attributable to neglect on the part of the officer). This is in contrast to s 56A of the PUA, which places the burden of proof on the secondary offender to show that on a balance of probabilities, the primary offence committed by someone under its supervision or instruction was not attributable to its neglect. Second, the *Abdul Ghani* approach is concerned with the actions of officers of a body corporate. This would appear narrower than s 56A of the PUA, which is not dependent on the accused person holding any post or office in the primary offender. The basis for imposing criminal liability under s 56A of the PUA, in contrast to s 59(1)(*b*) of the CDSA, is the ability of the secondary offender to supervise or instruct the primary offender (whether such ability arises out of an agency, employer-employee or other relationship).

38 To my mind, these differences make it such that the *Abdul Ghani* approach, while a useful guide, cannot be directly transposed to offences under s 56A of the PUA. Rather, certain amendments should be adopted to address the specific statutory provision at hand.

39 In determining whether secondary liability ought to be imposed under s 56A of the PUA, the court analyses whether, upon consideration of the entire context, the primary offence committed was attributable to any neglect on the

part of the alleged secondary offender. In ascertaining the relevant context, the focal points of the inquiry are: (a) the degree of supervision and instruction exercised, or which should have been exercised, by the alleged secondary offender over the primary offender; and (b) the facts which the alleged secondary offender knew or ought to have known about. This is similar to the approach adopted in *Abdul Ghani* in relation to s 59(1)(*b*) of the CDSA, where the functions of the office the alleged secondary offender holds in the company (*ie*, the primary offender) serve as a yardstick against which his actions are measured in determining whether the offence committed by the primary offender is attributable to his neglect (see [36] above). After all, neglect or negligence must be measured against some standard of what constitutes appropriate conduct.

40 In this regard, any contracts entered into between the primary and secondary offenders, as well as between them and other parties involved in the incident (*eg*, the PUB), would certainly form a key part of the context against which the court assesses whether a primary offence is attributable to an accused person's neglect. Such contracts would demonstrate: (a) the scope of the work to be completed and the degree of supervision or instruction exercised over the primary offender; and (b) the risks or dangers inherent in the project. That is not to say that any contracts would be determinative of the ambit of statutory obligations, accompanied by criminal consequences, imposed on a secondary offender. The breach of a private agreement cannot, without more, result in criminal liability, even if the other contracting party is a public utility.

41 The next step calls for a consideration of whether the alleged secondary offender has proven on a balance of probabilities that the primary offence committed was not attributable to any neglect on its part. This can be done by showing that reasonable steps were taken to avoid the harm which was caused

by the primary offence. In determining whether steps taken by the alleged secondary offender were reasonable, the relevant context (which would have been determined by this stage) is crucial. The evidence required for the statutory defence to be made out would inevitably be lower where the alleged secondary offender only exercises minimal supervision or instruction over the primary offender. In the same vein, more evidence is required of measures taken to guard against harm which the secondary offender knows or ought to know has a high risk of occurring.

Application to the facts

The relevant context

42 As mentioned above at [39]–[40], the first step in the inquiry is to ascertain the relevant context. Starting first with the degree of supervision and instruction, I am of the view that the Appellant clearly exercised a significant degree of control over the primary offenders in this case (*ie*, Gam and Parvez). Gam and Parvez were employed by GIS, a subcontractor engaged by the Appellant to drill some of the boreholes it was contractually obligated to drill under its contract with the PUB. Gam's evidence in the trial below was that he and Parvez were both subject to the instructions of Min, the Appellant's site coordinator.[40] This was corroborated by the Appellant's only defence witness at trial, Mr Tan Yong Beng, who conceded that GIS took instructions from the Appellant in drilling the Borehole.[41]

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40 ROP Vol 1 at pp 104–109.

41 ROP Vol 1 at p 238.

43 Taken together, the evidence establishes that the Appellant, through its employees Min and Yin, maintained a considerable degree of control over the actions of GIS's employees in drilling the Borehole, both at its original location and the Offset Location. Indeed, the uncontroverted evidence at trial was that it was Yin who directed drilling at the Offset Location by directing that an offset of 600mm be applied to the original drilling location.[42]

44 The Appellant contends that the instructions should be deemed to have come from Yin and Min (see [14] above), rather than the Appellant. As I understand it, the Appellant's argument is that Yin and Min exercised supervision and instruction over the primary offenders, rather than the Appellant. I am not persuaded by this argument. What must be considered in determining whether the defence is made out is whether the Appellant exercised the appropriate degree of supervision. In this context, as was noted by the District Judge in the GD at [19], GIS was employed by the Appellant as a subcontractor to carry out the drilling of boreholes. In the course of this arrangement, GIS was to take instructions from the Appellant. Yin and Min were employees of the Appellant tasked with instructing GIS and its employees on the drilling of the boreholes.[43] In the circumstances, I am of the view that the actions of Yin and Min are attributable to the Appellant for the purposes of determining whether a defence can be made out to the offence under s 56A of the PUA.

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42 ROP Vol 1 at p 138.

43 ROP Vol 1 at pp 133–134.

45 The evidence also shows that the Appellant would have been aware by the date of the incident (*ie*, 16 March 2015) that there was a risk of damage being caused to a water main. In particular:

(a) The Appellant's contract with the PUB stated that it would be responsible for the quality of all works undertaken. The contract also included specific terms as to how drilling was to be carried out to minimise the chances of damage to underground services (see [3] above).[44]

(b) On 30 January 2015, the Appellant was forwarded an email from the PUB which was sent to its cable detection worker, H H Tan. This informed that there were water mains in the vicinity of the works and had attached to it the PUB Plan and the "Dos and Don'ts" list. The locations reflected in the PUB Plan were stated to be only approximate, and the Appellant was directed to determine the exact location and depth of water mains by means of trial holes before the commencement of any work in the vicinity of the water mains.[45] The "Dos and Don'ts" list recommended: (i) using trial holes to identify the exact location of existing water mains; (ii) using pipe locaters with the assistance of valve chambers and hydrants to identify the location of existing water mains; and (iii) consulting with the PUB on the location of existing water mains.[46]

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44 ROP Vol 1 at p 413.

45 ROP Vol 1 at pp 449–452.

46 ROP Vol at p 453

(c) A nearby fire hydrant had a different alignment vis-à-vis the Borehole from what was shown on the PUB Plan.[47]

(d) On or about 15 March 2015, an obstruction was encountered at a depth of approximately 6.5m while drilling the Borehole in the vicinity of the water mains, which was brought to the attention of the Appellant's site coordinator and project manager.[48]

Whether the primary offence was attributable to the any neglect on the Appellant's part

46 I now turn to consider whether the Appellant has shown that the primary offence committed by Gam and Parvez was not attributable to its neglect. I am of the view that it has not.

47 The Appellant raises numerous measures which it claims to have taken to demonstrate that the statutory defence under s 56A of the PUA was made out (see [15]–[17] above). They may be summarised as follows:

(a) Consulting with the PUB-appointed consultant BV/AECOM on the Offset Location.

(b) Drilling at the Offset Location to ensure that drilling was conducted further away from any water mains shown on the PUB Plan.

(c) Adhering to the prevalent industry practice of digging a trial hole to a depth of 1.5m, before using a manual hand auger to a depth of 3m.

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47 ROP Vol 1 at pp 457–458, 471.

48 ROP at pp 107, 138.

(d) The manner of drilling was entirely dependent on the drilling operator and the drill bit used was made out of tungsten.

(e) Ensuring that GIS and its employees heeded all instructions from the PUB.

The Appellant also pointed to the fact that it would be absurd to require the Appellant to consult the PUB every time a trial hole is dug, and that the PUB Plans were inaccurate. To my mind, these facts do not go any way to assisting the Appellant in discharging its burden to make out the statutory defence on a balance of probabilities. At best, they simply form part of the context against which the Appellant's actions are assessed to determine whether reasonable steps were taken to avoid the harm caused by the primary offence.

48 The matters discussed above (at [45]) should have raised red flags that water mains or other underground structures were not necessarily in the locations that would have been expected from the PUB Plan, and that caution would have to be exercised. Given the degree of supervision and instruction exercised over GIS and its employees by the Appellant, I accept the arguments of the Prosecution that remedial steps ought to have been taken given the risk that water mains may run beneath the intended location of the Borehole. These steps would have included those that were raised by the Prosecution, namely to contact the PUB, and to discuss the matter with the PUB-appointed consultant BV/AECOM.[49] Indeed, if consultations had been held with PUB or its agents, and damage occurs thereafter, it would be hard I should think for it to be shown that there was neglect on the part of the Appellant. It is not necessary for the

[49] Prosecution's submissions at para 28, 34.

Prosecution to establish that such discussions would definitely have prevented the occurrence of the drilling which resulted in the primary offence. What these measures would have shown is that care was at least taken, which could reasonably have led to a different course of action, and thus some possibility of avoiding the harm caused.

49 The Appellant alleges that it had discussed with BV/AECOM about the Offset Location. However, the District Judge had found in the trial below that no such discussion had taken place (GD at [25]). The Appellant makes no argument other than to say that any evidence of a failure to consult with BV/AECOM is hearsay.[50] This misses the point completely. As pointed out by the Prosecution, the burden lies on the Appellant to prove that such discussions had taken place.[51] No witnesses had testified that these discussions had taken place. The documentary evidence, far from supporting the Appellant's case, in fact suggests that BV/AECOM was at most only informed, rather than consulted, of the decision to drill at the Offset Location.[52] In the circumstances, I am of the view that there is nothing suggesting that the District Judge's finding was against the weight of evidence.

50 The Appellant also argues that it took precautions by drilling at the Offset Location, which was further away from any water mains shown on the PUB Plan (see [16] above). Again, I do not think this is sufficient to discharge its burden of proof. Given the surrounding factual matrix, particularly the fact that an obstruction was encountered while drilling the Borehole on 15 March

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50 Appellant's reply submissions at paras 32–37.

51 Prosecution's submissions at paras 34–35.

52 ROP Vol 1 at pp 467–468.

2015 (see [45(d)] above), the Appellant should have proceeded with great caution. Drilling elsewhere would of course have been a possible step taken in response to this development, and may have been evidence that there was no neglect. But where the drilling is done is important. Consideration and assessment must be shown, such that the new location is established to be one with little or much lower risk of causing damage to water mains.

51 The steps taken by the Appellant were not sufficient. The Appellant decided to direct GIS to drill at the Offset Location, but the offset was done without physical checks. As mentioned above at [8], the Offset Location was determined simply by offsetting the original location of the Borehole by 600mm in the direction of a nearby Canal. There is no evidence to show that there was any consideration of whether this was an appropriate offset to minimise the risk of damage to water mains, and how the direction and other details were determined.

52 Turning next to the fact that the Appellant had adhered to industry practices in digging trial holes, I do not think that it is sufficient to make out the statutory defence. As a starting point, I would note that a particular practice may be negligent even if it is common: *Abdul Ghani* at [90]–[91]. However, what is more pertinent in this case is that the primary offence which the court is concerned with in the present case was caused by drilling at the Offset Location. That the Appellant may have taken appropriate measures in other respects is simply not relevant to the question at hand.

53 As for the Appellant's remaining arguments, I do not think that they take it very far. The statutory defence requires that the Appellant prove that the primary offence caused was not attributable to *any* neglect on its part. Given that the other evidence points to the Appellant having failed to take appropriate

steps to prevent the commission of the primary offence (see [46]–[51] above), I am satisfied that the Appellant has failed to make out the statutory defence under s 56A of the PUA.

54 At this juncture, I will also address some of the points raised by the Appellant. Much was made by the Appellant about the fact that the PUB did not possess information about the location of nearby water mains, with the PUB Plan reflecting incorrect locations.[53] But that is not a sufficient answer. While it does seem odd that the national agency responsible for the water system did not itself seem to know where the water mains were (and one would expect the PUB to know more than the Appellant), that is not the focus of the inquiry in the present case. The Appellant was the party on the ground supervising and instructing the primary offenders, and knew or ought to have known that there was a risk of damage being caused to a water main. As noted above, the Appellant failed to take reasonable steps to prevent the commission of the offence by the primary offenders.

55 The Appellant also refers to the impact an adverse decision would have. The argument appears to be that imposing liability in this situation would have an adverse impact on those involved in drilling. The counter to this would simply be that the consequences of such impact, such as increased cost in engaging such persons, or a dearth of such persons providing these services, would be a distinct matter from any culpability under the PUA. The determination of whether an offence was committed, including whether a defence is available, cannot be linked to the possible adverse consequences: if

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53 Appellant's reply submissions at paras 27–29.

on the proper interpretation, the criminal law requires the court to take a particular line, that line has to be taken.

56 These adverse consequences are not sufficient to compel the adoption of a less demanding interpretation of the provisions, overriding the clear meaning that should be given to the word 'neglect'. In any event, if such adverse consequences do come to pass, then that is a matter to be addressed by the legislature.

Conclusion

57 For the above reasons, I find that the Appellant has not made out the statutory defence under s 56A of the PUA.

58 On this basis, it would follow therefore that the original appeal, following the ruling of the Court of Appeal on the question of the culpability of the Appellant for the actions of the primary offenders, would have to be dismissed.

59 Given that neither party has appealed against the sentence, there is no reason to disturb the sentence of a $50,000 fine imposed by the District Judge.

Aedit Abdullah
Judge

Faizal Shah Bin Mohamed Haniffa, Vigneesh s/o Nainar and Khairul Ashraf Bin Khairul Anwar (Shah Eigen LLC) for the appellant;
Ang Feng Qian, Gabriel Choong and Jane Lim (Attorney-General's Chambers) for the respondent.
