Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric
[2007] SGCA 36

Case Number : CA 104/2006, 105/2006

Decision Date : 26 July 2007

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Lee Seiu Kin J; V K Rajah JA

Counsel Name(s) : Cheong Yuen Hee and Lee Nyet Fah Alyssa (East Asia Law Corporation) for the appellant in CA 104/2006 and the respondent in CA 105/2006; Lai Yew Fei (Rajah & Tann) for the respondent in CA 104/2006 and the appellant in CA 105/2006

Parties : Sunny Metal & Engineering Pte Ltd — Ng Khim Ming Eric

Contract – Contractual terms – Rules of construction – Architect hired by contractor signing deed of indemnity with developer – Whether clauses in deed imposing additional duties on architect beyond his statutory duties as qualified person under Building Control Act (Cap 29, 1999 Rev Ed)

Contract – Remedies – Damages – Causation – Distinction between causation and remoteness – Distinction between causation in fact and causation in law – Applicable test to determine causation in fact in contract – Whether different tests of causation in fact applying in contract and tort

Tort – Negligence – Damages – Pure economic loss – Applicable test to determine imposition of duty of care – Whether architect owing duty of care to developer in respect of additional duties beyond his statutory duties as qualified person under Building Control Act (Cap 29, 1999 Rev Ed)

26 July 2007

V K Rajah JA (delivering the grounds of decision of the court):

Introduction

1 Both Sunny Metal & Engineering Pte Ltd ("SME") and Ng Khim Ming Eric ("Eric Ng") appealed against the decision of the trial judge in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR 853 ("*Sunny Metal*"). Briefly, the trial judge had found Eric Ng, the project architect for a building project developed by SME, liable for breaches of his (a) contractual obligations, which arose from cl 1 (but not cl 4) of a deed of indemnity signed between SME and Eric Ng dated 21 October 1996 ("the Deed"); and (b) tortious duties owed to SME. Consequent upon this finding, SME was awarded judgment for the sum of $1,243.20, being damages of $447,473.50 less two items of set-offs amounting to $446,230.30: *Sunny Metal* at [167]. SME was also allowed to recover 70% of its costs.

SME's appeal in Civil Appeal No 104 of 2006

2 SME's appeal in Civil Appeal No 104 of 2006 ("CA 104/2006") was, in the main, against the trial judge's decision on the quantum of damages. Specifically, there were four main grounds of appeal, *viz*:

(a) on the issue of liability, whether cl 4 of the Deed applied to attach contractual obligations of, *inter alia*, supervision on Eric Ng;

(b) on the issue of damages, whether the contractual test of remoteness of damages should apply where there was concurrent liability in *both* contract and tort;

(c) still on the issue of damages, whether certain claims by SME were too remote; and

(d) whether the set-offs taken into account by the trial judge could in fact be so utilised.

Eric Ng's appeal in Civil Appeal No 105 of 2006

3 On the other hand, Eric Ng's appeal in Civil Appeal No 105 of 2006 ("CA 105/2006") was against the trial judge's findings on liability, damages and costs. Specifically, on the main issue of liability, there were four main grounds of appeal, *viz*:

(a) whether, on a proper construction of cl 1 of the Deed, Eric Ng had agreed to undertake certain duties to SME beyond his statutory duties as a qualified person ("QP") under the Building Control Act (Cap 29, 1999 Rev Ed);

(b) whether Eric Ng owed certain duties in tort to SME to prevent economic loss; and

(c) if either ground (a) *or* (b) is answered in the affirmative, whether Eric Ng had breached the said duties.

Our decision at the end of the hearing

4 Since Eric Ng's appeal in CA 105/2006 concerned the issue of liability, and it would be academic to consider the further issues on the quantum of damages should liability not be established, we decided to hear his appeal first. In the result, we allowed Eric Ng's appeal against the trial judge's decision on liability and dismissed SME's appeal in CA 104/2006 accordingly. We now give detailed reasons for our decision.

Facts

Events leading up to the design-and-build contract and the Deed

The first design-and-build contract

5 The facts of this case are relatively uncontroversial. The unhappy saga began sometime in mid-1994, when SME desired to construct and complete a three-storey factory with an ancillary office ("the Factory") to accommodate its expanding business. Towards the end of 1994, SME was introduced to Lim Chor Hua ("Lim") of Pierre Marc Design ("PMD"). After a series of discussions, SME agreed to engage PMD as its design-and-build ("D&B") contractor pursuant to an agreement dated 12 October 1994 ("the first D&B contract"), which terms were in turn embodied in a letter sent by PMD to SME on 10 October 1994. Although SME contended that the first D&B contract was in fact a consultants' services agreement, the terms of the first D&B contract show quite clearly that it was meant to engage PMD as the D&B contractor for SME. In this connection, it is pertinent to note that SME's Sunny Pang signed and embossed SME's stamp on the letter dated 10 October 1994 beneath the words:

> We, the undersigned hereby confirm to appoint you [PMD] as a [*sic*] Architects, Consultant Engineers as well as *Tunkey [sic] Contractor* in accordance with the content of the above [meaning the letter from PMD to SME dated 10 October 1994]. [emphasis added]

The term "turnkey contractor" is often used to describe D&B contractors. It has been said that it is intended to indicate that upon completion the key can be turned and everything will be ready:

Stephen Furst & Sir Vivian Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 8th Ed, 2006) at para 1‑029. It was thus clear from the terms of the first D&B contract that SME engaged PMD as its D&B contractor. Furthermore, it was also clear that the parties proceeded on the basis that the first D&B contract was valid and binding. For example, on 16 February 1995, *after* the said contract was entered into, PMD issued an invoice to SME based on the professional fee of 6.5% mentioned in the contract.

6 Sometime in early 1995, PMD applied to Jurong Town Corporation ("JTC") for a plot of land for the purpose of constructing the Factory. On 14 January 1995, JTC granted to SME a two-year licence for a plot of land at Changi South Avenue 2. SME then applied for a bank loan, which required a cost estimate from PMD. In a letter dated 20 January 1995, Lim submitted his cost estimate under the letterhead of Pierre Marc Corporation Pte Ltd ("PMC"). PMC was the construction arm of PMD, and the total development cost quoted in this cost estimate was $4,631,415.40.

The second design-and-build contract

7 Subsequently, on 21 November 1995, Lim submitted a *revised* cost estimate (at $3,926,400) to SME. A detailed breakdown of the scope of works and services was enclosed with this cost estimate and it was also specifically stated that the estimated costs did not include, *inter alia*, the Temporary Occupation Permit ("TOP") certificate clearance. At around the same time, SME engaged a quantity surveyor, Ng Boon Cheng ("NBC"), to evaluate the prices submitted by PMC to SME. This was apparently required for the purpose of SME's loan application with its bank. NBC's preliminary cost report was submitted to SME in November or December 1995.

8 In a letter dated 6 December 1995, SME accepted PMC's cost estimate dated 21 November 1995 "based on [the] design and build concept" under its own letterhead. Although Eric Ng contended that SME "unequivocally accepted PMC's offer", it is clear that SME specifically stated in its letter dated 6 December 1995 that "[y]our [*ie*, PMC's] scope of work include [*sic*] obtaining Temporary Occupation permit". As such, this "acceptance" by SME was more properly a counter-offer, which was in turn *accepted* by PMC when it signed the acceptance at the end of the letter on 12 December 1995. This was the second D&B contract and what the parties had agreed to was evidently embodied within the terms of PMC's cost estimate dated 21 November 1995 *modified* by SME's letter dated 6 December 1995. Indeed, such an interpretation is supported by a statement contained in the latter letter, *viz*:

> *Your letter ref. PMC/SME/111/95 dated 21st Nov 1995* shall form as integral part of the award. Unless and until a formal contract is executed, *this letter* and *your acceptance* of the terms and conditions *stated herein* [referring to SME's letter dated 6 December 1995] shall constitute a *binding contract* between us. [emphasis added]

New tenders

9 On about 12 March 1996, SME decided to hold back the project "[d]ue to the over budget for the … development". This was recorded in the minutes of a meeting which had taken place between SME, PMC and other parties on 12 March 1996. By this time, the piling works had already been completed (they were in fact so completed on 15 January 1996) and the building permit for the Factory was received on 16 February 1996. PMC was thus ready to carry out the substantive construction works but this was halted as SME deferred its final decision to commence the construction works.

10 Subsequent to this temporary cessation of works fresh tenders were invited from other

contractors. The reason for the fresh tenders is unclear. Whatever the reason, PMC submitted a lower revised quote of about $3,591,600 in a letter dated 27 August 1996, and this was similar to the quotation dated 23 April 1996 received from one Erecon Construction Co Pte Ltd, save for some additional items.

Further meetings and Eric Ng's responsibilities

11 At a meeting between SME, PMC and other parties on 11 September 1996, SME expressed its doubts about PMC's ability to undertake the construction and provided a counter-offer on various items in PMC's offer in the letter dated 27 August 1996. At the meeting, it was further stated that Eric Ng was expected to obtain the TOP within two months of the completion of the Factory. A further meeting between the parties, including Eric Ng, took place on 24 September 1996. At this meeting, it was stated that Lim was "expected to sign [SME's letter dated 11 September 1996] … [which] will become an integral part of the construction contract". Further, it was also stated that "Eric Ng will from now chair all the meetings and will be responsible for *monitoring the work of* [PMC] and all the sub-contractors involved in the project … [and] will be responsible for noting all the minutes of the meetings" [emphasis added]. Subsequent to this meeting, PMC accepted in writing SME's counter-offer on 30 September 1996 by signing the acknowledgement portion of SME's letter dated 11 September 1996.

12 Between 6 December 1995 and 21 October 1996, Eric Ng performed various acts which amounted, according to SME, to the acknowledgement of his duties of supervision over PMC. For example, when the issue of a potential conflict of interest of the engineer employed by PMC was raised, it was decided at a meeting on 4 October 1996 that "the Structural engineer will now take instruction and receives [*sic*] his professional fee from Mr Eric Ng". Further, on 14 October 1996, Eric Ng wrote to PMC warning PMC that its "failing to meet up [*sic*] *with* [its] commitment and fabrication of information to mislead [SME] and consultant is intolerable" and that "should there be any future repeat of such act, we will not hesitate to take action against you". This letter was apparently effective. It also bears mention that Eric Ng also chaired all site meetings held after 24 September 1996.

The third design-and-build contract and the Deed

The third design-and-build contract

13 On 21 October 1996, SME entered into a comprehensive D&B contract with PMC and this is the third D&B contract. This contract included the following documents: (a) Public Sector Standard Conditions of Contract for Construction Works (Building and Construction Authority, 1995) ("the PSSCOC"); and (b) "Particular Conditions of Contract (For Design and Build Contract)" ("the Particular Conditions") which modified and augmented the PSSCOC. However, pursuant to cl 3 of the contract, PMC's letter dated 27 August 1996 was not included.

14 Pursuant to cll 4 and 14.1 of the PSSCOC read with the appendix attached to the third D&B contract, the Factory was to be completed within ten months, *ie*, by 20 August 1997, at a cost of $3,926,400. In addition, some of the more pertinent clauses of the contract are as follows.

15 First, the Particular Conditions inserted a new cl 12A to the PSSCOC, which provided as follows:

Supervision of Works

(1) The Contractor shall, in compliance with the Building Control Act, appoint an Architect and an Engineer to act as Qualified Persons under the said Act. The Architect and Engineer are to *assist the Superintending Officer in the supervision of the Works* and all instructions bearing on the Works may only be issued by the *Architect* and/or Engineer with the express written consent of the Superintending Officer.

(2) The duties of the Architect and/or Engineer shall not in any way affect, relieve or diminish the duties and responsibilities of the Contractor under the Contract.

…

[emphasis added]

16 Secondly, the Particular Conditions introduced new cll 17A and 17B to the PSSCOC which provided as follows:

17A Temporary Occupation Permit (TOP)

(1) The Contractor shall programme and complete the Works (including all sub-contractors' work) in such a manner that the Contractor's Architect can apply and obtain for the Employer a Temporary Occupation Permit (TOP) for the Building.

(2) All works to enable the various submissions to be made for the application of a TOP by the Architect must be completed to the satisfaction of the Superintending Officer at a date not later than six (6) weeks prior to the Time for Completion of the Contract.

…

17B Certification of Statutory Completion

(1) The Contractor shall effect and complete any amendment required by the relevant authorities and … ensure that the Architect apply and obtain the Certificate of Statutory Completion for the Employer for the Building.

…

The deed of indemnity

17 In addition, SME and Eric Ng also entered into the Deed. However, Eric Ng signed the Deed only one day later, *ie*, 22 October 1996. The reason given by Eric Ng as to why he did not sign on 21 October 1996 was because he "apparently" did not go to the lawyer's office, although *he was aware* that he was required to sign it on 21 October 1996.

The construction works and termination of PMC

Supervision of PMC's works

18 The construction of the Factory continued after the execution of the third D&B contract but there were numerous delays. In this connection, Eric Ng contended that SME did not engage any consultant to supervise PMC's works and that SME had assumed the responsibility to do so. SME purported to do this through two employees, Kenny Koh ("Koh") and Tim Tio ("Tio"). Koh was alleged

to be the project manager by virtue of such description in some of the letters originating from SME. As for Tio, he was described as a "Project Coordinator" in SME's own letter dated 5 May 1998, and also as the "Superintending Officer" in SME's own letter dated 11 September 1998 read with SME's termination certificate dated 11 September 1998, SME's letter dated 21 September 1998 and SME's notice of termination dated 21 September 1998.

Payment disputes

19 Under cl 32.6 of the PSSCOC read with item (viii) of the appendix, SME was required to settle a payment certificate within 21 days of the date of the payment certificate. Eric Ng has contended that sometime in late 1996, disagreements arose between SME and PMC over the delay of SME in settling the payment certificates. We will briefly examine the relevant correspondence between the parties which show the extent of this payment dispute later on.

Termination of PMC and SME's claims

20 SME attributed the delay in the works to PMC. On 21 August 1998, SME set in motion the process of terminating PMC and eventually did so on 21 September 1998. Following the termination of PMC, it followed that Eric Ng's appointment as architect for the Project was also terminated. This was confirmed by SME itself in its pleaded case.

21 As PMC was subsequently liquidated in February 2000, SME commenced the present proceedings against Eric Ng alone, contending that his breach of his contractual obligations under the Deed and/or his tortious duties owed to SME had caused its (SME's) losses. In its statement of claim, SME contended that Eric Ng was in breach of his duties to SME in that he failed to, in the main, (a) adequately supervise and monitor the progress of the works; and (b) procure from PMC the inspection reports, builders' certificates and registered inspection forms for the purpose of obtaining the TOP. The latter duty must be distinguished from Eric Ng's contractual duty under cl 17A(1) of the Particular Conditions to apply for the TOP *upon receipt* of the relevant documents. For convenience, we shall refer to these two duties as the "additional duties". Since these additional duties were beyond Eric Ng's duties as a QP, they had to attach either contractually by way of the Deed or by common law as duties of care in tort. We thus considered whether the additional duties arose either by way of the Deed or in tort.

Eric Ng's liability under the Deed

Whether Eric Ng agreed to undertake additional duties to SME under clause 1 of the Deed

Background

22 As the trial judge noted in *Sunny Metal* ([1] *supra*) at [14], the issue with regard to SME's head of claim under the Deed was straightforward inasmuch as it centred, in the final analysis, on the interpretation of the terms of the Deed itself. Specifically, it involved the interpretation of the word "duties" in cl 1, and whether these duties entailed the additional duties. Clause 1 provided as follows:

> The Consultants warrant that they shall exercise reasonable skill, care and diligence *in the performance of their duties* to the Contractor and/or the Employer. [emphasis added]

23 In the trial below, upon an *objective* construction of cl 1 of the Deed (*Sunny Metal* at [14]), the trial judge found (at [32]) that SME "clearly intended for the Deed to give it *extra legal*

protection by subjecting *[Eric Ng], on a personal level,* to legal duties that [Eric Ng] would not otherwise have had under the existing arrangement" [emphasis in original] and that the "entire point of the Deed was therefore to ensure that the defendant *did* owe legal duties to [SME] as well" [emphasis in original]. The trial judge rejected Eric Ng's contention that the *content and scope* of that duty were confined to duties he already owed as a QP as well as under his own legal relationship with the main contractor (at [32]).

24 In doing so, the trial judge placed considerable emphasis on three factors. First, the trial judge held that the purpose of cl 1 could not be merely to *reiterate* the limited duties which Eric Ng owed to SME as a QP since, if this were the correct interpretation, cl 1 would not have any real effect and would be an exercise in "legal redundancy and futility" (at [21] and [32]). Secondly, the trial judge found that the *context* under which the third D&B contract was entered into between SME and PMC, including the discomfort SME felt in entering into the said contract, showed "why [SME] wanted the *additional* (legal) protection afforded by the Deed" [emphasis in original] (at [32]). Thirdly, the trial judge also relied on the fact that Eric Ng had performed various duties that clearly went beyond the narrow scope of duties he alleged he had assumed, including carrying out various administrative roles, chairing various meetings, and carrying out various certification duties (at [22] and [32]). In the premises, the trial judge found (at [32]) that:

> Looked at in this light, *and* in the light of the *plain language* of cl 1 above, it is clear that cl 1 means exactly what it says – *in other words, [Eric Ng] warranted, in a Deed no less, that he would exercise reasonable skill, care and diligence in the performance of his duties owed to,* inter alia*, [SME]. These legal duties included the proper supervision of [PMC's] work. It was on that basis that [SME] was willing to enter into the (separate) design-and-build contract with [PMC].* [emphasis in original]

Parties' arguments

25 On appeal, Eric Ng submitted that in his position as the QP, he owed certain duties to SME to ensure that the building works were carried out according to the plans approved by the Building and Construction Authority and that the building works did not endanger public safety. However, he contended that these duties did not include duties of "contract administration, supervision of the main contractor's building works and certifying payments", *ie*, the additional duties. Eric Ng further submitted that the trial judge's construction of cl 1 of the Deed was wrong as it was not redundant even if it merely reiterated Eric Ng's duties as a QP. In fact, Eric Ng pointed out that the Deed had all the hallmarks of a standard form collateral warranty. Such a construction would benefit SME and did not render cl 1 of the Deed redundant.

26 On the other hand, SME relied principally upon the circumstances in which the Deed was entered into to cast light on the duties which Eric Ng owed to SME under its terms. It pointed out that the trial judge's conclusion that SME was uncomfortable with contracting with PMC and wanted additional legal protection was amply supported by the evidence. SME also pointed out that there was ample documentary evidence to show that Eric Ng not only contractually bound himself to supervise the building works, but in fact performed such duties. Specifically, Eric Ng had agreed on 24 September 1996 to "chair all meetings and … be responsible for monitoring the work of [PMC] and all the subcontractors involved in the project". As such, SME submitted that the trial judge's finding in relation to cl 1 of the Deed should be upheld.

Applicable legal principles

27 In our view, the issue here essentially concerned the interpretation of cl 1 of the Deed; more

specifically, whether it imposed a contractual obligation on Eric Ng to undertake the additional duties. The applicable legal principles concerning the interpretation of contracts apply equally to the interpretation of deeds: *OTV Birwelco Ltd v Technical and General Guarantee Co Ltd* [2002] 4 All ER 668; *Keating on Construction Contracts* ([5] *supra*) at para 3-067.

28 The starting point of discussion would be the *dictum* of Lord Diplock in *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724. Lord Diplock had said (at 736) that:

> The object sought to be achieved in construing any commercial contract is to ascertain … what each [party] would have led the other reasonably to assume were the acts that he was promising to do or to refrain from doing by the words in which the promises on his part were expressed.

Indeed, as the learned authors of *Keating on Construction Contracts* note (at para 3-002), in construing a contract, the court applies the rule of law that, while it seeks to give effect to the intention of the parties, it must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used: see further *The Commissioners of Inland Revenue v Raphael* [1935] AC 96 at 143. However, as against this primary emphasis on the words as expressed in the contract, the courts have also recognised, especially where the meaning of the words used is not expressly clear, that *that* meaning cannot be divorced from its context. The court must "inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view": *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384, and see also *Arbuthnott v Fagan* [1996] 1 LRLR 135.

29 These general principles were endorsed by this court most recently in *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] SGCA 20, where it noted (at [29]):

> It is clear that, at *common law*, it has always been open to the court to have recourse to extrinsic material where such material would aid in establishing the factual matrix which would (in turn) assist the court in construing the contract in question. This assumes, of course, that the reference to such material would not result in the contravention of the parol evidence rule which is statutorily embodied within ss 93 and 94 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Act"). This is, in fact, precisely the situation in the present case. The key concept here is that of *context*. ***No contract exists in a vacuum and, consequently, its language must be construed in the context in which the contract concerned has been made. We would go so far as to state that even if the plain language of the contract appears otherwise clear, the construction consequently placed on such language should not be inconsistent with the context in which the contract was entered into if this context is clear or even obvious, since the context and circumstances in which the contract was made would reflect the intention of the parties when they entered into the contract and utilised the (contractual) language they did***. It might well be the case that if a particular construction placed on the language in a given contract is inconsistent with what is the obvious context in which the contract was made, then *that* construction might *not* be as clear as was initially thought and might, on the contrary, be evidence of an ambiguity. [emphasis added in bold italics]

30 In determining the circumstances in which the contract was entered into, it is permissible to refer to documents (other than the contract being interpreted) which formed part of the same transaction. In such cases, all the contracts may be read together for the purpose of determining their legal effect: see also Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 2004) at para 3.03. In *Smith v Chadwick* (1882) 20 Ch D 27 at 62–63, Jessel MR said:

> [W]hen documents are actually contemporaneous, that is, two deeds executed at the same

> moment, … or within so short an interval that having regard to the nature of the transaction the Court comes to the conclusion that the series of deeds represents a single transaction between the same parties, it is then that they are all treated as one deed; and, of course, one deed between the same parties may be read to shew the meaning of a sentence, and be equally read …

Although the Deed was entered into between SME and Eric Ng, and the third D&B contract was between SME and PMC, both were executed at around the same time. In our view, the two documents ought to be read together in order to shed light on the interpretation of the Deed.

Our decision

31 In our judgment, Eric Ng had not contractually undertaken the additional duties by virtue of cl 1 of the Deed. On the contrary, cl 1 was intended to be a collateral warranty. As pertinently noted in *Jackson & Powell on Professional Liability* (Sweet & Maxwell, 6th Ed, 2007) at para 9-060, a construction professional may undertake express contractual duties to a person other than his immediate client. For example, a building owner who contracts with a D&B contractor may wish to ensure that he will have a remedy for defective design in the event that the contractor becomes insolvent. If the design work has been sub-contracted to an architect, the employer may require the architect to sign a collateral warranty. In the context of the present case, such a warranty would have functioned as such: in consideration of the employer (SME) awarding the main contract to the contractor (PMC), the architect (Eric Ng) undertakes a direct obligation to the employer (SME) to use reasonable skill and care in performing the work sub-contracted to him by the contractor (PMC). On this construction, all that Eric Ng agreed to directly undertake by way of the Deed was to properly perform the work sub-contracted to him by PMC. He had not agreed to undertake the additional duties.

32 Such a construction is consonant with the factual matrix in which the Deed was entered into. First, as pointed out above at [15], cl 12A(1) of the Particular Conditions expressly provided that Eric Ng, being the architect of the Project, was only to *assist* the superintending officer in the supervision of the works. Given that the duty of Eric Ng was so clearly spelt out in cl 12A(1), we were unable to accept a construction of cl 1 of the Deed which would impose on Eric Ng the additional duties, over and above this clearly stated duty in cl 12A(1).

33 Secondly, in relation to the purported reliance which SME placed on Eric Ng's assumption of supervisory duties before entering into the third D&B contract, which in turn was supposedly due to SME's discomfort with PMC's capabilities, the key issue was the date in which the Deed was concluded. Although the Deed was dated 21 October 1996, it was undisputed that Eric Ng only signed the Deed a day later, *ie*, 22 October 1996. As such, given that SME had signed the third D&B contract on 21 October 1996, it would be difficult for it to assert that it had *relied* on Eric Ng's undertaking of the additional duties by way of the Deed *before* it entered into the said contract.

34 We were also unable to accept SME's argument that if the purpose of the Deed was merely to reiterate the duty of Eric Ng stated elsewhere, this would render the Deed superfluous. The construction of cl 1 as a collateral warranty would have allowed SME to sue Eric Ng in the event that Eric Ng failed to perform his obligations *to PMC* adequately. This, far from being superfluous, actually provided the contractual privity which SME would otherwise not have had if Eric Ng was only accountable to PMC for duties owed to PMC. In our view, this was the precise purpose of the Deed. In the absence of additional evidence confirming that the parties had agreed that Eric Ng would personally undertake the additional duties adverted to in the Deed, we felt that it would not be appropriate to construe cl 1 of the Deed to have this effect.

Whether Eric Ng agreed to undertake additional duties to SME under clause 4 of the Deed

Background

35 Apart from cl 1, SME had argued before the trial judge that cl 4 of the Deed also imposed additional duties of, *inter alia*, supervision, on Eric Ng. Clause 4 of the Deed provided as follows:

> The Consultants shall indemnify and keep indemnified the Employer from and against all claims, demands, proceedings, damages, costs, charges and expenses arising out of or in connection with any breach of duty, whether in contract, in tort or otherwise.

However, the trial judge rejected this argument, holding that the language of cl 4 was clear and that it was an indemnity clause which applied only to damages incurred by *third parties*, and not SME (*Sunny Metal* ([1] *supra*) at [34]). SME appealed against this finding and we heard counsel's arguments when SME responded to Eric Ng's appeal in relation to cl 1.

Parties' arguments

36 SME argued that the trial judge failed to appreciate that cl 4 encompassed two sets of factual situations for which Eric Ng covenanted to indemnify SME: the first being to indemnify SME against third party claims and the second being that Eric Ng covenanted to indemnify SME against "damages, costs, charges and expenses arising out of or in connection with any breach of duty, whether in contract or in tort". In response, Eric Ng submitted that the trial judge's interpretation of cl 4 (*ie*, that it applied only in respect of third party claims) was clear from a plain reading of cl 4. A plain reading would show that the words "claims, demands, proceedings" referred to a claim made by third parties against SME in circumstances where there was a genuine dispute between SME and third parties.

Our decision

37 We agreed with the trial judge that cl 4 was an indemnity clause in respect of *third party claims* only. Indeed, the language of cl 4 was plain and clear; it presupposed a claim by a third party. There was nothing in the factual matrix in which the Deed was entered into to suggest that the parties intended for a different interpretation of cl 4. Such a construction is amply supported by case law. In *The Lindenhall* [1945] P 8, the relevant indemnity clause read as follows:

> The owners … of the ship … being towed … agree … to indemnify and hold harmless the Port Authority against all claims for or in respect of … damage of any kind whatsoever and howsoever or wheresoever arising in the course of and in connexion with the towage.

The English Court of Appeal held that the clause was limited to claims against the port authority *by third parties*, and did not embrace claims by the owner of the towed vessel.

38 *Even if* we were to agree with SME that cl 4 did impose a duty on Eric Ng, this still would not have assisted SME because the question which must then be answered is simply that which was posed in respect of cl 1, *viz*, what was the scope of the duties so contemplated? For the reasons considered above, we were unable to find that the additional duties were undertaken by Eric Ng under the Deed.

39 Accordingly, we found that Eric Ng did not contractually agree to undertake the additional duties. For this reason alone, SME's claim for damages owing to Eric Ng's alleged breaches of the

additional duties under the Deed must fail.

Eric Ng's liability in negligence for pure economic loss

Background

40 Apart from the contractual claim, SME mounted a separate claim in common law negligence against Eric Ng. SME's claim in negligence for pure economic loss raised interesting (albeit difficult) legal issues relating to the duty of care. In this respect, the trial judge, after an extensive examination of the current state of the law, stated that he believed that the two-part test in *Anns v Merton London Borough Council* [1978] AC 728 ("*Anns*") was superior to the other tests to determine a duty of care. Nonetheless, bound by authority emanating from this court, the trial judge considered that *even if the other tests were applied*, the result would be the same and a duty of care would *still be imposed* on Eric Ng. He considered that, on the facts, it was clear that (a) the damage or loss to SME was in fact foreseeable if Eric Ng failed to take reasonable care in fulfilling his duties set out in the Deed; (b) the Deed provided the requisite proximity of relationship between SME and Eric Ng; and (c) there were clearly no policy considerations which militated against the imposition of a duty of care on Eric Ng: *Sunny Metal* at [122]. Eric Ng appealed against this finding.

Parties' arguments

41 Eric Ng submitted that if this court reversed the finding on the existence of a contract for services and found that there was no contractual duty on Eric Ng to perform such duties, it would follow that no duty of care in respect of the additional duties existed in tort. Furthermore, Eric Ng pointed out that following the reasoning in *Man B&W Diesel S E Asia Pte Ltd v PT Bumi International Tankers* [2004] 2 SLR 300, a duty of care in tort should not be imposed by the court *ex post facto* to allow SME to circumvent the allocation of risks and improve its commercial bargain.

42 In response, SME contended that Eric Ng had at the very least, voluntarily assumed the responsibilities of supervision and administration of the contract and there would be an implied retainer. It was further submitted that the present case met all the tests which have been used in deciding whether a defendant sued for causing pure economic loss to a claimant owed the latter a duty of care in tort.

Our decision

43 We agree with the trial judge that the local jurisprudence in relation to the applicable test to determine the imposition of a duty of care is presently unclear. However, for the purposes of the present appeal, we see no need to determinatively resolve the test to be applied. In our view, it suffices to note that the crux of any imposition of a duty of care must be premised on there being sufficient proximity between the parties. Whether or not there are other factors to be considered in addition to the requirement of proximity is an issue which we will address on a more appropriate occasion.

44 Adopting the approach that there must be sufficient proximity between the parties and bearing in mind that the trial judge's finding of proximity was very much premised on his interpretation of the Deed (which we have, with respect, rejected), we were of the view that there was insufficient proximity between SME and Eric Ng for a duty of care to be imposed tortiously. Furthermore, apart from the effect of the Deed, we were also satisfied from the evidence that there was very little, if any, reliance by SME on Eric Ng to fulfil his alleged additional duties to SME.

45 As will be recounted, the trial judge held in *Sunny Metal* (at [120]) that the proximity between SME and Eric Ng had arisen because "there was *a contractual relationship* between them in the first instance" [emphasis in original]. However, since we have decided that the Deed did not impose on Eric Ng the additional duties, it must necessarily follow that the Deed could not provide the proximity between SME and Eric Ng on a tortious basis as well. However, this did not conclude our consideration of this ground of appeal. There remained for us to consider if, *apart from the Deed*, there was any evidence of legal proximity.

46 On this point, we were convinced that SME had not relied on Eric Ng to fulfil his alleged additional duties to SME. The evidence showed quite clearly that SME itself sent numerous complaints to PMC by Sunny Pang, Koh or Tio. As we stated above at [18], Koh was the project manager and Tio was variously described as a "Project Coordinator" and "Superintending Officer". It was clear to us that SME had, at the time the problems with PMC arose, relied on either Koh or Tio to resolve them, and had not relied on Eric Ng to do so. Accordingly, we could not see any measure of reliance on Eric Ng by SME which would entitle us to find sufficient proximity for a tortious duty of care to be imposed on Eric Ng.

47 Accordingly, we were of the view that there was no duty of care in respect of the additional duties imposed on Eric Ng in tort. Given that we had found that Eric Ng did not owe the additional duties to SME either by way of the Deed or in tort, it would follow that SME's claims would fail. However, for completeness, we also considered that even if Eric Ng had owed these additional duties to SME by way of the Deed or in tort, and had breached these duties (as was conceded by Eric Ng on the assumption that these duties were owed), SME's claims would still have failed on the issue of causation. It is to this that we now turn.

Causation

Background and the parties' arguments

48 On to the issue of causation, Eric Ng appealed against the trial judge's implicit finding that causation was proved on the facts. Specifically, Eric Ng submitted that even if he owed the additional duties to SME and had performed these duties, it was clear from the documentary evidence that PMC would have ignored him in view of the payment dispute between PMC and SME. Even when SME threatened to terminate PMC's contract and did in fact terminate PMC's contract, PMC simply ignored SME. Accordingly, Eric Ng submitted that there was no doubt that PMC would have reacted in a similar manner if he had been the one making the threat and there was nothing he could have done to make PMC complete the construction works and rectify the defects.

49 In response, SME asserted that the building defects were directly or indirectly the result of Eric Ng's complete abdication of his duties to supervise and administer the contract and contended that the payment dispute raised by PMC was unjustified. Before addressing the parties' submissions on this issue, we first turn to the applicable legal principles. We note that both the factual and legal aspects of this issue were not adequately developed by counsel and the learned trial judge did not have the opportunity to properly assess this issue.

Applicable legal principles

Causation and remoteness

50 We start with the basic proposition that, not only must there be damage, but the damage must have been *caused* by the defendant's act or omission which amounted to a breach of his duty:

see, for example, *Yeo Yoke Mui v Ng Liang Poh* [1999] 3 SLR 529 at [25] and *F v Chan Tanny* [2003] 4 SLR 231 at [97]. This is the question of causation. In *McGhee v National Coal Board* [1973] 1 WLR 1, Lord Reid said (at 5):

> [I]t has often been said that the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in the everyday affairs of life.

Similarly, Goh Joo Seng J in *Ikumene Singapore Pte Ltd v Leong Chee Leng* [1992] 2 SLR 890 at 899, [31] cited *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310 at 359 where McHugh JA referred to the "common sense notion of causation which the common law champions".

51 The common law is full of such statements about causation, suggesting a simplicity that is deceptive. Indeed, causation is a question which, as John G Fleming said in *The Law of Torts* (LBC Information Services, 9th Ed, 1998) at p 218, "has plagued courts and scholars more than any other topic in the law of torts". Locally, Choo Han Teck J in *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd* [2006] 3 SLR 116 had also alluded to the complexity of this subject (at [18]). Part of the problem is the distinction between causation and the remoteness of damage, with the latter embodying legal principles strictly founded upon reasons of policy. Even within the realm of causation, there exists both causation in fact *and* causation in law. In this regard, Fleming noted that some of the perplexity that has been experienced is due to the undifferentiated use of the word "cause", accompanied by such adjectives as "legal", "proximate" or "remote", in dealing with two very different inquiries, *viz*, causation and remoteness (*The Law of Torts* at p 218). Indeed, the learned authors of *Jackson & Powell on Professional Liability* ([31] *supra*) group the two inquiries under the general rubric of "remoteness" before separating the two inquiries as being concerned with "causation" and "foreseeability" (at pp 448 and 454). In contrast, the distinction drawn in Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) is that between "cause in fact and cause in law" (at p 99, heading of para 6-005) *and* the "scope of protection: the limits of policy" (at p 145, heading of para 6-075). The former categorisation, *viz*, "cause in fact and cause in law", appears to distinguish between factual causation as determined by the "but for" test and legal causation which is concerned with consequences following upon an intervening act or event. It needs only to be mentioned that other authors refer to "causation in law" as relating to the question of remoteness of damage: see, *eg*, D K Srivastava and A D Tennekone, *The Law of Tort in Hong Kong* (Butterworths Asia, 1995) at pp 209–210. In our view, it would conduce towards clarity to state at the outset that there are, broadly, two rather distinct inquiries, *viz*, causation and remoteness of damage.

(1) Causation

52 The first broad inquiry involves causation, which, as alluded to earlier, is in turn made up of causation in fact and causation in law. Causation in fact is concerned with the question of whether the relation between the defendant's breach of duty and the claimant's damage is one of cause and effect in accordance with scientific or objective notions of physical sequence. It is concerned with establishing the *physical connection* between the defendant's wrong and the claimant's damage. The universally accepted test in this regard is the "but for" test, which we will elaborate on later.

53 However, satisfying the "but for" test is by no means a sufficient condition because the all important "causation in law" test must be satisfied as well. The reason for this is that to adopt the "but for" test without limit would lead to absurd results. To illustrate the potential absurdity, we refer to the example provided in *McGregor on Damages* ([51] *supra*) at para 6-008. Consider that a mother gives birth to a son who, when he grows up, commits murder. Adopting the question of factual causation, it is clear that if the mother had not decided to have a child in the first place, the murder

would never have happened; the "but for" test is amply satisfied. She is thus a cause in fact of the murder by virtue of a physical sequence that is unbroken by scientific and objective notions of logic. Yet, it is equally true that the law regards the mother as bearing no responsibility for the murder on account of lack of negligence or other tortious activity on her part; it is the *law* which removes her from being a cause of the murder. This is causation *in law*. The rationale is to prevent indeterminate liability resulting from causation in fact alone. This concern is most aptly summarised in *Prosser and Keeton on the Law of Torts* (West Group, 5th Ed, 1984) at p 266, which we gratefully adopt:

> It should be quite obvious that, once events are set in motion, there is, in terms of causation alone, no place to stop. The event without millions of causes is simply inconceivable; and the mere fact of causation, as distinguished from the nature and degree of the causal connection, can provide no clue of any kind to singling out those which are to be held legally responsible.

54 As illustrated by the example just discussed, sometimes, the defendant's conduct sets off a sequence of events, each one of which is a necessary link in the causal chain between the initial wrong and the claimant's damage. In such cases, the court has to determine whether any of the intervening events can be said to be so significant causally as to break the causal link to be regarded as a *novus actus interveniens*. There is usually no dispute as to what in fact happened to cause the claimant's damage; rather the question is which event will be treated as *the cause* for the purpose of attributing legal responsibility. The court therefore has to decide whether the defendant's wrongful conduct constituted the "legal cause" of the damage. This recognises that causes assume significance to the extent that they assist the court in deciding how best to *attribute responsibility* for the claimant's damage: see *M'Lean v Bell* (1932) 48 TLR 467 at 469. In effect, as Andrews J quite candidly put it in *Palsgraf v The Long Island Railroad Company* 248 NY 339 (1928) at 352:

> [B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.

55 These principles were recognised recently by this court in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR 769, where it said (at [108]): "Indeed, where it can be established that a *novus actus interveniens* has broken the chain of causation, the defendant will be freed from liability". See also *Salcon Ltd v United Cement Pte Ltd* [2004] 4 SLR 353; *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR 543; *Low Hua Kin v Kumagai-Zenecon Construction Pte Ltd* [2000] 3 SLR 529; and *Saatchi & Saatchi Pte Ltd v Tan Hun Ling* [2006] 1 SLR 670 (at [25] and [26]), in which the High Court found that there was no break in the chain of causation when the event relied on was an inanimate act or the omission of a third party which formed one of the links between the negligent conduct and the damage complained of.

(2) Remoteness of damage

56 Apart from causation, the second broad question involves the question of whether, or to what extent, the defendant should have to answer for the consequences which his breach of duty has *caused*. By this stage of the enquiry, causation would already have been established and remoteness merely sets the limits of actionability for damage admittedly *caused* by the defendant's wrong: see also *Chapman v Hearse* (1961) 106 CLR 112. We would label this as being the question of "remoteness of damage". As Fleming noted in *The Law of Torts* ([51] *supra*) at p 218, some limitation must be placed upon legal responsibility because the consequences of an act theoretically, as can also be seen from the example cited above, stretch into infinity. This inquiry, unlike that of causation, presents a much larger area of choice in which legal policy and accepted value judgment must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an

innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were to be held to answer for *all* consequences of his default. This was recognised by this court recently in *Ho Soo Fong v Standard Chartered Bank* [2007] 2 SLR 181 ("*Ho Soo Fong*"), where it alluded (at [28]) to the need for the law to place such limits to prevent what Cardozo CJ feared in *Ultramares Corp v Touche, Niven & Co* 255 NY 170 (1931) at 179, *ie*, the imposition of "liability in an indeterminate amount for an indeterminate time to an indeterminate class". The current approach (in tort, at least) to restrict such liability is the test of reasonable foreseeability, as established by the seminal case of *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388, and this was recently reiterated by this court in *Ho Soo Fong* (at [39]).

57 Indeed, we would add that the framework necessitating the two broad inquiries discussed above is not only recognised in the Commonwealth, it appears to be adopted in civil law countries as well. In "Comparative Conclusions on Causation" (in *Unification of Tort Law: Causation* (J Spier ed) (Kluwer Law International, 2000 at pp 127–154), Jaap Spier and Olav A Haazen, after examining the tests for causation (which in this formulation includes the remoteness of damage) in several civil law jurisdictions in Europe, concluded that only Belgium officially rejects the "dual test" which all the other jurisdictions take as a theoretical framework.

(3) Causation in fact in the present case

58 As would be clear from the preceding discussion, the question which we were concerned about in the present case is that of causation in fact and *not* causation in law and remoteness of damage. There was, in our view, no intervening event between SME's alleged losses and Eric Ng's alleged breach. The payment dispute between SME and PMC was already in existence when SME asked Eric Ng to exercise his alleged duties of supervision (this would presumably be the time when Eric Ng's breaches occurred). As noted in *McGregor on Damages* ([51] *supra*) at p 112, where the third factor in the situation (in this case, the payment dispute) had already occurred at the time of the wrongful act, the law will hold the wrongful act to be the cause of the damage in the absence of subsequent intervening factors, subject to the fulfilment of the "but for" test.

Causation in contract and tort

59 Before proceeding to deal with the substantive law in relation to causation in fact, we recognised that SME's claim was framed in both contract and tort. It was therefore necessary to consider, as a preliminary point, whether different principles of causation apply in contract and tort. For example, it is clear that, in so far as remoteness of damage is concerned, different principles apply, and this was indeed what the trial judge recognised in *Sunny Metal* ([1] *supra*) at [134] where he noted that the principles "are not the same": see further *The Wagon Mound* ([56] *supra*) and *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145. Accordingly, it was important for us to consider if different principles applied.

60 In contract, as in tort, causation must first be proved before the issue of remoteness is addressed: see *Chitty on Contracts* (Sweet & Maxwell, 29th Ed, 2004) vol 1 at para 26-029. As was stated in *Monarch Steamship Co, Limited v Karlshamns Oljefabriker (A/B)* [1949] AC 196 ("*Monarch Steamship*") at 225, it is established law that the claimant may recover damages for a loss only where the breach of contract was the "effective" or "dominant" cause of that loss: see also *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370; *Sykes v Midland Bank Executor and Trustee Co Ltd* [1971] 1 QB 113; and *CHS CPO GmbH v Vikas Goel* [2005] 3 SLR 202, in which the High Court referred to *contractual* principles relating to causation (at [51]).

61 However, as H L A Hart and Tony Honoré stated in *Causation in the Law* (Clarendon Press, 2nd Ed, 1985) at p 308, explicit discussions of causation are much less prominent in books about contract than tort. The learned authors postulate three reasons why this is so:

(a) the harm for which compensation is to be paid in the law of contract is usually economic rather than physical, and establishing "causal connection" involves a different relation from tort, *viz*, that of failing to provide a person with opportunities for gain;

(b) the causal problems which arise in actions for breach of contract are often relatively simple in comparison with the difficulty of determining the scope of the duty to pay damages, so that attention has been concentrated on the latter; and

(c) liability in contract is more often based on the notion of risk than in tort.

62 Indeed, the courts have avoided laying down any formal tests for causation in contract; instead, they have relied on common sense as a guide to decide whether a breach of contract is a sufficiently substantial cause of the claimant's loss: *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 at 1374–1375 and *Sinogreat International Trading Ltd v Hin Leong Trading (Pte) Ltd* [2004] 1 SLR 393 at [43]. For example, in *Monarch Steamship* ([60] *supra*), while the shipowner was technically in breach of contract because his ship was not equipped with a proper medicine chest, the owners of goods on board could not claim that the breach was the cause of their loss should the ship later founder in a storm. Similarly, in *Bank of Credit and Commerce International SA v Ali (No 2)* [2002] 3 All ER 750, it was held that the stigma which an employee might suffer as a result of his employer's breach of contract would not give him the right to damages in respect of loss of employment prospects if he failed to prove that the stigma was the cause of such loss. In all the above cases, the defendant was not liable for a loss which was not caused by the breach at all.

63 In our view, there is no reason why the "but for" test in tort cannot also be used in contract cases to determine the issue of causation *in fact*. Indeed, in the cases cited in the preceding paragraph, the application of the "but for" test would have yielded the same result as that decided by the courts in a commonsensical manner. For instance, in reference to the facts cited in *Monarch Steamship*, it could not be said that "but for" the shipowner's breach, the claimants suffered damage to their goods as that damage would still ensue *even if* there was no breach. This court recognised as much in *The Cherry* [2003] 1 SLR 471, where it said (at [68]):

> As Kan J held in *The Feng Hang* [2002] 2 SLR 205, a claimant can recover damages for a breach of contract or in tort where that breach (or wrong) was the "effective" or "dominant" cause of the loss. The courts adopt a common sense approach in interpreting the facts of each case to determine whether the breach was the cause of the loss or merely gave the opportunity for the loss to be sustained. Though different terms have been used, ("dominant and effective cause" in contractual cases like *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 as opposed to what is termed the "but for" test often used in tort cases to determine causation) *the law of causation in tort and contract is the same.* [emphasis added]

Accordingly, we adopted the tortious test for causation in fact in considering the issue of causation in SME's claims in *both* tort and contract.

The "but-for" test

(1) General principles

64 For the determination of whether a defendant's wrongful conduct is a cause *in fact* of the damage to a claimant, the test, which has almost universal acceptance, is the so-called "but for" test. As the learned author of *McGregor on Damages* ([51] *supra*)notes at para 6-006, "[t]he defendant's wrongful conduct is a cause of the claimant's harm if such harm would not have occurred without it; 'but for' it". In other words, one should, in order to determine whether an act or omission was a cause of the loss, eliminate the act or omission mentally and consider whether or not the loss would still have occured. If the loss would not have occurred when the act or omission is eliminated, the act or omission is a *condicio sine qua non* for the loss. If the loss would still have occurred, even when the act or omission in question is disregarded, the loss has not been caused by this act or omission. In "Comparative Conclusions on Causation" ([57] *supra*), Spier and Haazen point to a second formulation in addition to the first just recounted, *viz*, an act or omission is the cause in fact if, *ex post*, it is established that the damage would not have occurred without the act or omission judged "on the basis of the best science and experience of the moment" (at p 127) or, as alluded to above (at [52]), in accordance with scientific or objective notions of physical sequence. This is the threshold which claimants must cross, on a balance of probabilities, if their claim for damages is to eventually succeed. However, even if the test yields a positive answer, *ie*, the loss would not have occurred but for the defendant's act or omission, it merely qualifies the act or omission as a possible, though by no means necessarily, sufficient cause for legal purposes. As Fleming reiterated in *The Law of Torts* ([51] *supra*) at p 220, this act or omission must then be regarded as the cause *in law* and then pass an additional test of remoteness. In other words, "but for" is a necessary but not a sufficient condition of legal responsibility.

65 Indeed, it might be briefly mentioned that the "but for" test finds almost universal acceptance, even in civil law jurisdictions. In "Comparative Conclusions on Causation", Spier and Haazen found that the jurisdictions of Austria, Belgium, England, France, Germany, Greece, Italy, South Africa and Switzerland all recognise causation as a requirement of tortious liability and all legal systems consider a "but for" test as a first test. The same can also be said of the United States: see for example *Mt Healthy City School District Board of Education v Doyle* 429 US 274 (1977) at 285–287.

66 Returning to the more familiar territory of English law (which in turn is *generally* representative of other Commonwealth jurisdictions), the oft-cited case for the "but for" test is *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428. In this case, a night watchman presented himself to the defendants' hospital casualty department, complaining of prolonged vomiting after drinking tea, and was instructed by the medical officer on duty to go home to bed and call in his own doctor. Five hours later the night watchman was dead as a result of arsenic poisoning from the tea. An action by his widow claiming that death had resulted from the medical officer's negligence in not diagnosing or treating her husband's condition was unsuccessful – it was held that her husband would have died of poisoning even if he had been admitted to the wards five hours before his death and treated with all care and that the widow had failed to establish on a balance of probabilities that the defendants' negligence had caused the death.

6 7 In a more pertinent line of authority, the construction cases have also reached the same result. In *Driver v William Willett (Contractors) Ltd* [1969] 1 All ER 665 ("*Driver*"), Rees J, after having concluded that the consultant safety engineers were in breach of their duty in failing to advise the contractors appropriately, nonetheless went on to consider, on a balance of probabilities, whether the claimant had established that if the requisite advice had been given, the advice would have been accepted and the loss averted.

68 The "but for" test has also been widely applied in local cases. In *Yeo Peng Hock Henry v Pai Lily* [2001] 4 SLR 571 ("*Yeo Peng Hock Henry*"), the appellant, who was a general medical

practitioner, saw the respondent when she complained of blurring of vision in her left eye. The respondent did not advise the appellant to seek immediate medical treatment and, in the result, the appellant lost her vision eventually although she went to the hospital the next day. At the High Court, the respondent succeeded in her claim for damages against the appellant for negligence at the consultation because the appellant had not advised the respondent to seek immediate medical attention. However, on appeal, the High Court's decision was reversed. This court held that the respondent had to prove, on a balance of probabilities, that the appellant's negligence had caused or materially contributed to her loss of vision and, applying the "but for" test, held that she had not successfully discharged her burden (at [52]). The other cases which applied the "but for" test include *The Cherry* ([63] *supra*), *The Feng Hang* [2002] 2 SLR 205 and *Fong Maun Yee v Yoong Weng Ho Robert* [1997] 2 SLR 297.

(2) Retreat from the "but for" test

69 However, it has been said by many that the "but for" test is, in some circumstances, insufficient to lead to a just result. McLachlin J of the Canadian Supreme Court, writing extra-judicially in "Negligence Law – Proving the Connection" (in *Torts Tomorrow: A Tribute to John Fleming* (Nicholas J Mullany & Allen M Linden eds) (LBC Information Services, 1998) pp 16–35), has pointed out (at p 18) that the problem is that:

> [S]ometimes when the answer to the but-for test is negative, the circumstances nonetheless cry out that the defendant was a cause of the plaintiff's injuries and must be held liable. There is a tension between the traditional but-for, all-or-nothing, approach to cause-in-fact and the need to compensate persons who are likely victims of wrongful conduct, but who would be denied recovery under the traditional test.

McLachlin J then goes on to list three situations in which the "but for" test is "troublesome", *viz*, in (a) indeterminate defendant cases; (b) indeterminate claimant cases and (c) indeterminate harm cases. For indeterminate defendant cases, the claimant has been tortiously injured, but it is not clear who, among a group of potential tortfeasors, was the cause in fact of the loss. As for the indeterminate claimant cases, the defendant has engaged in tortious conduct which has caused loss to a number of persons, but it is not clear whether the claimant belongs to the group of persons injured by the defendant's conduct. Finally, in respect of the indeterminate harm cases, a defendant has engaged in tortious conduct *vis-à-vis* the claimant, but it is not clear whether the defendant's conduct actually caused harm to the claimant. All that can be said is that the defendant's conduct increased the risk of harm in that the claimant lost a chance of avoiding harm or of achieving a better result. These problems with the "but for" test were also recognised by this court in *The Cherry* (at [69]).

70 As a result of the inadequacy of the "but for" test in the above circumstances, numerous solutions have been suggested by courts and academics: see, for example, David W Robertson, "The Common Sense of Cause in Fact" (1997) 75 Texas L Rev 1765. One solution which we will highlight is that of altering the burden of proof.

(3) Burden of proof

71 In the traditional "but for" test, the claimant bears the burden of proving cause in fact and is only entitled to succeed if he or she proves on the balance of probabilities that, but for the defendant's wrongful conduct, he or she would not have been injured. If, on the balance of probabilities, the loss would have been suffered even if the defendant had not acted negligently, the claimant is not entitled to recover. This is well established in local case law: see *Chong Yeo &*

Partners v Guan Ming Hardware & Engineering Pte Ltd [1997] 2 SLR 729 at [12]; *Tan Hun Hoe v Harte Denis Mathew* [2001] 4 SLR 317 ("*Tan Hun Hoe*") at [47]; *Yeo Peng Hock Henry* ([68] *supra*) at [19]; *The Cherry* ([63] *supra*) at [67]; and *Chew Swee Hiang v AG* [1990] SLR 890. Indeed, Christopher Lau JC stated in *Guan Ming Hardware & Engineering Pte Ltd v Chong Yeo & Partners* [1996] 2 SLR 621 at 643, [106] that:

> [The lack of causation] is a direct attack on the plaintiff's case, for it indicates that the plaintiff's case is defective in one of its elements. From this it must follow that it must be part of the plaintiff's assertions that there is sufficient causation, and therefore the burden must lie on him.

However, as alluded to above, this is problematic in certain circumstances, where it might be impossible for the claimant to prove cause in fact.

72 In *Cook v Lewis* [1951] SCR 830, the Canadian Supreme Court shifted the burden of disproving cause in fact to the defendant. In that case, two hunters simultaneously discharged their rifles and the claimant was injured. The jury determined that the claimant was shot by one of the defendants, but did not determine which one. On the basis of the reasoning in a similar American case (*Summers v Tice* 199 P 2d 1 (1948)), Cartwright J, for the majority, held that if the jury was of the opinion that both defendants were negligent in shooting towards the claimant but was unable to decide which one, both should be held liable. The burden lay on them to prove otherwise.

73 In other cases, Canadian, English and Australian courts have held that the "but for" test should be applied flexibly and with common sense. Thus, although the burden of proving cause in fact is not reversed and no actual presumption of causation is created, an inference of causation may be drawn even in the absence of affirmative scientific evidence of causation, or where the claimant's evidence of causation is minimal: see, for example, *Wilsher v Essex Area Health Authority* [1988] AC 1074 and *March v E & M H Stramare Pty Limited* (1991) 171 CLR 506. In fact, this court in *United Project Consultants Pte Ltd v Leong Kwok Onn* [2005] 4 SLR 214 appeared to apply a commonsensical approach to causation in place of the "but for" test.

(4) Loss of a chance

74 Yet another way of overcoming the inadequacies of the "but for" test in certain situations is to adopt a "loss of chance" analysis. Under the traditional approach, proof, on the balance of probabilities, of a causal link between the defendant's wrong and the claimant's damage normally entitles the claimant to recover in full from the defendant and no account is taken of the strength or weakness of the proof, once the balance is tipped in the claimant's favour. The corollary is equally true: If the claimant fails to persuade the court of the causal link, the claim will fail, regardless of how close the claimant came to overcoming the balance of probabilities: see *Tan Hun Hoe* ([71] *supra* at [46]). By the loss of chance analysis, the causal link is dealt with on the basis of "proportionate loss" and the claimant's damage is effectively re-categorised as the *chance* of obtaining a benefit or avoiding a loss, rather than the loss itself: see, for example, *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 and *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2005] 1 SLR 661. With these principles in mind, we come to the facts of the present case.

Application to the present case

Burden of proof

75 First, we considered the burden of proof. The reason why we had to consider the issue of the burden of proof in causation is that, before us, counsel for SME contended that, as a "matter of

common sense", it should be for Eric Ng to prove that PMC would *not* have responded to Eric Ng's exercise of his additional duties, especially that of supervision, and not for SME to show that PMC would have performed its obligations if Eric Ng had exercised his duties. This appeared to be predicated on the present case coming within a situation in which the application of the "but for" test would be innately unjust so as to warrant the reversal of the burden of proof. However, when pressed further for authority to substantiate this submission, counsel did not frame his argument as such but instead referred to the Evidence Act (Cap 97, 1997 Rev Ed). The relevant section is s 103(1) of the Evidence Act, which provides as follows:

> Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

76 In the first place, we were not of the view that the present case fell within so unique a situation as to warrant a consideration of the reversal of the burden of proof. This was a one-on-one situation in which the claimant, defendant and harm were not indeterminate. However, even if we were to accept such an argument, it is difficult to see how s 103(1) of the Evidence Act can be surmounted. While it was not necessary for us to decide the issue in this case, we would note that s 103(1) of the Evidence Act appears to preclude local courts from reversing the burden of proof in situations where the application of the "but for" test would be inadequate. As such, contrary to counsel's assertion, the Evidence Act did not, in fact, assist his submission that the burden was on Eric Ng to prove causation.

77 In fact, it was clear from the record of appeal that SME had similarly misunderstood the burden of proof which it was expected to discharge before the trial judge. In SME's closing submissions before the trial judge, it had submitted that "[i]t is <u>not</u> clear from the evidence, whether documentary or oral, that PMC would have ignored [Eric Ng's] directions" [emphasis in original]. In our judgment, the corollary of this submission must be equally true: it was unclear, on a balance of probabilities, whether Eric Ng's intervention could have led to PMC completing the works on schedule. In other words, SME had itself *implicitly* acknowledged the lack of evidence adduced to show that PMC *would have*, notwithstanding the ongoing payment dispute between it and SME, heeded Eric Ng's intervention and proceeded to complete the works on time.

Loss of a chance

78 Secondly, we noted that SME's claim was not framed as one involving the loss of a chance to avoid the financial losses it allegedly suffered, and so we need not consider the application of that principle in this regard.

Evidence of causation

79 As such, as in the case of *Driver* ([67] *supra*), the factual issue which *SME* must prove in this case is whether Eric Ng's fulfilment of his additional duties would have, *notwithstanding the payment dispute between SME and PMC*, led to PMC performing its obligations to SME under the third D&B contract, such as to avert the losses which SME now claimed. Since this was the case, SME's failure to adduce any evidence to show that PMC would have heeded Eric Ng's intervention (if so exercised) means that it had failed to show that *but for* Eric Ng's breaches, it would *not* have suffered its alleged losses. In any event, we were satisfied that the evidence did show quite clearly that PMC would not have responded to Eric Ng, even if he had exercised his alleged duties.

The documentary evidence

80 The evidence showed, on a balance of probabilities, that PMC would not have heeded Eric Ng's exercise of his duties in view of the payment dispute it (PMC) was having with SME. As recounted above at [19], under cl 32.6 of the PSSCOC Conditions read with item (viii) of the appendix, SME was required to settle a payment certificate within 21 days of the date of the payment certificate. Eric Ng contended that sometime in late 1996, disagreements arose between SME and PMC over SME's delay in settling the payment certificates. On 27 December 1996, PMC wrote to SME stating that it (PMC) had not received any payment for the outstanding sum of $534,702.30 for its work and even purported to terminate the third D&B contract with SME. On 17 February 1997, PMC wrote to SME again to expedite the payment of $400,919.55. In this latter letter, PMC expressly stated that SME's "defaults in not paying us [*ie*, PMC] the outstanding contract progress claims for our work done to the project" were clearly breaches of the third D&B contract dated 21 October 1996. Under such circumstances, PMC reiterated that it was "not obligated to complete the Work in accordance to the Schedule". The same messages were repeated in a letter sent by PMC to SME dated 25 February 1997. In fact, in this letter dated 25 February 1997, PMC expressly stated that it was:

> … under no contractual obligation to proceed with the Works in accordance to the Schedule as a result of a major breach in the terms and conditions of the contract *caused by your [ie, SME's] repeated failures to pay us the outstanding claims despite our demands*. [emphasis added]

In our judgment, this showed that PMC had such strong views about the payment dispute with SME that this amounted to the *sole cause* of its refusal to carry out the construction in accordance with the agreed schedule. Further, it must be noted that the contractual completion date was 20 August 1997. Given that the payment dispute was still ongoing in February 1997, there is no doubt that this was *at least* a contributory cause to SME's alleged losses.

81 SME replied on 20 February 1997 asserting that there was no default in any payment to PMC but acknowledged there was delay on SME's bank's part in releasing payment to PMC. This was in turn caused by the manager of SME's bank being absent on long maternity leave. SME also suggested that PMC should "scrutinise its accounts" before accusing SME of owing $400,919.55. Next, on 9 April 1997, SME wrote to PMC complaining about the delay in the construction work and that PMC's complaint about the late payment *being the cause* of the delay would not have "exonerate[d] you [*ie*, PMC] from the fact that this construction progress is a fiasco and the slow progress is getting really out of control". This showed that as of April 1997, SME was fully aware that it was PMC's allegations about the payment problems that led to PMC's decision to delay the construction works.

82 This state of affairs apparently continued until 23 December 1997 (as evidenced by a letter from PMC to SME dated 11 March 1997 mentioning that no settlement in relation to the payment dispute had been reached, following which there was little indication of any settlement having been reached), when both parties met and compared their respective sets of accounts. At this meeting, the parties agreed that PMC would commit to a final completion date, bearing in mind the completion deadline of 31 January 1998 allowed by JTC. In the meantime, SME agreed to pay PMC $200,000 as an interim settlement and that the remaining amount would be settled after completion of the Factory. On 6 January 1998, SME wrote to PMC stating that $761,232.50 was owing to PMC and proposed to carry out the interim settlement plan discussed earlier at the meeting on 23 December 1997.

83 However, it appeared that this interim settlement plan was not satisfactorily implemented. On 5 May 1998, PMC again wrote to SME expressing its "disappointment again on the non-payment for [its] works completed to date" and even threatened, once again, to suspend work pending the settlement of outstanding claims. On 26 June 1998, PMC wrote to SME stating that it had not

received a progress payment of $100,000 and that this had *caused* "unnecessary delay to the project". The payment dispute continued right up to 31 July 1998 when PMC wrote to SME claiming SME still owed PMC $657,064.21.

84 In view of this documentary evidence, it was certainly less than clear that Eric Ng's intervention could have persuaded PMC to resume work. PMC's correspondence with SME showed that it had regarded the third D&B contract as having been terminated on two occasions in December 1996 and February 1997. In other words, Eric Ng's breaches could not be said to have caused SME's losses given that PMC would have, on a balance of probabilities, continued to disregard its obligations to SME anyway. This was irrespective of whether PMC's disputes were legitimate or not. Indeed, in the letter dated 9 April 1997, SME itself appeared to acknowledge that PMC was justifying the delays because of the payment dispute. It was rather unlikely that Eric Ng's intervention at any point of time could have led to a different conclusion.

85 Before us, counsel for SME pointed out that when Eric Ng did in fact issue a letter of warning to PMC (the *only* time Eric Ng is acknowledged to have done so), it proved effective in bringing about a timely response by PMC to speed up its works. The premise of this submission appeared to be that *had* Eric Ng exercised his duties of supervision, PMC would have completed the work according to schedule, hence averting SME's alleged losses and establishing causation. However, this, with respect, did not answer the question of whether Eric Ng's exercise of his supervisory duties would have, *notwithstanding the payment dispute between SME and PMC*, led to PMC performing its obligations to SME under the third D&B contract, such as to avert the losses which SME claimed. This was because this warning by Eric Ng was sent out on 14 October 1996. In contrast, the payment dispute between SME and PMC only started in late 1996, *after* October 1996. As such, this warning, while having penumbral relevance, did not satisfactorily indicate that similar interventions from Eric Ng would have been *equally* effective *after* the payment dispute had arisen in December 1996. In other words, this submission did not establish, on a balance of probabilities, that PMC would have heeded Eric Ng's intervention *notwithstanding* the payment dispute it had with SME.

86 To conclude, we were of the view that the burden was on SME to prove causation, and SME had not shown, on a balance of probabilities, that Eric Ng's alleged breaches had caused its losses. Specifically, it had not shown that PMC would have heeded Eric Ng's intervention (in exercise of his supervisory duties) notwithstanding the ongoing payment dispute it had with SME. Instead, the documentary evidence suggested that PMC would have nonetheless delayed its construction works in view of the payment dispute it had with SME until 1998, *whether or not* Eric Ng had exercised his duties of supervision. Accordingly, SME failed on the causation issue.

87 In relation to Eric Ng's alleged breach of his duty to obtain the necessary documents with which to obtain the TOP, the documentary evidence once again showed that it was the payment dispute which led to the delay in the release of the relevant certificates for the TOP application. As such, even if Eric Ng had tried to obtain the relevant documents, he would still not have prevailed. In other words, Eric Ng's failure to obtain the necessary documents had not caused SME's alleged damages flowing from the delay in the TOP application.

Conclusion

88 For the reasons above, we allowed Eric Ng's appeal in CA 105/2006 with costs here and below, and accordingly dismissed SME's appeal in CA 104/2006 with costs.

89 Further, considering that Eric Ng had made an offer to settle for $10,000 on 30 July 2004 and SME has now obtained a judgment less favourable than this offer, we ordered that Eric Ng was

entitled to costs on an indemnity basis from that date.

Copyright © Government of Singapore.