IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(A) 26

Civil Appeal No 98 of 2021

Between

The Subsidiary Management Corporation No. 01 – Strata Title Plan No. 4355

… *Appellant*

And

(1) Janaed
(2) Zoe International Pte Ltd

… *Respondents*

Civil Appeal No 99 of 2021

Between

Janaed

… *Appellant*

And

(1) Felizardo Paras Jose t/a STA Rita Engineering Services
(2) The Subsidiary Management Corporation No. 01 – Strata Title Plan No. 4355

… *Respondents*

In the matter of Suit No 1127 of 2019

Between

Janaed

… *Plaintiff*

And

(1) Newtec Engineering Pte Ltd
(2) Felizardo Paras Jose t/a STA Rita Engineering Services
(3) Zoe International Pte Ltd
(4) The Subsidiary Management Corporation No. 01 – Strata Title Plan No. 4355

… *Defendants*

JUDGMENT

[Tort — Negligence — Breach of duty]
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Woo Bih Li JAD, Quentin Loh JAD and Chua Lee Ming J
16 March 2022

21 June 2022 Judgment reserved.

Chua Lee Ming J (delivering the judgment of the court):

Introduction

1 These appeals arise from the oral judgment (the "Judgment") given by the High Court Judge (the "Judge") in HC/S 1127/2019 ("Suit 1127"). The plaintiff in Suit 1127, Mr Janaed ("Janaed"), was injured after falling 3.7 metres from the top of a chiller ("Chiller 1") in the mechanical and electrical room ("M&E Room") at Westgate Tower, Singapore. Westgate Tower is a commercial office building.

2 In Suit 1127, Janaed sued the following:

(a) Newtec Engineering Pte Ltd ("Newtec");

(b) Felizardo Paras Jose ("Ding") t/a STA Rita Engineering Services ("STA");

(c) Zoe International Pte Ltd ("Zoe") ; and

(d) The Subsidiary Management Corporation No. 01 – Strata Title Plan No. 4355 ("MCST").

3 MCST had engaged Zoe to replace two flow switches (the "Works") at another chiller ("Chiller 2") in the M&E Room. Zoe subcontracted the Works to STA. Newtec, who was Janaed's employer, supplied labour (including Janaed) to STA for the Works.

4 Janaed's case was that his accident was caused by negligence on the part of Newtec and/or STA and/or Zoe and/or MCST.

Background facts

5 Zoe was represented by its Project Manager, Mr Eugene Julian ("Eugene"), in its communications with MCST and STA. The Judge found that on 7 November 2018, MCST confirmed its engagement of Zoe for the Works (Judgment at [27]). The Judge further found that Eugene called Ding on 7 November 2018 and informed Ding to liaise with MCST's Property Executive, Mr Beringuel, Monti Carlo Catarinen ("Monti") for the Works to be carried out (Judgment at [30]). Ding did so and arranged with Monti for a site survey to be carried out in the morning on 8 November 2018.

6 On the morning of 8 November 2018, the following persons visited the M&E Room for the site survey:

(a) Monti;

(b) MCST's technician, Mr Faizal ("Faizal");

(c) STA's sole proprietor, Ding; and

(d) Janaed.

The site survey was to, among other things, assess the location of the flow switches at Chiller 2. After the inspection, Monti, Faizal and Ding left the M&E Room; Janaed stayed behind alone in the M&E Room.

7 Ding spoke to Monti later that afternoon. Monti told Ding that he could replace the flow switches at Chiller 2 with the same model as the existing switches or alternatively, he could use the model of the switches installed at Chiller 1. Ding then called Janaed and asked him to check the model of the flow switches at Chiller 1.

8 Janaed used a fireman's ladder to climb to the top of Chiller 1. He stood on the top of Chiller 1 and used his mobile phone to take photos of one of the switches. He held his mobile phone in one hand and used his other hand to zoom in for a close-up of the flow switch. There were no guard-rails at the top of the chiller and Janaed did not use any safety harness or belt.

9 Janaed fell from the top of Chiller 1 and landed on the floor. As a result of the fall, Janaed suffered injuries and is now paralysed. Although Janaed could not recall how or why he fell, footage from closed circuit television ("CCTV") in the M&E Room suggested that he fell in the circumstances mentioned in [8] above and this was not disputed before us.

Decision below and these appeals

10 The Judge:

(a) did not grant interlocutory judgment against Newtec on the ground that Newtec had not entered appearance and it was open to Janaed to enter default judgment against Newtec (which Janaed subsequently did after the Judgment was delivered);

(b) found STA and MCST jointly and severally liable to Janaed for negligence;

(c) found Janaed 30% contributorily negligent; and

(d) found Zoe not liable for negligence.

11 AD/CA 98 of 2021 ("AD/CA 98") is MCST's appeal against Janaed and Zoe. MCST's case is that (a) it was not liable to Janaed; alternatively, that (b) Zoe caused and/or contributed to the accident, and (c) Janaed was 50% contributorily negligent.

12 AD/CA 99 of 2021 ("AD/CA 99") is Janaed's appeal against STA and MCST. Janaed's case is that (a) he was not contributorily negligent, and alternatively, that (b) his contributory negligence did not exceed 10%.

Issues before us

13 These appeals raise the following issues:

(a) Whether MCST was liable to Janaed for negligence;

(b) Whether Zoe was liable to Janaed for negligence; and

(c) Whether Janaed was contributorily negligent, and if so, to what extent.

14 As stated earlier, the Judge declined to enter interlocutory judgment against Newtec on the ground that it was open to Janaed to enter interlocutory judgment in default of appearance. Janaed has since done so pursuant to O 13 of the Rules of Court (2014 Rev Ed) (the "Rules"). Under the default judgment, Newtec's liability is not reduced by any contributory negligence on the part of Janaed. It is not clear why the Judge did not in any event grant Janaed judgment against Newtec after the trial. Since Janaed's action was proceeding against the other defendants in any event, the Judge could and should have entered interlocutory judgment against Newtec after trial, if he found Newtec to be liable, so as to avoid any argument as to whether the Judge's finding that Janaed was 30% contributorily negligent would also apply to Newtec. However, this is not an issue before us and we say no more about it.

MCST's liability

Duty of care

15 In *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"), the Court of Appeal established a single test to determine whether a duty of care should be imposed in a claim arising out of negligence (at [73]–[86]). First, there must be factual foreseeability. This refers to reasonable foreseeability from a factual perspective and will almost always be satisfied. Next, there must be sufficient legal proximity between the claimant and defendant. The focus of legal proximity is on the closeness of the relationship between the parties, including physical, circumstantial and causal proximity, supported by the twin criteria of voluntary assumption of responsibility and reliance. If there is factual foreseeability and sufficient legal proximity, a *prima facie* duty of care arises. The final stage of the analysis is to determine whether there are policy considerations that negate

the *prima facie* duty. Examples of such policy considerations include the presence of a contractual matrix which clearly defines the rights and liabilities of the parties and their relative bargaining positions.

16 In the present case, the Judge found that it was factually foreseeable that Janaed may suffer injury if he were to carry out any work, to be done on the top of the chillers at such a height without any guard-rails or barriers, or safety equipment and with no one (including any representative from MCST) in attendance (Judgment at [64]). The Judge also found that Janaed's relationship with MCST was sufficient to find legal proximity and that there were no policy considerations which would negate the *prima facie* duty of care owed to Janaed (Judgment at [65]).

17 In its Appellant's Case, MCST refers to *Gursahib Singh v Aquatemp Pte Ltd and others* [2020] SGDC 127 ("*Gursahib*") and submits that it did not owe Janaed a duty of care because its duty pertained to the physical condition of the premises and did not extend to the operations at the site. We reject MCST's submission.

18 In *Gursahib*, the plaintiff (who was employed by a subcontractor) fell off a ladder while he was working at a construction site and suffered injuries. One of the defendants was the occupier of the premises. The District Judge ("DJ") noted that the Court of Appeal in *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd and others* [2013] 3 SLR 284 ("*See Toh Siew Kee*") had decided that the law on occupiers' liability had been subsumed into the tort of negligence (at [75]). She then went on to find the occupier not liable to the plaintiff because, in her view, the threshold requirement of factual foreseeability had not been met (at [77]–[81]).

19 In coming to her conclusion, the DJ referred to the following passage in the High Court's decision in *Neo Siong Chew v Cheng Guan Seng and others* [2013] SGHC 93 ("*Neo Siong Chew*") at [49]:

> An occupier owes a duty of care to prevent injury to an invitee from unusual dangers which the occupier knows or ought to have known about (*Mohd bin Sapri v Soil-Build (Pte) Ltd and another appeal* [1996] 2 SLR(R) 223 at [47] ("*Sapri*"). Critically, this duty only pertains to the physical condition of the premises and not the operations at the site (*Sapri* at [47]).

20 The DJ described the finding in the above passage as "in effect, … a finding on 'factual foreseeability'" (at [79]). The DJ then applied the distinction between the physical condition of the premises and the operations on the premises to the case before her and found that the plaintiff's accident was the result of an operation and not a condition of the premises (at [80]).

21 The plaintiff in *Gursahib* appealed to the High Court against the District Court's finding that he was 40% contributorily negligent but did *not* appeal against the dismissal of his claim against the occupier of the premises.

22 In our judgment, MCST's reliance on *Gursahib* is misplaced. The static-dynamic dichotomy between the condition of the property (static) and the operations carried out on the property (dynamic) was the result of traditional common law rules, which drew a distinction between the law on occupiers' liability and the general law of negligence. Under these traditional rules, an occupier's liability pertained to the static condition of the property. The general principles of the law of negligence (which pertained to dynamic activities done on the property) did not apply to an occupier's liability as occupier: *See Toh Siew Kee* at [20].

23 MCST's submission is reminiscent of the traditional claim based on occupiers' liability *qua* occupier. However, the Court of Appeal in *See Toh Siew Kee* has authoritatively decided that there is no need to preserve the action based on occupiers' liability as a separate cause of action and that the law in Singapore on occupiers' liability should be subsumed under, and dealt with within, the framework of the tort of negligence (at [76], [132] and [144]). The static-dynamic dichotomy has no place in the law of negligence.

24 In *Gursahib*, the DJ noted that *See Toh Siew Kee* had decided that the law on occupier's liability had been subsumed under the tort of negligence (at [75]). It is curious therefore that the DJ nevertheless went on to apply the static-dynamic dichotomy, relying on *Neo Siong Chew*. The judgment in *Neo Siong Chew* was delivered just six days after the Court of Appeal delivered its judgment in *See Toh Siew Kee*, and *Neo Siong Chew* made no reference to *See Toh Siew Kee*. Instead, *Neo Siong Chew* referred to *Mohd bin Sapri v Soil-Build (Pte) Ltd and another appeal* [1996] 2 SLR(R) 223 ("*Sapri*") (see [19] above). *Sapri* was decided before *Spandeck* and is no longer the law in Singapore: *See Toh Siew Kee* at [100]. In our view, the DJ's reliance on *Neo Siong Chew* and the static-dynamic dichotomy cannot be supported in the light of the decision in *See Toh Siew Kee*.

25 The determination as to MCST's liability in this case therefore does not turn on the static-dynamic dichotomy or the traditional rules relating to occupiers' liability. Instead, it is the general principles of the law of negligence, specifically, the *Spandeck* test (see [15] above), which must be applied.

26 With respect to factual foreseeability, it was clearly foreseeable in the present case that there was a risk of falling when standing on the top of the chiller to access or work on the flow switches, if preventive steps were not taken.

Anyone accessing or working on the flow switches would have to stand on top of the chiller, near the edge. We agree with the Judge that the threshold requirement of factual foreseeability was satisfied (Judgment at [64]).

27 We turn next to the question of legal proximity. In *Spandeck* (at [78]), the court approved of the following explanation of proximity in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 55–56:

> The requirement of proximity is directed to *the relationship between the parties* in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves *the notion of nearness or closeness and embraces physical* proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, *circumstantial* proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (*perhaps loosely*) be referred to as *causal* proximity in the sense of the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury sustained. It may reflect *an assumption by one party of a responsibility* to take care to avoid or prevent injury, loss or damage to the person or property of another or *reliance* by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance. … The requirement of a relationship of proximity *serves as a touchstone and control of the categories of case in which the common law will adjudge that a duty of care is owed.* Given the general circumstances of a case in a new or developing area of the law of negligence, the question what (if any) combination or combinations of factors will satisfy the requirement of proximity is a *question of law to be resolved by the processes of legal reasoning, induction and deduction.* …
>
> [Court of Appeal's emphasis in *Spandeck* in italics]

28 We agree with the Judge that there was sufficient legal proximity between MCST and Janaed giving rise to a *prima facie* duty of care, for the following reasons.

29 First, as the Court of Appeal held in *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd and others* [2014] 2 SLR 360 ("*Jurong Primewide*") at [47], citing *See Toh Siew Kee* at [80], the legal proximity requirement would be satisfied in the vast majority of occupiers having control of the property which they occupy and/or the activities carried out there. However, this depends on the degree of control which an occupier has over the property concerned and/or the activities carried out there. An occupier may have so little control over the property and/or the activities carried out there that, for all intents and purposes, he effectively does not have control. In such cases, there would not be sufficient legal proximity to give rise to a *prima facie* duty of care.

30 Here, however, there is no reason why the relationship between MCST and Janaed should not give rise to a duty of care. MCST had control over access to the M&E Room – visitors like Janaed and Ding could only access the M&E Room after receiving an access card – and whether works were permitted in the M&E Room. Janaed was a lawful entrant as STA brought him into the room with MCST's knowledge and consent. Indeed, Monti himself (MCST's Property Executive) escorted Janaed into the M&E Room.

31 Second, MCST owed certain duties to Janaed under the Workplace Safety and Health Act (Cap 354A, 2009 Rev Ed) ("WSHA") and the Workplace Safety and Health (Work at Heights) Regulations 2013 (the "WH Regulations"). In our view, MCST's statutory duties were sufficient to satisfy the legal proximity test in this case.

32 Although the mere existence of a statutory duty is not in itself conclusive of a common law duty of care, it remains a relevant factor in deciding whether there is sufficient legal proximity which gives rise to a *prima facie* duty of care at common law: *Tan Juay Pah v Kimly Construction Pte Ltd and others* [2012]

2 SLR 549 ("*Tan Juay Pah*") at [53] and *Jurong Primewide* at [37] and [46]. Whether a statutory duty gives rise to a common law duty of care under the *Spandeck* test is highly – but not wholly – dependent on the particular statutory and/or regulatory framework: *Tan Juay Pah* at [79].

33 In the present case, the relevant statutory and/or regulatory framework is the WSHA and its regulations (the "WSH Regime"). The effect of the WSH Regime on the question of whether there exists a duty of care in negligence was discussed by the Court of Appeal in *Tan Juay Pah* and *Jurong Primewide*. The facts in both cases offer contrasting illustrations.

34 In *Tan Juay Pah*, a tower crane on a project site collapsed, resulting in the deaths of three workers. The main contractor sued the subcontractor from whom it had rented the tower crane. The subcontractor brought in, as a third party, the certifying mechanical engineer whom it had engaged to inspect the tower crane, claiming an indemnity against him in the event it was found liable to the main contractor (at [1]–[2]).

35 The certifying mechanical engineer was registered as an "authorised examiner" ("AE") under the WSHA Regime. As an AE, the engineer was authorised by the Ministry of Manpower to inspect, test and certify lifting machines, including tower cranes, as being safe for use (at [2]). The engineer had certified that the tower crane in question was safe for use (at [12]). However, a subsequent investigation indicated the presence of pre-existing cracks at certain locations of the mast anchors and mast of the tower crane (at [16]).

36 To succeed in its claim for an indemnity against the AE under s 15 of the Civil Law Act (Cap 43, 1999 Rev Ed) (the "Civil Law Act"), the subcontractor had to show that the AE and itself were liable to the main

contractor for the "same damage". Thus, one of the questions that arose was whether the AE owed a duty of care to the main contractor (at [49]–[50]).

37 The Court of Appeal analysed the objective of the WSH Regime and concluded that the AE did not owe a duty of care to the main contractor (at [68] and [73]):

> 68 … the objective of the [WSHA] was to protect workers and members of the public present at a workplace from injury by deterring risk-taking behaviour (through the imposition of liability for such behaviour) on the part of persons who create and have control over safety risks at workplaces. To achieve this objective, a "more direct liability regime" … was put in place under Pt IV of the [WSHA] to hold various groups of persons accountable for workers' safety and health according to their different capacities. We observe that while an AE does not fall under any of the categories of persons enumerated in Pt IV of the [WSHA], a main contractor and a subcontractor may fall under one or more of those categories … The structure of the [WSHA] suggests that the liability of an AE under the WSH Regime is *secondary* to that of the persons specifically mentioned in Pt IV of the [WSHA] (*inter alia*, contractors and subcontractors). …
>
> …
>
> 73 … It is clear, in our view, that while the office of the AE is an integral part of the WSH Regime's overall statutory purpose of ensuring workplace safety …, the statutory objective is not to protect contractors and/or subcontractors as they have primary responsibility for all aspects of safety at a workplace. … the office of the AE is not intended to protect either the contractor and/or the subcontractor from risk, but is instead intended to protect workers and members of the public present at workplaces. … the first limb of the *Spandeck* test is *not* satisfied in the present case and, thus, [the AE] did not owe [the main contractor] any *prima facie* duty of care at common law.
>
> [emphasis in original]

The Court of Appeal also noted (at [68]) that had the office of the AE been mentioned under Pt IV of the WSHA, this would have made for a stronger argument for the imposition of a common law duty of care on the AE.

38 In *Jurong Primewide*, the appellant was the main contractor of a development at a worksite. The second respondent ("Hup Hin") supplied cranes to the worksite under a rental agreement with the appellant. In turn, Hup Hin hired cranes from the first respondent ("Moh Seng") under a hiring contract (at [4]). Moh Seng delivered a crane to the worksite pursuant to its hiring contract with Hup Hin. The crane was parked at a designated location at the worksite. During the lifting operation, part of the crane collapsed into a concealed manhole, causing the crane to topple over (at [6]–[8]).

39 The Court of Appeal referred (at [39]) to the objective of the WSHA as set out in *Tan Juay Pah* and discussed the effect of the WSHA on contractors and subcontractors (at [40]–[42]):

> 40 Moreover, the prevailing intention behind the WSHA was precisely to create a system of accountability by defining the responsibilities of various persons at workplaces …
>
> 41 … it is clear that contractors and subcontractors … are precisely the entities which the WSHA seeks to increase direct liability on for workplace safety. They have "primary responsibility" in all areas of safety, given their "operational control" of workplaces. In fact, the main purpose of the WSHA is to strengthen the accountability of and impose responsibilities on parties such as the main contractor and subcontractors so as to ensure a safer working environment at construction sites. These statutory responsibilities also complement the very aims of the common law tort of negligence, which is concerned with ensuring that negligent conduct, within legal limits, would attract corresponding liability. The law of tort serves two functions here: it is an engine of compensation as well as a financial deterrent. The law governing the establishment of a duty of care in turn helps to limit claims in negligence to only parties with sufficient proximity and foreseeability, so that the net of liability is not cast too widely. Plainly, contractors and subcontractors are parties whose negligence on construction sites has the most potential to result in fatal, or at least costly, consequences, given their well-placed abilities to foresee and be aware of the various possible mishaps that others without operational responsibilities and control may not be able to identify. In fact, it would be very hard to think of situations where sufficient

> proximity to give rise to a common law duty of care will not be found to exist due to the control contractors and subcontractors have over the worksite and the on-going activities on it.
>
> 42 The WSHA is clearly focussed on strengthening the safety management of worksites as its primary aim. By placing heavy responsibilities on contractors and subcontractors, the scheme of the WSHA intends that the burden of making worksites as free from hazards as possible and installing necessary systems and safeguards would fall on these parties.

40 The court found that there was sufficient legal proximity between the appellant and Moh Seng for the following reasons (at [45]–[48]):

> 45 … as main contractor, [the appellant] would already *prima facie* have owed a duty of care to Moh Seng simply by virtue of being identified heavily as a responsibility bearer by the WSHA. …
>
> 46 … It was undisputed that [the appellant] was an "occupier" as defined under the WSHA … and had to fulfil the relevant duties and responsibilities under it. …
>
> 47 As an "occupier" under the WSHA, [the appellant] could not expect to abrogate from its duty to ensure safety at the worksite simply by looking at the strict contractual arrangements between the parties. While acknowledging that it was the *licensed occupier* of the worksite, [the appellant] attempted to draw "a distinction between a general duty of care owed by an occupier *vis-à-vis* the land (occupier's liability) and *vis-à-vis* the operations being carried out (negligence)". Yet, this distinction has already ceased to exist with this court's decision in *See Toh Siew Kee* …
>
> 48 … [the main contractor] also knew … about the existence of the manhole. … the sheer *knowledge* that such a manhole existed … gave rise to sufficient proximity between Moh Seng and itself. …
>
> [emphasis in original]

41 It is clear from *Tan Juay Pah* and *Jurong Primewide* that (a) the categories of persons falling under Pt IV of the WSHA have primary and heavy responsibility for safety at worksites and (b) their duties under Pt IV of the WSHA are a strong factor in determining whether a duty of care at common law

exists. As the Court of Appeal said in *Jurong Primewide* (at [41]), these statutory responsibilities complement the very aims of the common law tort of negligence (see [39] above).

42 The categories under Pt IV of the WSHA include an "occupier". Under s 4 of the WSHA, an "occupier", in relation to any premises or part of any premises, means –

> (*a*) in the case of a factory where a certificate of registration has to be obtained … pursuant to any regulations …;
>
> (*b*) in the case of a factory where a notification has to be submitted … pursuant to any regulations … ; and
>
> (*c*) in the case of any other premises – the person who has charge, management or control of those premises either on his own account or as an agent of another person, whether or not he is also the owner of those premises.

43 MCST submitted at the hearing before us that it was not an "occupier" because it did not control Janaed's activities for the purposes of the Works. We reject MCST's submission; it has no basis whatsoever. The language in the definition of "occupier" is clear. It is unarguable that MCST fell within limb (c) of the definition and thus was an occupier of the M&E Room for purposes of the WSHA and its regulations.

44 Section 11(*a*) of the WSHA provides that it shall be the duty of every occupier of any workplace to take, so far as is reasonably practicable, such measures to ensure that the workplace is safe and without risks to health to every person within those premises. Section 5(1) of the WSHA defines "workplace" as any premises where a person is at work or is to work, for the time being works, or customarily works.

45 In addition, reg 8 of the WH Regulations provides that it shall be the duty of the occupier of a workplace to comply with the following requirements:

> (a) every open side or opening into or through which a person is liable to fall more than two metres shall be covered or guarded by effective guard-rails or barriers to prevent fall: r 8(2) of the WH Regulations; and
>
> (b) where it is not reasonably practicable to comply with the above, a travel restraint system shall be used to prevent a person falling into or through the open side or opening, or where this is not reasonably practicable, a fall arrest system shall be used: r 8(5) of the WH Regulations.

46 The terms "travel restraint system" and "fall arrest system" are defined in reg 2 of the WH Regulations. In brief, a "travel restraint system" means a system consisting of a full-body harness or restraint belt designed to prevent the person wearing it from falling off an edge of a surface or through a surface. A "fall arrest system", on the other hand, means a system consisting of equipment (which may include a full-body harness but excludes a restraint belt) designed to prevent or reduce the severity of injury to a person in the event of a fall.

47 It is clear that MCST, as an "occupier", owed duties under s 11 of the WSHA relating to a safe workplace, and under reg 8 of the WH Regulations relating to safety when a worker is liable to fall more than two metres. It cannot be disputed that Janaed is within the class of persons intended to be protected by the statutory duties imposed on MCST under the WSHA and WH Regulations. In our judgment, MCST's duties under the WSHA and WH

Regulations gave rise to sufficient legal proximity for purposes of the first limb of the *Spandeck* test.

48 MCST also argues that its position was akin to homeowners who have engaged contractors to repair their air-conditioning system. According to MCST, it was in no position to advise on safety aspects of the Works. The comparison is erroneous. An occupier of domestic premises (provided the premises are not used to conduct any business or undertaking of the occupier) is exempted from the WSHA: para 4(1) of the Workplace Safety and Health (Exemption) Order (GN No S 142/2006, 2007 Rev Ed). Further, it cannot be disputed that the WSHA and WH Regulations places the primary responsibility for work safety squarely on MCST.

49 As for the second limb of the *Spandeck* test, there are no policy considerations that negate the *prima facie* duty. Accordingly, we agree with the Judge that MCST owed Janaed a duty of care.

Standard of care

50 In *Jurong Primewide*, the court found that the industry standard guidance provided by the Singapore Standard SS 536 2008 Code of Practice for the safe use of mobile cranes and the stipulations under the WSHA were relevant in pitching the standard of care in that case (at [43]). In the present case, Janaed relied on (among others):

(a) MCST's duties under the WSHA and WH Regulations; and

(b) the Code of Practice for Working Safely at Heights published by the Workplace Safety and Health Council in collaboration with the Ministry of Manpower (Second Revision, 2013) (the "Code").

51 In our view, there is no reason why MCST's duties under the WSHA and WH Regulations, and the Code, should not apply in pitching the standard of care that MCST had to meet. MCST could have installed guard-rails or barriers, or if it was not reasonably practicable to do so, MCST could have provided a travel restraint system or ensured that such a system was used, and if that was also not reasonably practicable, MCST could have provided a fall arrest system or ensured that a fall arrest system was used (see [45] above).

Breach

52 MCST did not do any of the things that it should have done to discharge its duties under the WSHA and the WH Regulations. MCST submits that the costs of installing guard-rails or barriers were excessive and/or disproportionate, and that they were impracticable and not part of industry practice. However, there was no evidence of industry practice adduced in support of these submissions. In any event, MCST could have provided a mobile elevated work platform, which MCST has since acquired. The mobile elevated work platform is one of the fall prevention systems provided under the Code. It uses a work platform that is surrounded by guard-rails/barriers and an extending structure that can position workers at heights. Further, as MCST itself submits, there were alternatives, *ie*, proper safety equipment and/or a safety harness. Unfortunately, MCST did nothing to provide or ensure that Zoe/STA provided any such equipment either.

53 MCST argues that it did not breach its duty of care because it could reasonably rely on Zoe as its independent contractor to provide a safe system of work, the requisite equipment and/or supervision. We reject this argument. As the Court of Appeal found in *Tan Juay Pah* (at [74]): "Pt IV of the WSHA stands for the broader proposition that under the WSH Regime, persons who create or

have control over safety risks at workplaces will not be allowed to shelter behind each other or others to avoid liability when those risks materialise." As an occupier under the WSHA, MCST had primary responsibility for safety in the M&E Room and cannot avoid liability by sheltering behind its contractor, Zoe.

54 We agree with the Judge that MCST breached its duty of care.

55 As an aside, we would mention that MCST had engaged a managing agent to manage the development. MCST's counsel informed us that although Monti was described as MCST's Property Executive or Quality Executive in these proceedings, he was in fact employed by the managing agent. MCST's counsel further informed us that he was instructed that MCST is prepared to consider Monti as one of its staff. We would caution legal practitioners that they have to describe the legal position accurately. It was not for MCST's counsel to truncate the facts and state that Monti was a staff of MCST just because MCST was prepared to consider Monti as one of its staff. Whether MCST is willing to bear responsibility for Monti's conduct is another matter.

56 We would also caution legal practitioners to be careful when they receive instructions that a subsidiary management corporation is willing to bear responsibility for the conduct of a staff of its managing agent. For example, who is the instruction from? If it is from the managing agent or the same staff whose conduct is in question, then there may be a conflict of interest. Clear instructions on this point should be obtained from the MCST itself through the council of the MCST and not from the managing agent or its staff. In the present case, as no one raised any issue about a conflict of interest, we did not pursue this at the oral hearing before us.

57 We have made the above observations so that one does not assume that a subsidiary management corporation will necessarily be liable for the negligent conduct of its managing agent or that legal practitioners may always act on the instructions of the managing agent alone when the legal practitioners purport to act for the subsidiary management corporation.

Proximate cause

58 MCST argues that even if it did breach its duty of care, its breach was not the proximate cause of the accident. First, MCST relies on the fact that Janaed was unable to say how or why he fell. In our view, it is a reasonable inference in this case that the use of guard-rails or barriers (whether on the top of the chiller or through the use of the mobile elevated work platform), or a travel restraint system would have prevented Janaed's fall; alternatively, the use of a fall arrest system would have prevented or reduced the severity of Janaed's injuries.

59 Second, MCST submits that the accident occurred due to, among other things, Janaed's failure to use proper safety equipment. We do not see how this submission helps MCST. It was MCST's duty to comply with the requirements for effective guard-rails or barriers, or the use of a travel restraint system or a fall arrest system in the first place. This was not a case in which MCST provided Janaed with a travel restraint system or a fall arrest system and Janaed failed to use the same.

60 We agree with the Judge's conclusion that MCST's breach of its duty of care was the proximate cause of Janaed's fall and injuries.

Zoe's liability

61 We note first of all that it was MCST, not Janaed, that filed the appeal against the Judge's finding that Zoe was not liable to Janaed. Accordingly, it was MCST, and not Janaed, that was pursuing a claim of negligence against Zoe on appeal. Before us, Zoe did not question MCST's standing to appeal against this finding. In any case, in our view, MCST has the necessary standing to appeal because MCST was directly affected by the finding and had a personal interest in seeking its variation (see *Microsoft Corp and others v SM Summit Holdings Ltd and another* [1999] 3 SLR(R) 1017 at [18]). MCST had pleaded in its defence that the accident was caused or contributed to by the negligence of Zoe or its agents as particularised in Janaed's statement of claim. If Zoe is found liable, MCST could have a claim for contribution against Zoe pursuant to s 15 of the Civil Law Act.

Duty of care

62 The Judge found that Zoe had no knowledge of the appointment on 8 November 2018 arranged between Ding and Monti. On the basis of this finding, the Judge went on to conclude that (Judgment at [33]–[34]):

> (a) The threshold requirement of factual foreseeability was not met because Zoe could not have foreseen any incident involving Janaed on that date.
>
> (b) There was insufficient legal proximity to find a *prima facie* duty of care owed by Zoe to Janaed.

63 We have some reservations about the Judge's conclusion that there was no factual foreseeability or legal proximity simply because Zoe did not know of the appointment on 8 November 2018. Factual foreseeability refers to

reasonable foreseeability from a factual perspective whilst the focus of legal proximity is on the closeness of the relationship between the parties (see [15] above). It seems to us that Zoe's lack of knowledge as to the *specific date* of the appointment is not relevant to the questions of *factual foreseeability and legal proximity*, although as will be explained later in this judgment, that lack of knowledge is relevant to the question of *breach* (see [67] below). As mentioned earlier (see [5] above), Zoe had asked Ding to contact Monti to follow up on the matter.

64 In our view, the factual foreseeability threshold was met in this case. It also seems arguable that there was sufficient legal proximity between Zoe and Janaed such as to give rise to a *prima facie* duty of care. Zoe was a "principal" as defined in s 4(1) of the WSHA, and as such, Zoe had the responsibility under s 14A(1)(*b*) of the WSHA to ensure that its contractor (STA) had "taken adequate safety … measures in respect of any … process used, or to be used" by STA or Janaed. Under s 14A(3), Zoe's duty included ascertaining that STA had conducted a risk assessment in relation to the safety risks posed to Janaed. Zoe's duties under s 14A of the WSHA fall within the categories under Pt IV of the WSHA. As stated at [41] above, this would be a strong factor in determining whether a duty of care at common law exists.

65 Nevertheless, it is unnecessary for us to decide whether Zoe did owe Janaed a common law duty of care in this case. Even if Zoe did owe a duty of care, we are satisfied that it has not been proven that Zoe breached that duty.

66 MCST had pleaded in its defence that, among other things, Zoe had breached ss 14A(1)(*b*) and (3) of the WSHA. However, Eugene was not cross-examined by MCST's counsel as to how Zoe was alleged to have breached its duties under these provisions – save for a brief exchange where Eugene testified

that Ding had prepared a risk assessment which was subsequently approved by Zoe and submitted to MCST.

67 Zoe was not informed about the appointment on 8 November 2018. Eugene testified under cross-examination that work could not be carried out without his knowledge and that Ding had to inform him of any arrangement for a site survey. His evidence was not challenged. Importantly, Eugene was not cross-examined as to the steps that Zoe should have taken under these circumstances but omitted to do so.

68 Further, when cross-examining Eugene, MCST's counsel suggested to Eugene that Ding and Janaed were the main persons to ensure their own safety, but significantly, he did not go on to suggest that, nevertheless, Zoe was partly responsible for the accident.

69 In the circumstances, we affirm the Judge's dismissal of the claim in negligence against Zoe, albeit for different reasons.

70 We would add that before us, MCST also submits that Zoe should be held vicariously liable for STA's negligence. MCST argues that the relationship between Zoe and STA/Ding was akin to that of an employer-employee relationship. Suffice it to say that this was not part of MCST's pleaded case below and MCST also did not make any submissions on this before the Judge. MCST is not entitled to make this submission on appeal. Allowing MCST to do so would be prejudicial to Zoe as Zoe had conducted its defence at the trial based on the issues raised by the pleadings.

Janaed's contributory negligence

71 Section 3(1) of the Contributory Negligence and Personal Injuries Act (Cap 54, 2002 Rev Ed) states as follows:

> **Apportionment of liability in case of contributory negligence**
>
> **3.**—(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

72 Apportionment of liability in negligence is a fact-sensitive balance and an appellate court should not intervene on the issue of apportionment by the trial judge unless it was clearly against the weight of the evidence or was plainly wrong: *Ng Li Ning v Ting Jun Heng and another* [2021] 2 SLR 1267 at [34].

73 In this case, the Judge found that Janaed was 30% contributorily negligent. Janaed submits that he was not contributorily negligent at all, or alternatively, that his contributory negligence was not more than 10%. On the other hand, MCST submits that Janaed's contributory negligence ought to be 50%. There was no submission from STA even though its own liability to Janaed for negligence might be affected if Janaed was found not liable for contributory negligence at all or Janaed's liability was reduced below 30%.

74 Janaed submits that he ought not to be held contributorily negligent at all as the accident was due to the negligence on the part of MCST and STA in failing to provide the requisite safety equipment. Janaed relies on *Zheng Yu Shan v Lian Beng Construction (1988) Pte Ltd* [2009] 2 SLR(R) 587 ("*Zheng Yu Shan*").

75 In *Zheng Yu Shan*, the plaintiff (the "employee") and his co-worker were tasked to remove metal formworks off a wall (at [3]). No instructions were given on how to carry out the actual dismantling (at [5]). The employee and his co-worker adopted a method which they had previously used. This involved the co-worker (who was at a lower level of the scaffold) prising part of each metal formwork away from the wall and attaching a hook to the formwork. The employee (who was at the top level of the scaffold) would hold on to the other end of the hook, dislodge the metal formwork completely off the wall, pull it up to the top level of the scaffold and throw it through a gap in the wall. The employee stood with one leg on the scaffold and the other on the gap in the wall (the "straddling position") instead of putting both legs on the scaffold (the "scaffold position") (at [7]–[8], [14]). After pulling the 30th piece of formwork, the employee felt a sharp pain in his back and stopped work (at [9]).

76 The DJ took judicial notice of the premise that the risk of injury would have been reduced if the employee had adopted the scaffold position and found the employee 30% contributorily negligent. On appeal, the employer argued that the employee ought to have adopted the scaffold position and had primarily himself to blame for adopting the straddling position (at [14]). The High Court found (at [34]) that based on the evidence, it could not be said with any degree of certainty whether the straddling position or the scaffold position was less likely to cause the injury. The High Court held that it was not correct for the DJ to take judicial notice of a fact that was not generalised knowledge or could not be deemed to be sufficiently notorious or clearly established. The High Court went on to find (at [47]) that the employer had not provided the employee with a safe system of work, considering that it had not given the employee any precise instructions as to how the metal formworks should be removed manually and it had not provided more workers to assist the employee and his co-worker.

77 The High Court concluded (at [50]) that it was not open to the employer to argue that the employee was at fault for adopting the straddling position instead of the scaffold position since it had not devised a safe system of work to begin with. The High Court also concluded that the employee could not be held responsible for any part of his injury as there was no evidence to show that the risk of the injury was more likely with the straddling position as opposed to the scaffold position. Finally, the High Court observed that in any event, the employee's conduct fell within the realm of "[error] of judgment" rather than "culpable neglect" and therefore did not amount to contributory negligence.

78 However, as the High Court acknowledged (at [51]), the fact that an employer has been remiss in its duty to provide a safe system of work does not mean that the employee can never be found to be contributorily negligent; the court will take a common-sense approach in assessing the culpability (if any) of the employee. The question of contributory negligence is necessarily fact sensitive.

79 In our view, the decision in *Zheng Yu Shan* must be understood in the context of the facts in that case. The employer had argued that the employee was contributorily negligent in failing to adopt the scaffold position. This argument failed because there was no evidence that the risk of injury was more likely with the straddling position as opposed to the scaffold position. The employee therefore could not be said to have been contributorily negligent in adopting the straddling position.

80 The facts in the present case are different. The fact that MCST/STA did not provide Janaed with any safety equipment does not mean that Janaed therefore did not have to exercise reasonable prudence. Having decided to climb to the top of Chiller 1 to check the model of the switches without any safety

equipment, it was still incumbent on Janaed to exercise reasonable prudence in looking after his own safety. Janaed fell off the top of Chiller 1 when he was using his mobile phone to take photographs of the switch, using one hand to hold his mobile phone and the other to zoom in for close-up shots of the switch, whilst standing near an edge of Chiller 1. The CCTV footage supports the inference that Janaed missed his footing and stepped off the edge of Chiller 1. We agree with the Judge that Janaed was careless in looking after his own safety. In our view, it is clear that Janaed's fall and injury was the result partly of his own fault and that he has to share in the responsibility for his fall and injury.

81 We now consider two other cases cited by Janaed. In *Chen Qiangshi v Hong Fei CDY Construction Pte Ltd and another* [2014] SGHC 177 ("*Chen Qiangshi*"), a rebar cage collapsed on the plaintiff as it was about to be lifted by a tower crane (at [5]). A rebar cage is a grid of interlocking steel bars that is utilised in the construction of reinforced concrete columns. It is fabricated off-site, transported to the construction site and lifted by a tower crane to the floor where it is to be installed. When installed, it is secured to starter rebars with wire ties. Starter rebars are steel bars that protrude from the concrete floor which the rebar cage is to be installed on (at [6]–[8]).

82 In that case, a rebar cage had been installed in an incorrect position and had to be relocated (at [22]). Before the hoist chains from the tower crane arrived, the plaintiff and his co-worker undid the wire ties on alternate steel bars of the incorrectly-positioned rebar cage (at [27]). The hoist chains arrived and the plaintiff rigged up the rebar cage (*ie*, attached the rebar cage to the hoist chains) in an improper and unsafe manner. With the help of a co-worker, the plaintiff then undid the remaining wire ties which secured the rebar cage to the starter rebars. The rebar cage tipped over and collapsed on the plaintiff (at [28]–

[29]). The plaintiff was an experienced rebar worker and was aware of the proper manner of rigging up a rebar cage in an upright position even though he was not a qualified rigger (at [207]).

83 The court found (at [207]) that the accident would not have occurred if the plaintiff had not rigged up the rebar cage in an improper and unsafe manner or released the remaining wire ties after the rebar cage was improperly rigged. The court concluded (at [216] and [225]) that the plaintiff was 50% contributorily negligent. On appeal, the Court of Appeal reduced the plaintiff's contributory negligence to 20%.

84 In *Miah Rasel v 5 Ways Engineering Services Pte Ltd* [2018] 3 SLR 480 ("*Miah Rasel*"), the plaintiff was deployed to replace sprinkler pipes located on the ceiling of a worksite. This was done at a height of about 5m. The plaintiff stepped out of the scissors lift and stood on an air conditioning duct located below the sprinkler pipe system. The duct gave way; the plaintiff fell and suffered serious injuries (at [7]). The High Court found (at [46]) that there was contributory negligence on the part of the plaintiff in consciously undertaking a risky and potentially dangerous endeavour. The court reduced the defendant's liability by 25% for the plaintiff's contributory negligence (at [48]).

85 Janaed points out that the plaintiff in *Chen Qiangshi* had rigged the rebar cage himself in an improper and unsafe manner, whilst the plaintiff in *Miah Rasel* had taken a risk by stepping on the air conditioning duct. Janaed submits that he had merely followed the instructions of STA and MCST and there should be no contributory negligence on his part. We disagree. In checking the model of the switch, it was incumbent on Janaed to exercise reasonable prudence in looking after his own safety. As discussed at [80] above, it is clear that Janaed's

fall and injury was the result partly of his own fault and that he has to share in the responsibility for his fall and injury.

86 As for the extent of Janaed's contributory negligence, Janaed submits that his contributory negligence should be less than 10%. Janaed argues that he had followed the way in which Ding had conducted the site survey that morning and that there was no other equipment available that he could have used that would have posed less risk to him.

87 On the other hand, MCST emphasises Janaed's experience and expertise in working from heights and submits that Janaed's conduct falls within the category of recklessness. MCST submits that Janaed's share of liability should be 50% in view of his level of blameworthiness and his blatant disregard for his own safety.

88 In coming to his conclusion, the Judge correctly directed himself on the law and took into consideration Janaed's experience and training in safety, the fact that Janaed was using both hands to take photographs with his mobile phone and that he was standing too close to an edge of Chiller 1, and the fact that the accident occurred during daylight hours in a reasonably well-lit area of the M&E Room and the danger of falling from height was quite apparent (Judgment at [80] and [82]).

89 We are not persuaded that the Judge's apportionment of liability between Janaed and MCST/STA was against the weight of the evidence or was plainly wrong. Accordingly, we affirm the Judge's decision that Janaed's claim for damages should be reduced by 30% for his contributory negligence.

Contribution among joint defendants

90 MCST, Zoe, STA and Newtec did not claim any contribution from each other; none of them served any notice of contribution pursuant to O 16 r 8 of the Rules. In the event, the issue of contribution from Zoe did not arise as the Judge dismissed the claim against Zoe. The issue of contribution from Newtec did not arise as the Judge declined to enter interlocutory judgment against Newtec. As between MCST and STA, the Judge did not make any finding on contribution between them since, apparently, no claim for contribution arose in the trial before him. The issue as to contribution between MCST and STA thus does not arise in MCST's appeal before us. Defendants who wish to claim a contribution against each other should take note that they have to file the requisite notices of contribution under the Rules so that the issue can be dealt with by the trial judge. While we are aware that at times defendants seek such a contribution before a trial judge without filing the requisite notice of contribution and trial judges have made decisions on such a contribution, we take this opportunity to remind litigants and legal practitioners to comply with the Rules (as we have said so previously in *Hwa Aik Engineering Pte Ltd v Munshi Mohammad Faiz and another* [2021] 1 SLR 1288 at [31]–[33]).

Conclusion

91 For the above reasons, we dismiss MCST's appeal in AD/CA 98 and Janaed's appeal in AD/CA 99.

92 With respect to AD/CA 98, MCST is to pay costs to:

(a) Janaed, fixed at $40,000 (inclusive of disbursements); and

(b) Zoe, fixed at $20,000 (inclusive of disbursements).

93 As for AD/CA 99, Janaed is to pay costs to MCST, fixed at $20,000 (inclusive of disbursements). Janaed and MCST may set-off costs payable by one to the other. We make no order on costs in favour of STA as STA did not file any documents or take any position in this appeal. The usual consequential orders apply.

Woo Bih Li
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

Chua Lee Ming
Judge of the High Court

Eu Hai Meng Michael and Alicia Chia Si Min (CIVIC Legal LLC) for the appellant in AD/CA 98/2021 and the second respondent in AD/CA 99/2021;
Namasivayam Srinivasan and VM Vidthiya (Hoh Law Corporation) for the first respondent in AD/CA 98/2021 and the appellant in AD/CA 99/2021;
Peter Ong Lip Cheng (Peter Ong Law Corporation) for the second respondent in AD/CA 98/2021;
The first respondent in AD/CA 99/2021 in person.