Eng Yuen Yee (sole executrix of the estate of Chan Poh Choo, deceased)
v
Grandfort Builders Pte Ltd and others (Wu Ruixin and another, third parties)

[2018] SGHCR 01

High Court — Suit No 131 of 2017 (Summons No 4593 of 2017)
Zeslene Mao AR
23 November 2017, 28 December 2017

Building and Construction Law – Construction Torts – Neighbouring Properties

5 March 2018 Judgment reserved.

Zeslene Mao AR:

Background

1 The plaintiff's late mother ("the deceased") was the owner of a terrace house at Jalan Chengkek. The plaintiff, the sole executrix of the deceased's estate, and other members of her family have lived there for many years.

2 The 2nd and 3rd defendants are husband and wife. They own the land and terrace house adjacent to the deceased's property and have been neighbours with the plaintiff for more than 40 years. Sometime in 2013, the 2nd and 3rd defendants decided to undertake major reconstruction to their home and employed the 1st defendant, a construction firm, to rebuild their house.

According to the plaintiff, a pre-condition survey report had been carried out by Forte Adjusters & Surveyors Pte Ltd ("Forte") prior to the reconstruction works. While some stains and cracked tiles were observed, the deceased's property appeared to be largely in satisfactory condition.

3 During the period of construction in 2014, defects, such as large cracks, appeared on the deceased's property. The 2nd defendant was informed of the damage, and he conveyed the issues to the 1st defendant's representative. In April 2014, the Building and Construction Authority of Singapore was notified of the complaint and sent an officer down to inspect the deceased's property. The officer was of the view that the deceased's property was not safe for occupation and advised the plaintiff and her family to move out.

4 Subsequently, the plaintiff engaged SYT Consultants Pte Ltd ("SYT"), a civil, structural and geotechnical engineering firm, to investigate the cause of the damage. SYT opined that the damage to the deceased's property was caused by the "excessive differential settlement and tilting of [the 2nd and 3rd defendants' property] as a result of its new erection work". In the Statement of Claim, the cause of damage and structural failure is summarised as follows:

> (a) Excessive imposed load from the Reconstruction Works and/or the 2nd or 3rd Defendants' Property acting on the Deceased's Property;
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> (b) The Deceased's Property was and is still under compression due to the tilting of the 2nd and 3rd Defendants' Property;
>
> (c) The tilting of the 2nd and 3rd Defendants' Property towards the Deceased's Property has created an additional lateral load towards the structural frame of the Deceased's Property;
>
> (d) The horizontal load magnitude from the 2nd and 3rd Defendants' Property acting on the Deceased's Property is beyond the magnitude of any possible notional load/wind load

> that was considered in the design of the Deceased's Property's structural frame; and
>
> (e) The horizontal crack lines observable on the structural members such as the columns and non-load bearing brick walls are due to horizontal shear stress.

5 The plaintiff therefore commenced this action against the defendants.

The application

6 Summons No 4593 of 2017 is an application by the plaintiff under O 14 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) for interlocutory summary judgment to be entered against the 2nd and 3rd defendants for damages to be assessed. The application is premised on the basis that the 2nd and 3rd defendants had breached a "non-delegable duty" not to interfere with the deceased's right of support. Although certain allegations about admissions had been made, the plaintiff's counsel clarified during the hearing that the admissions were *not* the basis for the application for summary judgment.

7 The plaintiff relies principally on the decision of the Court of Appeal in *Xpress Print Pte Ltd v Monocrafts Pte Ltd and another* [2000] 2 SLR(R) 614 ("*Xpress Print*") and argues that the court had, in that case, held that a landowner had a right to support in respect of his buildings by neighbouring land which translated into a correlating duty on the part of the adjoining landowner not to cause damage to his neighbour's land. The plaintiff argues that liability for breach of this right is a strict one. As the deceased's property had been damaged by the construction activities procured by the 2nd and 3rd defendants, the plaintiff submits that the 2nd and 3rd defendants had clearly breached this duty. Since liability for breach of this right is strict, and the corresponding duty is non-delegable, the plaintiff seeks to enter summary interlocutory judgment on

the plaintiff's claim against the 2nd and 3rd defendants for damages to be assessed.

8 At the first hearing of this application, the 2nd and 3rd defendants submitted on the basis that the plaintiff was mounting her primary claim in negligence or nuisance. The 2nd and 3rd defendants' core defence was hence that the 1st defendant was an independent contractor and that they had taken reasonable care in selecting the 1st defendant as the main contractor for the reconstruction works. This resulted in the parties submitting at cross-purposes. The confusion was not surprising as the plaintiff had initially pleaded that the 2nd and 3rd defendants had breached a "non-delegable duty *of care*" [emphasis added] in the Statement of Claim. Matters were only clarified subsequently during the hearing when plaintiff's counsel stated that he was chiefly relying on the right of support in *Xpress Print*, which he submitted is a "distinct and separate right" independent from causes of action in negligence or nuisance. Parties were thus given an opportunity to address each other's submissions head on. The Statement of Claim was also subsequently amended to delete the words "of care" so far as this concerned the 2nd and 3rd defendants' alleged liability to the plaintiff to make clear that the plaintiff was not pursuing a cause of action in negligence against the 2nd and 3rd defendants. This is in contradistinction to the plaintiff's claim against the 1st defendant, which is squarely in the tort of negligence.

9 As things stand, there is therefore no pleaded case against the 2nd and 3rd defendants in negligence though the plaintiff pleads in the Statement of Claim a further and alternative ground that the reconstruction of the 2nd and 3rd defendants' house constituted nuisance against the deceased. While the plaintiff did not appear to rely on the tort of nuisance at the application for summary judgment, as will be seen in the analysis below, an action for the breach of the

right of support in *Xpress Print* has been viewed by commentators as an action in nuisance. The plaintiff's submission that the right of support she relies on in *Xpress Print* is separate and independent from nuisance or negligence is hence questionable.

10 Be that as it may, the 2nd and 3rd defendants' position is that that the plaintiff has not shown a *prima facie* case for summary judgment. They submit that the plaintiff's right to damages should be based either on the principles of nuisance or negligence. They also take the position that the fresh defects on the deceased's property were not caused by the reconstruction works and that in any case, this is a matter that ought to be determined at trial after testing the expert evidence of parties. As the plaintiff has failed to show that all the elements of nuisance or negligence are made out, there is no *prima facie* case for summary judgment and the application ought to be dismissed.

11 This application raises interesting issues as to the nature and scope of right of support relied on by the plaintiff, its corresponding duty and the way in which that duty interacts with a non-delegable duty of care as recognised in the tort of negligence. In this decision, I will briefly consider the legal authorities establishing the right of support. I will then consider whether on the facts currently before the court, it can be said that the 2nd and 3rd defendants have infringed the plaintiff's right such that the summary interlocutory judgment ought to be entered on the plaintiff's claim against the 2nd and 3rd defendants.

The right of support for land and buildings

12 The common law recognises that a landowner is entitled to a right of support for land in its natural state from the neighbouring land. Such a right is recognised as being a natural right, being an ordinary incident of ownership of land. However, once land is built on, it is no longer regarded as being in its

natural state. What then is the position as regards the right of support of buildings from the neighbouring land? Prior to *Xpress Print*, the position in Singapore was similar to the position in England which had been laid down by the House of Lords in *Charles Dalton v Henry Angus* (1880–1881) 6 AC 740 ("*Dalton v Angus*"). In that case, the question before the House of Lords was whether "a right to lateral support from adjoining land could be acquired by 27 years' uninterrupted enjoyment for a building proved to have been newly erected at the commencement of that time". The House of Lord answered this in the affirmative, holding that the right of lateral support from adjoining land in respect of a building was a right in the nature of a positive easement, which could be acquired by the prescriptive period of 20 years' uninterrupted enjoyment.

13 The decision in *Dalton v Angus* has been recognised as standing for the principle that a landowner may excavate his land with impunity prior to the prescriptive period of 20 years. Indeed, this proposition was adopted and followed in Singapore in the Court of Appeal of the Strait Settlements' decision in *Lee Quee Siew v Lim Hock Siew* (1895–1896) 3 SSLR 80. This proposition appears in Lord Penzance's judgment in *Dalton v Angus*, where he stated (at 804):

> … it is the law, I believe I may say without question, that at any time within twenty years after the house is built, the owner of the adjacent soil may with perfect legality dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground …

14 The Torrens system of land registration added a further layer of complication on the decision in *Dalton v Angus*. Section 46 of the Land Titles Act (Cap 157, 1994 Rev Ed) provided that the proprietor of registered land shall hold the land free from all encumbrances, liens, estates and interests except such as may be registered or notified in the land-register, subject to any subsisting

easement which was in existence at the date on which the land was brought under the provisions of the Land Titles Act. The effect of this, so far as it concerned the law in respect of a building's right of support from neighbouring land, was explained thus in *Xpress Print* (at [36]):

> The upshot of applying it to the present scenario is that a building which has stood for 20 years on land prior to that land being brought under the Land Titles Act will have acquired an easement of support in respect of neighbouring lands. On the other hand, a building which has stood for less than 20 years before such date will not have acquired such a right.

15 It is against this legal backdrop that the facts of *Xpress Print* came up for decision before the Court of Appeal. In that case, the first respondent engaged the second respondent, a firm of contractors, to construct an industrial building on its land. The appellant owned a building and the plot of land adjacent to the first respondent's land. Prior to constructing the industrial building, the contractors erected a temporary retaining wall between the two plots of land to hold up the soil on the appellant's land. Thereafter, they excavated the first respondent's land to build a basement and the foundation for the industrial building. However, the retaining wall was inadequate as the contractors failed to follow the structural design provided by the engineers. This resulted in soil subsidence and substantial damage to the appellant's property. The appellant sued the first respondent and the contractors for "damages and loss suffered as a result of the negligence, wrongful interference of support and nuisance" on the part of the first and second respondents.

16 Before the Court of Appeal, counsel for the appellant argued that the principle in *Dalton v Angus* was a legal anachronism and ought not to be followed. Relying on American, Australian, Canadian and New Zealand authorities, he submitted that the first respondent ought to be liable in negligence or nuisance for the damage caused, on the basis that this would be

consistent with realities of an urban city. Thus, he urged the court to recognise that there ought to be a duty of reasonable care on landowners who carry out potentially damaging excavation works, and this duty ought to be a non-delegable one.

17 Having surveyed the authorities relating to the right of support in respect of buildings, the Court of Appeal found no hesitation in rejecting the existing approach (at [37]):

> Perhaps only lawyers can understand and appreciate how a simple issue such as this, through the process of law, comes to be governed by a mass of convoluted and irreconcilable rules; surely only the bravest among them would attempt to explain it to the average citizen. For our part, we fail to see any legal principle capable of supporting the distinctions drawn by the cases. Further, we are of the view that the proposition that a landowner may excavate his land with impunity, sending his neighbour's building and everything in it crashing to the ground, is a proposition inimical to a society which respects each citizen's property rights, and we cannot assent to it. No doubt the trial judge felt constrained by the authority in *Dalton v Angus* … and *Lee Quee Siew*'s case … but this court is entitled to depart from those cases, and therefore does not suffer any such impediment. In the event, we are of the opinion that the current state of affairs cannot be allowed to persist. The question is therefore not whether the principle applied by the trial judge in the court below should be rejected, for it clearly must, but rather how far the duty of the landowner should extend.

18 The Court of Appeal then turned to consider the various approaches it could take to recognise a duty on the part of a landowner to support his neighbour's buildings. In this connection, it was held that whilst there was no objection in principle to adopting a negligence-based approach, the Court of Appeal observed that there was an additional factor to consider in Singapore due to the different land ownership regimes between registered and unregistered land. Adopting a negligence-based approach would, given the context of land ownership in Singapore, create an anomalous situation where in relation to

unregistered land, the right of support would supersede the duty of care after the passage of 20 years, whereas in relation to registered land or buildings built on unregistered land that had not met the 20-year prescriptive period prior to being brought under the Land Titles Act, no easement would arise and the duty of care would continue in perpetuity (at [41]–[42]). Due to these differences, the Court of Appeal preferred to hold that landowners had a natural right of support in respect of his buildings from neighbouring lands once the building was erected (at [50]). This, it held, was based on the principle that landowners should use their property in such a manner as not to injure that of another. The Court of Appeal then went on to state (at [51]):

> We acknowledge that in imposing a strict duty on landowners we are going further than our learned colleagues in the Commonwealth cases cited above, but the law must adapt itself to modern conditions and local policies. Furthermore, we see the solution we have adopted not so much as one which creates a new legal right, but rather as one which removes unjustifiable restrictions on a right already firmly established and accepted. So the enlarged right has exactly the same characteristics as the "original" right of support which operated only in respect of land in its natural state. In particular, it is not a right to have adjoining soil remain in its natural state, but rather a right to support from the adjoining soil, which in practical reality translates to a correlating duty of the adjoining landowner not to cause damage to his neighbour's land by excavating or otherwise removing his land without first securing alternative means of support. Further, the right is infringed as soon as, but not until, damage is sustained in consequence of that withdrawal of support. We would observe that what is prohibited is an *active interference* with the support that causes damage. …
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> [emphasis in italics in original; emphasis in underline added]

19 Relying on the case of *Bower v Peate* (1875–1876) 1 QBD 321 ("*Bower v Peate*"), the Court of Appeal then held that the duty on the landowner could not be disposed by delegation. On the facts, it was found that the first respondent had breached its duty to support the appellant's property by causing its soil to be removed without sufficient additional means of support.

20 The principle in *Xpress Print* that a landowner has a duty not to cause damage to his neighbour's land by excavating or otherwise removing his land without first securing additional means of support was applied in the subsequent High Court decision of *Afro-Asia Shipping Company (Pte) Ltd v Da Zhong Investment Pte Ltd and others* [2004] 2 SLR(R) 117. The plaintiff in that case owned a building at Robinsons Road. Subsequently, the first defendant who owned the neighbouring land and building decided to redevelop the premises. The first defendant employed the second defendant to demolish the premises. Thereafter, piling works were carried out by the third defendant. The plaintiff sued, alleging that the construction activities at the first defendant's premises caused damage to its property, including cracks, soil subsidence and the tilting of their building.

21 Judith Prakash J (as she then was) found that the damage to the plaintiff's property was caused by the second defendant's demolition works. This resulted in the removal of the support that the first defendant's land gave to the plaintiff's building. Applying the principle in *Xpress Print*, Prakash J held the first defendant liable for the damage as the duty to support the plaintiff's building could not be delegated. Prakash J further held that the first defendant was also liable under the duty established in *Xpress Print* for further damage caused by the third defendant's piling works. Although the initial withdrawal of support manifested while the second defendant was demolishing the premises, the first defendant had a duty to ensure that the further piling works carried out by the third defendant did not aggravate the damage arising from the withdrawal of support or further interfere with the support of the plaintiff's building.

22 Before turning to consider the facts of this case, a preliminary point that concerns the nature of an action for the breach of a right of support ought to be addressed. In *Xpress Print*, the Court of Appeal stated that the action for the

breach of the appellant's right of support was "akin to an action in nuisance" (at [52]). The measure of damages the Court of Appeal awarded was thus for all foreseeable losses suffered by the injured party as a result of the wrongful act. Though the Court of Appeal analogised an action for the breach of the right of support to an action in nuisance, commentators have appeared to categorise a breach of the right of support as a *type* of nuisance instead (see, for example, *Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) ("*Land Law*") at para 20.14); *Clerk & Lindsell on Torts* (Sweet & Maxwell, 21st Ed, 2014) ("*Clerk & Lindsell*") at paras 20–139 to 20–146; Tang Hang Wu, "The right of lateral support of buildings from the adjoining land" (2002) Conveyancer and Property Lawyer 237 at p 257 ("*Right of Lateral Support*"); and Prakash Pillai, "The primacy of the principle of reciprocity in the Singapore land regime" (2001) SAcLJ 198 at p 201).

23 The plaintiff's assertion that the right of support in *Xpress Print* is independent from nuisance is hence, in my view, misconceived. While this misconception is not fatal to the plaintiff's claim, it does somewhat alter the complexion of its case. Given the remarks in *Xpress Print* and the commentary cited above, the subsequent analysis below on the right of support will proceed on the basis that an action for the breach of the right of support articulated in *Xpress Print* is either akin to an action in nuisance or is itself a type of actionable nuisance.

24 Having set out the legal principles on which the plaintiff's application is premised, I now turn to consider whether summary judgment ought to be entered on the plaintiff's claim against the 2nd and 3rd defendants.

The decision

25 The law relating to summary judgment is well-established. O 14 r 3(1) of the Rules of Court provides that judgment may be entered against a defendant if there is no issue or question in dispute which ought to be tried and there is no other reason why there ought to be a trial. In order to obtain summary judgment, the plaintiff must show that there is a *prima facie* case for summary judgment. If the plaintiff does so, the tactical burden shifts to the defendant to show that there is reasonable probability that there is a real or *bona fide* defence in relation to the issues. Having reviewed the evidence, the court would then enter judgment against the defendant only if the plaintiff has satisfied the court that there is no reasonable probability that the defendant has a real or *bona fide* defence in relation to the issues in dispute which ought to be tried (see *Wee Cheng Swee Henry v Jo Baby Kartika Polim* [2015] 4 SLR 250 at [35]–[38]).

Whether the present facts fall within the principle in Xpress Print

26 In the circumstances, the plaintiff is first required to establish a *prima facie* case for summary judgment. This requires the plaintiff to prove that the 2nd and 3rd defendant, as owners of the adjoining land, had infringed the deceased's right of support. It is clear from *Xpress Print* and *Afro-Asia* that as the legal principles in Singapore presently stand, the right of support entails a duty on the part of the neighbouring landowner "not to cause damage to his neighbour's land by excavating or otherwise removing his land without first securing alternative means of support" (see *Xpress Print* at [51] and *Afro-Asia* at [59]). Both *Xpress Print* and *Afro-Asia* concerned cases where the adjoining landowner had excavated his land or demolished buildings thereby removing support for the claimant's land or building which resulted in claimant's property suffering damage. It would therefore appear that the right of support for land and buildings is a right not to have support for those land and buildings *removed*.

27 In the present case, the plaintiff's case is *not* that the 2nd and 3rd defendant unduly *removed* support by excavation or other means without first securing alternative support for the deceased's house. Rather, the plaintiff's complaint is that the damage to the deceased's property was caused by the additional load imposed by the construction of the 2nd and 3rd defendants' house, and in particular, the allegation that the 2nd and 3rd defendants' house was built in a way that caused it to tilt towards the deceased's property (see the extracts of the Statement of Claim quoted above at [4]). Thus, even if the facts as pleaded were accepted as true, the present case is distinguishable from *Xpress Print* and *Afro-Asia* as it does not concern damage caused by the excavation of land or the removal of support *per se* but instead damage caused by the imposition of an additional lateral load on the deceased's property as a result of the reconstruction of the 2nd and 3rd defendants' house.

28 When this point was raised, counsel for the plaintiff acknowledged that his case did not fall squarely within the principle in *Xpress Print*. He then clarified that his essential submission was that the right of support as set out in *Xpress Print* ought to be taken one step further to cover the facts of the present case. In her written submissions, the plaintiff submits that the right of support and the attendant non-delegable duty ought to be "read to include all operations where injury would be caused to adjoining properties and not just to excavations". In substance, the plaintiff's position is that the court should, based on the principle in *Xpress Print*, recognise a broad non-delegable duty on the part of a landowner not to cause damage to his neighbour's property, regardless of whether that damage was a result of excavations or other construction activities (hereinafter referred to as "the broad non-delegable duty"). Implicit in the plaintiff's submission that the principle in *Xpress Print* ought to be *extended* is a recognition that the Court of Appeal in *Xpress Print* had *not* laid down a general duty on the part of landowners not to cause damage to their neighbours

per se. In my view, this is clearly correct as there is no suggestion that in *Xpress Print* that the Court of Appeal intended to lay down such a broad and general legal rule apart from its holding in respect of the right of support.

29 In the premises, it is clear that even assuming the facts as pleaded were proved on a balance of probabilities, the plaintiff's claim against the 2nd and 3rd defendants does not fall strictly within the four corners of the principle expounded in *Xpress Print*. In order for the plaintiff obtain summary judgment, she would have to make out a case that Singapore law ought to recognise the broad non-delegable duty in the tort of nuisance. This is the next issue which I turn to consider.

Whether the broad non-delegable duty ought to be recognised in Singapore

30 In urging the court to recognise the broad non-delegable duty, the plaintiff relies principally on the Latin maxim *sic utere tuo ut alienum non loedas* referred to by the Court of Appeal in *Xpress Print*. The Latin maxim translates to "use your property in such a manner as not to injure that of another". It is useful to set out, at this juncture, the passage relied on in full (*Xpress Print* at [48]):

> We believe that the true legal justification for the right of support is the legal principle encapsulated in the Latin maxim *sic utere tuo ut altenum non loedas*, which translates in English to: use your property in such a manner as not to injure that of another. The importance of that principle is compounded in Singapore in view of our land-use pattern, whereby all land available for commercial, industrial or residential purposes is used to a high intensity. The damage that might be caused if landowners were lackadaisical in their excavation works could be astronomical, not to mention the cost in human lives or injury to property.

31 Based on the above passage, the plaintiff's counsel submitted that the non-delegable duty *Xpress Print* should not be limited solely to situations

involving excavation works or the removal of support, since there are various ways by which landowners could damage their neighbour's land or building. As I understand the argument, the plaintiff's submission is that the Latin maxim should be elevated to a legal *rule*, and that the court ought to adopt a wide interpretation of "use" and "injury" in interpreting that rule. Since the 2nd and 3rd defendants had used their property in a manner which caused injury to the deceased's property, the 2nd and 3rd defendants ought to be liable to the plaintiff for the damages that resulted and could not rely on the fact that they had engaged the 1st defendant as an independent contractor to escape liability.

32 Apart from the Latin maxim, Mr Chew also referred to the English cases of *Bower v Peate* and *George Martin Hughes v John Percival* (1883) 8 App Cas 443 ("*Hughes*") where it had been held that a landowner had a non-delegable duty not to cause damage to his neighbour's property. *Bower v Peate* was a case involving excavation works. The defendant who owned the neighbouring house admitted that the contractor had been negligent in carrying out the excavation works, but contended that he was entitled to the benefit of the rule that he was not liable, as employer, for the negligence of the independent contractor. Cockburn CJ disagreed and stated the court's judgment as follows (at 326–327):

> The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else – whether it be the contractor employed to do the work from which the danger arises or some independent person – to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed which, if properly done, no injurious consequences can arise, and handing over to him work to be done which mischievous consequences will arise unless preventive measures are

> adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for prevention may arise.

33 In the plaintiff's submission, the above holding is an application and elaboration of the Latin maxim. The plaintiff also puts forth the case of *Hughes* was an example where the principle in *Bower v Peate* had been applied in a case that did not involve excavation works.

34 The plaintiff and the defendant in *Hughes* owned adjoining houses, between which was a party-wall that was the property of them both. The defendant decided to reconstruct his house. In the course of the reconstruction, the defendant's contractor negligently cut into the party-wall. This caused the defendant's house to fall, and the fall of the defendant's house dragged down the party-wall and damaged the plaintiff's house. The House of Lords held that the defendant was liable to the plaintiff for the injury caused to the latter's house. In this regard, the parties did not argue that the principle in *Bower v Peate* was inapplicable (see 451). Applying the principle, Lord Fitzgerald stated (at 455):

> … The conclusion I have reached is, that the defendant had undertaken a work which as a whole necessarily carried with it considerable peril to his neighbours. …
>
> What is the law applicable? What was the defendant's duty? The law has been verging somewhat in the direction of treating parties engaged in such an operation as the defendant's as insurers of their neighbours, or warranting them against injury. It has not, however, reached quite to that point. It does declare that under a state of circumstances it was the duty of the defendant to have used every reasonable precaution that case and skill might suggest in the execution of his works, so as to protect his neighbour from injury, and that he cannot get rid of the responsibility thus cast on him by transferring that duty to

> another. He is not in the actual position of being responsible for injury, no matter how occasioned, he must be vigilant and careful, for he is liable for injuries to his neighbour caused by any want of prudence or precaution, even though it may be culpa levissima.
>
> It seems to me that the peril to the plaintiff's premises continued so long as there remained anything to be done which could interfere with the stability of the girder on which the defendant's house rested, and which the defendant had fastened into the plaintiff's party-wall, and that there was that want of due supervision and due precaution which makes the defendant liable.

35 While Lord Blackburn doubted whether Cockburn CJ's statement in *Bower v Peate* cited at [32] above was "not too broadly stated" (at 447), he similarly held that the defendant had a non-delegable duty to ensure that no damage was caused to the plaintiff's property which the defendant had breached (at 445–447):

> The defendant had a right so to utilize the party-wall, for it was his property as well as the plaintiff's; a stranger would not have had such a right. But I think the law cast upon the defendant, when exercising this right, a duty towards the plaintiff. I do not think that duty went so far as to require him absolutely to provide that no damage should come to the plaintiff's wall from the use he thus made of it, but I think that the duty went as far as to require him to see that reasonable skill and care were exercised in those operations which involved the use of the party-wall, exposing it to this risk. If such a duty was cast upon the defendant, he could not get rid of responsibility by delegating the performance of it to a third person. …
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> …
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> … [If] I am right in thinking that the defendant in consequence of his using the party-wall of which the plaintiff was part owner had a duty cast upon him by law, similar to that which in *Dalton v Angus* it was held was cast upon the defendant in that case, in consequence of his using the foundations on which the plaintiff had a right of support, it is not necessary now to inquire how far this general language [in *Bower v Peate*] should be qualified.

In the plaintiff's submission, *Xpress Print*, *Bower v Peate* and *Hughes* supported the recognition of the broad non-delegable duty.

36 In my view, there are a number of obstacles to recognising a non-delegable duty on the part of landowners not to cause damage to their neighbour's property in the manner contended for by the plaintiff. In the first place, it is not clear that all conduct as between adjoining landowners ought to be governed by an action in nuisance as opposed to an action in negligence. Indeed, the plaintiff did not cite any reason why the broad non-delegable duty ought to be imposed on landowners instead of a duty of care in negligence. It bears reiterating that even the Court of Appeal in *Xpress Print* held that there was no objection in principle to the application of negligence principles, save that it was not appropriate to do so in the context of the right of support because of the anomalous results caused by the difference between registered and unregistered land (see [18] above). In fact, the authors of *Land Law* have, in this connection, sounded a word of caution as regards the Court of Appeal's extension of the natural right of support for land from adjoining soil to a right of support in respect of buildings from adjoining land (at paras 20.13–20.15):

> While the decision in *Xpress Print* … is welcome in rejecting the idea that a landowner may do as he pleases on his land without regard to any damage he may cause to his neighbour's buildings, it is not without its own set of problems, especially where the planning authorities are always seeking to maximise land use. As liability is strict, and with planning laws increasing the intensity of use of land, it is not inconceivable that the recognition of a natural right to support for buildings may adversely affect the rights of owners of land who are slower to develop their land. It is conceivable, for example, that the first owner to develop his land may have employed shoddy building techniques so that his buildings are more prone to damage than if they were properly engineered. By building cheaply and shoddily, an owner of land could render it more expensive for a neighbour to subsequently develop his land or in an extreme case, make it altogether impossible for him to do so.
>
> It is certainly arguable that it sufficed to overrule *Dalton v Angus* to the extent that a claim in the tort of negligence is permitted rather than through the recognition of a strict liability right to support that is actionable in nuisance. This has been the approach of the Canadian and New Zealand courts. The court's concerns over consistency as between registered and

> unregistered land may, in hindsight, have been overblown considering the process of converting land in Singapore to the Torrens system was completed on 31 December 2002. Nor is it obvious that the solution is to recognise an absolute right to support for buildings rather than prohibiting negative easements from being acquired prescriptively.
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> It is likely though, that the right to support for buildings recognised by the Court of Appeal in *Xpress Print* … will nevertheless be tempered by considerations of contributory negligence so that the imbalance between the two landowners will not be quite as severe as suggested above.

37 Whilst the plaintiff cites the Latin maxim as justification for the recognition of the broad non-delegable duty, I do not find this compelling for two reasons. First, the Latin maxim has been criticised as lacking legal content. The remarks of Professor Tang in *Right of Lateral Support* are apposite (at p 254):

> … [There are] some problems with using the maxim *sic utere tuo ut alienum non laedas* as the primary source of liability. Critics of the use of this maxim are many. For example, Erle J in *Bonomi v Backhouse* held that the maxim is mere verbiage. He said that a party may damage the property of another where the law permits, and he may not where the law prohibits him. In a sense, the maxim can never be applied until the law is determined. Thus, to Erle J, the maxim is superfluous. Street has also stigmatised the use of the phrase by arguing that:
>
> > "But this maxim it must be remembered, like many others of its kind, is merely a sort of mnemonic. As a statement of principle, it is a question-begging phrase … for the injunction against the doing of harm (*non laedas*) must be taken to refer to that which is harmful or injurious in the eye of the law. Consequently one can never tell what situations such a maxim applies to until the category of legal harms has first been exhausted. Such a maxim can be of no assistance in determining the primary question of liability."

38 Second, and in any event, the Latin maxim of itself does not suggest that any duty to be imposed on landowners not to cause damage to his neighbour's property as a result of construction activities ought to recognised as an aspect of property rights. Indeed, the recent decision of *Ng Huat Seng and another v*

Munib Mohammad Madni and another [2017] 2 SLR 1074 ("*Ng Huat Seng*") (a case cited by the 2nd and 3rd defendants) suggests that instead of recognising an absolute duty on adjoining landowners not to cause harm to each other's property through construction activities, the law recognises a duty *of care* in the tort of negligence, subject to the application of established principles of negligence, such as the existence of a duty, breach of the duty, and causation of damage.

39 In *Ng Huat Seng*, the appellants and respondents owned neighbouring properties located along a slope. The appellants' house was located on the lower part of the slope while the respondents' house was located on the higher end. The two properties were separated by a boundary wall located between the two plots, and the building lines of the two houses were about 6 meters apart. The respondents demolished their property and intended to build another in its place. They employed a main contractor to carry out the demolition and rebuilding works. When the demolition works were being carried out, some debris from the respondents' property fell on the boundary wall and on the appellants' property and caused damage. The appellants sued the respondents in the tort of negligence, joining the main contractors as defendants. When the case came before the Court of Appeal, the main contractors had been made bankrupt and the appeal proceeded only against the respondents. It was not disputed that the main contractor had been negligent.

40 Before the Court of Appeal, the appellants submitted that the respondents were (a) vicariously liable for the main contractor's negligence; (b) negligent in their selection of the main contractor; or (c) had breached a non-delegable duty to ensure that the main contractor took reasonable care in performing the demolition works. The Court of Appeal rejected all three contentions. On the issue of vicarious liability, the Court of Appeal held that

this required there to be a special relationship between the tortfeasor and the defendant, and additionally, the defendant must have in some way created or significantly enhanced, by virtue of that relationship, the very risk that in fact materialised in order to be held vicariously liable for the tortfeasor's wrong acts (*Ng Huat Seng* at [66]). On the facts, the requirement of a special relationship had not been satisfied as the respondents had engaged the main contractors as independent contractors. Indeed, the Court of Appeal noted that to impose vicarious liability on a defendant for the lapses of an independent contractor would be antithetical to the doctrine's foundations (*Ng Huat Seng* at [64]). Moreover, there was nothing to suggest on the facts that the respondents had, by its relationship with the main contractors, created or significantly increased the risk of the harm that was caused.

41 The Court of Appeal also dismissed the negligent selection issue. As the main contractors were licensed to carry out the demolition works, it could not be said that the respondents were negligent in their selection of the contractor.

42 Finally, the Court of Appeal also held that the respondents did not owe a non-delegable duty to the appellants in the performance of the demolition works. The court referred to the test set out in a previous Court of Appeal decision in *MCST Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 ("*Tiong Aik*"). In *Tiong Aik*, the Court of Appeal set out a two-stage framework for determining whether a non-delegable duty would arise on a given set of facts. First, the claimant would have to establish either that this claim fell within one of the recognised categories of non-delegable duties, or that his case possessed all five of the defining features outlined by Lord Sumption JSC in *Woodland v Swimming Teachers Association* [2014] AC 537 ("*Woodland*") at [23]. These five defining features were namely:

(a) The claimant was a patient or a child, or, for some other reason, was especially vulnerable or dependent on the protection of the defendant to avoid the risk of injury.

(b) There was an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission, which placed the claimant in the defendant's actual custody, care or charge, and from which it was possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not merely a duty to refrain from the conduct which would foreseeably harm or injure the claimant.

(c) The claimant had no control over how the defendant chose to perform the obligations arising from the positive duty at (b) above.

(d) The defendant had delegated to a third party some function which was an integral part of the positive duty which it assumed towards the claimant, and at the time of the tortious conduct, the third party was exercising, for the purpose of the function thus delegated to him, the defendant's custody, charge or care of the claimant and the element of control that went with it.

(e) The third party had been negligent in the performance of the very function assumed by the defendant and delegated by the defendant to him.

If the claimant established that his claim fell within either of the abovementioned perimeters, the court would then take into account the fairness and reasonableness of imposing a non-delegable duty of care on the defendant

in the particular circumstances of the case, as well as the relevant policy considerations.

43 Applying this test to the facts, the court first considered, as a preliminary issue, whether the doctrine of ultra-hazardous acts should be recognised as an established category of non-delegable duties under Singapore law. It noted that there were two contrasting judicial approaches to the doctrine of ultra-hazardous acts. The first approach was adopted by the English Court of Appeal in *Honeywill and Stein Ltd v Larkin Brothers (London's Commercial Photographers) Ltd* [1934] 1 KB 191 ("*Honeywill*"). That case involved by photographers who had been employed to take photographs of the cinema's interior causing a fire in the cinema as a result of their negligent use of magnesium flash photography. The issue was whether the employers of the photographers who had paid compensation to the cinema owners were entitled to an indemnity from the photographers, who were independent contractors. The photographers argued that since they were independent contractors, the employer was not legally liable to compensate the cinema owners for their negligence, and therefore that the employers were not entitled to an indemnity.

44 The English Court of Appeal noted the general rule that an employer was not liable for the acts of an independent contractor but articulated an exception in the case of ultra-hazardous acts. As taking the photograph in the cinema (which involved the creation of a fire and explosion) was "a dangerous operation in its intrinsic nature", the employers had assumed an obligation to the cinema owners which was "absolute" or "at least an obligation to use reasonable precautions, to see that no damage resulted to the cinema company from these dangerous operations", and this obligation was one which the employers could not delegate by employing the photographers as independent contractors (*Honeywill* at 200). It is notable that in arriving at its decision, the

English Court of Appeal cited *Bower v Peate* and *Hughes* as examples supporting the general principle that employers may be liable for the negligence of their independent contractors if the operation which the independent contractor was engaged to carry out was an inherently dangerous one.

45 The second approach which the Court of Appeal referred to in *Ng Huat Seng* was that of the English Court of Appeal in *Biffa Waste Services Ltd v Maschinenfabrick Ernst Hese GmbH* [2009] 3 WLR 324 ("*Biffa Waste*"). In that case, independent contractors had been engaged to carry out welding works that led to a fire. The pertinent issue was whether the employers of the independent contractors were liable for the latter's negligence on the basis of the doctrine of ultra-hazardous acts as elucidated in *Honeywill*. Stanley Burnton LJ, delivering the judgment of the English Court of Appeal, noted that *Honeywill* had been criticised as producing "preposterous distinctions" as the line between operations that were inherently dangerous and those that were not was uncertain. Due to the unsatisfactory nature of the doctrine in *Honeywill*, the court stated that its application should be kept as narrow as possible and applied "only to activities that are exceptionally dangerous whatever precautions are taken" (*Biffa Waste* at [78]).

46 The Court of Appeal in *Ng Huat Seng* preferred the approach adopted in *Biffa Waste*. In its view, the doctrine of ultra-hazardous acts ought to be confined to the limited circumstance where an activity posed a material risk of causing exceptionally serious harm to others even if it was carried out with reasonable care (at [94]–[96]). Applying this to the facts, the Court of Appeal held that the facts in *Ng Huat Seng* did not fall within the doctrine. Notably, the Court of Appeal held that the demolition works could not be reasonably said to be ultra-hazardous, elaborating as follows (at [97]):

> (a) The appellants did not put forward anything to explain how the damage to their property ensued from a particular risk arising from the demolition works on the respondents' property that remained substantial despite the exercise of reasonable care.
>
> (b) Demolition works are routinely done and there is nothing to suggest that despite the exercise of reasonable care, there remains a material risk of exceptionally serious harm arising from such works.
>
> (c) This analysis does not change even though landed properties in Singapore tend to be located in close proximity to one another. That simply establishes the element of factual proximity and the foreseeability of harm being caused if reasonable care is not taken when demolition works are carried out. It does not in any way shed light on whether such works are "exceptionally dangerous whatever precautions are taken" …, which was the central issue here.

Given the above finding, the Court of Appeal stated that there was therefore no need to recognise the doctrine of ultra-hazardous acts as part of Singapore law since the facts of the case would not engage the operation of the doctrine, properly conceptualised (at [89]).

47 The Court of Appeal then turned to consider if the five defining features set out by Lord Sumption JSC in *Woodland* were present. The court held that none of the features existed on the facts, and elaborated as follows (at [103]):

> We, however, agreed with the Judge … that the **relationship which the appellants described was essentially that which would ordinarily exist between neighbours owning adjoining plots of land. Under such a relationship, liability would arise if one of the neighbours acted negligently and caused foreseeable harm to the other.** There was nothing distinctive about the facts here which demonstrated the particular kind of relationship described in *Tiong Aik* so as to found a non-delegable duty of care on the respondents' part in respect of the demolition works carried out on their property. What was critical in this case was that unlike the relationship between a school and its students or that between a hospital and its patients, where it could meaningfully be said that the latter was in the "custody, charge or care" or the former, there was nothing to indicate that the appellants were in any sort of relationship of "special dependence" on or "particular

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

48 The decision in *Ng Huat Seng* demonstrates that a landowner who has had negligent construction works carried out on his or her land or property by an independent third-party which has caused damage to his neighbour's property is not *ipso facto* liable to his neighbour for the damage caused. Indeed, it is difficult to see why the broad non-delegable duty ought to be recognised when the Court of Appeal has, on similar facts, declined to impose a non-delegable duty of care in negligence.

49 In my assessment, the plaintiff's reliance on *Hughes* and *Bowers v Peate* for the recognition of the non-delegable duty may, too, be misplaced. For one, the difference in the outcome in *Hughes* – where a non-delegable duty was recognised – and *Ng Huat Seng* – where no non-delegable was recognised – is stark and difficult to reconcile. This is especially so when it is considered that both cases involved damage to a wall adjoining the parties' properties when certain construction works were taking place on one of the party's property. Additionally, *Hughes* and *Bower v Peate* are part of a line of cases relied on in *Honeywill* for the doctrine of ultra-hazardous acts that the Court of Appeal in *Ng Huat Seng* declined to follow (see [44]–[46] above). To the extent that the Court of Appeal in *Ng Huat Seng* declined to follow *Honeywill* and preferred the narrower conception of the doctrine of ultra-hazardous acts in *Biffa Waste*, this indicates that the position in *Bower v Peate* and *Hughes* is unlikely to be

followed in Singapore, at least in so far as it may be said that these cases were decided on the doctrine of ultra-hazardous acts.

50 In this connection, it is pertinent to note that the English Court of Appeal in *Biffa Waste* in limiting the doctrine of ultra-hazardous acts, expressly cautioned *against* reliance on *Hughes*, noting that this was a case of liability in private nuisance, of interference with an easement (*ie*, the right of support), rather than the tort of negligence (at [71]). Indeed, although the damage in *Hughes* was not caused by excavation works *per se*, it has been accepted in various authorities besides *Biffa Waste* that the decision was premised on the defendant's withdrawal of support to which the plaintiff was entitled (see *Clerk & Lindsell* at para 6–65; but *cf* Lord Sumption JSC's judgment in *Woodland* where he stated that *Hughes* was a case where the principle that a positive duty could be owed by a landowner to his neighbour in respect of hazardous acts carried out by his contractor was "applied to a duty of care" by analogy (at [10])). If it is correct that *Hughes* concerned an action in nuisance in connection with the infringement of a right of support, then contrary to the plaintiff's submission, *Hughes* is *not* an example of a case where a non-delegable duty has been imposed on a landowner in nuisance in a case where the right of support for land or building has *not* been infringed.

51 It may perhaps be argued that *Ng Huat Seng* was decided in the manner which it was because this was the manner in which the case was run before the courts. *Xpress Print* and *Hughes* had not been cited, and there was no indication that the appellants had brought an alternative action in nuisance. However, it is difficult to conceive (and would indeed be incongruous) that if these cases had been cited, the Court of Appeal would have held the respondents liable in nuisance for breach of a strict non-delegable duty whilst at the same time holding that no non-delegable duty in negligence should be imposed. In fact, it

may even be arguable that *Ng Huat Seng* represents a departure from the previous judicial attitude towards the nature of the relationship between neighbouring landowners expressed in *Xpress Print*. As set out above at [30], the Court of Appeal in *Xpress Print* had premised the right of support for buildings on the principle that landowners should use their property in a manner as not to injure that of another, the importance of which was compounded by the fact that land in Singapore was used to a high intensity. This lead the court to find a natural right of support for buildings, and a corresponding *non-delegable duty* on the owners of neighbouring property not to remove that support. In contrast, the Court of Appeal in *Ng Huat Seng* appeared to take a much more measured approach, stating both that the relationship that existed between neighbours that owned adjoining plots of land was governed primarily in the law of negligence (see the extracts of the judgment in *Ng Huat Seng* set out at [46]–[47] above). Indeed, the fact that land is used to a high intensity in Singapore did not, in the Court of Appeal's view in *Ng Huat Seng*, warrant the imposition of a special duty on the part of a landowner who has engaged contractors to carry out demolition works on his land vis-à-vis his neighbours. Hence, it appears that the appellants in *Ng Huat Seng* would not have succeeded even if an action had been brought in nuisance against the respondents.

52 Finally, and on a related note, it may be noted that the relationship between nuisance and negligence is a vexed one. It is not presently clear whether nuisance is a tort that imposes strict liability in all situations (see, generally, Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at paras 10.065 and 10.093–10.097). To the extent that certain instances of nuisance may not impose strict liability for breach, the question as to whether the standard of the duty required is those cases is concomitant with the standard of care in negligence is one deserving of further analysis with the benefit of

fuller arguments. It is only necessary to quote from the following extract from *Clerk & Lindsell* to illustrate the issues to be considered (at para 20–31):

> It was said by Lord Wilberforce in *Goldman v Hargrave* that "the tort of nuisance, uncertain in its boundary, may comprise a wide variety of situations, in some of which negligence plays no part, in others of which it is decisive" and he added, "the present case is one where liability, if it exists, rests upon negligence and nothing else; whether it falls within or overlaps the boundaries of nuisance is a question of classification which need not here be resolved". Because nuisance has this protean character, the cases contain judicial statements some of which assert that the duty of the occupier towards his neighbour is strict and some of which assert the duty to be based on reasonable foreseeability of harm, i.e. negligence. Such statements, if taken out of context and applied generally to nuisance as a whole, naturally produce contradiction and perhaps confusion, and in the light of such disparate statements the standard of duty has been considered a vexed and difficult question. But if … there is no single standard applicable to all situations covered by the tort of nuisance, it is illusory to seek a single answer to the question. Instead, attention should be directed towards identifying different kinds of situations and the appropriate standard of duty in each. Moreover, in approaching the task, it seems desirable to bear in mind that in modern times the general field of liability for negligence has been greatly expanded … This has had an inevitable effect upon the way in which the judges have handled the law of nuisance, and Lord Parker CJ as said that "the present tendency of the law is not only to move further and further away from absolute liability but more and more to assimilate nuisance and negligence." It seems important therefore to be guided by the more recent cases, and to treat with caution statements concerning the standard of duty to be found in the older cases.

53 In my opinion, the observation by the authors of *Clerk & Lindsell* that the "general field of liability for negligence has been greatly expanded" applies with force in Singapore. Since the seminal decision in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"), the law of negligence has gained coherence and prominence. Liabilities that used to be governed by disparate principles have been subsumed under the broad umbrella of negligence. For instance, the Court of Appeal in

See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd and others [2013] 3 SLR 284 had recently held that the framework of negligence as set out in *Spandeck* ought to apply to claims that arose in the context of occupier's liability. What this means in the context of the present case is that *even if* the plaintiff could bring a claim in nuisance against the 2nd and 3rd defendants, it is likely that the issue of whether the 2nd and 3rd defendants are liable to the plaintiff for any damage cause may nonetheless be governed by principles of negligence.

Summary

54 The above analysis shows that in sum, based on current authorities, the broad non-delegable duty for which the plaintiff contends is not recognised. As the law currently stands in Singapore, a landowner would owe only a non-delegable duty to his neighbour in nuisance for damage caused to them by an independent contractor if the negligent construction works caused the neighbouring land or building to lose its support and which resulted in damage (as per *Xpress Print* and *Afro-Asia*). However, if the negligent works did not result in a loss of support for the land or building, the matter would be governed by the principles of negligence, with the plaintiff being required to prove first, that the contractor was negligent, and second, that in those circumstances, primary or secondary liability for the contractor's negligence ought to be imposed on the landowner as well.

55 Furthermore, there is little, if any, support for the argument that the broad non-delegable duty ought to be recognised in Singapore. The authorities suggest that a negligence-based approach may be preferable to assess the 2nd and 3rd defendants' liability to the plaintiff, at least in the context of the present case where damage was not caused by the removal of support, as this strikes the appropriate balance between the rights of neighbouring landowners. Recent

authority from the Court of Appeal in *Ng Huat Seng* also appears to demonstrate a change in judicial attitudes as regards the relationship between adjoining landowners. In this regard, while a landowner has a general duty of care not to cause reasonably foreseeable damage to his neighbour's property, it was held that there is nothing otherwise especial in the relationship of adjoining landowners to impose a non-delegable duty of care on them. Even if landowners could be said to owe a broad duty in nuisance not to cause damage to his neighbour's property, the trend in the more modern authorities is to assess that duty with reference to negligence principles.

56 In the result, I decline to enter for summary judgment against the 2nd and 3rd defendants, since, in my view, the principle on which the plaintiff's application is based is not recognised in Singapore and there is no *prima facie* case for the recognition of such a duty. Instead, the present case is more appropriately governed by the principles of negligence, but this is not a claim mounted by the plaintiff. Had she done so, she would have to prove, amongst other things, negligence on the part of the 1st defendant. In any case, even if there was an arguable case that the broad non-delegable duty ought to be recognised in Singapore as an aspect of nuisance, this would not be an appropriate case to grant summary judgment because of the various difficult legal issues raised. The plaintiff would also have to prove factual issues, such as causation, to be entitled to judgment. These are matters in dispute which ought to be decided after a trial. The comments of the court in *Obegi Melissa and others v Vestwin Trading Pte Ltd and another* [2008] 2 SLR(R) 540 at [40] that where novel legal issues are raised and more evidence would be needed to satisfactorily determine those issues which require a full examination of all the relevant facts, the matter ought to proceed to trial rather than be summarily determined are exactly to the point here.

Conclusion

57 In conclusion, I grant the 2nd and 3rd defendants unconditional leave to defend. I will hear the parties on costs.

Zeslene Mao
Assistant Registrar

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