NTUC Foodfare Co-operative Ltd
v
SIA Engineering Co Ltd and another

[2017] SGHC 250

High Court — Suit No 1251 of 2015
Debbie Ong J
23, 24 May; 21 July 2017

Tort — Negligence — Duty of care — Pure economic loss

9 October 2017 Judgment reserved.

Debbie Ong J:

Introduction

1 This claim arises from a collision of an airtug vehicle driven by the second defendant into a pillar at the underpass baggage handling area of the Changi Airport Terminal 2 Building ("T2 Building") on 13 February 2014. As a result of the collision, the cantilever portion of the floor of the Terminal 2 Transit Lounge on level two of the T2 Building ("the Transit Lounge") was damaged. The Building and Construction Authority ("the BCA") issued a closure notice over the affected area of the Transit Lounge from 14 February 2014 to 30 July 2014. The plaintiff was a lawful tenant of the Changi Airport Group (Singapore) Pte Ltd ("CAG") operating a food kiosk, Wang Café, which was situated in the affected area.

2 The plaintiff now sues in negligence to seek compensation for the following losses allegedly caused by the second defendant's negligent act:

Particulars of loss	**Quantum**
(a) Repair/replacement of damaged equipment	$5,909.85
(b) Loss of gross profits for the duration of BCA's closure notice (14 February 2014 to 30 July 2014)	$ 171,017.00
(c) Rebuilding of the kiosk	$82,838.33 (including GST)
(d) Rental from 7 August 2014 to November 2014 (pro-rated) (period of renovation of kiosk)	$183,429.89 (including GST)
Total losses allegedly incurred	$443,195.07

3 The plaintiff received a pay-out of $176,176.85 (which excludes a deductible sum of $750.00 paid by the plaintiff) from its insurers, NTUC Income Insurance Cooperative Ltd ("NTUC Income") in respect of items (a) and (b) above. The plaintiff purports to claim this sum of $176,176.85 for these two heads of loss on behalf of NTUC Income pursuant to NTUC Income's right of subrogation under the insurance policy. The plaintiff is claiming for itself the sum of $266,268.22 for items (c) and (d) above. In total, excluding the policy deductible, the plaintiff is claiming $442,445.07.

4 The second defendant is an employee of the first defendant and was driving the airtug vehicle as an employee of the first defendant when the accident occurred. It is not disputed that if the second defendant is found liable in negligence, the first defendant would be vicariously liable for his liability.

5 The defendants' core defence is that they do not owe a duty of care to the plaintiff. They characterise the plaintiff's losses as pure economic loss and argue that, on the applicable test for the duty of care in negligence, none of the indicia for proximity exist between the plaintiff and the defendants. If a duty of care is found to have been established, the defendants further raise issues of causation, remoteness and mitigation of damage. On the other hand, the plaintiff contends that it suffered economic losses consequent upon physical damage to the T2 Building and that there was sufficient physical, circumstantial and causal proximity to give rise to a duty of care.

Background

6 I briefly set out how the plaintiff's losses came to be sustained.

7 The Transit Lounge was located on level two in a part of the T2 Building overhanging the underpass baggage handling area where the second defendant was operating the airtug on a lower floor. It is common ground that the airtug collided into, and damaged, a column located at the underpass baggage handling area of the T2 Building. It is also common ground that the cantilever portion of the floor of the Transit Lounge was damaged. Part of the floor near the kiosk caved in. It appears that the damaged part of the floor was located next to the column into which the airtug collided on the lower ground. The BCA issued a closure notice over the affected area. CAG, which owned the T2 Building, sustained physical damage to their property. CAG's contractors carried out rectification works to ensure that the structural integrity of the T2 Building was safe. Upon completion of these rectification works, BCA inspected the T2 Building and lifted its closure notice on 30 July 2014.

Business closure during period of BCA's closure notice

8 As the plaintiff's kiosk was situated within the affected area, it could not operate its business during the period of BCA's closure notice. This explains its claim for loss of gross profits for this period (*ie*, item (b) at [2] above). The plaintiff's landlord, CAG, did not charge the plaintiff rent during the period of closure. CAG only resumed its rental charges from 7 August 2014, the date that the businesses at the Transit Lounge were to be reopened.

Rebuilding of the kiosk

9 The plaintiff did not resume its business operations on 7 August 2014 because it had yet to satisfy CAG's requirement for it to certify the safety of the kiosk. Initially, when the plaintiff met with CAG on 18 March 2014, CAG expressed concern about damage to the waterproofing membrane and the existing support structure of the kiosk. The plaintiff was advised by its contractor that in order to redo the waterproofing, the kiosk would have to be dismantled and all equipment removed. CAG initially offered to cover the cost of the rectification works, but later redirected the plaintiff's quotation to the loss-adjusters of the first defendant, who denied liability as well. Subsequently, on 23 July 2014, CAG informed the plaintiff that it would be permitted to commence business operations as long as it engaged a qualified person ("QP") or professional engineer ("PE") "to endorse the overall safety and operational readiness of the kiosk". In other words, with a QP's or PE's endorsement, it would not be necessary to dismantle and rebuild the entire kiosk.

10 The plaintiff adduced evidence that it was unable to procure a QP or PE to provide the requisite endorsement. It maintained that no QP or PE was willing to undertake the job without information on the extent of the damage to the structure of the T2 Building, what rectifications were done to the T2 Building

and how the kiosk structure was originally built. The defendants disputed this state of affairs. First, the defendants highlighted that, contrary to the account given in the affidavit of the plaintiff's personnel, the plaintiff did not attempt to procure a QP or PE but relied on its contractors to address the matter. Second, and more critically, the defendants' expert, Mr Poh Cher Seng Allan, testified that in order to endorse the kiosk's structural safety, he would have carried out a visual inspection. To inspect the joints, he would have had to remove some plasters and finishes (which could be easily refitted), but not the entire structure. The lack of plans was not an insuperable obstacle because he was only concerned with the kiosk, a light and small structure which was "very easy to inspect", and was not concerned with examining the entire T2 Building, which had already been certified safe.

11 In any event, the plaintiff's position was that, in August 2014, the only way forward was to rebuild the kiosk. However, this course was not commercially viable given that its lease was expiring in eight months' time. It was only after CAG agreed in October 2014 to grant the plaintiff a fresh 3-year lease that the plaintiff decided to undertake the renovation work. After completing the renovations, the plaintiff eventually resumed business sometime in November 2014. Its claims for items (c) and (d) (at [2] above) reflect the cost of the renovation work and the rent paid during the period of renovation.

12 Important in this suit is the plaintiff's concession that none of its property, including the kiosk, suffered physical damage directly from the collision. In other words, it is common ground that the reason for the rebuilding of the kiosk was *not* that the kiosk was damaged. The plaintiff's kiosk was examined by its insurers' loss-adjusters, Cummingham Lindsey (Singapore) Pte Ltd ("Cunningham Lindsey"). Cunningham Lindsey's reports clearly state that no physical damage to the plaintiff's kiosk was detected and that the plaintiff

"suffered no direct property damage … as a result of [the] incident" on 13 February 2014. The plaintiff did not engage a QP or PE to examine the kiosk for damage prior to dismantling and rebuilding it. The consequence of this is that there is no evidence before me that the kiosk was damaged or unsafe due to the collision. The fact that CAG was concerned to eliminate risks to safety does not in itself prove that the kiosk was damaged or unsafe.

Damaged equipment

13 Similarly, the plaintiff's equipment was not damaged by the impact of the collision. The equipment was damaged due to dust, rust and the lack of electricity supply and other utilities while the affected area was closed and the plaintiff's kiosk was not in operation. Thus, the damage to the equipment was a consequence of the *closure* of the affected area surrounding the damaged pillar of the T2 Building. To protect its equipment, the plaintiff would have had to engage contractors to dismantle and remove the equipment from the kiosk. Although CAG had planned to arrange for the plaintiff's employees to do so in March 2014, arrangements for their entry into the closed area were not carried through. Even after the closure notice was lifted on 30 July 2014, the plaintiff did not immediately retrieve their equipment but only did so on 9 October 2014, after CAG agreed to extend the plaintiff's lease for another 3-year period. The plaintiff gained entry to the kiosk to assess its equipment on 2 June 2014. Cunningham Lindsey carried out an inspection in August 2014. It was discovered that the following equipment was damaged:

(a) Hoshizaki ice maker (affected by dust and staining);

(b) Open chiller (affected by dust);

(c) Bain Marie and noodle boiler (faulty parts);

(d) 3-tap water boiler (container rusty and dented; faulty beyond repair);

(e) Electric toaster (could not be turned on, collection tray rusty, filament spoilt beyond repair); and

(f) Hoshizaki under-counter 2-door chiller (mouldy gaskets, rusty and strong odour, inoperable).

Insurance coverage

14 As mentioned (at [3]), NTUC Income paid $176,176.85 to the plaintiff in respect of the damaged equipment and the loss of gross profits for the period of BCA's closure notice. The plaintiff is pursuing these claims on the behalf of NTUC Income, pursuant to cl 5 of the General Conditions in its Industrial All Risks Policy No 5044711896-03 with NTUC Income, which reads:

> **5. SUBROGATION**
>
> Any claimant under this Policy shall, at the expense of the Society [defined as NTUC Income] do, and concur in doing and permit to be done all such acts and things as may be necessary or reasonably required by the Society for the purpose of enforcing any rights and remedies, or of obtaining relief or indemnity from other parties to which the Society shall be or would become entitled or subrogated, upon its paying for or making good any loss or damage under this Policy, whether such acts and things shall be or become necessary or required before or after his indemnification by the Society.

Duty of care in Negligence

Classification of plaintiff's losses

15 I begin with the characterisation of the plaintiff's losses, which will aid in elucidating the nature of the duty of care being alleged by the plaintiff. As the background set out above shows, the plaintiff did not suffer any property damage as a direct result of the collision. The plaintiff made a sweeping

submission that it suffered economic loss *consequent upon physical damage to the T2 Building* caused by the second defendant. I do not accept this submission. Since the property damage was directly sustained by CAG and not the plaintiff, it cannot be said that the plaintiff's losses were consequential economic loss – they were not consequential to any damage to the *plaintiff*'*s* own property.

16 It is well-established that only a person with either legal ownership or a possessory title to the property at the time when the loss or damage occurred may sue in negligence for damages: *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] 1 AC 785 at 809 ("*Aliakmon*"). *Aliakmon* has been accepted and applied by the Singapore courts in cases where it was disputed whether the claimant(s) had the requisite title to the damaged property (see *The "Patraikos 2"* [2002] 1 SLR(R) 966 at [137] and *Sato Kogyo (S) Pte Ltd and another v Socomec SA* [2012] 2 SLR 1057 at [42]).

17 I accept the defendants' submission that the plaintiff's losses constitute pure economic loss. The loss of gross profits and the damaged equipment were caused by the closure of the Transit Lounge and were not consequent on any damage to the plaintiff's property. In respect of the cost of rebuilding the kiosk, the defendants relied on *D&F Estates Ltd and others v Church Commissioners for England* [1988] 1 AC 177 and *RSP Architects Planners & Engineers (formerly known as Raglan Squire & Partners FE) v MCST Plan No 1075 and anor* [1999] 2 SLR(R) 134 ("*Eastern Lagoon*") to argue that where a defect is discovered before any property damage or personal injury has materialised, expenses incurred to avoid future property damage or personal injury are pure economic losses. In *Eastern Lagoon*, the wall claddings of a building had failed at only one location but the MCST carried out rectification works to all the wall claddings which had not fallen so as to avoid any future injury to persons and/or

damage to property. The Court of Appeal classified the expenses incurred in rectifying the wall claddings that had not failed as pure economic loss.

18 The present case is even weaker than that in *Eastern Lagoon*. Unlike the wall claddings in *Eastern Lagoon* which were *proven* to be at risk of failure, it has not been proven that the kiosk's structure or waterproof membrane were damaged or compromised by the collision. The demolition and rebuilding of the kiosk were precautionary measures taken to prevent the *possibility* of future safety issues. I characterize the expenses incurred in taking these measures as pure economic loss. Consequently, the rent paid from 7 August 2014 until the kiosk was reopened in November 2014 is also pure economic loss.

The law on duty of care in negligence

19 The test for the duty of care in negligence set out in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR (R) 100 ("*Spandeck*") is as follows (at [77] and [83]):

> 77 The *first* stage of the test to be applied to determine the existence of a duty of care is that of proximity, *ie*, that there must be sufficient *legal* proximity between the claimant and defendant for a duty of care to arise. The focus here is necessarily on the closeness of the relationship between the parties themselves …
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> …
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> 83 Assuming a positive answer to the preliminary question of factual foreseeability and the first stage of the legal proximity test, a *prima facie* duty of care arises. Policy considerations should then be applied to the factual matrix to determine whether or not to negate this duty. Among the relevant policy considerations would be, for example, the presence of a contractual matrix which has clearly defined the rights and liabilities of the parties and the relative bargaining positions of the parties.
>
> [emphasis in original]

20 The preliminary question of factual foreseeability as a threshold requirement is likely to be fulfilled in almost all cases. The test of duty of care, at its first stage, requires sufficient legal proximity between the plaintiff and the defendant to be established. The focus is on the closeness of the relationship between the parties, considering their physical, circumstantial and causal proximity, as well as (where the facts support it) any voluntary assumption of responsibility by the defendant and/or reliance thereon by the plaintiff. If it is determined that on the facts, there is factual foreseeability and legal proximity, a *prima facie* duty of care arises. The second stage of the test of duty is whether there are policy considerations that negate this *prima facie* duty of care.

21 The *Spandeck* test is applied to determine the existence of a duty of care regardless of the nature of the damage caused. There is no general exclusionary rule against recovery of pure economic losses. The Court of Appeal clarified in *Spandeck* (at [68]) that where economic loss is concerned, it is not the type of damage itself that necessitates a different approach; rather, it is the circumstances in which the economic loss has arisen that may prompt greater caution. Unlike a case of direct physical damage where the links between the parties are bounded by the physical laws of nature, the circumstances involving pure economic loss that bring a plaintiff and a defendant into a relationship "are primarily human in creation and can form a complex web through which economic losses can ripple out from the one negligent act" (see *Spandeck* at [66], citing *Clerk and Lindsell on Torts* (Sweet & Maxwell, 18th Ed, 2000)). In this way, economic loss may be sustained from a negligent act even where the parties' relationship may be less direct, consequently lacking the circumstances giving rise to a proximate relationship. It is thus not surprising that in inquiring into proximity in a case involving pure economic loss, the courts have generally recognised a duty of care to protect a plaintiff against pure economic loss only where the defendant has voluntarily assumed responsibility to the plaintiff

and/or the plaintiff has reasonably relied on the defendant to take care to avoid such loss (see, *eg*, *Spandeck* at [81] and [108]; *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [60]; *Goh Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [31]–[35]). It was noted in David Tan & Goh Yihan, "The Promise of Universality" (2013) 25 SAcLJ at 523 that "[i]n the cases decided by the Court of Appeal, the court has consistently applied the proximity factors of assumption of responsibility and reliance where the damage suffered was economic loss". The learned authors contend that "the choice of the appropriate proximity factors is determined by the type of harm" (at 523). But even if a more restricted approach is preferable for cases of pure economic loss due to these circumstances, the determination of duty has to be made within the confines of the *Spandeck* framework.

22 In deciding whether it is appropriate to impose a duty of case in any set of facts, the *Spandeck* framework is to be applied incrementally. The courts should consider decided cases with analogous situations to understand how the courts have reached their conclusions on proximity and/or policy, and be guided by precedents to ascertain the current limits of liability and how the law should develop incrementally (see *Spandeck* at [73]). It is pertinent in the present case to consider precedents in which economic loss arose in very similar circumstances, *viz*, as a consequence of damage to a third party's property upon which the plaintiff relied or in which the plaintiff had a contractual interest.

23 In *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines and anor* [1986] PC 1 ("*Candlewood*"), the Privy Council affirmed the long-standing proposition, first stated in *Elliott Steam Tug Co. Ltd v Shipping Controller* [1922] 1 KB 127, that "the common law does not recognize a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the

chattel" (at 15) and who as a result of the property damage finds his/her contractual obligations more onerous or less advantageous. In *Candlewood*, the defendants' vessel negligently collided into a vessel hired by the first plaintiff on a time charter. The court dismissed the time charterer's claim for pecuniary loss (that is, for the hire paid to the bareboat charterer and the loss of profits while the vessel was not operational) because the time charterer had no proprietary or possessory right in the damaged vessel. The court crystallised the lack of proximity on the facts by describing the claim as one brought "against a wrongdoer by a person who was *not the victim of his negligence* but by a third party whose only relation to the victim was contractual" (at 21) [emphasis added].

24 The Privy Council in *Candlewood* carefully considered the contrary decision of the High Court of Australia in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 ("*Caltex Oil*"). In that case, a dredge fractured a pipeline used to carry products from an oil refinery to the plaintiff's oil terminal. The pipeline and refinery belonged to a third party who, apart from suffering the damage to the pipeline, bore the risk of loss of the oil product carried through the pipeline under its contract with the plaintiff. In contrast, the loss claimed by the plaintiff was entirely economic in nature and did not flow from the loss of the oil product. The plaintiff claimed expenses incurred in transporting oil products from the refinery to the terminal by alternative means while the pipeline could not be used. The question was "whether a person is entitled to be compensated in damages for economic loss sustained by that person as a result of damage negligently caused to the property of a third party" (at 544). The court granted the plaintiff's claim, but as the Privy Council noted in *Candlewood*, no discernible *ratio* emerges from *Caltex Oil*.

25 In *Caltex Oil*, Gibbs and Mason JJ expressly affirmed that damages are generally not recoverable for economic loss which is not consequential upon injury to the plaintiff's person or property. However, exceptionally in their view, the defendants were liable because they knew or had the means of knowing that a particular individual, and not merely a member of an unascertained class, would be likely to suffer economic loss due to their negligence. It was material but not sufficient that the plaintiff was in physical proximity to the damaged property. On the facts of *Caltex Oil*, the defendants operating the dredge knew that the pipeline led directly from the refinery to the plaintiff's terminal and was designed to serve the terminal particularly and not the public generally. Thus it was said that the defendants should have had the plaintiff in contemplation as a person who would probably suffer economic loss if the pipeline was damaged. Moreover, the operators' navigational drawings marked out the pipeline for the very purpose of avoiding damage to it. The contemplation of a particular individual "eliminates or diminishes the prospect that there will come into existence liability to an indeterminate class of persons" (*per* Mason J at 593).

26 However, in *Candlewood*, the Privy Council was critical of deploying the criterion of an ascertained class as a control mechanism (at 24):

> … With regard to the reasons given by Gibbs and Mason JJ., their Lordships have difficulty in seeing how to distinguish between a plaintiff as an individual and a plaintiff as a member of an unascertained class. The test can hardly be whether the plaintiff is known by name to the wrongdoer. Nor does it seem logical for the test to depend upon the plaintiff being a single individual. Further, why should there be a distinction for this purpose between a case where the wrongdoer knows (or has the means of knowing) that the persons likely to be affected by his negligence consist of a definite number of persons whom he can identify either by name or in some other way … and who may therefore be regarded as an ascertained class, and a case where the wrongdoer knows only that there are several persons, the exact number being to him unknown, and some or all of whom he could not identify by name or otherwise, and who may

> therefore be regarded as an unascertained class? Moreover much of the argument in favour of an ascertained class seems to depend upon the view that the class would normally consist of only a few individuals. But would it be different if the class, though ascertained, was large? … But it is not easy to see a distinction in principle merely because the number of possible claimants is larger in one case than in the other. … [Their Lordships] do not consider that it is practicable by reference to an ascertained class to find a satisfactory control mechanism which could be applied in such a way as to give reasonable certainty in its results.

27 Returning to *Caltex Oil*, Stephen J, while of the view that the presence of physical damage was not necessary, opined that there was a need for "some control mechanism based upon notions of proximity between tortious act and resultant detriment" (at 575). However, no clear control mechanism was articulated. In his view, a number of features combined to furnish the requisite proximity in *Caltex Oil* (at 578). The defendant knew that the property damaged was of a kind inherently likely, when damaged, to be productive of consequential economic loss to those who rely directly upon its use, and knew or had the means of knowing that the pipeline extended to the plaintiff's terminal. It ought to have been apparent that more than one party was likely to be exposed to loss should the pipelines be severed; the plaintiff's economic loss was a direct consequence of its loss of use of the pipeline rather than due to collateral commercial arrangements. It appears that Stephen J's analysis was a fact-sensitive one that did not lay down new principle other than that recovery for pure economic loss was possible as long as proximity was proved.

28 Faced with the lack of a satisfactory guiding principle but a common affirmation of the need for a limit upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence, the Privy Council in *Candlewood* maintained the "definite and readily ascertainable line" of disallowing recovery for pure economic loss arising from the claimant's relation to the direct victim of the negligence (at 25).

29 In an older case, *Weller and Co. v Foot & Mouth Disease Research Institute* [1965] 3 WLR 1082, where the defendant's negligence allegedly led to an outbreak of foot and mouth disease among the cattle belonging to third parties, the claimants were unable to recover from the defendants the profits they lost as cattle auctioneers due to the closure of the markets. The claimants' business was dependent on the third parties being able to bring cattle to the market for auctions, but it was the third parties' cattle that was injured by the virus. The English Court of Appeal explained that the claimants' losses were not within the scope of the defendants' duty of care because the injury to the claimants was not foreseeable and direct.

30 I am well aware of other Australian and Canadian authorities that have, in a similar vein to *Caltex Oil*, allowed claims by parties suffering economic loss due to damage to a third party's property (see, *eg*, *Perre v Apand Pty Ltd* [1999] HCA 36 ("*Perre*") and *Canadian National Railway Co v Norsk Pacific Steamship* [1992] 1 SCR 1021 ("*Norsk*")). I am not opining on the validity of the principles articulated and applied in those cases as they were not canvassed before me. Nonetheless, I note that in all these cases, the courts have found it necessary to find something more that indicates a close relationship between the parties beyond the mere fact of economic loss and the claimant's factual or contractual interest in the damaged property. In these cases, the elements that supplied the requisite proximity included (amongst others) the plaintiff's known vulnerability to a known risk posed by the defendant's acts (see *Perre* at [41] and [50]), a close connection between the plaintiff's operations and the property damaged such that the plaintiff is in a "common venture" with the owner of the damaged property (see *Norsk* at [277]–[279]), as well as the fact that the plaintiff was an identifiable victim (see *Norsk* at [329]). A duty of care was only recognised where the court was satisfied that doing so would not expose the defendant to indeterminate liability. Such inquiry into the facts that give rise to

sufficient proximity is consistent with the approach taken in applying *Spandeck*'s test of duty of care in Singapore.

31 It was not argued before me whether the concepts recognised in these cases should play a part in the proximity inquiry in Singapore's *Spandeck* framework. But a point of commonality is that in Singapore, there is no general rule excluding recovery of pure economic loss if it can be shown that, taking into account all the circumstances, the parties were in a proximate relationship and the concern over the ensuing potential indeterminate liability for an indeterminate amount to an indeterminate class is adequately addressed. It has been said that the twin indicia of voluntary assumption of responsibility and reasonable reliance are in many cases "the best – and most practical – criteria for establishing whether or not there is proximity between the claimant and the defendant from a legal standpoint": Andrew Phang, Cheng Lim Saw and Gary Chan, "Of Precedent, Theory and Practice – The Case for a Return to Anns" [2006] Sing JLS 1 at 47 (cited in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [63]).

My decision

32 Turning to the present case, I wish to clarify as a preliminary matter that the plaintiff's pleaded case was that the *second defendant* was negligent and that the first defendant is vicariously liable for the second defendant's negligence. It is the second defendant, allegedly responsible for the collision, who is alleged to owe a duty of care towards the plaintiff. In the plaintiff's written submissions, the plaintiff alleged that a duty of care was owed by *both* defendants. This position fails to distinguish between the liability of the second defendant for his allegedly tortious act and the *vicarious* liability of the first defendant as an employer of the second defendant. It is of limited value for the plaintiff to rely

on the conduct and knowledge of the first defendant's staff to prove the second defendant's duty of care.

Factual foreseeability

33 The threshold question is whether a reasonable person in the second defendant's position ought to have foreseen that persons in the plaintiff's position would be harmed by his failure to take care when driving the airtug. The plaintiff argues that, considering the fact that the first defendant carried out work in the vicinity of the T2 Building, it was factually foreseeable that the second defendant's negligent driving and collision into the pillar was likely to damage the T2 Building and potentially affect the structural integrity of the T2 Building. This would in turn make it likely that any affected area would be closed for a period of time for repair works. On this basis, the plaintiff submits it was foreseeable that shops and/or businesses in operation in the Transit Lounge above the damaged pillar would have to cease operations during the period of closure and thereby suffer loss as a result of the second defendant's negligence. The defendants did not directly dispute that damage to the plaintiff was factually foreseeable but focused their arguments on legal proximity.

34 I accept that it was factually foreseeable that if the second defendant failed to take reasonable care in operating the airtug, he may cause harm to users of the T2 Building.

Proximity in the first stage of the test of duty

35 The plaintiff submits that the relationship between the plaintiff and the defendants was sufficiently proximate because there was a clear causal link between the accident and the closure order over the affected area, and the first defendant knew that the kiosk was in the affected area. It argues that in cases involving negligent acts causing economic loss to plaintiffs who were strangers

at the relevant time, the concept of voluntary assumption of responsibility is less pertinent than in cases of negligent advice and negligent services. It submits that in such cases, the reliance by the plaintiff is of a "passive" nature. Even if the concepts of voluntary assumption of responsibility and reliance were relevant, the plaintiff submits that the defendants assumed responsibility to operate their vehicles safely so as not to cause damage to the T2 Building, whilst the plaintiff relied upon the defendants not to affect the operation of the plaintiff's kiosk.

36 The defendants submit that the twin factors of voluntary assumption of responsibility and reliance are crucial to cases involving pure economic loss, even where the parties were strangers at the relevant time. They argue that there was insufficient legal proximity because the defendants, in particular the second defendant, did not voluntarily assume responsibility to the plaintiff to drive safely and avoid causing damage to the T2 Building or its structure. There was no undertaking analogous to contract between the second defendant and the plaintiff.

37 In my view, there is insufficient proximity between the plaintiff and the second defendant for a *prima facie* duty of care. First, there was insufficient causal and circumstantial proximity between the parties. I do not agree with the plaintiff that there was a "clear causal link" between the damage suffered by the plaintiff and the second defendant's negligent act. As I have said above, the plaintiff's losses in the form of damaged equipment and loss of gross profits did not flow directly from the collision but from the plaintiff's loss of use of the Transit Lounge during the period of BCA's closure notice. What the plaintiff suffered were the ripple effects of the damage to the pillar of the T2 Building which was common to all business operators in the affected area who likewise depended on everyone not to cause damage and closure to the T2 Building. Given the common nature of its injury, I am of the view that it would be an

inappropriate expansion of liability to allow recovery in this case. The plaintiff's expenses in rebuilding the kiosk are even more remote because they were incurred not due to any proven damage to the kiosk – and thus not due to any physical impact of the collision – but to satisfy CAG's requirements for reopening its business. It could also be said that CAG's requirements were an intervening act breaking the chain of causation, if any, between the collision and the rebuilding works. Although these analyses also pertain to the causation of damage which is an independent element of negligence from the duty of care, causation is also relevant when considering "causal proximity" in determining legal proximity in the first stage of *Spandeck*'s test of duty.

38 Second, there was no special relationship between the plaintiff and the second defendant beyond the mere dependence by the plaintiff on CAG's T2 Building not being damaged. As the defendants highlight, there was in fact no relationship between the plaintiff and either defendant at all before the incident occurred. This makes it something of a stretch to say that either defendant, and in particular the second defendant, could have undertaken a responsibility akin to a contract to operate the airtug safely so as to protect the plaintiff from economic loss. I note that this would be so in almost every case where losses ripple from an accident in which the parties were strangers at the relevant time, but the point I wish to make is that given the indeterminacy of economic loss, there is nothing on the facts to distinguish the plaintiff as having a special proximate relationship with the second defendant, or even the first defendant for that matter.

39 In its attempt to establish physical, circumstantial and causal proximity, the plaintiff relied on the facts that the first defendant's Vice President of Line Maintenance (Operations), Mr Yong Kit Meng, visited the affected area, including the kiosk, after the accident, and was aware that the kiosk was located

in the affected area which was closed off by BCA's notice. Mr Yong also conceded under cross-examination that he was made aware after the accident of a beam extending from the vicinity of the plaintiff's kiosk to the ground where the second defendant had collided into the pillar. In my view, neither of these facts are of significance in establishing proximity between the plaintiff and the second defendant. Apart from the fact that the Mr Yong's knowledge cannot be imputed to the second defendant, the purpose of the visit by the first defendant's personnel was to survey the extent of property damage due to the collision but, as mentioned, the plaintiff suffered none. The beam near the plaintiff's kiosk was evidently a support structure for the T2 Building and did not serve the plaintiff in particular, since the damage to the pillar necessitated an inspection by BCA into the structural integrity of the T2 Building.

40 It is not sufficient that the plaintiff generally or passively relied on the defendants (and everyone in the world) not to interrupt their business and endanger the safety of the T2 Building where they carried on business. The correspondence after the accident shows that the plaintiff was looking to CAG or CAG's insurers to reimburse it for the cost of rebuilding the kiosk; this is consistent with the plaintiff relying on *CAG* to provide safe premises for its business operations. There is no evidence supporting the plaintiff's bare assertion that it specifically relied on the defendants not to do any negligent act that would affect its operation of the kiosk.

Policy considerations in the second stage of the test of duty

41 Further, I find that, on the present facts, a duty of care is precluded by policy considerations. In the absence of a close relationship between the plaintiff and the second defendant, there remains the potential for indeterminate liability owing to the nature of pure economic losses. In my view, the risk of the losses suffered by the plaintiff should be spread out throughout society through

the engine of insurance. Indeed, the plaintiff was insured in respect of the damaged equipment and the loss of gross profits. It would be disproportionate for the second defendant, and vicariously the first defendant, to bear not only the costs of the immediate and direct consequences of the collision (assuming the second defendant was found negligent) but also the losses caused to all persons who had some relationship to the damaged property, such as the many businesses affected by the closure.

Conclusion

42 In conclusion, I find that the second defendant did not owe a duty of care to the plaintiff. Consequently, the first defendant is not vicariously liable. Even if I were to consider the plaintiff's submission of a duty of care by the first defendant, I do not think it is made out for similar reasons to the above. The plaintiff's claims against both defendants are dismissed. It is unnecessary for me to deal with the remaining elements of the tort of negligence. I would only add that even if I had found a duty of care owed by the second defendant, I would have agreed with the defendants that the rebuilding of the kiosk was not caused by the second defendant's negligence and that the plaintiff had failed to act reasonably to mitigate its losses by deciding to rebuild the kiosk. As I noted at [10] above, the expert's evidence was that a QP or PE would have been able to examine the kiosk to determine if it was structurally sound, such that it may not have been necessary to rebuild the kiosk. I have noted that the rebuilding works were undertaken only after the lease was renewed for a further 3 years.

43 I will hear parties on the issue of costs on a date to be fixed by the Registry.

Debbie Ong
Judge

N K Rajarh and Cheong Wei Yang Daryl (Straits Law Practice LLC)
for the plaintiff;
Kwek Yiu Wing Kevin and Tan Yiting Gina (Legal Solutions LLC)
for the first and second defendants.