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26. TORT LAW

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Conspiracy

26.1 There are two categories of conspiracy: (a) involving the use of unlawful means and proof of intention on the part of the defendant to injure the plaintiff; and (b) where there is an absence of unlawful means, but the defendant had a predominant, illegitimate purpose to harm the plaintiff. Both causes of action were pursued in *Trans Asian Shipping Services Pte Ltd v Pua Teck Ann*[1] and *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd*.[2] It is also not uncommon for a conspiracy claim to be initiated together with other economic torts as in *Leiman Ricardo v Noble Resources Ltd.*[3] Another important legal issue under the tort of conspiracy concerns the principle in *Said v Butt*,[4] relating to directors' personal liabilities for the company's breaches of contract.

26.2 In *Trans Asian Shipping Services Pte Ltd v Pua Teck Ann*, the plaintiff company, which provided shipping and logistics services, was a judgment creditor of a company of which the defendants were the shareholders and directors. It alleged that the defendants had conspired to cause loss to the plaintiff when they breached their fiduciary duties and dissipated the company assets, thereby depriving the plaintiff of the satisfaction of the judgment. After the company had ceased trading in 2011, it sold its fixed assets to a third party and made payments to the first defendant in discharge of the loans he had made to the company.

26.3 The plaintiff's suit was based on both unlawful means and lawful means conspiracy. According to the District Court, the act of the

1 [2018] SGDC 207.
2 [2018] 5 SLR 1.
3 [2018] SGHC 166. See para 26.39 below.
4 [1920] 3 KB 497.

defendants was one of undue preference in making the payments to the first defendant. This was characterised by the plaintiff as a breach of fiduciary duties. The claims in conspiracy were dismissed by the District Court on the following grounds:

> (a) The fiduciary duty was not owed by the defendants to the plaintiff but to the company.
>
> (b) Based on *Quah Kay Tee v Ong & Co Pte Ltd*,[5] allowing the conspiracy claim would
>
> > … defeat the very object of the liquidation regime which would permit the plaintiff recovery only *pari passu* along with other unsecured creditors upon liquidation of the company.
>
> (c) On the basis that there was no unlawful means, the predominant intention of the defendants in making the payments to the third parties was to benefit the first defendant and not to cause harm to the plaintiff. Hence, the case did not fall under lawful means conspiracy.
>
> (d) Even if the alleged undue preference constituted unlawful means, there was no loss to the plaintiff as the payments could be set aside on the application of the liquidator.
>
> (e) There was an absence of overt acts on the part of the second defendant contributing to the alleged conspiracy.

26.4 The most significant development for conspiracy (and inducement) to breach a contract concerns the principle in the English case of *Said v Butt*[6] that where a director acts *bona fide* within his scope of authority, he is immune from personal liability for procuring the company's breach of contract. The Australian High Court in *O'Brien v Dawson*[7] and the Newfoundland Court of Appeal in *Imperial Oil Ltd v C & G Holdings Ltd*[8] have approved the principle. Singapore courts in *Chong Hon Kuan Ivan v Levy Maurice*,[9] *Nagase Singapore Pte Ltd v Ching Kai Huat*,[10] *Ng Joo Soon v Dovechem Holdings Pte Ltd*[11] and *M+W Singapore Pte Ltd v Leow Tet Sin*[12] have also followed the principle. Yet, the precise scope and the basis of the principle remain to be clarified.

5 [1996] 3 SLR(R) 637 at [47]–[50].
6 See para 26.1 above.
7 (1942) 66 CLR 18.
8 (1989) 62 DLR (4th) 261.
9 [2004] 4 SLR(R) 801.
10 [2008] 1 SLR(R) 80.
11 [2011] 1 SLR 1155.
12 [2015] 2 SLR 271.

26.5 The Court of Appeal in *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd*[13] ("*PT Sandipala*") has now clarified that the principle in *Said v Butt* should exempt the personal tortious liability of directors for contractual breaches of their company (whether based on the tort of inducing breach of contract or unlawful means conspiracy) if their acts, in their capacity as directors, are not in themselves in breach of any personal legal duty owed to the company.[14] There were two reasons given by the court:

> (a) When a director acts in the exercise of his functions as a director within the scope of authority, he acts in the capacity of the company and not on his own.
>
> (b) There was a good policy reason to ensure that directors would not be unduly deterred by the fear of personal liability when they act in the company's interests.

26.6 The *Said v Butt* principle affects legal liability and is not the basis for a defence. Therefore, the plaintiff has the burden to prove that the defendant-directors were in breach of their personal legal duties to the company. The requirement of the director acting *bona fide* under the *Said v Butt* principle refers to the director acting *bona fide* in the discharge of his office as director of the company and not with regard to the third party (claimant). Hence, even if it is shown that a director acted with the predominant purpose to injure the third party (claimant), he may nevertheless be protected by the principle. On the facts, the directors of PT Sandipala were not personally liable in conspiracy under the *Said v Butt* principle as they were not in breach of their personal legal duties to PT Sandipala.

26.7 Another question raised by the Court of Appeal for further debate was whether the principle in *Said v Butt*[15] to exempt the personal liability of directors should likewise be extended to the commission of torts by the company. Extending the principle to torts generally would alleviate the concerns of directors who may otherwise have to bear personal liability for company torts. One reason for not extending the principle to torts, however, is the doctrine of privity of contract,[16] which differentiates the contractual relationship between the company and third party from that found in situations involving company torts

13 [2018] 1 SLR 818. See the review of the High Court decision (*PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2017] SGHC 102) in (2017) 18 SAL Ann Rev 698 at 706–707, paras 26.24 and 26.25.

14 See also Lee Pey Woan, "The Company and Its Directors as Co-conspirators?" (2009) 21 SAcLJ 409.

15 See para 26.1 above.

16 Lee Pey Woan, "Company and Its Directors as Co-conspirators" (2009) 21 SAcLJ 409 at 427–428.

generally. Where a contract is entered into between the company and the third party, the latter would typically look to the company for recourse in the event of a breach; in the ordinary situation involving company torts, however, the third party and the company may well be strangers prior to the alleged tort.

26.8 This recent interpretation of the *Said v Butt* principle in *PT Sandipala* above was applied in the subsequent case of *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*.[17] This case arose from disputes between parties to a joint venture between the respondents (plaintiffs) and the SAA Group (comprising five individuals, including the defendant-appellants) ("SAA") to develop and operate a site. It was envisaged that the successful bidder for the lease of the site by the Singapore Land Authority would grant a subtenancy to the joint venture companies. The disputes led to two legal actions, whereupon a consent order was entered into by the respondents and the appellants (which included Tan CB and Tan Senior) in relation to the investigations into the financial affairs of the joint venture companies and the submission of a report by the KPMG entities that were engaged to supervise the bidding exercise. Under the consent order, SAA was obliged to grant subtenancies to the joint venture companies.[18]

26.9 One of the appellants, Tan CB, was in breach of his fiduciary duties to act in the best interests of SAA. Hence, Tan CB was not protected by the *Said v Butt* principle and was liable under both the tort of conspiracy by unlawful means and the tort of inducing breach of contract. Tan CB subjectively knew that SAA would be in breach of a consent order (which is an order of the court). Further, the consent order was the culmination of years of litigation between multiple parties to arrive at a settlement.

26.10 The Court of Appeal agreed with the High Court's findings. First, Tan CB had combined with other persons to injure the respondents. Second, he intended to cause injury to the respondents. Tan CB subjectively intended and knew that by deciding that SAA would not grant the subtenancies to the JV Companies in breach of the consent order, this would cause the respondents to either (a) overbid for the joint venture companies' share held by SAA; or (b) be deprived of the opportunity to participate in the development and operation of the site and be unable to obtain fair value for their shares in the joint venture companies. The breach of the consent order constituted a breach of contract and amounted to "unlawful means". Further, Tan CB

17 [2018] 2 SLR 655.

18 More detailed facts and the holding of the High Court in *Yeo Boong Huat v Turf Club Auto Emporium Pte Ltd* [2018] 3 SLR 806 may be found in (2017) 18 SAL Ann Rev 698 at 702–703, paras 26.13–26.17.

was liable for the tort of inducing breach of contract by procuring the breach of the consent order by SAA.

26.11 Although Tan Senior had formally relinquished his position as shareholder and director of SAA and/or JV Companies, he remained involved in substance and was liable for both the tort of conspiracy with Tan CB and the tort of inducement of breach of contract in relation to the breach of the consent order by SAA. Koh KM was liable under the tort of conspiracy based on his non-disclosure of the 2007 head lease to the respondents and/or KPMG entities (which constituted a breach of the consent order) as the "means" by which he "actively" participated in the conspiracy to injure the respondents.

26.12 The following cases are mentioned briefly for completeness. In *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd*,[19] the claim in unlawful means conspiracy, which relied on breaches of an agreement, failed as there were no breaches or any combination of parties to commit the alleged breaches. Further, with respect to the lawful means conspiracy claim, there was no evidence of any predominant purpose by the alleged conspirators to injure the claimant.[20] In another case, *Yuanta Asset Management International Ltd v Telemedia Pacific Group Ltd*,[21] the claim in unlawful means conspiracy failed due to the insufficiency of pleadings. Finally, there was no underlying breach of confidence amounting to unlawful means according to the High Court in *International Financial Services (S) Pte Ltd v Old Mutual International Isle of Man Ltd Singapore Branch*.[22]

Conversion

26.13 In *Sea-Shore Transportation Pte Ltd v Technik-Soil (Asia) Pte Ltd*,[23] Sea-Shore Transportation Pte Ltd ("Sea-Shore") sued Technik-Soil (Asia) Pte Ltd ("Technik-Soil") to claim for unpaid rent for the use of Sea-Shore's premises to store its equipment. Technik-Soil counterclaimed in the torts of conversion, detinue and negligence as well as breach of contract on the ground that Sea-Shore had sold or removed the equipment stored at the premises without Technik-Soil's consent.

19 *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd* [2018] 5 SLR 1 at [361].
20 *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd* [2018] 5 SLR 1 at [364].
21 [2018] 2 SLR 21 at [152].
22 [2018] SGHC 127.
23 [2018] SGHC 231.

26.14 The High Court held that Sea-Shore was liable in conversion as it had no right to sell the equipment to discharge the outstanding debt. Though Technik-Soil had sent a letter to Sea-Shore to request for time to relocate the equipment, failing which Sea-Shore could scrap Technik-Soil's equipment, the learned judge observed that Sea-Shore did not accept the proposal stated in the letter. Further, Sea-Shore's subsequent conduct in scrapping the equipment and allowing Technik-Soil to continue storing the equipment without charging further rental was inconsistent with such right to sell the equipment.

26.15 With respect to the quantification of damages, Technik-Soil could not prove the quantity and value of the equipment sold. It could not identify the items that were converted largely due to its failure to keep proper records of equipment at the premises. Audrey Lim JC referred to the principle in *Armory v Delamirie*[24] that an evidential presumption may be made in the claimant's favour if the defendant has made it difficult or impossible for the claimant to adduce relevant evidence.[25] Notwithstanding, the learned Judicial Commissioner did not feel there ought to be an evidential presumption raised against Sea-Shore as there was no evidence it had wilfully sold the equipment or refused to produce them to prevent Technik-Soil from giving evidence. Thus, Technik-Soil remained the party responsible to prove the specific equipment converted and the value thereof. As it failed to do so, reference was made by the Judicial Commissioner to other evidence, namely, the price paid to Sea-Shore by the purchaser for the equipment at the time of the tort.

Deceit

26.16 In *Nurlinda Lee @ Lee Beng Hwa v Doktor Kereta Pte Ltd*,[26] the plaintiffs (purchasers of a second-hand Mercedes) alleged that the defendant (a second-hand car dealer) had made a misrepresentation that the Mercedes had travelled 115,000km as at 27 July 2016 ("the mileage representation"). District Judge Chua Wei Yuan opined by reference to several case authorities[27] that the display on a vehicle for sale with an odometer reading, intending that the vehicle be inspected by prospective buyers, amounts to a representation that it has travelled

24 (1722) 1 Stra 505; (1722) 93 ER 664.

25 See also *Browning v Brachers* [2005] EWCA Civ 753 at [210] (in assessing lost chances in negligence suit against lawyers); *Glenbrook Capital LP v Hamilton* [2014] EWHC 2297 (Comm) at [42]–[44]; and *Murphy v Overton Investments Pty Ltd* [2004] HCA 3 at [74].

26 [2018] SGDC 188.

27 See, *eg*, *Given v C V Holland (Holdings) Pty Ltd* (1977) 15 ALR 439 (FCA); *Hollis v PH and D Stephens Investments Pty Ltd* Case No BC8501344 (FCA) (1985) (unreported); *Brown v Southport Motors Pty Ltd* (1982) 43 ALR 183 (FCA).

that distance. Further, there was *prima facie* evidence that the defendant caused the odometer to be tampered with and would therefore have known that the reading was false. Thirdly, the defendant intended to induce potential buyers to buy the Mercedes on the faith of the mileage representation. District Judge Chua referred to the Court of Appeal decision in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve*[28] which cited Assoc Prof Pearlie Koh[29] that in the case of fraudulent misrepresentation, a presumption of inducement applied, unless rebutted by the representor.

26.17 Based on the above, District Judge Chua held that the plaintiffs had established a *prima facie* case for summary judgment whilst the defendant had failed to raise a *bona fide* triable case. Interlocutory judgment was therefore granted with damages to be assessed on the basis that the mileage representation was false and fraudulently made. District Judge Chua also granted the plaintiffs a declaration that the agreement has been validly rescinded.

Defamation

26.18 In this segment, the authors will examine two important High Court decisions flowing from disputes between subsidiary proprietors and management corporations in condominium developments. The disputes in each case led to defamatory statements being made about the propriety of conduct of a management corporation and subsidiary proprietor respectively. In another case, *Solomon Alliance Management Pte Ltd v Pang Chee Kuan*,[30] the defendant's counterclaim in defamation was dismissed as the plaintiffs' mere statement that the defendant's appointment as consultants to provide "professional services" had been "suspended" was not defamatory to begin with.

26.19 In *Gao Shuchao v Tan Kok Quan*,[31] the respondents – the chairman, treasurer and secretary of the management committee ("MCST") in a strata development – sued one of the subsidiary proprietors ("the appellant") in defamation. This arose from a decision by the MCST to impose a special levy on the subsidiary proprietors to alleviate the MCST's cash flow problems due to the failure of 13 subsidiary proprietors to pay arrears of contributions. The MCST had sued those subsidiary proprietors and subsequently received the judgment sum. During the annual general meeting ("AGM"), the

28 [2013] 3 SLR 801 at [42].
29 See Pearlie Koh, "Misrepresentation" in *The Law of Contract in Singapore* (Academy Publishing, 2012) ch 11 at para 11.071.
30 [2018] SGHC 139.
31 [2018] SGHC 115.

appellant stated that the MCST had deliberately concealed the receipt of the judgment sum or had misrepresented the facts at the AGM. The District Judge upheld the claim in defamation and awarded damages to the respondents.

26.20 On appeal, the High Court overturned the decision. Whilst the High Court agreed with the District Judge that the defamatory words at the AGM were uttered on an occasion of qualified privilege based on common interest concerning the special levy, there was a difference in opinion on the malice requirement. See Kee Oon J stated that the appellant was not reckless in his belief that the defamatory words he had spoken were true. The question here was whether the appellant ought to have enquired about the existence of further information which would go towards forming the basis of his belief about the truth or accuracy of the defamatory words. The learned judge opined that the appellant was not put on notice as to the existence of further information so as to form such a belief. In addition, a mere refusal to apologise does not necessarily mean he was reckless as to the truth of his statements.

26.21 The appellant was also not actuated by improper motives. The thrust of his case was that the imposition of the special levy was illegal or wrongful. The antagonistic and defiant tone used by the appellant did not lead to the conclusion that he had improper motives to avoid paying the special levy. His antagonism may have been due in part to the first respondent's rejection of the appellant's attempts to seek an explanation from the MCST.

26.22 There was, however, no defence of fair comment. Though the allegation concerning the deliberate concealment and misrepresentation constituted a comment, the defence failed as (a) a fair-minded person, according to the High Court judge, would not allege deliberate concealment and misrepresentation on the part of the MCST based on the lack of disclosure about the receipt of the judgment sums; and (b) the matter, being confined to the MCST and subsidiary proprietors, was not one of public interest. With respect to (a), the fair-minded person test did allow for prejudices and exaggeration and did not need to be based on reasonable inferences. The learned judge noted, however, that the allegations were more than mere exaggeration and that the appellant's view of the matter represented a "blinkered foregone conclusion" which closed off other plausible explanations of the MCST's conduct.

26.23 In the second case, *Ma Kar Sui Anthony v Yap Sing Lee*,[32] disputes arose between a subsidiary proprietor ("YSL") of a penthouse

32 [2018] SGHC 30.

unit with an existing roof terrace structure and the MCST of the condominium development. The roof terrace structure consumed gross floor area ("GFA") for the condominium development in accordance with the written permission from the Urban Redevelopment Authority ("URA") in 1996. YSL proposed in 2006 to make further structural additions (staircase enhancements works) to his unit. The MCST took the view that such enhancement works would consume additional GFA.

26.24 The allegedly defamatory statements were contained in a special edition newsletter released by the MCST in March 2007 that:

> (a) the subsidiary proprietors sought to "compel the management corporation to allow them to construct [additions and alterations] to their roof terrace or allow [additions and alterations] already constructed without authorisation from previous MCs, even when the same results in the use of GFA of [the condominium development]"; and
>
> (b) "if the unauthorised structures and alterations were allowed to continue in the penthouse/townhouse, the [subsidiary proprietors] of the penthouses/townhouse would have used GFA of [the condominium development] to the detriment of all other [subsidiary proprietors] and occupiers".

26.25 The District Court held that the natural and ordinary meaning of the statements were that:

> … YSL had brought pressure to bear on the MC so that he could wrongfully use GFA belonging to the condo for his penthouse alone. He was out to grab GFA belonging to the condo.

26.26 Three main points ensued from the High Court judgment. First, on the defence of justification, the District Court decided that it should fail as YSL's acts were not wrongful as long as he obtained permission from the planning authorities. See Kee Oon J disagreed, stating that YSL's actions in carrying out works on his property were indeed "wrongful". This was because authorisations were required, according to See J, to be obtained from both planning authorities and MCST. Although YSL had received the sanction from the planning authorities, he had not obtained authorisation from MCST. Thus, the defence of justification succeeded and the claim in defamation was dismissed.

26.27 The second point concerned the issue whether, given the existence of the defence of qualified privilege, fair comment and right of reply privilege, there was malice on the part of MCST to defeat the above-mentioned defences. The High Court was of the view that the members of the MCST (the defendants) believed in the truth of the statements published in the newsletter. They honestly and genuinely believed that the retention of the structures in a subsidiary proprietor's

unit would not be approved by the planning authorities if additional GFA was consumed. At the relevant time before the publication, there was already strong consensus amongst the subsidiary proprietors that legal action ought to be taken against those subsidiary proprietors with unauthorised structures in their units. They were also aware of a precedent case in which URA rejected an owner's proposal for works that consumed additional GFA due to the lack of consent from other subsidiary proprietors in the condominium project. Moreover, these members of the MCST had sought legal advice that the retention of unauthorised structures would consume additional GFA and affect the other subsidiary proprietors.

26.28 The third legal issue related to the counterclaim by certain members of the MCST against YSL. The District Judge had awarded $3,000 general damages for each of the counterclaimants but the High Court judge decided to intervene in the award of damages. See J considered certain factors for enhancing the amount of damages, namely, that the YSL's letters were disseminated to the residents of the condominium project for an extended period, his failure to apologise or retract the statements as well as the "vitriolic nature of the language used" indicating malice and his dominant motive to injure the appellants. As the two appellants were specially named in YSL's defamatory statements, they were each awarded $25,000 general damages whilst the remaining appellants were awarded $20,000 each.

26.29 In addition, See J also awarded aggravated damages of $10,000 against YSL payable to each of the appellants due to YSL's repeated allegations of the defamatory imputations, failure to apologise or retract the statements and persisting in his defence of justifications for a prolonged period.

Inducement of breach

26.30 There are four cases in this section involving a variety of contexts. The first involved competition between rivals in the online property classifieds space. The second concerned alleged inducement by shareholders of a company's breach of contract. The remaining two were employment-related cases – one based on a breach of confidence by former employees, and the other based on the employer's decision to deprive an employee of his shares and share options.

26.31 The plaintiff and defendant in *PropertyGuru Pte Ltd v 99 Pte Ltd*[33] were competitors in the business of providing online property classifieds. The plaintiff claimed that the defendant, in developing and

33 [2018] SGHC 52.

marketing a mobile application to allow cross-posting of property agents' listings from the plaintiff's website to the defendant's website, had induced property agents to breach the terms of the use of the plaintiff's website. This claim was eventually dismissed.[34]

26.32 The three requirements for an action in inducement of breach of contract are that (a) the defendant knew of the contract and intended the breach; (b) the defendant induced the breach; and (c) the contract was breached and damage was suffered by the plaintiff.[35] First, even if it could be assumed that the defendant began to induce the breaches of the terms of service from the point of launching the mobile application as stated in the statement of claim,[36] the pleadings did not identify the alleged breaches of contract. Secondly, the plaintiff did not provide evidence that the property agents had used the mobile application to reproduce the property listings in question on the defendant's website. Without this evidence, there was no proof of a "causal link" between the defendant's alleged act of inducement and the alleged breaches.

26.33 The second case *Bumi Armada Offshore Holdings Ltd v Tozzi Srl*[37] was an appeal from a decision of the Singapore International Commercial Court in *Tozzi Srl v Bumi Armada Offshore Holdings Ltd*.[38] The first appellant ("BAOHL") granted a right of first refusal to the respondent ("Tozzi") to supply topside process modules as part of a project to supply gas processing facilities. Subsequently, a subcontract was awarded by BAOHL to another party without giving Tozzi the opportunity to exercise its right of first refusal. The Court of Appeal regarded this right of first refusal as legally enforceable.

26.34 Tozzi also alleged that BAB (BAOHL's parent company) had induced BAOHL's breach of contract. For the claim in inducement of breach of contract, Tozzi would have to prove that BAB (a) acted with knowledge of the existence of the contract; and (b) intended to interfere with Tozzi's contractual rights.[39] In what circumstances can a parent company be held liable for inducing breach of contract by its subsidiary? The Court of Appeal opined that the owner or shareholder of a company could not be held liable for inducing breach of contract by that company if the actions in question merely involved the owner or shareholder

34 The other claim related to the infringement of copyright was also dismissed but the plaintiff recovered damages and obtained an injunction based on the breach of the terms of a settlement between the parties.

35 *M+W Singapore Pte Ltd v Leow Tet Sin* [2015] 2 SLR 271 at [88].

36 *PropertyGuru Pte Ltd v 99 Pte Ltd* [2018] SGHC 52 at [82].

37 [2019] 1 SLR 10.

38 [2017] 5 SLR 156. See review of the Singapore International Commercial Court decision in (2017) 18 Sal Ann Rev 698 at 717–718, paras 26.55–26.56.

39 *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407.

pursuing in good faith its own interest in its capacity as owner of, or shareholder of, that company.[40] The rationale for the proposition was to avoid a situation where the shareholder would have to choose between sacrificing his right of pursuing his self-interest *bona fide* as a shareholder and being liable for the company's breach of contract. Hence, in order to find liability for inducement of breach of contract, it must be shown that the parent company was pursuing an interest unrelated to (or possibly, in addition to) its capacity as owner of the shares in the subsidiary. It is also possible that a finding of lack of good faith would suffice. On the facts, however, there was no evidence to suggest that BAB (or BAB's employees) acted other than in good faith in pursuing its interest as an owner of BAOHL.

26.35 In the employment-related case, *Nanofilm Technologies International Pte Ltd v Semivac International Pte Ltd*,[41] there were concurrent actions by the plaintiff company against its former employees (second and third defendants) who had left the plaintiff to join the first defendant company. George Wei J found that the first defendant had infringed the copyright of the plaintiff in respect of certain (Semivac) drawings and that the second defendant had breached his contract with the plaintiff not to disclose confidential information and not to engage in other businesses. This review focuses on the claims for breach of confidence and the tort of inducement of breach of contract.

26.36 With respect to the claim for breach of confidence, the plaintiff had to prove that (a) the information possessed the necessary quality of confidence; (b) the information was imparted or received in circumstances giving rise to an obligation of confidence; and (c) there was unauthorised use to the detriment of the plaintiff. Wei J held that the second defendant had breached his duty of confidence to the plaintiffs in respect of certain technical design drawings which constituted confidential information. First, they were labelled as confidential and security measures were undertaken to prevent dissemination. The fact that the technical drawings were accessible to

40 See also *Stocznia Gdanska SA v Latvian Shipping Co (No 2)* [2002] EWCA Civ 889 ("*Stocznia*") at [132] (that the parent company would not be liable for inducement of breach of contract if it acted in its own interests as a parent company or had taken a formal decision as a shareholder of the breaching party). In this case, however, the parent company did not directly induce the contractual breach but did so only *indirectly* by *unlawful means* (in breaching its undertaking with a third party to keep the subsidiary company in funds to meet its responsibilities). Following *OBG Ltd v Allan* [2008] 1 AC 1 at [8], *per* Lord Hoffmann, the tort of inducement of breach of contract should be distinguished from the tort of causing loss by unlawful means; and the latter tort would be more appropriate on the facts in *Stocznia*.

41 [2018] 5 SLR 956.

third parties did not mean they were not confidential information.[42] Secondly, the second defendant was under a contractual duty of confidence based on the employment agreement. Thirdly, he breached his duty of confidence by passing the confidential information to the first and third defendants. The first defendant company was a knowing recipient of the confidential information and it used the drawings to create technical drawings for its customers. An injunction was therefore granted against the defendants in respect of the continued use of the plaintiff's technical drawings and to deliver up and forfeit them. The claim for damages for breach of confidence was subsumed under the award of statutory damages for copyright infringement.

26.37 On the claim for inducement of breach of contract, the third defendant admitted under cross-examination that he knew of the second defendant's contractual obligations not to disclose confidential information. Further, as he and the second defendant were colleagues employed by the plaintiff at or around the same period and would have been under similar contractual obligations, the third defendant knew that the second defendant was also contractually obliged not to engage in other businesses. Hence, the third defendant had intended for the second defendant to breach the contract with the plaintiff as a means to the end of establishing the first defendant company. The third defendant was the "driving force" behind the first defendant company. Subsequently, he persuaded the second defendant to join him in the company. Finally, the second defendant's contract with the plaintiff was breached. Thus, all the elements in the tort of inducing breach of contract in *M+W Singapore Pte Ltd v Leow Tet Sin*[43] were satisfied.

26.38 Wei J stated that the damages for the inducement of breach of contract were separate and distinct from the damages against the contract breaker.[44] Eventually, the learned judge made a nominal award of $15,000 as damages against the third defendant. Although the plaintiff had shown there was likely loss caused by the inducement of breach of contract, there was insufficient evidence to ascertain the magnitude of the loss.

26.39 *Leiman, Ricardo v Noble Resources Ltd*[45] also involved an employment-related dispute. Leiman (the first plaintiff) was formally employed by Noble Resources Ltd ("NRL") (the first defendant company). He was given shares and share options in Noble Group Ltd

42 See *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd* [2012] 4 SLR 36.

43 [2015] 2 SLR 271 at [88]. See para 26.4 above.

44 See *Gunter v Astor* (1819) 4 Moore CP 12.

45 See para 26.1 above.

("NGL") (second defendant company) as part of his remuneration. Both NRL and NGL were part of the Noble group. Leiman assigned his shares to a trust of which the second plaintiff was the trustee. Differences arose between Leiman and the defendant companies. NRL and Leiman entered into a settlement agreement in 2011 relating to Leiman's resignation from NRL and his severance benefits. The settlement agreement stated that Leiman's entitlement to the shares and their accrued dividends as well as the right to exercise the share options were conditional on Leiman not acting in any way to the detriment of Noble. Subsequently, the second defendant company's remunerations and options committee ("R & O Committee"), comprising certain board directors of NGL, decided that, as Leiman had approached other parties with a view to set up a competitor to Noble and had appointed persons to run Noble's sugar mills despite their previous fraudulent conduct and lack of expertise in the industry, the plaintiffs' exercise of the share options would not be approved.

26.40 The plaintiffs challenged the decision made by the R & O Committee and alleged that the defendants had procured that decision to deprive the plaintiffs of the shares and share options. In addition to applications for declarative reliefs, they claimed damages in respect of (a) a conspiracy by NRL and NGL based on unlawful means; (b) inducement of breach of contract by NGL and/or for interfering with NRL's performance of the settlement agreement; and (c) interference by NGL thereby causing loss to the trust by unlawful means. George Wei J found that the R & O Committee decision was valid and that they did not act arbitrarily, capriciously or in bad faith in the exercise of their discretion. As such, with respect to claim (a) in conspiracy, there was no unlawful means used by the defendants. Furthermore, the defendants did not intend to injure the plaintiffs but only to safeguard their own interests under the contract. The inducement of breach of contract claim in (b) also failed as there was no breach to begin with since the R & O Committee decision was valid. Similarly, the claim in (c) failed in the absence of any unlawful act.

Malicious prosecution (and abuse of process)

26.41 A series of legal actions between the developer and the management corporation relating to the right of way for residents to access the condominium development (Grange Heights) culminated in the Court of Appeal decision in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301*[46] ("*Lee Tat*") In the

46 [2018] 2 SLR 866. The relevant facts including the five legal actions and the holding in the High Court decision of *Lee Tat Development Pte Ltd v Management* (*cont'd on the next page*)

present action, Lee Tat claimed for damages against the MCST under the torts of malicious prosecution, abuse of process, malicious falsehood[47] and trespass.[48]

26.42 The main legal issue discussed in this section is whether the tort of malicious prosecution, which has thus far been applied to criminal proceedings, should be extended to civil proceedings in Singapore. The existing requirements of malicious prosecution in respect of criminal proceedings in Singapore are that the plaintiff must show that (a) he was prosecuted by the defendant (that is, the law must be set in motion against him on a criminal charge); (b) the prosecution was determined in his favour; (c) the prosecution was without reasonable and probable cause; and (d) the prosecution was malicious. There were two main English cases, namely, the Supreme Court decision in *Willers v Joyce (No 1)*[49] and the Privy Council decision in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd*,[50] which had decided by a narrow margin to extend the tort of malicious prosecution to civil proceedings.

26.43 In addition, there was a secondary issue of whether the tort of abuse of process should be recognised in Singapore. The sanctioned conduct in such a tort is essentially the use of court proceedings for the purpose of obtaining for the person who so uses it some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed. In England, the notable cases are *Grainger v Hill*[51] and *Gilding v Eyre*,[52] and in Australia, the High Court decision in *Williams v Spautz*.[53] The Court of Appeal in *Lee Tat* decided against extending malicious prosecution to civil proceedings and also against the recognition of the tort of abuse of process in Singapore.

26.44 The two English court decisions above relied on fairly old common law cases[54] to argue for the extension of malicious prosecution. The Singapore Court of Appeal observed that those common law cases mainly concerned the improper procuring of *ex parte* interlocutory orders to inflict damage to reputation and maliciously procuring the

Corporation Strata Title Plan No 301 [2017] SGHC 121 are described in (2017) 18 SAL Ann Rev 698 at 718–723, paras 26.58–26.76.

47 See paras 26.47–26.49 below.

48 See para 26.120 below.

49 [2016] 3 WLR 477.

50 [2013] 3 WLR 927.

51 (1838) 4 Bing NC 212.

52 (1861) 10 CBNS 592.

53 (1992) 107 ALR 635.

54 See, *eg*, *Savill v Roberts* (1698) 12 Mod Rep 208, *per* Holt CJ, and *The Walter D Wallet* [1893] PD 202.

arrest of vessels. Thus, whilst malicious prosecution with regard to these special categories of cases was recognised, the court held that the law should not be further extended.

26.45 The basis for the Singapore court's decision against extension of the tort to civil proceedings rested on both principle and policy. First, there was a material distinction between the effects and consequences of criminal prosecution *versus* civil proceedings. Unlike civil proceedings, criminal prosecutions are carried out by public authorities. This distinction remains even though it is recognised that a maliciously brought civil proceeding can cause significant economic and reputational damage. Second, the Court of Appeal was of the view that the concept of malice in malicious prosecution was uncertain, lending itself to a "subjective enquiry".[55] Third, allowing malicious prosecution in civil proceedings would be contrary to the notion of absolute privilege in defamation for statements made in judicial and quasi-judicial proceedings under existing law. Fourth, the extension might undermine the principle of finality of proceedings[56] and lead to the opening of the floodgates of litigation.

26.46 The Court of Appeal also treated the reasons for the purported tort of abuse of process as similar to the underlying rationales for the tort of malicious prosecution, namely, the need to respect the principle of finality and the desire not to create a chilling effect for genuine litigants. In addition to principle and policy, the *Lee Tat* decision may have been actuated by pragmatic considerations to pre-empt further litigation from this long-drawn episode between the management corporation and developer.

Malicious falsehood

26.47 In *Lee Tat*,[57] Lee Tat alleged that two of the MCST's statements in 1997 and 2007 were false and made maliciously. The 1997 statement asserted that the estate's owners had the right to use the road and that the residents could not give up the right to access as it was a valuable piece of land. The 2007 statement asserted that Grange Heights enjoyed convenient access from Grange Road.

26.48 The first question was whether the statements – which relied on certain judicial pronouncements relating to the right of way but which

55 *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] 2 SLR 866 at [99].

56 *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] 2 SLR 866 at [105].

57 See para 26.41 above.

decisions were subsequently overturned – were false when they were made. The Court of Appeal noted that the High Court judge's view that the statements were not false was consistent with the principle of finality "which requires that even erroneous decisions be given due effect".[58] Notwithstanding, the Court of Appeal decided it was not necessary to make a definitive ruling on this issue of whether the statements were false as the 1997 and 2007 statements, in their view, were not made maliciously to begin with.

26.49 The requirement of malice would be satisfied if the defendant, in publishing the words, was motivated by a dominant and improper intention to injure the claimant or did not honestly believe that the statement was true or had acted with reckless disregard as to the truth of the statement. The Court of Appeal held that there was no evidence of malice on the part of the MCST. One major reason was the existence of judicial pronouncements by the Court of Appeal in the 1992 and 2005 decisions, which stated or suggested that the Grange Heights residents were entitled to the right of way. As such, the evidence did not suggest that the MCST could not have had an honest belief in the truth of the statements.

Misfeasance in public office

26.50 In *Ten Leu Jiun Jeanne-Marie v National University of Singapore*,[59] various claims in breach of contract, tort of misfeasance in public office, tort of intimidation and negligence were raised. The plaintiff, who was a candidate for a Masters of Architecture (Research) degree, alleged that her National University of Singapore ("NUS") supervisor for her thesis had acted unprofessionally in plagiarising her work in relation to the supervisor's application for a research grant. Her complaints led to several communications between the plaintiff and the NUS office holders (including the vice provost) and even the setting up of an internal committee of inquiry ("COI") to look into the allegations. It transpired that the supervisor had acknowledged the plaintiff's research work in the grant application albeit without mentioning the plaintiff's name. Eventually, though the examiners passed the thesis, the plaintiff failed to comply with the subsequent procedural requirements for the award of the degree and her candidacy was terminated.

26.51 On the tort of misfeasance in public office, Woo Bih Li J opined, upon considering the cases of *Lines International Holding (S) Pte Ltd v*

58 *Royal Bank of Scotland NV, The v TT International Ltd* [2015] 5 SLR 1104 at [71].
59 [2018] SGHC 158.

Singapore Tourist Promotion Board[60] ("*Lines International Holding*") and *Three Rivers District Council v Governor and Company of the Bank of England (No 3)*,[61] that the act of the defendant had to be "deliberate". This was in line with the requirement in *Lines International Holding* that the act must have been done maliciously or with the knowledge that it was *ultra vires* the power of NUS. Inadvertent or negligent omissions would not amount to deliberate conduct.

26.52 In the present case, Woo J found that the alleged omissions of NUS to scrutinise the choice of the examiners based on the supervisor's recommendation or to disclose fully the COI's findings to the plaintiff that the supervisor did not fully comply with his duties did not amount to deliberate conduct. Moreover, the vice provost had *bona fide* made the decision to send the plaintiff's thesis for examination, which culminated in the examiners passing the thesis. The subsequent procedural requirements (including the submission of a form containing an intellectual property clause allowing NUS to reproduce her thesis) for the award of the degree highlighted to the plaintiff were prevailing requirements of the university, applicable to all other graduate students undergoing examination by thesis. Furthermore, the vice provost had genuinely believed that the other requirements (that the plaintiff accept the COI's decisions on the examination process and on the exoneration of the supervisor of plagiarism as well as that the plaintiff cease her e-mail protestations to the vice provost) ought to be communicated to the plaintiff.

26.53 There was no evidence of negligence on the part of any of the office holders at NUS to ground an action in the tort of negligence. The claim in intimidation failed as there was no evidence of any threat issued by NUS to the plaintiff which the latter had to comply with to her detriment.

Misrepresentation

26.54 *Ernest Ferdinand Perez De La Sala v Compania De Navegacion Palomar, SA*[62] involved a dispute within a family business. The appellant was one of the children of the scion of a family business who took over the management of the family business upon his father's death. The understanding was that the appellant would manage the business and assets for the family's benefit. At some point, other members of the family were involved as directors of the companies. The appellant and these other family members had a falling out, following which the

60 [1997] 1 SLR(R) 52.
61 [2003] 2 AC 1.
62 [2018] 1 SLR 894.

appellant transferred to himself certain shares, assets and moneys of the group of companies.

26.55 The group of companies sued the appellant to recover the assets and to seek a declaration that the assets belonged to the companies. The appellant argued that he was the sole and beneficial owner of the companies and their assets as he had bought out the other family members' shares. The appellant also sued the other directors for breach of fiduciary duties and dishonest assistance. The other directors sued the appellant for fraudulent misrepresentation, alleging that if he was the beneficial owner, he had fraudulently misrepresented that the assets were part of a "family legacy" and thereby had deceived them into assisting him in the management of the assets. The review here is restricted to the fraudulent misrepresentation claim.

26.56 The trial judge found the appellant liable for fraudulent misrepresentation, but this was overturned on appeal. The Court of Appeal found that the appellant's representation about the "family legacy" was not fraudulent because at the relevant time, a substantial portion of the assets were in fact for the benefit of family members. The appellant had genuinely considered the other directors as successors to him in managing the family assets, but changed his mind after the falling out. Thus, the Court of Appeal held that at the relevant time the representation was not false.

26.57 The plaintiffs in *Wibowo Boediono v Cristian Priwisata Yacob*[63] were Cristian Priwisata Yacob, his wife, Nila Susilawaty and Yacob's business partner, Denny Suriadinata. The defendants were Wibowo Boediono, his wife, Koh Teng Teng Isabelle and Boediono's father, Bodiono Kweh. The claims, made in two separate suits, involved various allegations of fraud. In the first suit, Yacob and Suriadinata alleged that moneys they had paid the defendants for the purchase of a car and to make payments toward joint property investments were misappropriated. In the second suit, Yacob and Susilawaty sued to recover an apartment they alleged was fraudulently transferred to Kweh. There were two additional defendants in this suit, namely, the solicitors acting for the defendants and plaintiffs respectively. The defendants argued that all the assets transferred were for payment of a debt owed by the plaintiffs to the defendants. The High Court found for the plaintiffs on all the issues.[64]

63 [2018] 2 SLR 481.

64 For a more detailed statement of the facts and findings of the High Court judge, see (2017) 18 SAL Ann Rev 698 at paras 26.107–26.114.

26.58 Judith Prakash JA (delivering the court's judgment) allowed in part the appeal by the Boedionoes with respect to the transferred moneys and apartment, and allowed in full the appeals by the solicitors. The appeals were allowed largely on factual grounds in that the Court of Appeal took a different view of the facts and evidence from the High Court judge. Prakash JA found that the High Court judge had erred in finding that Yacob did not owe Kweh a debt. Having found that there was a debt, Prakash JA went on to find that the money allegedly paid for the purchase of a car was in fact paid to settle the debt. However, the money paid for the investment was found to be independent of the debt and was in fact for a genuine joint investment. Thus, this part of the appeal was dismissed and Boediono was liable to repay the money to Yacob and Suriadinata. Prakash JA found that Koh was not a party to the joint investment and therefore not implicated in the fraudulent retention of the money. Koh's appeal was thus allowed.

26.59 On the transfer of the apartment to Kweh, the Yacobs alleged that their signatures had been procured through fraud or forgery. The High Court judge, holding that the Yacobs were entitled to plead in the alternative even though the two alternatives were contradictory, found that there was insufficient evidence to show forgery but sufficient evidence to show that the signatures had been procured by fraud. Prakash JA held that it was not open to the Yacobs to take directly contradictory positions without compromising their credibility. On the evidence, it appeared that Yacob had conceded that he had indeed signed the documents but was induced to do so by fraud. Susilawaty continued to maintain both positions. Based on the evidence and the inherent contradictions in the plaintiff's testimony, Prakash JA held that the plaintiffs had not proved that their signatures were obtained by fraud. Thus, the transfer was valid and the appeal on this upheld.

26.60 As there was no fraud with respect to the transfer of the apartment, the plaintiffs had suffered no actionable loss. Thus, the action in negligence against the two solicitors was unsustainable and their appeal was allowed. Prakash JA, however, went on to offer some *obiter* comments on three matters pertaining to solicitors' liability in negligence in such cases. The first concerned the application of the Legal Profession (Professional Conduct) Rules[65] ("PCR 2010") and Practice Directions 2008 ("PD 2008"). Together, these rules require solicitors to take reasonable measures to identify their clients before accepting instructions in order to detect potential money laundering or terrorist financing. The issue was whether solicitors could rely on notarial documents for identification purposes.

65 Cap 161, R 1, 2010 Rev Ed.

26.61 Prakash JA noted that the rules did not prohibit reliance on notarial documents unless there were red flags which should have alerted the solicitor. In such cases, the solicitor could not rely on the notarial documents, but had to take adequate measures independently to verify the identity and instructions of the client and the notary public. In this case, the notarial documents were all handled by the counterparties to the transaction that stood to gain the most. This should have raised red flags. The solicitors were thus negligent on the facts, but not liable as there was no actionable damage.

Negligence

Economic loss

26.62 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd*[66] involved a claim for pure economic loss arising out of a collision at Changi Airport Terminal 2. The second defendant, employed by the first defendant, negligently drove an airtug vehicle into a pillar in the baggage handling area of the building, causing damage to the floor of the transit lounge. The Building and Construction Authority issued a closure notice over the affected area, resulting in the plaintiff, a tenant operating a food kiosk in that vicinity, suffering losses. The plaintiff claimed for loss of profits and rental costs during the closure, as well as the cost of rebuilding the kiosk and replacing or repairing damaged equipment. The plaintiff conceded that its property had not been damaged physically. Thus, its losses were purely economic.

26.63 The trial judge had held that the defendant did not owe the plaintiff a duty of care, and in any case, that the loss was not caused by the defendant's negligence. The Court of Appeal, allowing the plaintiff's appeal in *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd*,[67] found that a duty existed on the *Spandeck* test and that causation was established on the facts. Steven Chong JA, giving the court's judgment, found that loss to the plaintiff was plainly foreseeable and there was a sufficiently close relationship between the parties. The plaintiff's kiosk was directly above the area where the collision occurred, making the parties physically proximate. There was causal proximity as the loss to the plaintiff flowed directly from the closure of the lounge area due to the accident. The defendant knew the plaintiff as a member of a determinate class (the occupiers of the damaged floor) would suffer economic loss. Chong JA also held that there were no policy considerations against finding a duty of care. There was no risk of

66 [2018] 4 SLR 762.
67 [2018] SGCA 41.

indeterminate liability and the argument that the plaintiff could have protected itself through insurance was not convincing.

26.64 On causation, Chong JA held that the defendant's negligence had caused loss of profits and damage to equipment, but that that it had not caused the loss related to the rebuilding of the kiosk and rental costs during the rebuilding period. The landlord, Change Airport Group ("CAG"), had initially advised the plaintiff to rebuild the kiosk in case there was damage to waterproofing membrane under the floor. However, CAG later informed the plaintiff that they could continue operating as long as a Qualified Person ("QP") or Professional Engineer ("PE") endorsed the safety and operational readiness of the kiosk. Thus, there was no need for the plaintiff to rebuild the kiosk. The plaintiff's decision not to seek a QP or PE to certify the kiosk and instead rebuild it broke the chain of causation.

26.65 The appellant in *Rohini d/o Balasubramaniam v HSR International Realtors Pte Ltd*[68] was the victim of fraud committed by her real estate agent. The respondent's real estate agent, an undischarged bankrupt, had gained the trust of the appellant and persuaded her to hand him four blank cheques which he assured would be used for her property purchase. Instead, he used the cheques to make payments to himself and a friend before absconding. The appellant was defrauded of over $800,000. She sued the agent and obtained judgment in default of appearance. She then sued the respondent alleging that the respondent owed her a duty of care, was vicariously liable for the agent's fraud or was liable as principal. The High Court found against the appellant, but the Court of Appeal allowed the appeal.

26.66 Andrew Phang Boon Leong JA, giving the court's judgment, found the respondent liable in negligence. The appellant argued that the respondent was negligent in appointing an undischarged bankrupt as its representative; failing to disclose his status as an undischarged bankrupt; failing to supervise him; and misrepresenting his status as a "Group Director". The respondent conceded that it owed a duty but argued that it was not negligent. On the first allegation, the respondent argued that there was no prohibition against appointing undischarged bankrupts at the time of the events. The restriction in the Estate Agents Act[69] came into force after the events giving rise to the claim. Phang JA held that the regulatory framework was not determinative of common law standards, and it could be negligent to appoint an undischarged bankrupt as it was foreseeable that such a person might be tempted to commit financial fraud.

68 [2018] 2 SLR 463.
69 Cap 95A, 2011 Rev Ed.

26.67 The respondent argued that it had a system in place to prevent fraud, and that the burden of disproving that lay with the appellant. Phang JA disagreed, holding that whether or not the respondent had an adequate system was a matter that was especially within its knowledge. Therefore, the legal burden of proving that there was an adequate system lay with the defendant under s 108 of the Evidence Act.[70] On the facts, the system that the respondent had in place consisted of ineffective advisories and notices warning its representatives against engaging in dishonest or fraudulent conduct. Although the respondent did advise clients to make cheques out to the respondent, this was clearly not enforced; indeed, there was evidence that the respondent even allowed representatives to receive cash from clients. Thus, the respondent was found negligent. Phang JA found the appellant 30% contributorily negligent for handing over the blank cheques.

26.68 The High Court in *Haw Wan Sin David v Sim Tee Meng*[71] examined the issue of when an agent may be personally liable for representations made on behalf of the principal. The plaintiffs (appellants) – two investors who purchased units in a residential project in New Zealand – claimed damages against a licensed estate agency (Faber), and the respondents, namely, Faber's sole shareholder and director (Jimmy Sim) as well as Faber's associate director (Belle Seah). The New Zealand developer did not have the title nor the resource consent to develop the land for the residential project. Moneys paid by purchasers such as the appellants were siphoned off from the New Zealand companies involved in the project. The appellants alleged that Jimmy Sim had (mis)represented that the respondents and Faber had performed checks on the ownership and legality of the project and conducted due diligence checks on the developer.

26.69 The District Court in *Haw Wan Sin David v Faber Property Pte Ltd*[72] allowed the appellants' claim against Faber but dismissed the claims against Jimmy Sim and Belle Seah. Lai Siu Chiu SJ disagreed with the District Court, holding that Jimmy Sim owed a personal duty of care to the appellants. Her Honour found that Jimmy Sim had spoken "directly and personally" to the appellants, that it should have been "obvious" to Jimmy Sim that the appellants might reasonably rely on his word as "a personal assumption of responsibility", and that Jimmy did not preface his statements with a disclaimer that he was speaking solely for the company rather than in his personal capacity.[73]

70 Cap 97, 1997 Rev Ed.
71 [2018] SGHC 272.
72 [2018] SGDC 143.
73 *Haw Wan Sin David v Sim Tee Meng* [2018] SGHC 272 at [83].

26.70 Lai SJ referred to *Animal Concerns Research & Education Society v Tan Boon Kwee*[74] in which the director was found personally liable and *Williams v Natural Life Health Foods Ltd*[75] in which the director did not assume personal responsibility for statements made in the company brochure (as there were no personal dealings between the director and plaintiff and no exchanges that conveyed the impression that the director was willing to assume personal responsibility). Lai SJ also cited a third case, *Su Ah Tee v Allister Lim and Thrumurgan*[76] ("*Su Ah Tee*"), in which the plaintiff's property agent (Ng Sing) was held to have personally assumed responsibility to the first plaintiff.

26.71 With respect to Belle Seah, Lai SJ applied *Su Ah Tee* as an "analogous" decision for the conclusion that Belle Seah, as property agent, owed a personal duty of care to the purchasers (appellants). However, her Honour decided that Belle Seah did not breach her duty as she did not misrepresent the content provided in the fact-sheets from Faber. She was acting as a "promoter", conveying statements that she had been trained to make by the business development manager from the Hong Kong real estate agency. She could reasonably expect the company providing the fact-sheet to have done its due diligence. She was not under a duty to verify the facts underlying the representations she was instructed to make.

26.72 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd*[77] was an interesting case both for its facts and the issues raised. Sun Electric Pte Ltd ("SE") was the first plaintiff and its subsidiary Sun Electric Power Pte Ltd ("SEP") was the second plaintiff. Menrva Solutions Pte Ltd was the first defendant and its sole director and shareholder was the second defendant. In 2015, the Energy Market Authority of Singapore ("EMA") established the Enhanced Forward Sales Contract Scheme ("the Scheme") to facilitate the participation of industry players in Singapore's electricity futures market as market makers. A participant would buy or sell a certain volume of electricity futures each trading day, a high-risk activity due to the volatility in the electricity futures market.

26.73 To mitigate their risk, participants entered into forward sales contracts ("FSC") with SP Services Limited ("SPS"). Under the FSC, participants would receive payment from SPS if the wholesale electricity price ("WEP") was lower than the vesting price of the liquefied natural gas ("LVP"). When the reverse happened with the prices, participants would pay SPS the difference. SEP became a participant of the Scheme. Its director and chief executive officer met the second defendant, whom

74 [2011] 2 SLR 146.
75 [1998] 1 WLR 830.
76 [2014] SGHC 159.
77 [2018] SGHC 264.

he wanted to engage as a consultant and advisor. By mutual agreement, they agreed to structure the consultancy agreement between SE and the first defendant, which was incorporated for the purpose of this consultancy. As the second defendant had started providing consultancy services prior to the incorporation of the first defendant, the parties by mutual agreement backdated the consultancy agreement with the first defendant.

26.74 As part of the arrangement, the first plaintiff was required to have a market making obligations and risk management partner ("MM Partner") to reduce the risks associated with being a participant in the scheme. The MM Partner undertook to make all payments to SPS when the price difference between WEP and LVP was against the participants. Where the price difference was in favour of the participants, the MM Partner would take 70% of the payment made by SPS. Soon after the Scheme was launched, EMA found the price volatility in the electricity futures market to be too great. To manage this, it introduced a cap on positive FSC payments and a floor to negative FSC payments as well as a global revenue cap. These changes significantly reduced risks and limited the participants' reward. One reason for the problems with the Scheme was that electricity suppliers deliberately undermined it by restricting supply to increase the WEP, causing losses to participants. To manage this volatility, participants entered into contracts for differences on the WEP ("CFDs").

26.75 The second plaintiff entered into seven such contracts and lost around $1.46m on six of them. SEP's director terminated the consultancy agreement and sued the defendants in contract and tort. The tort claim raised questions of the existence of a duty and whether it was breached. Applying the *Spandeck* test, Vinodh Coomaraswamy J found that the threshold foreseeability requirement was met. However, he found that there was no proximity between the defendants and the plaintiffs, and that even if there was a proximate relationship, policy considerations negated any duty of care.

26.76 Relying on *Hotel Royal @ Queens Pte Ltd v JM Pang & Seah (Pte) Ltd*[78] ("*Hotel Royal*"), the plaintiffs argued that the consultancy agreement created a proximate relationship. However, Coomaraswamy J distinguished *Hotel Royal* on the facts, noting that in that case the consultancy agreement was between the defendant and the plaintiff who had suffered loss. Here, the agreement was with the first plaintiff, which had suffered no loss, rather than with the second plaintiff, which had suffered the loss. Coomaraswamy J highlighted that the structure of the contract clearly showed that it was intended to exclude any duty owed

78 [2014] 3 SLR 967.

by the second defendant as well as any duty owed to the second plaintiff. Finding a duty of care would be wholly contrary to the contractual and corporate structure agreed to by the parties. Thus, the consultancy agreement did not establish proximity between the parties for the purposes of a duty of care.

26.77 Coomaraswamy J went on to look at other proximity factors, holding that there was no reasonable reliance on the facts nor voluntary assumption of responsibility. Interestingly, Coomaraswamy J took a subjective approach, holding that the plaintiffs had to prove directly or inferentially that the defendants had voluntarily assumed responsibility. To quote from the judgment:[79]

> A voluntary assumption of responsibility as conceptualised by *Hedley Byrne* [1964] AC 465 ('*Hedley Byrne*') is a term of art and not a turn of phrase. It means a contract minus only consideration. Because of its proto-contractual nature, a voluntary assumption of responsibility must be conscious and volitional. The question is thus whether a defendant, expressly or impliedly, *actually* assumed responsibility to a plaintiff to take care in performing the task in question such that the defendant's undertaking to do so would have amounted to a contract if the plaintiff had given consideration for it. [emphasis added]

26.78 This approach to voluntary assumption of responsibility may be narrower than that adopted in the UK where an objective approach is favoured. The question is not whether the defendant subjectively assumed responsibility, but whether the law would deem the defendant to have assumed responsibility through his or her conduct.[80]

26.79 The only indicators favouring proximity were that there was physical proximity and some causal proximity as the second plaintiff entered into the loss-making CFDs on the advice of the defendants. Finally, Coomaraswamy J held that policy considerations militated against a duty of care as any such duty would be wholly contrary to the corporate and contractual structure agreed to by the parties. Having found no duty, Coomaraswamy J nonetheless went on to examine the allegations of negligence, finding that the defendants had not been negligent on the facts. They had appropriately advised the plaintiffs to hedge against risk by entering into CFDs and had adjusted the hedging strategy appropriately.

26.80 For completeness, although this will be dealt with elsewhere in this Ann Rev, it bears noting here that Coomaraswamy J found in favour of the defendants in the counterclaim for repudiatory breach of contract

79 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [113].

80 See generally *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181.

and held that it would not be appropriate to lift the corporate veil to expose the second defendant to liability.

Medical negligence

26.81 *Armstrong, Carol Ann v Quest Laboratories Pte Ltd*[81] ("*Armstrong*") involved a dependant's action and survival of action claim brought by the wife of a deceased, who died as a result of medical negligence. In 2009, a doctor removed a piece of skin from a mole on the deceased's back and sent it to the first defendant for a pathology report. The second defendant was the pathologist who reported that the sample showed no signs of malignancy. Two years later, the plaintiff found swelling under his armpit and saw an oncologist who asked for the 2009 specimen to be reviewed by another pathologist, who in a report dated 30 January 2012 confirmed that the 2009 specimen was malignant. The second defendant examined a deeper section of the same specimen and confirmed the malignancy in a report dated 13 February 2012.

26.82 The plaintiff's and defendant's expert disagreed on whether the second defendant was negligent in preparing the first report. The defendant's experts were of the view that what was visible on the slide sample in 2009 was not sufficient to give rise to a diagnosis of malignant melanoma while the plaintiff's expert said it was. Choo Han Teck J held that the *Bolam/Bolitho* test was not helpful in this case as common sense dictated that the second defendant had been negligent. Choo J took the view that the cells were clearly not healthy, and a reasonable pathologist would have undertaken further tests before concluding on the malignancy or otherwise of the tissue.

26.83 Having found the defendant negligent, Choo J then went on to determine whether the negligence had caused the damage. This turned on the stage to which the cancer had progressed at the time of the negligence, which in turn predicted the likelihood of the deceased surviving had he been properly diagnosed and treated. The plaintiff's expert gave evidence that the likelihood of survival was anywhere between 68% and 80% while the defendant's expert put the likelihood of survival at below 50% (survival being defined as living for another ten years). Instead of making a finding on causation, based on the evidence and expert testimony, Choo J referred to loss of chance and appears to have elided the causation and assessment of damages inquiries.

81 [2018] SGHC 66.

26.84 Choo J referred to and rejected the majority views in the English and Australian authorities that had rejected loss of chance in medical negligence (*Gregg v Scott*[82] ("*Gregg*") and *Tabet v Gett*).[83] Instead, Choo J, expressing a preference for the dissenting opinion in *Gregg*, cited the opinion of Lord Diplock in *Mallet v McMonagle*[84] to support the recognition of loss of chance claims:

> The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards.

26.85 This statement is with respect to the assessment of damages, not causation of damage. Damages for future losses are always based on chance. Causation of damage is a question of fact, and as the quote above itself makes clear, "[i]n determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain". Loss of chance in medical cases becomes an issue only when the plaintiff cannot prove that there was a better than even chance of survival, but can prove that the chance of survival was reduced. For example, in *Gregg* the loss of chance was the difference between the original likelihood of survival (42%) when the cancer was missed and the likelihood of survival when the cancer was subsequently detected (25%). The claim was for a 17% loss of chance. *Armstrong* was not argued on the basis of loss of chance.

26.86 The deceased in fact died four years after the negligence. Choo J estimated that he would have lived twice as long had he been properly diagnosed. In terms of damages, the plaintiff set out four heads: the benefits the dependants would have received (the dependency claim); the loss of inheritance; the loss of appreciation in the value of the family home; and medical, funeral, out of pocket, and probate expenses as well as bereavement and pain and suffering (the estate's claims). The judge accepted the plaintiff's argument that the damages for loss of inheritance and dependence should be calculated separately. The dependency claim was based on the four years that were lost. The claim

82 [2005] 2 AC 176.
83 (2010) 240 CLR 537.
84 [1970] AC 170 at 176.

for loss of appreciation of the value of the home was rejected as it was based on the assumption that the deceased would have lived out his natural life up to 82 years of age. The estate's claim was also rejected for the same reason, although it seems that the estate should have received some compensation as the judge found that he would have lived for four years beyond his death. The loss of inheritance claim was allowed.

26.87 *Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd*[85] was another case involving missed diagnosis of cancer. The plaintiff first presented at the Changi General Hospital Accidents and Emergency ("A&E") department in October 2007, complaining of chest pain and shortness of breath. A chest X-ray showed an opacity in the right mid-zone of the plaintiff's chest. The A&E doctor referred the plaintiff to the hospital's respiratory department, which she visited two weeks later in November 2007. She was seen by the second defendant, a respiratory physician. The second defendant noted the opacity in the October 2007 X-ray and ordered a repeat X-ray, which he reviewed. He noted the opacity was resolving and concluded that there was no obvious nodule. He did not schedule a follow-up to confirm that the opacity had resolved, instead he gave the plaintiff an open date for follow-up if she felt unwell.

26.88 The plaintiff visited the hospital on a number of subsequent occasions. In April 2010, she was attended to by the third defendant at the A&E who ordered another X-ray in which he noted the nodule. After reviewing the plaintiff's history and consulting the senior consultant on duty, the third defendant concluded that the nodule was not clinically significant and discharged the plaintiff. In July 2011, the plaintiff returned to the A&E complaining of pain in the left region of her chest. The fourth defendant attended to her and ordered another X-ray. As he was focusing only on the left region, he missed the opacity in the right region of the chest. The plaintiff was discharged with painkillers.

26.89 In November 2011, the plaintiff went to Raffles Medical Clinic complaining of cough, breathlessness and blood in her sputum. An X-ray was ordered in December 2011 and the plaintiff referred to the respiratory physician who ordered further tests, including a computed tomography chest scan, which revealed a lesion. A biopsy was taken in February 2012 to establish a baseline histological correlation. That revealed that the plaintiff had lung cancer. She was diagnosed as Stage I. A lobectomy was carried out in March 2012, after she was diagnosed as Stage IIA. The cancer returned in 2014 and she was diagnosed as

85 [2019] 3 SLR 1063.

Stage IV. The plaintiff sued the first defendant (Changi General Hospital) and the doctors (second to fourth defendants) in negligence.

26.90 The plaintiff argued that the first defendant was liable in negligence for failing to have an adequate system in place, and that it owed her a non-delegable duty. Belinda Ang Saw Ean J left open the question whether a hospital owed its patients a non-delegable duty, holding that it was not necessary to resolve that on the facts as the first defendant accepted that it would be vicariously liable for the torts of its doctors. The plaintiff alleged that the first defendant was negligent in failing to have a system to report X-rays and failing to follow-up on abnormal radiological findings. Ang J disagreed, holding that although the first defendant did not report the X-rays back to the ordering doctors, it had an adequate system to report abnormal X-rays back to the relevant department, in this case the A&E for review by the senior doctor on duty. That was sufficient to discharge its duty. However, Ang J found the first defendant negligent in failing to provide the X-ray reports to the plaintiff for her own action to decide whether to return to the hospital for a follow-up or to seek a second opinion.

26.91 The second defendant was found to have acted reasonably in concluding that the opacity was resolving and was not something sinister. However, Ang J found the second defendant negligent for failing to arrange a follow-up with the plaintiff to ensure that the opacity had completely resolved. The alleged negligence against the third and fourth defendants was assessed in the context of A&E practice, which posed unique challenges. Ang J held that A&E doctors were to be judged by the standard *Bolam/Bolitho* test for negligence with respect to diagnosis and treatment. However, the realities of emergency medicine had to be taken into account. Some of the factors included the following:

(a) It is reasonable for A&E doctors to adopt a targeted approach, as their function is to deal with emergencies and not to undertake a general health screening.

(b) A&E doctors are nonetheless obliged to take proper medical histories of patients.

(c) A&E doctors generally have to make quick decisions and patients are likely to be seen by different doctors as they work in shifts and as part of a team.

(d) A&E departments have an over-representation of junior doctors, whose duty may be discharged by consulting their seniors.

(e) A&E doctors must be aware of their limitations and should refer patients to appropriate outpatient department for a more thorough diagnosis or advise patients to follow-up on incidental findings.

26.92 Ang J found that the third defendant had acted reasonably in referring the patient to the respiratory physician without personally following up. It was also reasonable for the third defendant to rely on the hospital's system to detect any abnormalities and ensure appropriate follow-up action. Finally, the third defendant consulted the senior doctor on duty to confirm his course of action. Referring to *Wilsher v Essex Area Health Authority*,[86] Ang J held that a junior doctor could discharge his or her duty by consulting the senior doctor. While this seems logical, it may create a dangerous situation in the A&E department where junior doctors refuse to take responsibility for their actions and pass the buck to the seniors, who will be overburdened in an already busy emergency environment. The fourth defendant was absolved of liability for similar reasons.

26.93 Although the plaintiff was successful in proving negligence against the first and second defendants, she failed to prove that their negligence caused her injury, in this case the loss of a better medical outcome. To succeed, Ang J held that the plaintiff had to prove that she had cancer when she consulted the doctors in 2007, 2010 or, at the very latest, 2011. If she did not have cancer by 2011, then the defendants' negligence could not be said to have caused her injury as they would not have delayed her diagnosis of cancer. The plaintiff's expert testified that where a nodule was detected, a patient should be managed on the assumption that the nodule was malignant in the absence of evidence that it was benign. Ang J held that the plaintiff had failed to prove that she had cancer prior to July 2011, and further held that the defendants had proved that the nodule was benign.

26.94 The finding that the defendant had proved that the nodule was benign until 2011 was based on the defendant's expert review of the medical records, the growth of the nodule, and the nature of the cancer. The plaintiff suffered from a type of cancer that was normally aggressive. This was inconsistent with the relative stability of the nodule from 2007 to 2011. The causation finding is a little troubling. As the plaintiff's expert put it:[87]

> It is impossible to state at any stage which of these lesions was a cancerous lesion. All we know is that there was a nodule there … [we] cannot state what the pathology was because *we didn't have the pathology at the beginning*. [emphasis added]

Basically, it was impossible for the plaintiff to prove that her nodule was cancerous because of the defendant's negligence in failing to detect it

86 [1987] 1 QB 730.

87 *Noor Azlin Bte Abdul Rahman v Changi General Hospital Pte Ltd* [2019] 3 SLR 1063 at [27].

early and to test it. It seems harsh for the plaintiff to fail on causation when the reason she could not provide causation was the defendant's failure to detect and test the nodule at the relevant time.

26.95 At the time of writing, the Court of Appeal reversed the High Court's decision, finding the first defendant liable in negligence.[88] Tragically, the plaintiff succumbed to the cancer shortly after that judgment.

Employers' liability

26.96 The plaintiff in *Alam Jahangir v Mega Metal Pte Ltd*[89] was employed by the defendant who ran a business of metal waste collection and recycling. A machine that separated aluminium cans from other metal cans stopped working when two cans became stuck in the space between the rollers. The plaintiff, without switching off the machine, reached into the space to remove the cans. His arm was caught and dragged into the machine, resulting in severe damage. the trial judge found the defendant negligent for failing to have fencing to prevent workers reaching into the rollers. As the switch was close by and the worker was experienced, the trial judge found that the plaintiff's conduct bordered on the reckless, and reduced damages by 50% for contributory negligence.

26.97 *Fan Zhaohong v Tay Liang Chuan*[90] involved a tragic accident when a migrant construction worker was electrocuted while volunteering at a temple function. His parents brought a dependency claim against the second defendant (the deceased's employer, who had organised the event) as well as against the first defendant, an independent contractor engaged by the second defendant to supply the tent, electrical installation, and tables and chairs. The deceased died when he was electrocuted while standing on a scaffolding. The District Judge found that it was most likely due to him coming into contact with exposed conductors on the electric cable laid by the first defendant.

26.98 The District Judge found that the first defendant owed a duty to the deceased and breached that duty by failing to take care in setting up the electrical installation. The death of the deceased was caused by the first defendant's negligence; therefore, the plaintiffs had a good cause of action under the dependency claim. The judge found that the second defendant as employer did not owe a duty of care as the deceased was acting in a voluntary capacity and not as an employee. Further, the

88 *Noor Azlin Bte Abdul Rahman v Changi General Hospital Pte Ltd* [2019] 1 SLR 834.
89 [2018] SGHC 198.
90 [2018] SGDC 234.

second defendant had engaged the first defendant to set up the tentage and electrical supply, and had no control over the set up. Hence, no duty was owed.

26.99 The plaintiff in *Karuppiah Kumar v Top Zone Construction & Engineering Pte Ltd*[91] was employed by the first defendant and sent to work for the second defendant as a construction worker. He claimed to suffer an injury to his hand at work and sued the first and second defendants. The District Judge dismissed the claim, holding that the plaintiff had failed to prove the injury was caused by the negligence of the defendants or even that it had occurred at the work place. The evidence of the plaintiff and his sole witness was found to be unreliable as there were discrepancies about the date the alleged incident occurred, how the work was carried out and what task the plaintiff was in fact instructed to carry out. Although the District Judge did not make a factual finding, he referred to a medical report in which the doctor who saw the plaintiff noted that the plaintiff had said that he had fallen at work and injured himself.

26.100 *Lee Swee Chon v Kiat Seng Metals Pte Ltd*[92] was a High Court decision by George Wei J involving a workplace accident. The plaintiff employee suffered injury to his leg, back and head when a heavy stack of aluminium sheets fell on him. The plaintiff was assisting a co-worker in retrieving a metal sheet from a stack leaning against the wall. The plaintiff supported the weight of the growing flipped stack of sheets as the co-worker flipped through the stack looking for an appropriate sheet. At some point, the weight was too much to bear and the stack fell on the plaintiff.

26.101 Wei J found the defendant negligent in failing to have a safety rack to support the aluminium sheets. The defendant argued that a forklift was provided to help with such manoeuvres and that the plaintiff should have utilised the forklift to bear the weight of the metal sheets. Referring to *Parno v SC Marine Pte Ltd*,[93] Wei J rightly noted that the duty of an employer to provide a safe system of work included guarding against carelessness or lapses by employees for their own safety. Wei J also reiterated that while the Workplace Safety and Health Act[94] ("WHSA") did not create a civil right of action, the standards set out in the legislation were relevant in determining whether the defendant was negligent.

91 [2018] SGDC 185.
92 [2018] SGHC 22.
93 [1993] SLR(R) 377.
94 Cap 354A, 2009 Rev Ed.

26.102 Having found the defendant negligent, Wei J then turned to the plaintiff's contributory negligence, finding that the plaintiff had clearly been contributorily negligent in failing to use the forklift and in failing to alert his employer to the need for a safety rack. In apportioning liability, Wei J again highlighted that the employer's duty included safeguarding the careless employee. The apportionment had to reflect this, and damages were reduced by 35% to reflect the plaintiff's contributory negligence.

Solicitor's liability

26.103 *Zhang Run Zi v Ascentsia Law Corp*[95] involved a plaintiff suing her solicitor for losses incurred as a result of a failed property transaction. The plaintiff signed an option to purchase ("OTP") for a property on 3 January 2007. On 5 January 2007, she met the defendant, her solicitor, to discuss another matter. At that meeting, she showed him the OTP and asked for his advice. The defendant highlighted two clauses that were potentially problematic, one being an agreement that the balance 4% deposit would be released to the vendors and another (cl 11) stating that the purchaser "has notice and knowledge of the road lines affecting the Property". At the same meeting, the plaintiff engaged the defendant to represent her in the purchase of another property, but not the property that gave rise to the dispute as she was content to handle that herself. The defendant, although not instructed with respect to the disputed property, advised her to carry out a property search herself.

26.104 On 24 January 2007, the plaintiff met the defendant again and asked him to exercise the OTP, which was due to expire at 4.00pm that day, within two hours of the meeting. The defendant urgently exercised the OTP and carried out a property search the following day. That search revealed that the property had been earmarked for road development and could pose a problem. The plaintiff, upon checking with the Land Transport Authority, discovered that the property was subject to compulsory acquisition by the Government. The plaintiff initially tried to extricate herself from the purchase. She then attempted to go through with the purchase, but failed to complete on time. The vendors sent several notices and demands through the defendant demanding that the plaintiff either complete the purchase or lift caveats placed on the property. The defendant conveyed all the notices to the plaintiff who steadfastly refused to give instructions.

26.105 Eventually, on 16 March 2007, the defendant discharged himself and instructed the vendor's solicitors to communicate directly with the

95 [2018] SGHC 183.

plaintiff. Despite this, communications continued between all parties until the vendors sought court orders to lift the caveats. The plaintiff sued the vendors for the return of her deposit, but failed in her action. She then sued the defendant, alleging that he was liable to her for breaches of contractual, tortious, fiduciary and statutory duties. The court found against the plaintiff on all allegations.

26.106 With respect to the negligence claim, See Kee Oon J held that no duty arose at the 5 January 2007 meeting as there was no solicitor–client relationship and the defendant had simply given her advice out of goodwill with no assumption of responsibility. The duty only arose from 24 January 2007 when the defendant was appointed. The defendant was not negligent in executing the OTP without conducting a full search as he had only two hours before the deadline. As such, he was justified in prioritising basic searches before conducting a detailed search the following day. See J found the various allegations of negligence made by the plaintiff about the failure of the defendant to advise her properly not to be credible. See J did highlight the importance of keeping contemporaneous notes of advice given over the telephone, which the defendant had failed to do. However, he accepted the defendant's testimony as to what advice he gave, as the defendant was credible and forthright.

Occupiers' liability

26.107 *Singapore Rifle Association v Singapore Shooting Association*[96] ("*SRA*") is a significant decision on occupiers' liability. The Singapore Shooting Association ("SSA") leased premises from Sport Singapore ("Sport SG") and allowed its member club, Singapore Rifle Association ("SRA") to use part of the premises, including the National Shooting Centre ("NSC") main building. Between 30 October 2013 and 1 December 2014, the premises underwent renovation. Sport SG engaged an independent contractor, HCJ Construction Pte Ltd ("HCJ"), to carry out the works. Sport SG and SSA handed over control of the premises to HCJ during this period of renovation. On 24 December 2014, the basement of the NSC main building was flooded, damaging SRA property stored there. On 3 May 2015, a second flood occurred. This did not cause any damage to property but SRA incurred some costs to clean out the premises. The cause of the flooding was a landslip due to a slope failure on the newly constructed embankment by HCJ. This prevented water from flowing away from the premises and instead allowed it to flow back into the NSC main building.

96 [2018] 2 SLR 616.

26.108 SRA sued SSA in negligence for the losses caused by the two floods. The High Court judge found that SSA had no control over the premises during the renovation period and consequently did not owe a duty to SRA during that period. However, upon regaining control of the premises on 1 December 2014, SSA as occupier of the premises came under a duty of care to SRA, a lawful entrant, in this case a licensee. The judge held that SSA had breached its duty by failing to check that the premises were safe after the renovation. SSA had simply relied on the assurances of Sport SG and did not independently make inquiries or carry out checks.

26.109 Having found SSA negligent, the judge nevertheless held that it was not liable for the first flooding. Even if it had conducted checks on 1 December 2014 and discovered the defects, it would not have been able to arrange rectification before the flood occurred on 24 December 2014. Thus, the plaintiff failed on causation in the manner of the plaintiffs in the classic case of *Barnett v Chelsea and Kensington HMC*.[97] SSA was, however, held liable for the second flooding.

26.110 SRA appealed against the High Court's decision with respect to the first flooding. The Court of Appeal dismissed the appeal. Chao Hick Tin SJ, giving the court's judgment, reaffirmed that the *Spandeck* test governed all areas of negligence and that the special rules for occupiers' liability no longer applied in Singapore following *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd*[98] ("*See Toh Siew Kee*"). In *See Toh Siew Kee*, Sundaresh Menon CJ and V K Rajah JA appeared to adopt slightly different approaches to the duty of care test. Rajah JA held that an occupier with control over the premises or activities on the premises would generally be held to owe a duty of care to lawful entrants. Menon CJ, while agreeing with the substance of Rajah JA's point, held that it was no longer necessary to distinguish between lawful and residual entrants, as the *Spandeck* test should be applied in all cases. Chao SJ, who was the third judge in *See Toh Siew Kee*, noted in *SRA*[99] that there was no real distinction between the views of Rajah JA and Menon CJ.

26.111 Turning to the particular issue in *SRA*, Chao SJ agreed with the High Court judge that the SSA had relinquished control over the premises during the renovation period and did not owe a duty of care to SRA. There was no relationship of proximity between the parties during that period. A duty did arise after SSA resumed control of the premises, as conceded by SSA itself. The High Court judge found that SSA had been negligent in failing to make proper inquiries or independent

97 [1969] 1 QB 428.
98 [2013] 3 SLR 284.
99 See para 26.107 above.

checks into the safety of the premises after the renovation, but Chao SJ disagreed, holding that SSA's duty was restricted to taking:[100]

> … reasonable care to eliminate any danger on the Premises that it actually knew or ought reasonably to have known about, and (contrary to what the Judge held) did not extend to include a duty to (among other things) conduct checks on the Premises' water drainage capability after the renovation works at the unlined drain, since it was common ground between both parties that the latter duty went beyond their pleaded cases.

26.112 If the scope of duty were restricted to dangers known or ought to be known purely because of the nature of the pleadings, that does not undermine the general principles of negligence. If the duty is restricted because the defendant is an occupier of the premises, then that risks reintroducing the special occupiers' liability rules. Chao SJ held that it was reasonable for SSA to rely on Sport SG without making any independent checks. That may hold true for the renovation period, but it should not be so after SSA regained control of the premises. There seems to be a conflation between the scope of duty and breach of duty. To be fair, Chao SJ concluded his discussion by saying that there was no breach of duty, rather than that there was no duty of care.

Road traffic

26.113 *Sim Tian Siang v Aw Yong Chyn Long*[101] involved a road traffic accident between a motor vehicle driven by the second defendant and a motorcycle ridden by the first defendant with the deceased riding pillion. The plaintiff was the deceased's husband, bringing the action as the estate's representative. The court found that the second defendant, driving on the right lane along the Pan Island Expressway, had suddenly cut into the left lane where the first defendant was riding. The first defendant applied the brakes and tried to avoid the collision but failed. The second defendant drove off and then provided an inaccurate statement to the police, laying the blame on the first defendant. Unfortunately, the first defendant, a Malaysian worker with minimal resources, pleaded guilty to a criminal charge.

26.114 Lai Siu Chiu SJ was rightly critical of the second defendant's conduct and found him 90% responsible for the accident, preferring the version of facts offered by the first defendant, corroborated by the

100 *Singapore Rifle Association v Singapore Shooting Association* [2018] 2 SLR 616 at [59].

101 [2018] SGHC 244.

objective evidence at the scene, including skid marks on the road. The first defendant was held 10% liable for failing to avoid the collision.

26.115 *Zou Rendao v Teo Chiew Yong*[102] involved a fatal accident in which a heavy vehicle ran into the deceased at an intersection. The plaintiff was the widower of the deceased, bringing a dependant's action. The deceased was walking with her grandson when he ran ahead of her. She tried to catch up and both ended up in the path of a bus driven by the defendant. The evidence showed that the defendant slowed down but did not stop at the stop sign. She failed to notice the child and the deceased and was unable to stop in time to avoid the collision. Liability was apportioned to account for contributory negligence, with the defendant 70% liable.

Remedies

26.116 In *Minichit Bunhom v Jazali bin Kastari*[103] ("*Minichit Bunhom*") the appellant, a foreign employee holding a work permit under the Employment of Foreign Manpower Act,[104] suffered injuries whilst he was travelling in a lorry negligently driven by the first respondent. The second respondent was the first respondent's motor insurer. The appellant's employer paid the medical expenses incurred by the appellant. The agreement between the appellant and his employer was that the appellant would claim the medical expenses from the first respondent and repay the employer. The agreement was on a non-recourse basis, meaning that the employer would have no claim against the appellant even if the appellant failed to recover the medical expenses from the first respondent. The legal issue was whether the appellant was entitled to claim his medical expenses as a head of special damages against the first respondent. Putting aside the statute in question, the appellant would ordinarily be entitled at common law to claim the medical expenses incurred.

26.117 The Employment of Foreign Manpower (Work Passes) Regulations[105] ("Regulations") obliges the employer to bear the costs of the foreign employee's medical treatment[106] as well as to purchase and maintain medical insurance for the foreign employee's in-patient care and day surgery.[107] The Court of Appeal held that these statutory

102 [2018] SGDC 94.
103 [2018] 1 SLR 1037.
104 Cap 91A, 2009 Rev Ed.
105 Cap 91A, Rg 2, 2009 Rev Ed.
106 Employment of Foreign Manpower (Work Passes) Regulations (Cap 91A, Rg 2, 2009 Rev Ed) Fourth Schedule, Pt III, para 1.
107 Employment of Foreign Manpower (Work Passes) Regulations (Cap 91A, Rg 2, 2009 Rev Ed) Fourth Schedule, Pt IV.

obligations of the employer under the Regulations were not relevant to the legal issue of entitlement to claim medical expenses as between a victim and the tortfeasor. There was no evidence of parliamentary intention to treat a tortfeasor who committed a tort against a foreign employee more favourably than a tortfeasor who committed the tort against another person (who is not a foreign employee). It was also not logical for the statute to operate to the benefit of a third-party tortfeasor at the expense of the employer. Nor was it intended by Parliament that an employer had to bear the medical expenses of a foreign employee with no prospect of recovery where the medical expenses were occasioned by a tortfeasor. The case authorities cited may be distinguished on the basis that they dealt with the deductibility of wages or bonuses rather than medical expenses.[108]

26.118 Furthermore, there are adequate safeguards against double recovery. The agreement on a non-recourse basis between the appellant and the employer was such that the appellant would subsequently repay his employer should he successfully recover the medical expenses from the tortfeasor. There was also no evidence that the employer would profit from double recovery by making a claim on his insurance.

26.119 Subsequently, the District Court in *Sharma Gautam v Soh Cheow Tiong*[109] applied *Minichit Bunhom*[110] by allowing the plaintiff (an Indian national) – who was injured in a road accident whilst riding a motorcycle in the course of work due to the negligence of the defendant (a taxi driver) – to recover damages ($23,911.05) from the defendant. Further, as the plaintiff's employer had previously paid a sum ($21,406.01) for the plaintiff's medical expenses, the court also ordered that the sum of $21, 406.01 be paid over to the employer.

Trespass

26.120 The question in *Lee Tat*[111] was whether the MCST was liable for trespass for the period between 24 December 2006 and 1 December 2008. Lee Tat (the developer) alleged that as Grange Heights residents had used the strip of land for access between Grange Heights and Grange Road up to 2008, MCST was liable in trespass. The Court of Appeal answered in the negative. The 2005 court judgment held that Lee Tat was estopped by the 1992 court decision from re-litigating the issue

108 See, for example, *Lim Kiat Boon v Lim Seu Kong* [1980] 2 MLJ 39; *Ong Jin Choon v Lin Hin Hock* [1988] 1 SLR(R) 559; and *Au Leong Wing Loong v Chew Hai Bun* [1993] 2 SLR(R) 290.

109 [2018] SGDC 175.

110 See para 26.116 above.

111 See paras 26.41–26.49 above.

concerning the right of way. Notwithstanding the subsequent court judgment in 2008 which held that the 2005 decision was wrong, the present Court of Appeal decided against allowing Lee Tat to reach back in time to establish trespass. Instead, it regarded the 2005 decision as the relevant decision upon which the parties could have ordered their affairs during the aforesaid period between 2006 and 2008.